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

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants Citizens for Responsibility and Ethics in Washington and Melanie Sloan hereby certify as follows:

A. Parties and Amici. Plaintiffs-Appellants are Citizens for Responsibility and Ethics in Washington, a non-profit corporation, and Melanie Sloan. Defendant-Appellee is the Federal Election Commission. There were no *amici curiae* in the district court.

B. Ruling Under Review. The ruling under review is the district court's February 22, 2017 order and accompanying memorandum opinion, ECF Dkt. Nos. 26, 27, in *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 15-cv-2038 (RC) (Hon. Rudolph Contreras). The district court's opinion is available at 2017 U.S. Dist. LEXIS 24253 and is reprinted in the Joint Appendix ("JA") at 861–88.

C. Related Cases. The case on review has not previously been before this Court or any other court. There are no related cases to the case on review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, plaintiff-appellant Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principle activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing, including financing of political committees, to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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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

STATEMENT OF JURISDICTION

This Court has jurisdiction over this timely appeal from a final judgment in the United States District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court's jurisdiction was based upon 52 U.S.C. § 30109(a)(8)(A). Appeal was timely taken on March 21, 2017, within sixty days of the district court's February 22, 2017 decision under review.

STATEMENT OF ISSUES PRESENTED

(1) The FECA, 52 U.S.C. § 30109(a)(8)(C), allows a complainant to the FEC whose complaint is dismissed to thereafter bring a suit "in the name of such complainant" against the alleged wrongdoer without the participation of the FEC or use of the agency's resources, but only if a court finds the FEC's dismissal was "contrary to law." Below, the district court held that an FEC dismissal is not "contrary to law" when it is based solely on the FEC's desire to preserve agency resources and avoid litigation risk, rather than on the merits of the complaint; a result which bars a complainant from bringing a meritorious suit in its own name even though such suit would neither expend agency resources nor pose any litigation risk to the agency, rendering § 30109(a)(8)(C)'s citizen-suit provision a dead letter. Did the district court commit reversible error?

(2) Did the district court commit reversible error when it found that a non-majority of the FEC's concerns about "litigation risk" rendered the dismissal of CREW's administrative complaint not "contrary to law" within the meaning of the FECA, despite the FEC's ability to partially remedy the violation of the FECA by releasing information already in the FEC's possession without incurring any such "litigation risk"?

(3) Whether the FEC has abdicated its statutory responsibilities in enforcing the FECA's political committee registration and reporting provisions, 52 U.S.C. §§ 30103, 30104, where three current commissioners of the FEC—a number sufficient to block FEC enforcement—have never found reason to believe a respondent has violated the FECA's political committee provisions and sought sanctions where the respondent's political nature was contested?

(4) Was the FEC's dismissal of CREW's administrative complaint otherwise "contrary to law" within the meaning of the FECA?

STATUTES AND REGULATIONS

This litigation involves application of the FECA, 52 U.S.C. § 30109, which will be reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

The FECA requires certain groups that engage in or intend to engage in extensive electioneering, called "political committees," to register with the FEC and file periodic reports disclosing, among other things, contributions over $200 per year. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. §§ 104.1, 104.3(a). To qualify as a political committee, the group must spend at least $1,000 on expenditures or accept more than $1,000 in contributions in a year. 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5(a). A qualifying expenditure includes an "independent expenditure," *i.e.*, a communication expressly advocating for the election or defeat of a federal candidate, but not coordinated with any federal candidate. 52 U.S.C. § 30101(17); 11 C.F.R. §§ 100.16, 100.22.

The Supreme Court has carved out from this statutory category those groups that (1) are not under the control of a candidate and (2) lack a "major purpose" of nominating or electing federal candidates. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). A group will lack the requisite major purpose if (1) it was not organized for the purpose of nominating or electing federal candidates and (2) its electoral activity is "[in]sufficiently extensive." FEC, Political Committee Status, 72 Fed. Reg. 5595, 5601, 5605 (Feb. 7, 2007) ("2007 E&J").

In addition, the FECA requires anyone, including those who do not qualify as political committees, to file a report with the FEC if they spend a sufficient sum of money on one of two types of electoral communications: (1) independent expenditures (defined above) or (2) electioneering communications (ads airing within a short time window before an election, clearly identifying a federal candidate in that election, and targeted to that candidate's electorate). 52 U.S.C. §§ 30104(c), (f); 11 C.F.R. §§ 100.22, 100.29, 104.20(b), 109.10. These reports must disclose, among other things, contributions above a specified amount that were made "for the purpose of furthering" the electoral communication. 11 C.F.R. §§ 104.20(c)(9), 109.10(e)(1)(vi).

The FECA places preliminary responsibility for enforcing federal campaign finance laws, including the political committee registration and disclosure requirements, with the FEC. 52 U.S.C. § 30106. Third parties, however, may file a complaint with the FEC if they identify a violation of the statute. 52 U.S.C. § 30109(a)(1). After a response from the alleged violators and a report from the FEC's Office of General Counsel ("OGC"), the six commissioners of the FEC then vote on whether they find "reason to believe" the FECA has been violated. *Id.* § 30109(a)(2). If four commissioners find reason to believe, the OGC will investigate and then make a recommendation whether there is probable cause. *Id.* § 30109(a)(2), (3). If four commissioners find probable cause, the FEC must then

seek conciliation with the respondents; if the FEC is unable to reach a conciliation agreement, the FEC may pursue a civil action in court. *Id.* at § 30109(a)(4)(A), 6(A).

If the FEC does not pursue enforcement, the FECA empowers the complainant to "bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C). The complainant may only bring that action, however, if, after presenting its complaint to the FEC, the FEC fails to enforce, the complainant receives a judicial declaration that the failure to enforce was "contrary to law," and then the FEC fails to "conform" with the declaration within thirty days. *Id.*

II. The Commission on Hope, Growth and Opportunity

As the district court recognized below, "[t]he parties agree that the [FEC] had strong grounds to prosecute [CHGO] under the [FECA]." JA 862. That conclusion was based on CHGO's complete failure to comply with its reporting obligations under the FECA with regard to its extensive political spending in the 2010 elections and informed by CHGO's reprehensible conduct.

CHGO was created in early 2010 by longtime political operative Scott Reed and Michael Mihalke, president of media relations and production company Meridian Strategies, LLC. JA 315, 324, 509. Although the two exercised control over CHGO, their association with the group was kept hidden from the public as

they were never named as officers, employees, or board members. JA 794, 809, 866. CHGO's attorney, William Canfield, also was "quite active" in the group's formation. JA 867.

According to its internal documents, CHGO's express goal was "[t]o make an impact using express advocacy" in targeted congressional races. JA 514. Its "[s]imple mission" was to "win Senate seats," though it later switched its focus to House races. JA 519. The group intended to take advantage of the recent *Citizens United v. FEC* decision, 558 U.S. 310 (2010), to "[p]rovide[] corporations and individuals with an opportunity to participate directly in [the] election or defeat of candidates" while making sure that its "donor name[s] [were] never made available to the public." JA 517–18.

Citizens United, however, contemplated that politically active organizations would be required to disclose the names of their donors so that voters would know who was financially backing (or attacking) candidates. 558 U.S. at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."). To avoid the possibility that its donors would be made public while still achieving its goal of spending heavily on politics, CHGO engaged in deeply troubling conduct over the next several years: it lied about its mission, plans, and activities, broke the law, then tried to disappear to avoid being held accountable.

CHGO started by lying to the IRS to help it obtain tax-exempt status while hiding its political plans. While an organization like CHGO that seeks to influence elections may operate under 26 U.S.C. § 527, those groups must disclose their donors, *id.* at § 527(j)(3)(B). Section 501(c)(4) organizations, on the other hand, are tax-exempt and may keep their donors secret. However, they must be operated "exclusively for the promotion of social welfare," 26 U.S.C. § 501(c)(4)—a category that does not include groups whose "primary" purpose is to participate in political campaigns, 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). In keeping with its goal of keeping its donors secret, CHGO did not register as a "527" group. Instead, Canfield filed an application for 501(c)(4) status in which he falsely represented under penalty of perjury to the IRS that CHGO did not intend to spend "any money attempting to influence" an election. JA 795.

Shortly thereafter, CHGO began raising money and spending it on political advertisements. In September 2010, the group received a $4 million contribution that would provide more than 83% of the funds CHGO raised over its lifetime. JA 573, 606. Most of the rest of CHGO's money came in after a purportedly volunteer fundraiser, Wayne Berman, sent a private fundraising letter on its behalf. JA 578, 705. Reflecting CHGO's true nature, Berman's request stated the group "focuses on running independent expenditure campaigns in key districts to support

the election of Republican Candidates" and assured would-be donors that contributions are "not disclosed." JA 578.

CHGO almost immediately sent the money it raised to its sole direct vendor, Mihalke's Meridian Strategies, eventually paying it about $4.5 million. JA 537, 714–15, 810. Contradicting Canfield's representation to the IRS that CHGO would not attempt to influence federal elections, Meridian used CHGO's money to produce and air electoral communications. JA 714.

