RECORD NO. 17-5049

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; MELANIE SLOAN,

Plaintiffs – Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANTS

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GLOSSARY

CHGO	Commission on Hope, Growth and Opportunity
CREW	Citizens for Responsibility and Ethics in Washington and Melanie Sloan
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
OGC	Office of General Counsel

SUMMARY OF ARGUMENT

As CREW showed in its opening brief, the district court effectively eliminated any possibility that a citizen suit authorized by the FECA could be brought by treating the FEC's dismissal of CREW's complaint against CHGO as not "contrary to law." In its response, the FEC concedes that under the express terms of the FECA there must be a viable scenario in which a complainant could bring a citizen suit. FEC Br. 31. Yet it uses the remainder of its brief arguing for an interpretation of the FECA under which no citizen suit could ever occur. That cannot be correct, as it would nullify the citizen suit provision.

Indeed, the FEC claims that in this case—where CHGO committed wanton and obvious violations of the FECA and obstructed the FEC's investigation, the FEC already possesses all necessary information to enforce the law yet won't to preserve agency resources, and CREW stands ready to take legal action to vindicate its rights—a citizen suit is still barred. One is left to wonder, if the FECA does not permit a citizen suit here, when would it? The FEC has no answer, and cannot posit even a single realistic case in which a citizen suit might proceed in the face of its claim of prosecutorial discretion.

The FEC's resistance to treating its discretionary dismissals as contrary to law rests on its mistaken understanding of the effect of that determination. A court's finding that the FEC's dismissal was "contrary to law" does not "require [the agency] to resolve" a case. FEC Br. 32. The FEC retains its discretion to abstain from enforcement. Rather, under the FECA, that decision merely opens the door to the possibility that the complainant will attempt to resolve the case on its own. There is simply no inconsistency with recognizing the FEC's prosecutorial discretion and nonetheless noting that an exercise of that discretion permits behavior contrary to law.

There is also no reasonable basis for a discretionary dismissal here. The FEC could partially remedy CHGO's significant violations of the FECA and deter future violations by releasing the names of CHGO's contributors at little or no expense to itself. Further, the dismissal against CHGO does not evidence a reasonable choice not to pursue enforcement in this one case, but rather is part of the controlling commissioners' broad abdication of their duty to enforce the FECA against dark money organizations. Finally, the legal doctrines cited by the controlling commissioners do not separately justify dismissal.

The Court should allow CREW to move forward on resolving this matter. The FEC has no legitimate basis to prevent enforcement against CHGO. Accordingly, it's dismissal below was contrary to law.

ARGUMENT

I. The FEC Misstates the Record

The FEC cannot and does not dispute that it had "strong grounds" to prosecute CHGO. JA 862. There also is no dispute that CHGO "obvious[ly]" violated FECA, allowing donors to spend millions of dollars to elect candidates while remaining unknown. JA 881. Nor is there any dispute that CHGO, in its scheme to keep those donors secret, filed false documents under penalty of perjury, lied to government agents, and obstructed the FEC's investigation. Nevertheless, in an attempt to bolster the controlling commissioners' unjustified conclusions, the FEC misrepresents a key part of the record: the clear evidence of CHGO's organizational purpose. *See* FEC. Br. 14.

The documents revealed in the investigation show that CHGO's one and only purpose—it's "[s]imple mission"—was to "win Senate seats." JA 519. In contrast to the FEC's suggestion that these documents indicate only "one of [CHGO's] goals," FEC Br. 14, the record shows CHGO's "goal"—singular—was to use "express advocacy in targeted Senate races" to "participate directly in [the] election or defeat of candidates," while shielding contributor identities. JA 514–25. The group "focuse[d] on running independent expenditure campaigns in key districts to support the election of Republican candidates." JA 578. A clearer statement of a group's single organizational electoral purpose is hard to imagine.

CHGO was created and existed for one purpose: to influence elections while shielding the identities of its contributors.

II. The FEC's Argument Leaves No Viable Path to a FECA Citizen Suit

The FEC does not dispute that an interpretation of the FECA that leaves a provision "superfluous, void, or insignificant" is to be rejected. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). It further does not dispute that the FECA's contrary to law standard for judicial review must be interpreted in a way that provides a viable path for a complainant to bring a citizen suit. Nonetheless, the FEC's contentions, taken as a whole, would prevent the conditions for a citizen suit from ever being realistically satisfied.

The FEC sets out an impassible gauntlet that precludes a complainant from bringing a citizen suit. On even the first step towards that suit, a judgment that the FEC's dismissal was contrary to law, the FEC argues that: (1) judicial review is "[h]ighly deferential," FEC Br. 24, (2) that standard is satisfied as long as the FEC's dismissal is "reasonable," *id.* at 28, (3) it is reasonable for the agency to avoid even the most minimal of expenses, *id*. at 26, (4) all agency enforcement involves the expense of some minimal resource and, therefore, every dismissal is reasonable, *id.* at 38 (arguing disclosure would require the agency to draft a memo, and avoiding that justified dismissal), (5) the complainant may not obtain discovery to show the dismissal was not motivated by cost-avoidance, *id.* at 34,

and (6) the complainant may not even cite other FEC action in its challenge to cast doubt on the commissioners' justification, *id.* at 41. And if a complainant miraculously navigates this treacherous path to win a "contrary to law" judgment, then the FEC may simply block the citizen suit by reopening the case and redismissing it. *Id.* at 31.

