**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs, Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan, by their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that the Commission for Hope, Growth and Opportunity ("CHGO") violated the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.*, was contrary to law, and directing the FEC to conform with such declaration within 30 days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, the Declaration of Stuart C. McPhail, and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than December 2, 2016. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated: July 28, 2016.

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In 2010, the Commission on Hope, Growth and Opportunity ("CHGO") formed to take full advantage of the new opportunity created by *Citizens United v. FEC*, 558 U.S. 310 (2010), the decision lifting the ban on corporate- and union-funded express electoral advocacy. Importantly, the new group spent millions to influence elections that year while evading the disclosure laws the decision left in place: laws the Court assumed would keep the public properly informed and elections clean, *id.* at 367. CHGO did so by hiding its political intentions from everyone but its donors and operators. Instead, CHGO told the public it was a "public welfare organization" focused on "economic growth"; told the IRS that it was a "social welfare" organization, falsely claiming it would not seek to influence elections; and told the Federal Election Commission ("FEC") nothing about its activities, even as it spent millions on overtly political ads in the 2010 federal elections. That abject failure to follow the most basic disclosure requirements, however, led to a complaint and an investigation that would eventually reveal—despite CHGO's obstruction through lies, misstatements, destruction of documents, and even an attempt to terminate itself and fraudulently transfer its remaining assets—that CHGO's true purpose was, in its own words, to take advantage of *Citizens United* to "engage in direct, express advocacy for [the] election or defeat of candidates."

Three FEC commissioners, however, were unmoved by the agency's own investigation and were apparently unconcerned with CHGO's egregious behavior. Rather, they voted to terminate proceedings because CHGO's obfuscation had delayed the investigation and, in their estimate, rendered enforcement "futile." Nonetheless, their votes, besides rewarding the group for its contempt of federal law, rested on impermissible interpretations of law, unfounded and unstated assumptions, and a general blindness to the evidence before them. Accordingly, the

dismissal was contrary to law, in violation of the Federal Election Campaign Act ("FECA"), and Plaintiffs respectfully request that this Court reverse the dismissal.

## STATEMENT OF FACTS

### A. Statutory and Regulatory Background

The FECA and FEC regulations impose a number of disclosure requirements on parties who make campaign-related communications. They impose certain one-time disclosure requirements on groups that air one of two types of communications: independent expenditures and electioneering communications. The laws impose more comprehensive disclosure requirements on groups that engage in extensive politicking, called political committees.

#### *1. Independent Expenditures*

Federal law requires a person who makes an "independent expenditure" to file a report with the FEC. An "independent expenditure" is a non-coordinated expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. "Express advocacy" are communications using phrases like "vote for," "re-elect," "support," or "Smith for Congress," and ads that, "in context, have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22. Anyone spending more than $250 on independent expenditures must file a report with the FEC for each independent expenditure disclosing the expenditure and information about it, including the identity "of each person who made a contribution in excess of $200 . . . made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi); *but see* 52 U.S.C. § 30104(b)(3)(A), (c)(1).

#### *2. Electioneering Communications*

Federal law requires disclosure of a second set of communications, "electioneering communications," which are communications that are broadcast to more than 50,000 people,

clearly identify a candidate, target that candidate's electorate, and air within 60 days of the general election or 30 days of the primary election. 11 C.F.R. § 100.29(a); *see also* 52 U.S.C. § 30104(f)(3). Anyone who spends more than $10,000 on electioneering communications during a year must file a report with the FEC for each electioneering communication. 11 C.F.R. § 104.20(b). The report must disclose various aspects of the communication depending on the nature of the entity paying for the ad. *Id.* § 104.20(c)(7)–(9). Most relevant here, if the communication is "made by a corporation or a labor organization," the report must identify each person who contributed more than $1,000 over the prior year who made the contribution "for the purpose of furthering electioneering communications." *Id.* § 104.20(c)(9).

***3. Disclaimers***

Federal law also requires each independent expenditure and electioneering communication contain a "disclaimer." 11 C.F.R. § 110.11. The disclaimer, among other things, must provide certain information to identify the "person who paid for the communication" and state whether the communication is "authorized" by a candidate. *Id.*

***4. Political Committees***

In addition to these one-off reports that are triggered by a particular communication, the FECA and FEC regulations impose more regular and comprehensive reporting requirements on groups that engage in extensive politicking. Federal law requires these groups, termed "political committees," to periodically file reports with the FEC that, among other things, identify each person who contributed more than $200 to the group in a calendar year, regardless of the purpose of the contribution. 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 meet statutory and judicially-created thresholds. First, under the FECA, the group must spend at least $1,000 on independent expenditures (or candidate contributions) or accept more than $1,000 in contributions in a year.