Beginning in September 2010, CHGO broadcast advertisements in at least fifteen congressional elections. JA 749–53. For example, one ad aired in November 2010 asked viewers to "pull the plug on" Rep. John Spratt (D-SC) and "join [Spratt opponent] Mick Mulvaney's fight against big spenders in Washington." JA 443 (describing identical Allen Boyd/Steve Southerland version of ad). Another ad attacked Rep. Spratt's voting record in Congress, then told viewers "Mick Mulvaney has a better idea" and urged them to "[h]elp Mick Mulvaney." JA 440 (describing identical Dan Maffei/Anne Marie Buerkle version of ad). CHGO ran variants of these two ads between September and November 2010 against Democratic candidates in ten other races. JA 642–43, 749–53. Another CHGO ad accused Rep. John Salazar (D-CO) of "squander[ing] billions on a bogus stimulus," and encouraged voters to "help [Salazar opponent] Scott Tipton make America work again." JA 442; *see also* JA 436 (similar ad run

against Rep. Dan Maffei (D-NY)). Some ads did not mention a candidate's opponent but were still election-related, such as one calling on voters to "stand with" Rep. Walt Minnick (D-ID), who had broken with Democratic leadership. JA 441. The FEC would eventually find that CHGO spent approximately $4.05 million on these electoral advertisements, comprising about 85% of CHGO's spending in 2010. JA 736, *see also* JA 436–47, 642–43, 749–53.

Despite the FECA's clear requirements, CHGO failed to file disclosure reports for any of these independent expenditures and electioneering communications, and it failed to register as a political committee and report its spending and contributors. JA 738, 740.

CREW filed a complaint in May 2011 with the FEC alleging CHGO failed to file the one-time reports, and later amended the complaint to allege CHGO failed to register as a political committee. JA 249–64, 392–424. In response, Canfield falsely represented CHGO's purpose and activity to the FEC, stating the group "may not and does not engage in electoral politics." JA 268–70. As proof of CHGO's purportedly non-political "social welfare" mission, Canfield pointed to a "study" commissioned by the group—though he failed to reveal that CHGO purchased it only after the group learned of the FEC complaint and that it cost only $5,000, about 0.1% of CHGO's expenditures. JA 268–70, 426, 572, 577, 737. Canfield also insisted Scott Reed was neither a founder, spokesman, nor official of

CHGO, JA 345, despite Reed being publicly identified as the "founder" of CHGO, Reed's statement "that CHGO sought to raise $25 million to run ads in 20 House Districts and a few Senate contests in 2010," JA 304, 320–21, and, as discussed *infra*, Reed's extensive involvement with the organization.

CHGO then once again misrepresented its activities on its Form 990 tax return for 2010. JA 803–17. Despite having spent millions on electoral ads, Canfield represented, under penalty of perjury, that CHGO did not "engage in direct or indirect political campaign activities." JA 805. CHGO repeated these false statements in its 2011 Form 990. JA 819–35.

On January 17, 2012, the FEC notified CHGO that the agency was still considering the allegations against CHGO, and that it expected to vote "in mid-2012." JA 389. Faced with the prospect of a full FEC investigation into its conduct, CHGO decided to try to go out of business.

On March 27, 2012, CHGO's treasurer, James Warring, emailed Mihalke—who supposedly only ran CHGO's single vendor and had no reported control of the group—listing the "few steps" CHGO would need to take to terminate. JA 634. Canfield was quickly included in the discussion. JA 633–34. On April 15, 2012, Canfield emailed Mihalke stating that it was "[r]eally important for us to get this terminated ASAP." JA 636. The next morning, Mihalke replied to Warring and Canfield asking, "What do we need to do to get this closed most quickly[?]" *Id.*

Mihalke's stated reason was that "[t]here is an outstanding matter at the [FEC] and my sense is that we ought to shut it down to make things less complicated moving forward." *Id.* Warring wrote back, "[w]e will make this a priority." JA 631. Weeks later, CHGO reported to the IRS on its 2011 Form 990 that it had terminated. JA 819.

Shortly after, on May 21, Canfield told the FEC that CHGO was "inactive" and that he "had no contact with" CHGO "since late December 2010," JA 426, failing to mention his recent participation in the correspondence about terminating CHGO. Soon after his representation to the FEC, Canfield continued his communication with CHGO, emailing Warring to discuss the group's tax returns. JA 629–30.

On December 27, 2013, the OGC issued its First General Counsel's report. JA 431–71. The report found that most of CHGO's ads were independent expenditures and the remainder were electioneering communications, and recommended that the Commission find reason to believe CHGO failed to file the required one-time reports for them. JA 438–50 470. The OGC also recommended finding reason to believe that CHGO failed to register and report as a political committee. JA 453–69. The OGC found CHGO easily met the statutory benchmark for political committee status, JA 461, and concluded that CHGO's

spending on its political ads was sufficiently extensive to find reason to believe CHGO's major purpose was federal campaign activity, JA 462–69.

On September 16, 2014, the Commission voted unanimously to approve the OGC's recommendation to find CHGO failed to file required independent expenditure and electioneering communication reports. JA 473–77. The Commission split, however, on the OGC's recommendation to find reason to believe CHGO failed to register and report as a political committee. *Id.* Nonetheless, the Commission authorized compulsory process, *id.*, and OGC began investigating CHGO.

The investigation eventually uncovered CHGO's deceptive goals and operations, despite obstructions by the group and its associates. It was difficult for OGC to even learn who operated CHGO and was responsible for its activities. James "Steve" Powell—CHGO's president according to its IRS filings—said he exercised no control over the operation and only wrote and produced television ads. JA 493–94, 546–52. Warring, CHGO's treasurer, said his firm did accounting and tax work for CHGO, JA 496, but Canfield confirmed that Powell and Warring had only "compartmentalized knowledge" about the group's activities, JA 500. For his part, Canfield said that he did not know who delegated CHGO's work as he "just handled compliance issues relating to express

advocacy," JA 500–01, and claimed he had no role in the review or preparation of any "funding, production or placement documents," JA 555.

Mihalke, though, admitted Reed formed CHGO, led the group, and, along with Canfield, was responsible for approving ads. JA 509, 714, 717. Additional documents produced by Warring further identified Reed's importance in the group. JA 572. Nevertheless, when the FEC finally reached Reed, he acknowledged he gave advice to CHGO about ad placement, but claimed he could not recall "anything to do with [CHGO's] formation" because he was involved in "too many political committees since 2010 to have a clear recollection." JA 638–39.

OGC's investigation was further hindered by CHGO's failure to preserve its records, despite the FEC repeatedly instructing it keep them. JA 246, 389, 428, 479. Powell said that while he was named on CHGO's tax returns as the group's custodian of records, JA 808, he had none related to the ads, JA 494. Warring asserted any financial records received from CHGO were returned to the group, and that his CHGO file was "sketchy" and had "practically nothing" in it. JA 496–98. And Canfield claimed CHGO's records would have ended up in his office's mail room, but that "at some time, the mail room staff 'tossed'" them. JA 501.

In one notable example of the impediments CHGO and its agents created to the investigation, an FEC investigator attempted to serve a subpoena on Meridian's offices after the previous attempt by mail failed. JA 505. Arriving at Meridian's

purported office address, he found it empty, save for one individual who said "no company called Meridian occupied office space on the floor." *Id.* When the investigator spoke to the building manager, she confirmed Meridian had no offices there, but added Reed used to have one, and that while he had accepted mail for Meridian, he had told her to reject acceptance of the FEC subpoena. *Id.*

Despite these obstacles, the OGC investigation uncovered revelatory details about CHGO's true purpose and activities. In response to an FEC subpoena, Mihalke produced a PowerPoint presentation and a memorandum revealing CHGO's political purposes. JA 514–25. Among other things, it revealed:

- CHGO's "goal" was "[t]o make an impact using express advocacy in targeted Senate races," and the group would "utilize all options available to it for direct, express advocacy under the recent SCOTUS decision," JA 514–15,
- CHGO "[s]upport[ed] pro-growth, free enterprise candidates in targeted Senate races," JA 516,
- CHGO believed *Citizens United* created the opportunity for corporations and labor unions to "engage in direct, express advocacy for election or defeat of candidates," which 501(c)(4) groups could do "with donor names never made available to the public under law," JA 517–18,

- CHGO planned to "win Senate seats" and planned to target certain races with a media roll-out with dates that corresponded to the ads CHGO would eventually run, JA 519 523–24, and
- CHGO intended to "participat[e] in election[s]" and "make [a] measurable difference in key Senate races," while assuring that "donors [are] never disclosed," JA 525.

Despite Mihalke's production, the FEC was unable to obtain from CHGO or its agents records detailing CHGO's ad purchases due to CHGO's failure to preserve documents. OGC therefore reached out to television stations that ran the ads to gather more information about CHGO's spending. From those records, OGC also learned of a previously undisclosed vendor, New Day Media, JA 662–67, and obtained from its owner bank records showing receipts for payments to the stations to run ads and learned that Meridian paid New Day about $3.2 million for them, JA 673–703.

The investigation also uncovered a questionable and potentially illegal transaction. Mihalke confirmed that Meridian paid New Day $3.2 million to place CHGO's ads, despite the fact that Meridian received $4.3 million from CHGO for that purpose. JA 714–16. Asked about the $1.1 million discrepancy, Mihalke said that

> [While] unused funds were to be given back to CHGO, . . . Reed told him that the remaining $1,100,000 would

> be evenly divided among Reed, Mihalke and Wayne Berman . . . [to] cover costs of 'fundraising' and would be a 'fundraising commission.'

JA 716–17. Reed, though, had no disclosed authority to order the distribution of CHGO's excess funds. Berman, the author of a fundraising letter, testified that his services were "voluntary." JA 705. Mihalke also admitted he had no fundraising role, JA 712, and CHGO's tax filings revealed no funds spent on fundraising, JA 803, 819.