The FEC's cramped interpretation of the FECA simply leaves no room for a citizen suit, rendering that provision void. It can point to no plausible case under its understanding where a citizen suit might proceed in the face of its expansive claim of prosecutorial discretion. Nor does it show that authority compels its claim.

A. The FEC's Interpretation Voids the Citizen-Suit Provision

The FEC argues that its interpretation of the FECA's contrary to law standard leaves ample room for citizen suits. Yet the only examples it cites—a single nonanalogous citizen suit bought after the FEC's failure to timely act and a hypothetical case of open racial discrimination—provide no support for the FEC's position.

In an attempt to portray its interpretation as reasonable and accommodating to citizen suits, the FEC cites only a single example of a citizen suit brought in the statute's forty-plus years. And even that case fails to reconcile the FEC's vision of its prosecutorial discretion with the text of the FECA. In *Democratic Senatorial*

Campaign Committee ("DSCC") v. National Republican Senatorial Committee, 1:97-cv-1493-JGH (D.D.C. June 30, 1997), the DSCC sued the FEC for its failure to act on the DSCC's complaint after almost two years. *DSCC v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998).[1] Unlike this case, the FEC's prosecutorial discretion was not at issue. Rather, the district court found that the FEC had failed to timely act, *id.*, and, when it failed to act again, granted the DSCC the right to sue the respondent, *see* Order 1–2, *DSCC v. FEC*, No. 96-2184 (JHG) (D.D.C. Sept. 11, 2000) (attached in addendum). The DSCC promptly did so. *Id.* at 2. Notably, however, the FEC argued that the DSCC's "private cause of action 'represented a continuing incursion on the Commission's exclusive jurisdiction to enforce the Act.'" *Id.* at 3–4. There was apparently no ruling on the FEC's argument, however, as the DSCC voluntarily dismissed its citizen suit after the FEC belatedly acted on the DSCC's complaint. *Id.* at 2.

The case, which did not consider an FEC dismissal nor its prosecutorial discretion, sheds no light on how a complainant may bring a citizen suit in those circumstances. It also does not represent a reasonable limit to the FEC's proffered interpretation, adopted below, because the agency argued that even *that* case was an improper intrusion on its authority. This odd and singular example hardly

[1] The FECA provides two grounds for suit: to challenge the "dismissal of the complaint or the failure to act." 52 U.S.C. § 30109(a)(8)(C). In either situation, the FECA provides for a citizen suit safeguard. *See id.*

shows a regularly exercised citizen suit provision consistent with the FEC's interpretation of the FECA.

In the absence of any instructive history of citizen suits, the FEC argues that complainants in other cases have at least been successful in securing the first precondition to bringing a suit: a contrary to law judgment. The example the FEC cited, however, CREW's victory in a different case, is not helpful to the FEC's contentions. In that case, the district court rejected the FEC's argument—adopted below in this case—that the controlling commissioners' simple citation of prosecutorial discretion rendered any legal error in their analysis irrelevant. *Compare* FEC Mot. for Summ. J. 49, *CREW v. FEC*, 1:14-cv-1419-CRC (D.D.C. Mar. 1, 2016) (arguing legal error irrelevant because dismissal was discretionary) (attached in addendum) *with CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (reviewing for legal error). Moreover, even after securing this victory, the FEC conformed with the judgment by simply redismissing one of the respondents based on new and specious justifications (the FEC has not issued a new decision on the other respondent). That new dismissal is again in litigation, *see CREW v. FEC*, 1:16-cv-2255-CRC (D.D.C. Nov. 14, 2016), but the district court held that even a newly erroneous dismissal conformed with the district court's judgment, CREW Br. add. 14–15, and thus blocked CREW from bringing a citizen suit. The case

hardly demonstrates the robust application of the FECA's citizen suit provision consistent with the FEC's interpretation.

Indeed, the FEC cannot conjure a single plausible example—real or imagined—in which it concedes that a court might rule that the FEC's decision to forgo enforcement simply to preserve resources could be unreasonable. Rather, the sole possibility to which it points is conjecture from a district court decision presuming that an exercise of prosecutorial discretion might be unreasonable if the agency's stated reason for dismissal "was racially discriminatory." FEC Br. 29 (citing *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 n.5 (D.D.C. 2014)). It would be exceedingly odd, however, for Congress to have crafted a statutory cause of action that is available only where an agency openly violates the Constitution—a situation in which the complainant would already have a remedy. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Indeed, according to the FEC, unless the controlling commissioners made their racist motivations plain, a complainant would have no remedy because it could not seek discovery to probe the true rationale for the commissioners' decision. FEC Br. 34.

Besides citing this singular example, the FEC does nothing to explain how a plaintiff could show an FEC decision based on its "decision on how to best allocate its resources" could ever be unreasonable. JA 877. Undoubtedly, *every* dismissal will result in the agency expending fewer resources than if it had gone forward. If

expending fewer resources is a legitimate goal, then every dismissal is reasonable, and no dismissal could ever be contrary to law. The FEC does not even attempt to grapple with the absurd results of its argument. Nor does it provide any explanation for why Congress would craft a citizen suit safeguard that can nonetheless be blocked by a fact that will be true for every FEC dismissal.