Armed with the additional information about CHGO's purpose and spending, the OGC again recommended finding reason to believe that CHGO failed to file the required one-time reports and failed to register and file as a political committee. JA 738, 740. The OGC found the overwhelming evidence—including internal documents revealing CHGO's organizational purpose and records of CHGO's extensive political advertising—demonstrated CHGO's major purpose was to influence elections. JA 736–38. The OGC calculated that 85% of CHGO's spending was on political ads, including 61% on express advocacy ads alone. *Id.* Nevertheless, on October 1, 2015, the Commission split three-to-three on all of the OGC's recommendations. JA 757–58.

Three commissioners—Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman—voted against finding reason to believe CHGO committed any violation of the FECA. JA 758. In a

subsequent statement of reasons, these controlling commissioners justified their votes on the grounds that the "statute of limitations [had] effectively expired," enforcement was "futile" because CHGO was now "defunct," and that the OGC's investigation "did not definitively resolve" CHGO's political committee status. JA 766–69. Finally, the three stated that they would close the file "consistent with the Commission's exercise of its discretion," citing *Heckler v. Chaney*, 470 U.S. 821 (1985), in a footnote. JA 769.

FEC Chair Ann M. Ravel and Commissioner Ellen Weintraub issued their own statement excoriating the three commissioners for ignoring "overwhelming evidence" of CHGO's purpose and for ignoring CHGO's obstruction of the investigation. JA 760–64. Commissioner Steven T. Walther issued his own statement, noting the "overwhelming" evidence against CHGO, the "obstacles" it laid to investigation, and that multiple paths to investigation and enforcement remained. JA 772–860.

CREW filed suit against the FEC for its dismissal pursuant to 52 U.S.C. § 30109(a)(8) on November 23, 2015. On February 22, 2017, Judge Rudolph Contreras granted the FEC's motion for summary judgment and denied CREW's motion for the same. JA 861. He began by recognizing that all the parties agreed the FEC "had strong grounds to prosecute [CHGO] under the [FECA]." JA 862. Despite the controlling commissioners premising their refusal to enforce on the

purported running of the statute of limitations and the impossibility of enforcement against a supposedly "defunct" group, the district court sidestepped these legal questions and did not rule on whether the three had permissibly interpreted the applicable statute of limitations or other relevant laws that they said barred FEC enforcement. JA 879. Rather than determine whether the controlling commissioners' interpretations were permissible or not, the district court found that the mere existence of uncertainty in the law created "litigation risk" for FEC enforcement. *Id.* As the district court construed the FEC dismissal as a "decision on how to best allocate [the agency's] resources," it found that the "litigation risk" provided a "rational basis" for the FEC to exercise "prosecutorial discretion." JA 863, 877, 882, 884. The district held that was sufficient to cause the dismissal to not be "contrary to law" within the meaning of the FECA, *see* JA 876, thereby not only upholding the FEC dismissal, but also terminating any possibility that CREW might seek enforcement against CHGO itself.

SUMMARY OF THE ARGUMENT

The FEC's dismissal of CREW's administrative complaint against CHGO was contrary to law. Even though there were "strong grounds to prosecute" CHGO, the FEC, preferring to preserve its resources in the face of "litigation risk," dismissed the complaint in "an exercise of prosecutorial discretion." The FECA provides a fail-safe in the event of such underenforcement: the complainant may

bring a citizen suit "to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C). By treating the dismissal premised on the FEC's prosecutorial discretion as not "contrary to law" under the FECA, however, the district court effectively eliminated any possibility that a citizen suit authorized by the FECA could be brought, nullifying that provision of the statute. While the FEC enjoys discretion about whether or not to pursue a case, the effect of exercising that discretion cannot invalidate a provision of the FECA. CREW is ready and willing to bring a citizen suit under the FECA that would have no impact on FEC resources or require the agency to incur any litigation risk. The dismissal based on the FEC's prosecutorial discretion blocks that option and thus is contrary to law.

The FEC's fear of litigation risk and desire to preserve resources is also irrelevant to enforcement here because, in this case, the FEC can partially remedy the violation without incurring any litigation or expending any resources. The FEC has in its possession the information that CHGO would be required to disclose if it were found to be a political committee that failed to file the requisite reports: the names of CHGOs' contributors. The FEC simply could stop withholding that information from the public after finding that CHGO was a political committee subject to reporting. The FEC's resources would remain untouched.

The FEC's dismissal in this case also should not be reviewed in a vacuum. A review of the other cases before the FEC involving political committee violations shows that the same three commissioners who blocked enforcement here block enforcement in all similarly contested cases. These controlling commissioners have abdicated their enforcement duties, denying voters essential information needed to exercise their franchise in an informed way.

Finally, none of the other grounds identified by the controlling commissioners justify dismissal. The statute of limitations presents no bar to FEC enforcement. CHGO's purported termination similarly does not render enforcement impossible. Nor are the supposedly novel legal issues raised in consideration of CHGO's status of a political committee relevant, and therefore there is no genuine dispute that CHGO is a political committee regardless of how those legal issues are resolved.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews district court grants of summary judgment *de novo*. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). Summary judgment is appropriate only where the moving party meets its burden of demonstrating the absence of a genuine dispute of material fact and that "'the moving party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

247 (1986) (quoting Fed. R. Civ. P. 56(c)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The standard for judicial review under the FECA is whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The term "contrary to law" is a technical one under the FECA. It does not mean the dismissal was unlawful or irrational. *See FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986) (holding a "contrary to law" action by the FEC was nonetheless rational and "substantially justified"). Rather, the examination looks at whether the FEC will permit the respondent's behavior, contrary to the law which proscribes it. Accordingly, a court first determines if the agency has "[]permissibl[y] interpret[ed]" the law to conclude the respondent's behavior has not violated it. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Second, the court reviews the agency's determination of the behavior itself to see if it was "arbitrary or capricious, or an abuse of discretion." *Id.*, *see also CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (finding that dismissal was contrary to law where organization's electioneering communications may have subjected it to political committee reporting, but where FEC dismissal nonetheless allowed it to avoid disclosure).

In reviewing a dismissal by the FEC to determine whether it was "contrary to law" within the meaning of the FECA, the court's determination is based on the statement of reasons provided by those commissioners who voted against

enforcement, even where those commissioners do not constitute a majority of the Commission. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did.").

II. BY FINDING THE FEC'S PROSECUTORIAL DISCRETION RENDERED DISMISSAL NOT CONTRARY TO LAW, THE DISTRICT COURT NULLIFIED THE FECA'S CITIZEN SUIT PROVISION

The district court below found that the controlling commissioners' dismissal of CREW's complaint was not "contrary to law" because, even though there were "strong grounds to prosecute" CHGO, "the FEC rationally dismissed Plaintiffs' complaint as an exercise of prosecutorial discretion." JA 862–63. The district court erred, however, because a dismissal premised on the FEC's prosecutorial discretion is "contrary to law" within the meaning of the FECA. Concluding otherwise impermissibly renders the FECA's citizen-suit provision "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted); *see* 52 U.S.C. § 30109(a)(8)(C) (providing complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint"). While the FEC has "discretion about whether or not to take a particular action," *FEC v. Akins*, 524 U.S. 11, 25 (1998), the effect of exercising that discretion cannot serve to block a citizen suit under the FECA,

and thus cannot block a precondition to a citizen suit: that the dismissal be found contrary to law.

A. The District Court's Holding Renders FECA Citizen Suits Impossible

The FECA permits a complainant to bring "a civil action [in their own name] to remedy the violation involved in the original complaint" if certain preconditions are met. 52 U.S.C. § 30109(a)(8)(C). First, a court must determine that a dismissal was "contrary to law." *Id.* Second, the FEC must then fail to conform with that judicial declaration within thirty days. *Id.* The district court here ruled that, because the dismissal was a "rational" exercise of the FEC's "prosecutorial discretion" in light of the perceived "litigation risk" involved in prosecuting CHGO, the FEC's dismissal was not contrary to law under the FECA. JA 863, 879. By treating discretionary dismissals as not "contrary to law," the district court effectively prohibits a complainant from ever satisfying the preconditions for a citizen suit. The result is to ensure the FEC's "decision on how to best allocate its resources" leaves entities like CHGO free to break the law, contravening Congress's design.

Putting the erroneous decision below aside, the conditions required to bring citizen suits under the FECA are extremely difficult to satisfy. In situations where the FEC has ruled on the substance of an enforcement action (*i.e.*, not those involving the FEC's prosecutorial discretion), a dismissal is contrary to law if it

was based on (1) "impermissible interpretations" of law, or (2) if based on permissible interpretations, was nonetheless "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. Though it does not require a showing of irrationality, this nonetheless is a demanding standard to meet. On the first question, the FEC's interpretation of law will often be afforded *Chevron* deference. *Id.* (applying *Chevron* framework to FEC interpretation of law). Review under the second question is "extremely deferential," *id.* at 167, and "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).

If a complainant manages to show that the dismissal was based on impermissible interpretations of law, unsupported by substantial evidence, or involved a clear error in judgment, the relief awarded is a judicial declaration that the dismissal was contrary to law and an order directing "the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). The court may not order any more: it may not direct the FEC to reach any particular conclusion on the complaint nor may it order the agency to prioritize consideration of the remanded enforcement action. *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("When the FEC's failure to act is contrary to law, we have interpreted § [30109](a)(8)(C) to allow nothing more than an order requiring FEC action.").

Further, while the district court may "direct the Commission to conform," the actual actions required by the FEC to conform are exceedingly minimal. The court's direction is satisfied so long as the FEC reopens the matter below and then avoids the explicit error identified in the district court's declaration. *See* Mem. Op. and Order 5–6, *CREW v. FEC*, 14-cv-1419 (CRC) (D.D.C. Apr. 6, 2017) (attached in addendum) (holding FEC conformed with court order where it reopened investigation and did not commit exact same legal error as before, even if it committed new legal error). In other words, the FEC would only fail to conform if it either (i) refused to reopen the matter, or (ii) reopened it and then dismissed while adhering to the exact same legal error, unsupported conclusion, or clear error in analysis that earned it a reversal in the first place. Such a brazen failure to take even the most minimal corrective action is exceedingly implausible. It also would constitute contempt of court, making it even less likely. *Id.* at 4 (citing *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984)).

Thus, with regard to a dismissal after a determination on the merits, a complainant must survive a gauntlet that virtually assures that it never satisfies the preconditions for a citizen suit under the FECA. A complainant must show error sufficient to secure a rare "contrary to law" determination, and then hope that the FEC would subject itself to contempt by refusing even the smallest of efforts to

conform—efforts that need not consist of actual enforcement. Not surprisingly, this situation has never arisen in the forty-plus years of the FECA's existence, to CREW's knowledge. Indeed, if a complainant ever found itself in this impossible situation, it most likely would not bother pursuing a suit in its own name and using its own resources. After all, the complainant could simply seek an order holding the FEC in contempt and force the FEC to enforce the law, making the citizen suit entirely redundant.

Of course, it is not unreasonable to interpret the FECA to effectively bar citizen suits where the FEC reaches the merits of a case. The district court, however, in effect barred a citizen suit in *every* case by expanding this obstacle course to situations in which its application is absurd: where the FEC does not reach the merits but dismisses based on its prosecutorial discretion.

By treating a dismissal for prosecutorial discretion like any other type of dismissal, the district court requires a plaintiff to show the FEC abused its discretion in its "decision on how to best allocate its resources." JA 877. A proper showing on that issue would require intrusive discovery into the FEC operations, despite the fact that a plaintiff must litigate based solely on the agency's self-selected administrative record. *Hagelin*, 411 F.3d at 243 (reviewing agency decision in light of "record before it"); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (authorizing discovery to determine if prosecution

abused discretion). Nonetheless, if the complainant could somehow meet their burden, the FEC could simply reopen the matter, once again exercise its discretion not to move forward based on a renewed look at its resources, and the agency would have carried out its duty to conform with the judgment. A complainant would never satisfy the preconditions for a citizen suit.

It is difficult to conceive of a situation in which a complainant could ever utilize section 30109's citizen suit under the district court's understanding of the law. If the FEC's dismissal based solely on its "decision on how to best allocate its resources" can prevent a citizen suit—especially in the face of such flagrant and "obvious" violations as those committed by CHGO, JA 881—one must conclude that there is *no* situation in which a citizen suit may be brought.

Yet "[i]t is a cardinal principle of statutory construction, that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.*, 534 U.S. at 31 (internal quotation marks omitted). The district court's analysis, however, leaves the FECA's citizen suit provision "superfluous, void, [and] insignificant." *Id.* Nevertheless, this result can be prevented by interpreting the FECA's contrary to law standard in a way that recognizes that the FECs' prosecutorial discretion cannot block a citizen suit. In fact, recognizing the FEC's exercise of prosecutorial discretion is contrary to law within the meaning of the FECA accords with the

logic and structure of the statute, addresses the legislative concern that motivated the provision, recognizes the purpose of citizen suits in federal law generally, and concords with judicial precedent on the FEC's "discretion about whether or not to take a particular action," *Akins*, 524 U.S. at 25.

B. FECA Citizen Suits Are Appropriate Where an FEC Dismissal is Discretionary

In providing for a citizen suit under the FECA, Congress created an important enforcement backstop. Where the FEC pursues enforcement, or where the complainant raises an unmeritorious claim, there would be no need for a citizen suit. Where there is no dispute, however, that a complainant raises serious and substantiated allegations of unlawful activity, yet the FEC only declines to enforce based on its prudential judgment to "husband resources, . . . a citizen suit against the violator can still enforce compliance without federal expense." *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001).

That is precisely the case here. There is no dispute that CREW made serious and substantiated allegations against CHGO—allegations that the FEC confirmed and buttressed through its investigation—showing CHGO "obvious[ly]" violated the FECA. JA 881. There also is no dispute that CHGO and its agents went to extreme lengths to hide their violations from government agencies, and there is evidence CHGO's roadmap has been used by similar groups to evade campaign disclosure. JA 150–68, 866–72. Yet simply because of the FEC's desire to

preserve its own resources, these violations of federal law will go unremedied, and voters will remain ignorant of CHGO's contributors. Congress contemplated this situation, however, and provided a citizen suit so that a complainant like CREW could remedy these violations at no expense to the FEC.

The structure of the FECA bolsters this reading of the statute. First, it simply defies reason to conclude that the FEC's desire to preserve its resources should have the effect of cutting off a citizen suit which would not require the FEC to expend any resources. A complainant must bring the suit in their own name and at their own expense. 52 U.S.C. § 30109(a)(8)(C). The FEC's resources would go untouched. It would be nonsensical therefore for Congress to condition a citizen suit on a factor that is entirely unimpacted by it. Rather, finding an FEC dismissal based on its prosecutorial discretion is contrary to law, and then finding that the FEC's continued adherence to that discussion is a failure to conform, would leave the agency entirely in control of its own resources. The sole result is to allow a complainant to bring their own suit.

Second, the FECA already expressly contemplates that a discretionary decision by the FEC not to pursue an enforcement action authorizes to a citizen suit. The second statutory condition for a citizen suit is that the agency fails to conform with a court's declaration. 52 U.S.C. § 30109(a)(8)(C). Under that provision, if the FEC simply chose not to take up a matter again, there would be a

failure to conform and a citizen suit could proceed. In other words, the FEC's discretionary decision not to pursue a case would permit a citizen suit. It would be exceedingly odd, then, for Congress to treat a discretionary choice to decline enforcement made *after* a judicial determination as the trigger for a citizen suit, but to treat the same agency choice made *before* a judicial determination as a bar to that same suit.

Third, treating the FEC's exercise of prosecutorial discretion as triggering a citizen suit accords with the FEC's gatekeeping role to "determine in the first instance whether or not a civil violation of the Act has occurred." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). A complainant must still bring their complaint to the FEC for consideration. If the FEC chooses to pursue enforcement, then a citizen suit may not follow. Even if the FEC makes the legal determination that there is no reason to believe a violation has occurred, a citizen suit may only follow if the complainant can show that that the decision is based on "impermissible interpretations" of law or an arbitrary or capricious analysis. *Orloski*, 795 F.2d at 161.[1] In that way, the FEC would continue to consider complaints in the first instance and protect respondents from unmeritorious suits. Where the FEC, however, does not find a complaint lacks

[1] The Commission routinely votes not only against finding reason to believe a violation occurred, but also to affirmatively find no reason to believe a violation occurred. *See, e.g.*, Certification, MUR 7124 (McGinty for Senate) (Apr. 28, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/17044414319.pdf.

merit, and dismisses based solely on a choice to preserve its resources, the FECA provides that a complainant may then bring a suit in its own name to ensure compliance and protect against underenforcement.

Fourth, treating FEC dismissals based on prosecutorial discretion as "contrary to law" within the meaning of the FECA recognizes the legislative concern that apparently motivated section 30109(a)(8)'s inclusion in the statute: ensuring the FEC "does not shirk its responsibility." *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) (quoting 125 Cong. Rec. S. 36,754 (1979)). Congress was acutely aware that underenforcement by the FEC was of concern and therefore reasonably provided for an alternative manner of enforcement where the FEC proved impotent.[2] Not only was the agency working with limited resources, like all federal agencies, but the structure of the Commission—evenly divided between three Republicans and three Democrats (or independents) but requiring four votes to act—created serious risks of gridlock. Where the Commission could split three-to-three and prevent agency enforcement

[2] *See* Legislative History of Federal Election Campaign Act Amendments of 1979 at 35, *available at* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf (noting questions about FEC performance "in the enforcement area"); Legislative History of Federal Election Campaign Act Amendments of 1976, *available at* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 72 (noting "past election statutes were scrupulously ignored for years"); *id.* at 75 (noting importance that FEC is "active watchdog . . . not a toothless lapdog"); *id.* at 92 ("Given the history of weak enforcement of campaign finance laws . . . it is no wonder that the public watches with some skepticism our efforts to reconstitute this Commission.").

solely based on the desire of a potentially partisan-based faction of the Commission, a citizen-suit backstop allows for meaningful enforcement. But it can only do that if the Commissioners' unwillingness to enforce is "contrary to law" within the meaning of the FECA.

Finally, treating the FEC's exercise of prosecutorial discretion as contrary to law actually provides *greater* deference to the FEC's "discretion about whether or not to take a particular action," *Akins*, 524 U.S. at 25, than does subjecting that discretion to an abuse of discretion analysis. Under the district court's interpretation of the FECA, the FEC's prosecutorial discretion is subject to judicial probing. JA 877. A thorough review would require analysis of the subjective decision making of the commissioners and thus discovery into the commissioners' discussions and decision-making processes. *See Armstrong*, 517 U.S. at 464; *Heckler*, 470 U.S. at 831 (noting assessment of prosecutorial discretion requires subjective determinations about agency priorities and "fit[]"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 825 (1971) (discussing "inquiry into the mental processes of administrative decisionmakers"). Further, the court must review the agency's assessment of priorities, and its allocation of its budgetary resources to those priorities, to determine whether they are truly rational. *Heckler*, 470 U.S. at 831.