Indeed, the fact that the FEC seeks to block CREW's complaint against CHGO is all the proof needed of the extremity of its interpretation. There is no dispute that CHGO obviously and egregiously violated the statute, by means of the actions of individuals who continue to remain active in politics, in support of candidates who continue to hold office, and on behalf of contributors who almost certainly continue to be active today. Nonetheless, the FEC argues that no relief can or will be sought, by either itself or by CREW, simply because it believes its resources are best spent elsewhere. If the FEC's decision is not contrary to law here, then the citizen suit provision is insignificant indeed.

The FEC's failure to seriously address the consequences of its argument betrays the fact that FEC's proffered interpretation, adopted by the district court below, simply leaves the FECA's citizen-suit provision superfluous, void and insignificant. That is impermissible and should be rejected.

B. The FEC's Interpretation is Without Support

The FEC argues that, irrespective of its impact on FECA citizen suits, binding authority demonstrates that it has prosecutorial discretion, which prohibits treating prudential dismissals as contrary to law. The authority cited by the FEC, however, does not support this conclusion.

First, the FEC cites the agency's "exclusive [civil] jurisdiction." FEC Br. 3 (citing 52 U.S.C. § 30106(b)(1)), but legislative history clarifies that the FEC's jurisdiction is "exclusive" between it and the Department of Justice: it does not bar citizen suits. Before the 1976 amendments, the FEC and DOJ shared responsibility for civil enforcement. *See* Legislative History of Federal Election Campaign Act Amendments of 1976 at 283 (1977) ("1976 History"), *available at* http://bit.ly/2vL2vh7. This led to a confusion of roles, and so in the 1976 amendments Congress gave the FEC "exclusive civil enforcement authority" to "avoid confusion and overlapping" authorities. *Id.* at 283, 470. In no way, however, was the FEC's exclusive civil authority understood to bar FECA citizen suits. Indeed, that would have been exceedingly odd as the same 1976 amendment that provided for the FEC's exclusive authority also created FECA citizen suits. *See id.* at 240.

Second, the cited case law does not help the FEC. The agency does not cite a single Circuit or Supreme Court case holding that its prosecutorial discretion bars

citizen suits. Rather, the FEC cites authority that shows it "may decline to pursue an enforcement matter." FEC Br. 24–25. But that is not relevant to the question presented. Even if the FEC may "decide[] in the exercise of its discretion not to" enforce the FECA, *FEC v. Akins*, 524 U.S. 11, 25 (1998), that provides no authority about whether that exercise of discretion is contrary to law.

Neither of the cases cited by the FEC considered whether the agency's prosecutorial discretion worked to block a citizen suit. In *Akins*, the Supreme Court recognized that the FEC could dismiss the plaintiffs' complaint on remand based on its prosecutorial discretion. *See* 524 U.S. at 25. It did not say, however, what effect that dismissal would have on a court's later review of that dismissal. Rather, the Court only noted that a later discretionary dismissal did not deny a plaintiff standing in the case before it. *Id.*

In *CREW v. FEC*, 475 F.3d 337 (D.C. Cir. 2007), this Circuit held that the plaintiff had no standing to challenge the FEC's dismissal because the sought-after information was already available to the public. *Id.* at 339–40. After finding the plaintiff suffered no injury, *id.* at 339, the court went on to note that the remedy the plaintiff sought, a specific action by the agency, was not within the court's power to order, *id.* at 340. Once again, however, that does not shed light on the question of whether a prudential dismissal bars a citizen suit.

With respect to the district court opinions cited, FEC Br. 26, there is no indication that the parties in those cases presented the court with the consequences of upholding the FEC's dismissal on the basis of prosecutorial discretion, or that any of the courts considered the issue. As the issue was "neither brought to the attention of the court nor ruled upon," the decisions are not even persuasive authority on the question. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

At bottom, the FEC confuses a court's judgment that a dismissal is contrary to law with an order that the FEC engage in enforcement proceedings. *See* FEC Br. 32 (presuming that if prosecutable discretion is "contrary to law," then the "agency is required to resolve the merits" of the case). Yet that is not what the FECA provides. If the FEC chooses not to act and that choice allows activity that is "contrary to law," a court's order finding as much only alerts the FEC that continued inaction will allow a citizen suit. *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (holding court may not compel agency action). The FEC's discretion that these cases recognized (and that the FEC spends so much of its brief guarding) is in no way diminished.

Third, the FEC ominously warns that citizen suits must not be allowed—despite Congress's express permission—because the FEC operates in so sensitive an area that private litigants must simply not be tolerated. Yet allowing citizen suits hardly raises the "specter of partisan federal law enforcement suits" of which

the FEC cautions. FEC Br. 32. Rather, the FECA provides that the FEC, unique among agencies, serves as a gatekeeper to weed out meritless or purely partisan attacks. *See* CREW Br. 30. Complainants may not pursue enforcement or gain "subpoena authority" until the FEC reviews the complaint for itself to confirm it has merit. If it does not, the FEC may dismiss the complaint on substantive grounds. Where, however, a complaint is well-substantiated and the agency merely chooses to forgo enforcement to save its resources—as is the case with the FEC's dismissal of CHGO—there is no legitimate reason not to allow a citizen suit to go forward. Indeed, it is for that very situation Congress enacts them. *See Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001).