Treating discretionary decisions not to pursue enforcement as contrary to law, however, would require none of this. Here, according to the district court, the three controlling commissioners chose to decline enforcement based solely on their prudential decision that prosecution was not an efficient use of resources. Rather than that decision working to immunize blatant law breaking, the court would recognize the FEC's dismissal is contrary to law within the meaning of the FECA, and no probing of FEC decision making would be required. The controlling commissioners' prudential decision would be taken at face value. The three commissioners would be put on notice that their adherence to this prudential choice would allow CREW to pursue litigation to enforce the FECA. If they continued in their assessment, no impact to FEC resources would result: CREW would simply be authorized to sue. If, however, they decided a different course was appropriate, they would be free to alter their judgment.

In sum, in contrast to the district court's interpretation which nullifies part of the FECA, treating FEC discretionary decisions not to pursue enforcement as contrary to law would give meaning to the citizen suit provision while according with the logic and structure of the FECA.

C. The District Court Misapplied Authority About the FEC's Discretion and Misconceived the FEC's Role Under the FECA

In interpreting the FECA's judicial review standard, the district court misapplied authority regarding the FEC's control over its own agency resources.

While that authority recognizes the FEC's prosecutorial discretion in enforcement, it does not show that the discretion blocks CREW's citizen suit.

The district court cites *FEC v. Rose*, where the D.C. Circuit stated that "[w]e are not here to run the agencies" to support its conclusion that prudential dismissal is not contrary to law. JA 877 (citing 806 F.2d at 1091). In *Rose*, however, this Court did not address the contrary to law standard under the FECA.

In *Rose*, a plaintiff won a "contrary to law" judgment from the district court due to the FEC's failure to act on the plaintiff's complaint in a reasonable manner. 806 F.2d at 1084–85. The plaintiff then sought attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. *Id.* at 1085. Under that statute, the plaintiff had to show that the FEC's position was not "substantially justified." *Id.* It was in the context of deciding whether the agency lacked substantial justification and whether to order it to pay a financial penalty for its inaction that this Court stated it would not "run" the agency. *Id.* at 1091. The question of the proper application of the FECA's "contrary to law" judicial review standard was not before the Court, and thus the Court could not and did not address that question. *Id.* at 1085. Nor would a decision on the propriety of a financial penalty against the agency have any relevancy to the propriety of a remedy—a citizen suit—which purposely avoids any impact on agency resources.

As discussed above, finding the FEC's dismissal was contrary to law does not require the Commission to expend any additional resources. It would not convert the court into the "a board of superintendence" over of the FEC. *Cf. Rose*, 806 F.2d at 1091. The FEC would still be free to refuse to conform with the court declaration, and the only result would be the authorization of CREW's suit against CHGO for CHGO's violations of the FECA. The FEC would remain free to run itself as it saw fit.

Other judicial recognitions of the FEC's authority over its own resources similarly do not speak to the question of whether that discretionary decision is "contrary to law" under the FECA. In *FEC v. Akins*, for example, the Supreme Court noted that agencies like the FEC "often have discretion about whether or not to take a particular action." 524 U.S. at 25. Nonetheless, it did so only to note that discretion did not cause plaintiffs' injury stemming from the dismissal to be irremediable. *Id.* The Court expressed no view on how to evaluate that discretion within the FECA's contrary to law standard.

There is no dispute that the FEC has discretion about whether to bring a particular action. CREW disputes, however, that that discretion can be used to block its right to a citizen suit under the FECA. Where the FEC can disregard a judicial declaration by simply failing to conform, finding a prudential dismissal

was "contrary to law" still leaves the FEC with discretion about whether or not to pursue enforcement.

For the same reason, the district court's citation to *Heckler* is misplaced. JA 877. *Heckler* held that agency failures to enforce were nonreviewable, unless Congress explicitly provided otherwise. 470 U.S. at 832 (noting APA did not commit agency decision not to take enforcement action to judicial review). Congress did exactly that in the FECA. *See Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc) (noting FECA provides for "unusual" review of agency's failure to enforce), *vacated on other grounds*, 524 U.S. 11. Moreover, as noted above, finding the FEC's dismissal was contrary to law does not impact decisions about "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831.

In short, no authority from the Supreme Court or this Circuit provides that the FEC's discretion over enforcement affects the FECA's judicial review standard. The district court below misapplied those precedents to find that it could not conclude the FEC's failure to enforce was contrary to law because it wrongly thought that such a finding would result in the judicial conscription of agency

resources. Because the FEC may simply choose to not conform with a judgment finding its discretionary dismissal is contrary to law, however, the district court's conclusion was erroneous.

D. Federal Citizen Suit Provisions Allow Suits Where an Agency Refuses to Enforce for Prudential Reasons

The FECA's citizen-suit provision, like all citizen suit provisions, serves the useful goal of "enforc[ing] compliance without federal expense" where the violation would go unpunished solely because of the agency's desire to "husband federal resources." *Sierra Club*, 268 F.3d at 905. The FECA's citizen suit provision should be read to accord with other such provisions in federal law.

For example, under federal employment nondiscrimination law, a potential plaintiff must first present their complaint to a federal agency, the EEOC, for agency consideration. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). If the EEOC exercises its prosecutorial discretion to abstain from pursuing enforcement, that does not block the plaintiff's suit. Rather, the EEOC issues a right-to-sue letter that permits the plaintiff to bring their own civil suit. 42 U.S.C. § 2000e-5(f)(1).

Similarly, a citizen suit is available under federal environmental law, but the citizen must first provide the EPA with sixty days notice of its intent to sue. *See* 33 U.S.C. § 1365. If the EPA exercises its prosecutorial discretion not to sue, that

similarly does not block enforcement. It merely permits the citizen to continue with their own litigation to enforce federal law.[3]

Like these other citizen suit provisions, the FECA's citizen suit provision should be understood to provide a mechanism for compliance where the FEC foregoes its role as primary enforcer. Of course, the FECA provides for an even greater gatekeeping role for the FEC than Congress provided for these other agencies. The FEC also may prevent a suit by rendering a lawful decision finding a complaint lacks merit. Nonetheless, the FECA's citizen-suit provision, like other citizen-suit provisions in federal law, provides an important mechanism to ensure compliance where the agency will not. The FECA's "contrary to law" standard should therefore be interpreted in a way to permit such suits.

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[3] *See also* 15 U.S.C. § 2619 (conditioning suit on notice to EPA Administrator and alleged violator, but allowing suit to proceed if no prosecution); 16 U.S.C. § 1540(g)(1) (conditioning suit on notice to Secretary and alleged violator, but allowing suit to proceed if no government prosecution); 18 U.S.C. § 1514A(b)(1) (whistleblower must file complaint with Secretary of Labor; if no decision within 180 days, private suit may proceed); 30 U.S.C. § 1270 (notice required to Secretary, State in which violation occurred, and alleged violator); 31 U.S.C. § 3730 (*qui tam* action sealed for sixty days to allow government to intervene and prosecute; if government declines, citizen suit may proceed); 33 U.S.C. § 1910 (notice to Secretary, alleged violator, EPA Administrator, and Attorney General, but allowing suit to proceed if no government prosecution); 33 U.S.C. § 1910 (same); 42 U.S.C. § 300j-8 (notice required to Administrator, alleged violator, and State in which violation occurred); 42 U.S.C. § 4911 (notice to EPA Administrator and Federal Aviation Administrator); 42 U.S.C. § 6972 (notice to EPA Administrator, State in which violation occurred, and alleged violator); 42 U.S.C. § 7604 (same); 42 U.S.C. § 11046 (same); 42 U.S.C. § 9659 (conditioning suit on notice to President, but allowing suit if government chooses not to prosecute).

III. The FEC Can Partially Remedy the Violation Without Expending Its Resources

Even assuming a rational exercise of the FEC's prosecutorial discretion is not "contrary to law," the FEC's use of it here is not rational because the identified concerns—that the FEC's desire to husband resources and avoid "litigation risk"—do not justify a failure to pursue enforcement where the FEC may partially remedy CHGO's violation of the FECA without expending any additional agency resources. The FEC could simply release the names of CHGO's donors that it already possesses.

In the course of the OGC's investigation, the FEC collected financial documents revealing the identifies of at least some, but perhaps all, of CHGO's contributors. *See* JA 572, 73–76, 578, 599–601, 619 (contributor identities redacted). The FEC could simply find that CHGO was a political committee and that the contributor names should therefore have been reported, and thus decide to no longer withhold those names from public view. Notably, the FEC has released such information in the past. *See CREW v. FEC*, 475 F.3d 337, 339–40 (D.C. Cir. 2007) (discussing materials published by FEC after investigation revealing details of wrongfully concealed transaction).

The district court below recognized this possibility, but said only that "the FEC would expose itself to serious legal challenges if it were to release donor information prior to a finding that CHGO was a political committee." JA 886. But

that misses the fact that CREW seeks by this litigation, among other things, "a finding that CHGO was a political committee." *Id.* As discussed further below, there is no genuine dispute that CHGO meets the FECA and judicial conditions for political committee status. Moreover, at least some contributors received clear notice that their contributions would be used for the purpose of "running independent expenditures in key districts to support the election of Republican Candidates." JA 578. Contributors to political committees have no valid First Amendment right against disclosure of their identities. *Buckley*, 424 U.S. at 68, 84 (holding First Amendment does not bar FECA's mandate to disclose of contributor identities). Accordingly, the names of CHGO's contributors can be made public.[4]

Yet the district court found that the FEC need not reconsider whether CHGO was a political committee because, if it did and found reason to believe CHGO was one, it could face litigation risk in enforcement. Looking to that litigation risk, however, grounds the district court's judgment in circular reasoning. According to the district court, the agency could avoid enforcement because it had not reached a decision on the merits, but the agency could avoid a decision on the merits because

[4] The controlling commissioners and the district court placed significant weight on the fact that releasing these names might possibly incur litigation, even if meritless litigation. Yet neither considered the fact that *not* releasing the names invited certain litigation: CREW was certain to sue to enforce its rights, and the FEC has incurred expense defending itself. Moreover, the district court invited FOIA litigation over access to those names. JA 886. A fear of litigation risk is irrational where that risk looks only at one type of potential litigation, but ignores certain litigation.

it wished to avoid enforcement. That sophistry does not meet the FECA's demand for a well-reasoned analysis.

As the FEC could, without expending resources, remedy the injuries created by CHGO's evasion of the FECA's disclosure obligations—disclosure obligations that serve vital roles in our democracy, *Buckley*, 42 U.S. at 66–67—the FEC's desire to husband resources cannot justify its failure to move forward on the merits of CREW's complaint. Accordingly, the district court erred in finding such desire rendered the dismissal not "contrary to law."

IV. The FEC has Abdicated Enforcement of the Political Committee Laws

Given the nature of CHGO's violations and the undisputed "strong grounds to prosecute" the group, JA 862, it might be seen as surprising that the FEC declined enforcement. The FEC's dismissal is less unexpected, however, in light of the fact that the three FEC Commissioners who blocked enforcement against CHGO have also blocked enforcement of the FECA's political committee rules in *every* contested case. An agency may not "abdicat[e] its statutory responsibilities," however, under the guise of prosecutorial discretion. *Heckler*, 470 U.S. at 833 n.4.

There have been fifteen cases before the FEC in which at least one of the three controlling commissioners who blocked enforcement against CHGO have voted on the OGC's recommendation to find reason to believe a respondent violated the FECA's political committee rules. JA 244. In eleven of those cases,

the three relevant commissioners refused to find reason to believe, blocking enforcement, despite their counterparts finding reason to believe a violation occurred. *Id.* In the other four cases, the FEC unanimously voted to find reason to believe a violation of the FECA's political committee rules occurred. *Id.* In each of those four cases, however, the political nature of the organization was not contested,[5] and in two of those four, the relevant commissioners still voted to take no action against the respondent.[6]

In sum, the three commissioners who voted to block enforcement against CHGO have voted to block enforcement of the FECA political committee rules in *every* contested case, typically by refusing to find reason to believe (as they did

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[5] *See* First General Counsel's Report 1–2, MUR 6315 (Greene) (Dec. 22, 2010), *available at* http://eqs.fec.gov/eqsdocsMUR/12044322956.pdf (finding candidate's principal campaign committee failed to timely register, noting candidate admitted fault); Conciliation Agreement ¶¶ 10–11, MUR 6106 (MN Corn Growers) (Feb. 11, 2009), *available at* http://eqs.fec.gov/eqsdocsMUR/29044224651.pdf (finding state PAC's focus was federal because a majority of its contributions went to federal candidates); Response 1–2, 4, MUR 6317 (Utah Defenders) (July 30, 2010), *available at* http://eqs.fec.gov/eqsdocsMUR/12044312632.pdf (contesting whether mailer group was admittedly founded to produce was express advocacy, but not that it was designed to defeat the referenced candidate); First General Counsel's Report 2, 4, MUR 5831 (Feb. 6, 2008) *available at* http://eqs.fec.gov/eqsdocsMUR/10044282395.pdf (discussing dispute of whether 527 group's expenditures contained express advocacy; noting group activities directed "almost exclusively toward supporting Rick Santorum's 2006 Senate re-election campaign").

[6] Certification, MUR 6315 (Greene) (Nov. 29, 2012), *available at* http://eqs.fec.gov/eqsdocsMUR/12044322988.pdf; Certification, MUR 5831 (Softer Voices) (Oct. 20, 2010), *available at* http://eqs.fec.gov/eqsdocsMUR/10044282476.pdf.

with CHGO), or by voting to take no action even after such finding. All the while, the wanton violation of the FECA's political committee rules by dark money organizations has exploded. *See* JA 72–149, 168–217. That is *per se* abdication. *See Adams v. Richardson*, 480 F.2d 1159, 1163, 1166 (D.C. Cir. 1973) (en banc) (finding "[a] consistent failure to [enforce] is a dereliction of duty reviewable in the courts"; enjoining agency against continued underenforcement); *see also* JA 762 ("Three of our colleagues have gone to great lengths to avoid enforcing the law against dark money groups like CHGO.").

Moreover, these same controlling commissioners have attempted to cover up their abdication by a now rote citation to the FEC's prosecutorial discretion. JA 244. In all but one of commissioners' statement of reasons, they included a boilerplate reference to prosecutorial discretion as a tag-on justification for their refusal to pursue enforcement. They included that same boilerplate in their statement of reasons for dismissing the CHGO matter and it (so far) has allowed them to once against sidestep enforcing the FECA's political committee rules. The commissioners, however, do not have the authority to repeal statutes passed by Congress and upheld by the courts. They should not be allowed to take that authority for themselves through overly deferential review under the FECA.

V. There is No Other Basis to Uphold the FEC's Dismissal

The district court below refused to adopt the reasoning of the controlling commissioners which contended that enforcement was blocked by the statute of limitations and that enforcement against a "defunct" entity was impossible. JA 882, 887. The court was correct to avoid those conclusions—they rely on impermissible interpretations of law and arbitrary and capricious analyses. The court's conclusion that "novel legal issues" about vendor commissions could justify dismissal, however, was mistaken. JA 884.

A. The Controlling Commissioners' Interpretation of the Statute of Limitations is Impermissible

First, with regard to the statute of limitations, the district court was right to refuse to adopt the commissioners' rationale. As a preliminary matter, the commissioners' interpretation of the applicable statute of limitations warrants no deference. *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (*Chevron* deference is unavailable for agency interpretations of 28 U.S.C. § 2462). On the substance, the statute of limitations is irrelevant because the FEC retains equitable authority to enforce, including by ordering corrected disclosure, even after expiration of the statute of limitations. *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding section 2462 "provides no . . . shield from declaratory or injunctive relief" sought by the FEC); *accord FEC v. Nat'l Republican*

Senatorial Comm., 877 F. Supp. 15, 20–21 (D.D.C. 1995).[7] The FEC need not show risk of future harm to justify equitable relief. *United States v. Phillip Morris USA, Inc.*, 801 F.3d 250, 262 (D.C. Cir. 2015) (holding injunctive relief mandating "correcting . . . misinformation . . . focuse[s] on remedying the effects of past conduct"). Even if such harm were required, it exists where beneficiaries of CHGO's spending remain in office and CHGO's contributors may continue to exact benefits for their support, JA 48–71, 436, 749–53; and where those associated with CHGO continue to copy CHGO's roadmap to flagrantly evade disclosure, JA 150–67 (showing Canfield's continued violations of campaign finance laws using CHGO model).

Further, even if relevant, the statute has not begun to run on CHGO's continuing violations, including its violation of its continuous obligation to file political committee reports. *Earle v. D.C.*, 707 F.3d 299, 307 (D.C. Cir. 2012)

[7] The district court below recognized a "split of authority" on this question. JA 880. That split should be resolved in favor of finding that equitable remedies survive. First, the FEC below did not even argue that the opposite authority was correct, and thus waived that argument. *See* JA 233. Moreover, the opposing authority has been widely criticized for resting on a mistaken reading of *Cope v. Anderson*, 331 U.S. 461 (1947). *See United States v. Telluride Co.*, 146 F.3d 1241, 1248 n.13 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 n.6 (11th Cir. 1997); *Christian Coal.*, 965 F. Supp. at 71–72. Finally, while the Supreme Court recently limited an agency's ability to order disgorgement after the expiration of the statute of limitations, *see Kokesh v. SEC*, 198 L. Ed. 2d 86 (2017), it did so for reasons related to disgorgement that have no application to injunctive relief to correct a failure to disclose, *see id.* at 90 ("Disgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462.").

(continuing violation exists where "text of the pertinent law imposes a continuing obligation to act or refrain from acting"); *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980) (a failure to disclose is a continuing violation); 52 U.S.C. § 30103(d) (political committees must continually file reports until they terminate).[8] The FEC below did not dispute that CHGO's political committee violation was continuing in nature. JA 229 (contesting only the assertion that CHGO's other violations, but not its political committee violations, are continuing violations). Finally, CHGO's fraudulent concealment—in the form of false statements under oath, JA 792–93, 803–17, destruction of documents they were on notice to preserve, JA 246, 389, 428, 501, obstruction of the service of a subpoena, JA 505, and false or misleading statements to FEC investigators, JA 270–72, 344–87, 426—tolled the statute of limitations.[9]

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[8] *See also* FEC, Terminating a Committee (last visited June 1, 2017), *available at* https://www.fec.gov/help-candidates-and-committees/terminating-a-committee/ ("Committees must file regularly scheduled reports until the Commission notifies them in writing that it has granted their request to terminate.").