Fourth, with respect to comparable statutory provisions providing for citizen suits, the FEC draws the wrong conclusion from the fact that no other citizen suit provision requires judicial review of an administrative judgment below. FEC Br. 30–31. To the FEC, this means that the FECA's citizen suit provision must be read in isolation, treating agency inaction as a bar to a citizen suit even though agency inaction in every other case authorizes a citizen suit. It has the logical inference backwards, however.

For every other agency, the availability of a citizen suit supports the conclusion that the agency's decision to prosecute is committed to its discretion. *See Sierra Club*, 268 F.3d at 904–05 ("Another aspect of the statutory structure

that suggests that the enforcement mechanisms are discretionary is the availability of citizens suits to enforce . . . ."). Thus, it is *because* a citizen suit may move forward in the absence of agency enforcement that those agencies enjoy prosecutorial discretion that protects their inaction from judicial review. *Id.* Courts recognize that treating these agencies' prosecutorial discretion as a bar to judicial relief against the agency does not impact the citizen's right to sue the wrongdoer and does not leave a violation unremedied.

The uniqueness of the FECA, however, means that treating the FEC's prosecutorial discretion in a similar fashion *would* eliminate citizen suits against the wrongdoer and would leave significant violations of the law unremedied. Accordingly, the FECA's uniqueness counsels against treating its prosecutorial discretion in the same way a court may treat another agency's inaction. Rather, it counsels in favor of treating the FEC's discretion as irrelevant to the question of whether judicial relief is available against the agency where its inaction permits behavior contrary to the law

Lastly, the FEC argues, without authority, that CREW's proffered interpretation is unworkable. The FEC argues that, if a court were to treat its discretionary dismissals as contrary to law, it would be forced to investigate and prosecute every violation, no matter how small, lest a respondent be dragged into court in civil litigation. FEC Br. 32. Where a violation involves "very small

amounts of money," however, the FEC may find the violation is *de minimis*: a ruling on the merits of the complaint that does not involve the agency's discretion. *Ass'n of Admin. Law Judges v. F.L.R.A.*, 397 F.3d 957, 961–62 (D.C. Cir. 2005) (treating *de minimis* dismissal as substantive interpretation subject to *Chevron*). A complainant who wishes to challenge that dismissal would therefore need to show the FEC's interpretation of the substantive rule is impermissible, or its conclusion as to the severity of the violation is arbitrary or capricious. Moreover, the FEC has several tools to dispose of "technical reporting violations" and other small violations: it may resolve the matter through its own procedure for administrative fines, 52 U.S.C. § 30109(a)(4)(C), 11 C.F.R. § 111.30, or if it may reach a conciliation agreement that considers the equities of the situation. The respondent then could not be subject to a citizen suit. In short, there is no need to nullify a congressionally enacted statute to protect those respondents from harassing litigation.

Rather than overenforcement, however, the real concern is the total and complete absence of enforcement that has resulted because of FEC gridlock and the nullification of the FECA's citizen-suit safeguard. As discussed in CREW's opening brief and by amici, the FEC has abdicated its job and federal campaign finances laws are violated with impunity. CREW Br. 41–43; Br. Amici Curiae Campaign Legal Center and Demos in Supp. of Appellants 31–34 (noting, *e.g.*,

massive increase in deadlocked votes). Even FEC commissioners recognize that there is currently no agency enforcement against dark money organizations. JA 762 ("Three of our colleagues have gone to great lengths to avoid enforcing the law against dark money groups like CHGO."). The lack of enforcement is particularly galling here, where CHGO's violations are obvious and egregious, its behavior was condemnable, and where a remedy could be so easily obtained. Congress crafted the citizen suit provision for exactly this possibility: to correct a "history of weak enforcement" and "nonenforcement." 1976 History 92, 176. Unfortunately, in part due to the blocking of citizen suits against groups like CHGO, that history has continued.

Irrespective of the reasons for the FEC's impotence, Congress provided a ready backstop to ensure enforcement—citizen suits brought by private plaintiffs who have shown that their complaint has merit. Because the FEC's proffered interpretation of the FECA—adopted by the district court below—provides no viable avenue for such suits to occur but, indeed, renders them impossible when they would be the most useful, the FEC's interpretation must be rejected. Citizen suits must be allowed to proceed where the FEC dismisses solely based on its prosecutorial discretion, and thus such dismissals must be contrary to law within the meaning of the FECA.

III. The FEC May Disclose CHGO's Contributors

Putting aside the statutory conflict created by the district court and FEC's interpretation of the FECA, both also wrongly concluded that enforcement here would require a material expenditure of resources by the agency. The FEC acknowledges that it knows the identities of CHGO's contributors and that, if CHGO is a political committee (as it undoubtedly is), those names should be made public. Yet it refuses an easy remedy: sharing those identities with voters.

The FEC argues it lacks authority to do so, but it is simply mistaken. The FEC has authority and indeed obligation to release documents from its own investigation where it finds the respondent's attempts to keep that information secret violate the FECA. Although FEC investigations are confidential while ongoing, 52 U.S.C. § 30109(a)(12)(A), and although First Amendment concerns counsel against disclosure of investigatory materials where the target of the investigation has engaged in no wrongdoing, *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003), the FEC has an obligation to "make the fullest possible disclosure of records to the public," 11 C.F.R. § 5.2. That obligation extends to the FEC's disclosure of investigatory information illuminating on a respondent's wrongdoing, just as it has done before.

As CREW noted in its opening brief, the FEC has released this information in the past. CREW Br. 39. While the FEC attempts to distinguish that case, it

simply misrepresents it. Contrary to the FEC's description, *see* FEC Br. 36, it was the *FEC* that released the information gathered in its investigation in the 2007 *CREW* case, *see* 475 F.3d at 339. The case involved the in-kind contribution of a list of activists to a campaign. *Id.* at 337. While the fact that the contribution had been made was known publicly, *id.* at 337–38, it was the FEC's OGC that "requested that the administrative respondents provide a copy of the materials" as part of its investigation into the administrative complaint. *Id.* at 338. The OGC recognized the material was an in-kind contribution that had not been properly reported in violation of the FECA. *Id.* at 338. When the matter closed, the FEC posted the gathered non-public materials online, where "any citizen who want[ed] to learn the details of the transaction . . . [could] do so by visiting the Commission's website." *Id.*; *see also* Response from Americans For Tax Reform and Grover Norquist, MUR 5409 (May 24, 2004), *available at* http://eqs.fec.gov /eqsdocsMUR/00002BFF.pdf; Response of Busy-Cheney '04 Inc., MUR 5409 (May 24, 2004), *available at* http://eqs.fec.gov/eqsdocsMUR/00002BF8.pdf.[2]

Notably, the FEC posted this material even after this Court issued its decision in *AFL-CIO* the year before, the case the FEC says prohibits release of

[2] While *some* of these materials were posted on a respondent's website, its "website [did] not include the extensive Coalition meeting attendees lists . . . which comprise most of the materials at issue." OGC Report 8, MUR 5409 (Sept. 1, 2004) (citing attachment to Resp. of Bush-Cheney '04 Inc., *supra*) *available at* http://eqs.fec.gov/eqsdocsMUR/00002BF9.pdf.

information here. *See* FEC Br. 37. It did so because nothing in *AFL-CIO* bars the posting of materials where a violation was or could have been found. Rather, that case considered only whether the agency could release investigatory materials gathered from "respondents [who] have been cleared of wrongdoing." 333 F.3d at 178 (noting such release would not "deter future violations"). Moreover, while this Court in *AFL-CIO* was concerned that the disclosure of the group's internal files and strategy documents—files that did "not even relate to questionable activities"—could chill First Amendment activity, *id.*, that concern is notably absent where the FEC possesses information the group is required to disclose, consistent with the First Amendment.

In response, the FEC again argues that the controlling commissioners made no assessment of whether CHGO violated the statute and wrongfully withheld information because they had not decided whether there was even reason to believe CHGO violated the FECA. FEC Br. 39. But the controlling commissioners refused to find reason to believe CHGO violated the FECA because, in part, they (erroneously) concluded any proceedings would be "academic" because the FEC could provide no remedy for CHGO's violations. JA 769. Because the FEC could release the investigatory files showing the identities of the contributors—the information CHGO wrongfully withheld—the controlling commissioners' conclusion is baseless.

As the FEC could disclose the identities of CHGO's contributors with little-or-no expenditure of resources, CREW's case against CHGO is in no way academic. The controlling commissioners therefore failed to offer an adequate explanation to justify their dismissal, and the dismissal was contrary to law.

IV. The FEC has Abdicated Enforcement of the FECA Against Dark Money

CREW notes in its opening brief that the three controlling commissioners who voted against finding reason to believe in the case below have refused to find reason to believe in any contested political committee case. Amici further support this point, citing the gridlock at the FEC and totally inadequate enforcement by the agency. In response, the FEC refuses to acknowledge the materials or explain the controlling commissioners' continued failure to enforce the FECA against dark money groups. Rather, the FEC argues the "FECA's text limits judicial review of complaint dismissals to 'the complaint' at issue" and, as an abdication requires consideration of "material that is beyond the scope of the administrative record," the FEC's abdication is immune from judicial review. FEC Br. 39–40. The FEC is wrong, however, for a number of reasons.

First, an abdication cannot justify agency inaction. *See Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (even where prosecutorial discretion not judicially reviewable, abdication is unreasonable and unlawful); *see also Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc). Thus, if the

controlling commissioners' dismissal of the complaint against CHGO is part of that abdication, their exercise of prosecutorial discretion is unreasonable *in this case*. The FEC's lengthy recitation of the limits of review of other cases is beside the point.[3]

Second, the Court may consider the other FEC matters cited by CREW. Those FEC determinations are agency judgments of which the Court may take notice, even if they are not in the administrative record. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). Moreover, consideration of those materials is necessary, as abdication by its very terms requires an examination of an agency's action across multiple cases. *See, e.g.*, *Adams*, 480 F.2d at 1163 ("A *consistent* failure to [enforce] is a dereliction of duty . . . ." (emphasis added)). If a court was limited to reviewing only a single case at hand, it would be impossible to differentiate prosecutorial discretion from abdication.