[9] *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) (holding "affirmatively misleading statements" toll the statute of limitations); *Firestone v. Firestone*, 76 F.3d 1205, 1210 (D.C. Cir. 1996) (finding defendants' affirmative misrepresentations to conceal wrongdoing toll statute of limitations); *Trustees of United Ass'n Full-Time Salaried Officers and Emp. of Local Unions v. Steamfitters Local Union 395*, 641 F. Supp. 444, 447 (D.D.C. 1986) (the submission of a single false report constituted fraudulent concealment); *In re Vitamins Antitrust Litig.*, No. MISC 99-197 (TFH), 2000 WL 1475705, at *3 (D.D.C. May 9, 2000) (holding "providing false information to law enforcement authorities" is an affirmative act of concealment).

The district court, however, found that the statute of limitations presented "litigation risk" and thus the FEC had a rational basis to fail to enforce. Yet an agency, "by definition, abuses its discretion when it makes an error of law." *Crossroads GPS v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Accordingly, as the FEC's incorrect interpretation of law informed its discretionary decision, that decision is necessarily arbitrary and capricious.

B. Enforcement was Not Futile

Similarly, the commissioners' argument that enforcement was futile because CHGO was purportedly "defunct" does not justify the FEC's dismissal. CHGO never terminated with the FEC, so it continues to exist as a political committee and thus is subject to FEC jurisdiction. 52 U.S.C. § 30103(d) (political committees may only terminate upon filing notice with the FEC).[10] While the controlling commissioners cited CHGO's supposed lack of money to pay a fine, that ignores the fact that three individuals fraudulently conveyed CHGO's remaining assets to avoid enforcement and that the FEC may therefore garnish those funds, JA 716–17, *see also* 28 U.S.C. § 3304(b)(1)(A), (B), and ignores the fact that the FEC can

[10] Even though CHGO never registered as a political committee, it is one under law and thus cannot cease to exist until the FEC authorizes its termination. *See* 52 U.S.C. § 30103(a) (imposing duty on groups already qualified as "committees" to file a "statement of organization"); *see also* Certification, MUR 5754 (MoveOn.org) (July 19, 2006), *available at* http://eqs.fec.gov/eqsdocsMUR/000058A6.pdf (finding group that had not registered as political committee in violation of FECA also failed to file reports required of political committees).

seek nonmonetary remedies such as requiring corrected disclosures, as it has done in the past with defunct groups, JA 224–26. Further, even if the FEC could not seek enforcement directly against CHGO, the FEC is aware of CHGO's agents, many of whom may be liable in their own right, and can order them to correct CHGO's disclosures. *Combat Veterans for Congress Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 12 (D.D.C. 2013) (holding treasurer liable for failure to file reports required by the FECA), 52 U.S.C. §§ 30102(c), (d), 30104(a)(1). Indeed, even if CHGO were truly defunct with no agents subject to FEC authority, the FEC could still remedy the violation by releasing the information it already has: the identities of CHGO's contributors. Accordingly, CHGO's defunct status cannot justify dismissal.

C. There is No Genuine Dispute about CHGO's Political Committee Status

Lastly, the purported "novel legal issues" cited by the controlling commissioners to excuse themselves from deciding CHGO's political committee status are irrelevant. The purported novel issues relate to the treatment of certain commissions paid to CHGO's vendors: New Day and Mihalke. JA 883. The FEC, however, should have easily determined that CHGO was a political committee without even addressing the question of how to treat those commissions. CHGO declared that it was organized for political purposes, which alone is sufficient. Moreover, only by excluding the entirety of the sums paid to

these vendors, plus all the money paid to air CHGO's electioneering communications, and the $1.1 million that Mihalke, Reed, and Berman accepted as a seemingly unjustified "fundraising commission," does CHGO's spending on unquestionably political activity fall below 50% of its total expenditures, the putative threshold before a group is no longer "extensive[ly]" engaged in campaigns. JA 754–55.

An organization has the "major purpose" of electing candidates even without engaging in extensive campaign activities if its organizational purpose is to engage in such campaigning. 2007 E&J at 5601, 5605 (the FEC will consider "internal documents about an organization's mission" to determine major purpose). Here, CHGO's internal documents admit that it was organized for the purpose of "win[ning] Senate seats." JA 519. *Ipso facto*, CHGO is a political committee subject to the FECA's reporting requirements. Neither the controlling commissioners nor the district court, however, addressed the evidence of CHGO's organizational purpose.

Moreover, even looking at CHGO's activity, it was contrary to law to dismiss regardless of how the novel legal issues were resolved. Only by ignoring all of CHGO's spending other than that used for express advocacy were the controlling commissioners able to claim the group's spending on politics was less than 50%. JA 754–55. As a district court in this circuit recently found, however,

the FEC may not look solely to a group's express advocacy communications in assessing its major purpose. *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016). At a minimum, some of CHGO's advertisements were electioneering communications, and even a cursory glance at them demonstrates their purpose to influence elections. *See* JA 441, 444–47. Nevertheless, the controlling commissioners refused to count them because they impermissibly assumed those ads were not relevant to determining CHGO's major purpose, just as they did in the prior *CREW* action. Only by doing so could they conclude that the "novel legal issues" had any determinate value.

The district court below failed to require the FEC to consider each ad individually because the *CREW* decision recognizing the legal error in excluding all non-express advocacy was issued after the FEC dismissed the CHGO complaint. JA 884. That timing, however, is irrelevant. The question is not whether the FEC comported with the *CREW* decision in 2016. It is whether the FEC permissibly interpreted judicial precedent to exclude CHGO's non-express advocacy in determining its major purpose. The *CREW* decision shows that it was impermissible, both then and now. Accordingly, because the "novel legal issues" of the vendor commissions only are relevant if the FEC is already making the legal error of excluding CHGO's electioneering communications, those commissions cannot justify dismissal here.

Further, the supposedly "novel" legal issues are not novel at all. The FEC has previously considered how to apply commissions paid to create political ads and (reasonably) decided they count towards the cost of the reportable political activity. *See, e.g.*, 11 C.F.R. §§ 104.20(a)(2)(i), (ii) (costs charged by "vendor" and "charges for broker" are attributable to the cost of communication). That is the only coherent solution—the controlling commissioners' supposition that a commission paid to a vendor to create and place a political advertisement is not money spent on the advertisement is absurd. New Day received $250,050.72 in commissioners for its work on CHGO's independent expenditures alone. JA 754. Adding just that amount to CHGO's undisputed political spending puts CHGO over the purported 50% threshold, even without counting any money CHGO spent on electioneering communications.

In sum, the district court was correct to refuse to adopt the commissioners' statute of limitations and futility arguments, but wrong to find the purported "novel legal issues" were at all relevant to the substance of the question before the commissioners. The controlling commissioners' interpretations of law were impermissible, and their analysis resting on them was arbitrary and capricious. While the FEC may not be bothered to seek enforcement here, CREW stands ready to vindicate its rights and the rights of millions of voters to know who has used CHGO to improperly shield their identities as they dumped millions into federal

elections. All that is needed is for the Court to find that the FEC's dismissal below was contrary to law.

CONCLUSION

The judgment of the district court should be reversed. CREW respectfully requests this Court declare that an FEC dismissal based on its prosecutorial discretion is "contrary to law" within the meaning of the FECA. Accordingly, CREW respectfully requests this Court find the dismissal below was contrary to law and order remand to the FEC for its consideration about whether it wishes to continue to refrain from pursing enforcement, or to conform with the Court's judgment.

Respectfully submitted,

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/s/ Stuart C. McPhail
Counsel for Appellants

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I hereby certify that on this 27th day of June, 2017, I caused this Brief of Appellants and Joint Appendix 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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ADDENDUM

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DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

§ 30109. Enforcement

(a) Administrative and judicial practice and procedure.

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The

Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)

(A)

(i) Except as provided in clauses [clause] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election,

then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)

(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall make public such determination.

(C)

(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections (a), (c), (e), (f), (g), or (i) of section 304 [52 USCS § 30104]; or

(II) section 305 [52 USCS § 30105].

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2018.

(5)

(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has been committed, a conciliation agreement entered into by the Commission under paragraphs (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $ 10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 320 [52 USCS § 30122], which is not less than 300 percent of the amount involved in

the violation and is not more than the greater of $ 50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)

(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any

contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.].

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing a willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the court may impose a civil penalty which does not exceed the greater of $ 10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 320 [52 USCS § 30122], which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $ 50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8)

(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the

name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) [Repealed]

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)

(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $ 2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $ 5,000.

(b) Notice to persons not filing required reports prior to institutions of enforcement action; publication of identity of persons and unfiled reports. Before taking any action under subsection (a) against any person who has failed to file a report required under section 304(a)(2)(A)(iii) [52 USCS § 30104(a)(2)(A)(iii)] for the calendar quarter immediately preceding the election involved, or in accordance with section 304(a)(2)(A)(i) [52 USCS § 30104(a)(2)(A)(i)], the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant

to section 311(a)(7) [52 USCS § 30111(a)(7)], publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by the Attorney General of apparent violations. Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses.