CREW introduces these other decisions because (1) they are the decisions of the same controlling commissioners that dismissed CREW's complaint against CHGO, (2) they involve legally analogous claims that involve the application of the FECA's political committee provisions, and (3) they involve cases that were found meritorious by the FEC's OGC. Those decisions show that the three controlling commissioners have *never* enforced the FECA's political committee

[3] The sole avenue for judicial review of the FEC's abdication is via a FECA suit. *See CREW v. FEC*, 164 F. Supp. 3d 113, 118–19 (D.D.C. 2015).

provisions in a contested case, even where the OGC recommends proceeding. Though the FEC clearly refuses to address this evidence, it demonstrates that the three controlling commissioners have abdicated enforcement of the FECA's political committee rules.

Third, the FEC argues that, even if these materials could be considered, the D.C. Circuit has limited abdication claims to those situations in which an agency affirmatively finds wrongdoing but then refuses to act. FEC Br. 42. The FEC's claim, however, is based on a misreading of *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993). In that case, this Court simply found that the plaintiffs' ability to sue the wrongdoing entities directly meant they had an alternative adequate remedy precluding APA review of agency inaction. *Id.* at 486–88. It did not call into question the ability to sue an agency for abdication where plaintiffs lack the ability to sue the wrongdoers directly or where, as here, plaintiffs can only obtain a right to sue the wrongdoer after judicial review of the agency action.

The FEC's abdication has blocked the enforcement of vital provisions of the FECA and denied CREW and voters essential information for the functioning of our democracy. Because an abdication cannot provide a reasonable basis for nonenforcement, the dismissal below was contrary to law.

V. There is No Other Adequate Basis for the FEC's dismissal

In its opening brief, CREW demonstrated that the legal doctrines cited by the controlling commissioners to justify dismissal did not, in fact, do so. In response, the FEC largely concedes CREW was right, but nonetheless argues the controlling commissioners' legal errors are irrelevant. According to the FEC, at most CREW has shown that the controlling commissioners were wrong about whether they *could* have sought enforcement against CHGO, but because no law "require[s]" enforcement, CREW cannot prevail. FEC Br. 43. This argument betrays the shocking implications of the FEC's perceived discretion: according to it, it need never correctly interpret the law because it is never actually required to enforce it in the first place, and thus no complainant may ever prevail because none could ever show the FEC *must* enforce. Nevertheless, the FECA's contrary to law standard does not oblige CREW to show that enforcement is "required." Rather, CREW need only show that the stated reasons for dismissal do not actually compel dismissal. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *CREW*, 209 F. Supp. 3d at 93 (reversing dismissal where First Amendment did not compel dismissal). CREW has done that.

First, with respect to the statute of limitations, the FEC concedes that the "controlling [c]ommissioners never suggested that the statute of limitations totally barred further enforcement proceedings on CREW's political committee claim."

FEC Br. 48–49. Of course, that means that there is no dispute that the statute of limitations did not require dismissal. Similarly, there is no dispute that the CHGO's purported defunct status did not require dismissal. FEC Br. 50 (noting controlling commissioners "did not completely rule out the possibility of proceeding" against a purportedly defunct group or its agents).

The FEC nonetheless attempts to use these issues to support dismissal by saying that they might complicate enforcement and drain the agency's resources. Yet that is merely a recasting of its broad prosecutorial discretion claim. For reasons stated above, that claim fails because it would mean no dismissal could be contrary to law because every enforcement will involve some use of the agency's resources.

CREW has further demonstrated that the cited "logistical difficulties" in enforcement due to the age of the case are, in fact, nonexistent. *Cf.* FEC Br. 51. Stale memories and missing documents are irrelevant where the FEC already has collected a complete record demonstrating beyond a mere reason to believe that CHGO was a political committee and failed to disclose its donors. In this case, there is no logistical difficulty to providing at least a partial remedy by releasing CHGO's contributors' names.

With respect to the merits, the FEC misstates the record in two important respects to try to make the controlling commissioners' refusal less indefensible.

First, the FEC states that the relevant commissions were "not exclusively attributed to the costs of producing and airing advertisements," and it could not count them towards CHGO's political activity. FEC Br. 52. However, the commissions paid to CHGO's subvendor, New Day, were exclusively for its work for "ad buys." JA 670 (describing New Days work as solely arranging the purchase of airtime). Indeed, its commission was proportional to the cost of each ad, *id.* (noting New Day's commission was "10%" of each ad buy), allowing granular attribution of her commission for each of CHGO's electoral ads, *see* JA 754. Adding just New Day's commissions for CHGO's express advocacy ads to the other amounts CHGO spent on them puts CHGO's expenditures on elections above the 50% putative threshold for political committee status.[4]

Secondly, the FEC misrepresents the record of CHGO's organizational purpose, stating that there was "conflicting evidence" on CHGO's purpose. FEC Br. 54. There was no credible conflict. As discussed above, the FEC's investigation revealed internal documents of CHGO declaring that CHGO's singular "goal" was to "win Senate seats." JA 514–25, 578. The controlling

[4] The controlling commissioners entirely failed to "clearly disclos[e] [or] adequately sustain[]" their purported concern with the OGC's assessment of CHGO's express advocacy, and thus those concerns cannot justify dismissal. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Nor would be it reasonable to interpret ads asking voters to "pull the plug on" an elected official and "join" his opponent's fight "in Washington," JA 443–44, as anything other than as an express call to vote against the incumbent and for his challenger.

commissioners failed to even acknowledge this document or discuss its impact on their analysis. *See* JA 766–70. In contrast, the controlling commissioners cited as evidence of CHGO's mission the statement of CHGO's attorney, claiming CHGO merely sought to "educate the public on matters of economic policy." JA 766–67. That statement lacks all credibility: it is based on CHGO's purchase of a single economic study for $5,000, about 0.1% of CHGO's expenditures, made only after CHGO learned it was under investigation. JA 268–70, 426, 572, 577, 737. Notably, the FEC investigation revealed no indication that CHGO did anything other than produce and air electoral ads. Considering those facts, it was wholly unreasonable for the controlling commissioners to adopt Canfield's statement of purpose and to completely ignore the irrefutable evidence of CHGO's major (and indeed singular) purpose: to influence elections while shielding the identities of its contributors.

Accordingly, no reasonable person could conclude CHGO lacked the major purpose to influence congressional elections. As such, any "contested issues of law" related CHGO's case were irrelevant to the question of whether CHGO violated the FECA, and those "contested questions" could not justify the controlling commissioners' refusal to find reason to believe CHGO was and is a political committee required to disclose its contributors.

In sum, the cited legal bases for dismissal—the running of the statute of limitations, the "defunct" status of CHGO, and remaining uncertainties about how to treat funds with which CHGO's agents absconded upon learning of the FEC investigation—do not justify dismissal. CREW is not required to show that, by law, the FEC must enforce, it need only show that the stated reasons for nonenforcement are unreasonable. CREW has done that here, and therefore the dismissal was contrary to law.

CONCLUSION

For the foregoing reasons, and the reasons stated in CREW's opening brief, CREW respectfully requests that the Court reverse the decision of the district court, declare that the FEC's dismissal of a case based solely on its desire to preserve resources is contrary to law within the meaning of the FECA, declare the dismissal below was contrary to law, and direct summary judgment for CREW.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: August 10, 2017

/s/ Stuart C. McPhail
Counsel for Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of August, 2017, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 10th day of August, 2017, I caused the required copies of the Reply Brief of Appellants to be hand filed with the Clerk of the Court.

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ADDENDUM

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 96-2184 (JHG)

ORDER

The Democratic Senatorial Campaign Committee's ("DSCC") filed administrative complaints with the Federal Election Commission's ("FEC"), alleging that the National Republican Senatorial Committee ("NRSC") had committed violations of campaign spending laws. Subsequently the DSCC filed an action in this Court, and on May 30, 1997, this Court held that the FEC's failure to take meaningful action within a reasonable time frame with respect to the DSCC's administrative complaints was contrary to law. The FEC appealed the judgment, and our Court of Appeals remanded the case for further consideration of the issue of standing. On October 18 this Court found that the DSCC had standing, and ordered that the May 30 order remain in effect. The October 18 order allowed the DSCC to proceed with a civil action against the NRSC, to remedy the

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violation alleged in the underlying administrative complaint.[1] The FEC again appealed. However, before the appeal could be heard, the FEC completed its proceedings on the underlying administrative complaint, and entered into a conciliation agreement with the NRSC. After being notified of the conciliation agreement, the DSCC filed a notice of dismissal in its action against the NRSC. In the appeal that was pending at that time, the DSCC filed a motion requesting that the appeal be dismissed as moot, and the FEC filed a motion that this Court's decisions be vacated. The Court of Appeals granted the unopposed motion to dismiss, and on the court's own motion, the case was remanded for consideration of the motion for vacatur as a motion for relief from judgment. After thorough consideration, this Court declines to grant relief from her earlier judgments.

The FEC moved for vacatur in reliance on *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), which describes the "established practice" of dealing with a case which has become moot pending appeal by reversing or vacating the judgment below and remanding it with a direction to dismiss. In remanding the motion, our Court of Appeals cited *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In that case, the court indicated that appellate courts should vacate a lower court's decision where such decision has become moot due to "circumstances unattributable to any of the parties," or the unilateral action of the prevailing party. *Id.* at 23 (internal quotation and citation omitted). However, the court held that a joint

[1] The DSCC filed its action against the NRSC on June 30, 1997, but that suit was stayed pending the outcome of the FEC's appeal of this Court's May 30, 1997 order.

responsibility for rendering the case moot (in that case, settlement) did not permit vacatur. Joint responsibility was insufficient because the court placed the burden for demonstrating the equitable entitlement to vacatur squarely on the petitioner for vacatur. The court did suggest that a court of appeals could remand a case with instructions for the district court to consider the request for vacatur pursuant to Federal Rule of Civil Procedure 60(b). The Court of Appeals has done so in this case, therefore this Court will consider the request for vacatur under the standard applicable to a Rule 60(b) motion.