(1)

(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $ 25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $ 2,000 or more (but less than $ 25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 316(b)(3) [52 USCS § 30118(b)(3)], the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $ 250 or more during a calendar year. Such violation of section 316(b)(3) [52 USCS § 30118(b)(3)] may incorporate a violation of section 317(b), 320, or 321 [52 USCS § 30119(b), 30122, or 30123].

(C) In the case of a knowing and willful violation of section 322 [52 USCS § 30124], the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $ 1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 320 [52 USCS § 30122] involving an amount aggregating more than $ 10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $ 25,000 (and subject to imprisonment under subparagraph (A) if the amount is $ 25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $ 50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al., Plaintiffs, v. **FEDERAL ELECTION COMMISSION,** Defendant.	Case No. 1:14-cv-01419 (CRC)

MEMORANDUM OPINION AND ORDER

Plaintiffs have moved this Court to order the Federal Election Commission ("FEC") to show cause why it should not be held to have violated this Court's September 19, 2016 Order directing the FEC to reevaluate its decisions not to investigate two political advocacy organizations. For the reasons that follow, the Court will deny the motion.

I. Background

In September 2016, the Court issued a Memorandum Opinion and Order granting summary judgment for Plaintiffs, who had challenged the FEC's decisions (by tie vote) not to investigate two organizations—American Action Network ("AAN") and Americans for Jobs Security ("AJS")—for failing to register as political committees. See Mem. Op., ECF No. 52; Order, ECF No. 53. The FEC's decisions had turned on its determination that AAN and AJS did not have an election-related "major purpose,"[1] and in reaching that conclusion, the FEC had

[1] An organization must register as a political committee (1) when it contributes or spends more than $1,000 in a calendar year for the purpose of influencing a federal election, see 52 U.S.C. § 30101(4)(A), and (2) when its "major purpose" is "the nomination or election of a candidate." Buckley v. Valeo, 424 U.S. 1, 79. It was undisputed that AAN and AJS had satisfied the first condition, so the legality of the FEC's dismissal decisions turned on the Commission's analysis of the "major purpose" test.

considered the organizations' spending on express advocacy (ads "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101) but *not* their spending on "electioneering communications" (ads broadcast in the lead-up to elections that reference federal candidates but do not expressly advocate for or against them, id. § 30104(f)(1)–(3)). Plaintiffs challenged the FEC's decision to treat the organizations' electioneering communications spending as essentially irrelevant to the major-purpose inquiry.

In its Opinion, the Court largely agreed with Plaintiffs: It declared "contrary to law" the Commissioners' decision to exclude from the category of spending showing a campaign-related major purpose *all* spending on communications that did not meet the technical definition of "express advocacy." Id. at 23. The Court also deemed arbitrary and "contrary to law" the "Commissioners' refusal to give any weight whatsoever to an organizations' relative spending in the most recent calendar year." Id. at 25–26. Having identified these two legal errors, the Court ordered the FEC to "conform with the Court's declaration within 30 days," pursuant to the judicial review provisions of the Federal Election Campaign Act ("FECA"). Order, ECF No. 53 (citing 52 U.S.C. § 30109). However, the Court did *not* compel the Commission to arrive at a different result—i.e., to reverse course and commence an investigation into whether AAN or AJS had unlawfully failed to register as political committees.

A. AAN Matter on Remand

On remand, and within the 30-day window set out in the Order, the FEC reopened the AAN matter, notified the parties, and reconsidered the record in light of the Court's Order. Pls.' Mot. for Order to Def. to Show Cause ("Show Cause Mot."), Ex. 1. However, once again, the Commissioners cast a tie vote on whether there was reason to believe AAN had unlawfully failed to register as a political committee. FEC, Certification, MUR 6589R (American Action

Network) at 1, http://eqs.fec.gov/eqsdocsMUR/16044401006.pdf).

As is customary, the "controlling group" of Commissioners—i.e., those finding there was no reason to believe there had been a violation—issued a statement of reasons for their decision. See Pls.' Show Cause Mot., Ex. 2 ("Controlling Commissioners' Statement"). In that statement, which numbers nineteen single-spaced pages, the Commissioners: summarized this Court's September Opinion, including the two legal errors the Court had isolated, id. at 4–5; briefly outlined a new framework for evaluating whether AAN's electioneering communications (i.e., non-express advocacy) indicated a major purpose to nominate or elect a federal candidate, id. at 5–6; and then applied that framework in a fact-intensive manner to *each* of AAN's electioneering communications, id. at 6–17. Whereas, prior to the Court's Order, the FEC had found *no* electioneering communications to indicate an election-related major purpose, it now identified four. For instance, the Commissioners explained that one ad, which "appear[ed] to be more about creating a negative impression of [a candidate for federal office] in the mind of the viewer than on changing [the candidate's] legislative behavior," was "indicative of a major purpose to nominate or elect federal candidates." Id. at 12.

After analyzing the ads, the Commissioners added the amounts AAN spent on the four electioneering communications identified as relevant to the amounts the organization spent on express advocacy, and concluded that "AAN's total outlay on ads indicating a purpose to nominate or elect federal candidates would still constitute only 26%—well under half—of its overall spending." Id. at 17. That finding, together with a "consideration of AAN's mode of organization [and] official statements," led the Commissioners to conclude that there was no "reason to believe" AAN had violated FECA's registration and reporting requirements.

B. AJS Matter on Remand[2]

[redacted]

Plaintiffs now move the Court for an order to show cause, asserting that the FEC "failed to act in conformity with" the Court's September Order. Pls.' Show Cause Mot. 1.

II. Legal Standard

Orders to show cause may be issued at a court's discretion. See Watkins v. Washington, 511 F.2d 404, 406 (D.C. Cir. 1975). However, at least where employed to enforce a court's previous order, such an order is generally appropriate "where an administrative agency plainly neglects the terms of a mandate." Int'l Ladies' Garment Workers' Union v. Donovan, 733 F.2d 920, 922 (D.C. Cir. 1984). And in any event, a motion seeking to enforce a judgment "is not the proper means" to challenge an agency's action where the grounds for that challenge exceed the scope of the relevant judgment. Heartland Reg'l Med. Ctr. v. Leavitt, 415 F.3d 24, 30 (D.C. Cir. 2005).

III. Analysis

Plaintiffs' motion fails for at least two separate reasons.[3] *First*, although Plaintiffs

[2] The Court has redacted its discussion of the AJS matter from the public version of this Opinion under the confidentiality provisions of FECA. See 52 U.S.C. § 30101(a)(12)(A). An unredacted version will be filed under seal.

[3] In addition to the rationales outlined below, the Court questions whether a motion for an order to show cause is ever an appropriate mechanism for challenging the FEC's compliance with a court's contrary-to-law declaration. FECA's text indicates that where the FEC has failed to comply with such a declaration, an aggrieved party shall "bring . . . *a civil action* to remedy

summarily assert that the FEC "failed to act in conformity with" the Court's September Order, Pls.' Show Cause Mot. 1, their arguments are largely untethered to any declarations of *this* Court. For instance, Plaintiffs argue that the Commissioners' newly articulated framework relies on a misreading of McConnell v. FEC, 540 U.S. 93 (2003), see Pls.' Show Cause Mot. 6–12, and that the application of that framework was arbitrary and capricious, see id. at 12–21. Those are new arguments, unrelated to anything this Court resolved in its previous ruling, and they are properly taken up in a separate suit. See Heartland, 415 F.3d at 30. Indeed, Plaintiffs have filed such a suit, see Citizens for Responsibility and Ethics in Washington v. FEC, Case No. 16-2255, and there, the Court may hear Plaintiffs' newly developed arguments.

Second, to the extent Plaintiffs do mean to argue that the FEC has failed to comply with this Court's Order, that contention is off the mark. With respect to the AAN matter, the FEC reopened it, developed a new framework for evaluating which expenditures suggested an election-related purpose, and applied that new framework to AAN's ads. Critically, the new framework the FEC developed was free of the legal errors identified in this Court's previous Opinion and Order. The FEC no longer excluded as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications (i.e., non-express advocacy).[4] Instead, it left open the possibility that at least some of the spending on those ads might indicate

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the violation involved in the original complaint." 52 U.S.C. § 30109(8)(C) (emphasis added). This suggests that the proper procedure for challenging compliance with a court order issued under FECA's judicial review mechanism is the filing of a new suit, not a motion to enforce the earlier judgment.

[4] The Commissioners also made clear that their determination did not turn on the application of the "lifetime-only" rule, which the Court had considered arbitrary and capricious, at least as applied to AJS. See Controlling Commissioners' Statement 17 n.52 ("Even if we considered AAN's spending solely in a single year [as opposed to over its two-year lifetime] the amount of its spending that indicates a purpose to nominate or elect federal candidates would constitute less than 28% of its total spending in that time period.").

a campaign-related major purpose. And it identified four such ads that *did* indicate such a purpose. Plaintiffs suggest that the FEC failed to comply with this Court's Order because their decision "resulted in . . . finding many or even most of AAN's electioneering communications [to be] not electoral." Pls.' Show Cause Mot. 7. But the Court never ordered the FEC to reach a particular result, or to consider any particular ad—or any proportion of electioneering communications—election-related. Instead, the Court directed the FEC to reconsider its decision without "exclud[ing] from its [major purpose] consideration all non-express advocacy." Mem. Op. at 23. The FEC did just that.

[redacted]

IV. Conclusion

For the reasons outlined above, it is hereby

ORDERED that Plaintiffs' Motion for an Order to Show Cause is DENIED.

Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: April 6, 2017