Rule 60(b) permits the court to relieve a party from a final judgment for a variety of reasons, including a catch-all "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6). Most pertinent to this case is Rule 60(b)(5), which permits relief if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

The FEC argued that it was the DSCC's dismissal of its private cause of action, not the FEC's entrance into a conciliation agreement with the NRSC, that mooted the appeal.[2] After the conciliation agreement had been entered but before the DSCC dropped its suit against the NRSC, the FEC filed a Notice of a New Development arguing that the case was not moot. It reasserted the same arguments in its motion for vacatur, asserting that the DSCC's private cause of action was dependant on the

[2] Neither party submitted arguments regarding relief from judgment under Rule 60(b), therefore the Court's interpretation of the parties' positions is drawn from their submissions to the Court of Appeal.

judgment on appeal, and that the private cause of action "represented a continuing incursion on the Commission's exclusive jurisdiction to enforce the Act."

The DSCC contended that the FEC mooted the appeal by complying with this Court's order, and resolving the administrative complaint. The DSCC also argued that the FEC could have protected its exclusive jurisdiction to enforce the act by raising that issue in the context of the DSCC's litigation against the NRSC. The FEC responded that the conciliation agreement did not constitute compliance with this Court's Order because it was not entered in response to the Order, it did not address all of the alleged violations or provide all the relief requested in the DSCC's complaint against the NRSC, and the FEC's action was delayed long past the 30 day time period this Court gave for compliance. The FEC argues that its repeated attempts to appeal this Court's Orders should not be thwarted by the DSCC's decision to drop its suit against the NRSC.

The Court finds that the equitable standard described in *U.S. Bancorp* is also a useful guideline in making a decision under Rule 60(b). The FEC has not met its burden to show that the DSCC was exclusively responsible for mooting the appeal. The combination of the conciliation agreement and the dismissal of the DSCC's suit against the NRSC clearly mooted the appeal, but it is at least a possibility that the FEC's entrance into a conciliation agreement would have mooted the appeal by itself. Relief under Rule 60(b) is discretionary, and this Court is not convinced that equity demands

relief in this instance. No relief from judgment will be granted. It is therefore

ORDERED that, considering the motion for vacatur as a motion for relief from judgment, the motion is denied.

IT IS SO ORDERED.

September 11, 2000

JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	Civ. No. 14-1419 (CRC) **ORAL ARGUMENT REQUESTED** MOTION FOR SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") respectfully cross-moves this Court for an order (1) granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), and (2) denying plaintiffs' summary judgment motion (Docket No. 33). In support of this motion, the Commission is filing a Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment and a Proposed Order. The Commission requests oral argument on this motion.

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regulation (which is not before this Court) has just been upheld by the Court of Appeals. *Van Hollen*, 2016 WL 278200.

Plaintiffs' disclosure argument is also overstated. AJS and AAN have filed numerous FEC reports detailing their independent expenditures and electioneering communications. *See supra* pp. 11-13. As the Seventh Circuit recognized, even groups "whose major purpose is not express advocacy — are not completely immune from disclosure and disclaimer rules for their occasional spending on express election advocacy." *Barland*, 751 F.3d at 839.

D. The Dismissals Were Also a Reasonable Exercise of Prosecutorial Discretion

Finally, the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion. AR 1460-61 n.142; AR 1712-13 n.137; *see Akins*, 524 U.S. at 25 (acknowledging that agencies like the FEC "often have discretion about whether or not to take a particular action" and observing that the FEC's "prosecutorial discretion" might have justified dismissal in that case, even if it "agreed with [complainants'] view of the law").

The Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988); *see also DCCC*, 831 F.2d at 1133-34 (discussing FEC's prosecutorial discretion). In *Orloski*, the D.C. Circuit concluded that the FEC is entitled to decide not to begin an investigation based on a "subjective evaluation of claims." 795 F.2d at 168. "It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance [sic] directing where limited agency resources will be devoted. [Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) (sustaining the Commission's decision not to prosecute based upon its "considerable" discretion); *Stark*, 683 F. Supp. at 840

("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources").

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court rearticulated the bases for an agency's discretion not to prosecute or enforce. *Id.* at 831 (collecting cases). It observed that such "discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement," and noted that such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* Agencies may consider not only "whether a violation has occurred," but also, *inter alia*, the best use of agency resources, the agency's likelihood of prevailing if it pursues the violation, whether the requested enforcement action "best fits the agency's overall policies," and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

Here, both controlling statements noted the FEC's prosecutorial discretion as discrete bases for deciding not to find reason to believe in the AJS and AAN matters. (AR 1463 & n.153; AR 1716 & n.153.) Specifically, the Commissioners expressed concern that in light of the similarities perceived between the approach recommended by the agency's in-house staff and the approach rejected in *Barland*, "constitutional doubts raised . . . militate[d] in favor of cautious exercise of our prosecutorial discretion." (AR 1460-61 n.142; AR 1712-13 n.137.) It was clearly reasonable for Commissioners to decline to pursue enforcement based on the analysis urged by plaintiffs here given the recent rejection of that approach by a federal Court of Appeals. The Commission's dismissal was thus a reasonable exercise of its broad prosecutorial discretion.

CONCLUSION

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

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