52 U.S.C. § 30101(4); 11 C.F.R. § 100.5(a). Second, the group must have as its "major purpose" the nomination or election of federal candidates, a threshold test created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). A group has a qualifying major purpose either if it was organized for the purpose of nominating or electing federal candidates or if it is operated in a way that devotes a "sufficiently extensive" amount of its resources to qualifying federal campaign activities. Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

***5. Enforcement***

The FECA places primary responsibility for enforcing federal campaign finance laws in the hands of the FEC. 52 U.S.C. § 30106. Third parties, however, may file a complaint with the FEC alleging a violation of the FECA. 52 U.S.C. § 30109(a)(1). The FEC's Office of General Counsel ("OGC") reviews the complaint and the response from the party alleged to have violated the FECA, and makes a recommendation to the Commission whether to proceed with an investigation based on whether there is "reason to believe" a violation may have occurred. *Id.* § 30109(a)(2). Four of the six FEC Commissioners must then vote to approve the OGC's recommendation before an investigation begins. *Id.* The "reason to believe" standard is "very low," however; it asks only whether a violation "may" have occurred based on the "credibl[e] alleg[ations]" of the complaint. Statement of Policy Regarding Commission Action in Matters at the Initial State in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007); AR 1541. Once the investigation is complete, the FEC staff may then recommend that the Commission find "probable cause" to believe a violation "has" occurred. 52 U.S.C. § 30109(a)(4). Only if the majority of commissioners approve the OGC's recommendation to find probable cause does the FEC seek a remedy for the violation. *Id.* The FEC must first seek a mutually agreeable resolution, but if it is "unable" to reach such an agreement, it may seek a judicial remedy. *Id.* § 30109(a)(4)(A), (6)(A).

### B. The Commission on Hope, Growth and Opportunity

#### *1. CHGO's Formation*

CHGO was the brainchild of longtime political operative Scott Reed. AR 90, 99, 327. In early 2010, Reed approached Michael Mihalke to discuss the idea of starting CHGO. AR 327. Mihalke was the President and Managing Member of Meridian Strategies, LLC ("Meridian"), a media relations and production company. *Id.* Although the two would exercise control over CHGO, their association with the group would remain hidden from the public.

Rather than simply create a new political organization and name themselves its leaders, one or both eventually recruited William ("Bill") Canfield, an attorney with whom Reed was familiar. AR 653. Canfield would act as CHGO's legal counsel, AR 1550, and, eventually, represent the organization before the FEC, AR 19. Canfield and Mihalke in turn recruited James S. "Steve" Powell, the individual who would ultimately be listed as CHGO's President and Executive Director but, in truth, exercised no control over the organization. AR 260, 363–64, 1550. Rather, Powell's role was limited to creating CHGO's political ads. AR 260, 364, 1234. Finally, Canfield retained James D. ("Jim") Warring, founder of Warring & Co., LLC, to serve as the group's treasurer and to be responsible for handling its accounting and tax work. AR 264. Despite his central role in forming CHGO, Mihalke would remain affiliated only with Meridian, CHGO's sole direct vendor. AR 1307. Reed would control CHGO, AR 1309, 1312, but his connection would be even more opaque: CHGO would hide his association completely.

One of the initial tasks for CHGO was to secure tax-exempt status from the IRS. As part of its application for section 501(c)(4) tax-exempt status, signed on March 31, 2010 under penalty of perjury, Canfield represented that CHGO was a "public welfare organization created to advance the principle that sustained and expanding economic growth is central to America's economic future." AR 1548–49. Where the application asked whether CHGO planned to spend

"any money attempting to influence the . . . election . . . of any person to any Federal, state, or local public office," Canfield checked "No." AR 1551. The application listed only three individuals affiliated with CHGO: Canfield, Powell, and Warring. AR 1550.

The declarations in the application were important. While organizations that plan to influence elections may seek tax exempt status under 26 U.S.C. § 527, such "527" groups much disclose their contributors, *id.* § 527(j)(3)(B). Groups exempt from taxes under section 501(c)(4) of the Internal Review Code, however, need not disclose their donors. 26 U.S.C. § 6104(d)(3)(A). Section 501(c)(4) groups, however, must be organized "exclusively for the promotion of social welfare," 26 U.S.C. § 501(c)(4), which 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). CHGO wanted to keep its donors secret, so it sought tax-exempt status under section 501(c)(4) and told the IRS that it did not plan to influence any elections.

Nonetheless, internal documents, apparently created around the same time Canfield was submitting the tax-exempt application to the IRS, show that the real goal of CHGO was "[t]o make an impact using express advocacy in targeted Senate races." AR 332. One document reiterated that CHGO "will utilize all options available to it for direct, express advocacy under the recent SCOTUS decision," *Citizens United.* AR 333. The document listed twelve "potential targets"—federal elections—for these express advocacy ads. AR 332. A PowerPoint created at approximately the same time stated frankly that CHGO's "[s]imple mission" was to "win Senate seats." AR 337. The presentation noted that *Citizens United* "[a]llows corporations, labor unions and individuals to engage in direct, express advocacy for [the] election or defeat of candidates" and "[p]rovides corporations and individuals with an opportunity to participate directly in election or defeat of candidates." AR 335. Of course, CHGO could openly engage in

an unlimited amount of such direct, express advocacy by registering as a 527, but if it did that, it would have to disclose its donors, and CHGO promised donors that it could "file[] annual report[s] with donor name[s] never made available to the public under law." AR 336. So, in order to keep its promise to donors, Canfield applied for 501(c)(4) status for CHGO, falsely declaring that the group had no intention of influencing elections.

While the application was pending, Mihalke—who again had no official reported authority over CHGO—made a $1,000 deposit to open a CHGO bank account. AR 329, 682. No other activity was recorded on the account until CHGO accepted a $4 million wire transfer on September 3, 2010. AR 683. That contribution would provide approximately 83.3% of the funds CHGO's raised over its lifetime. AR 473.[1] The identity of that contributor has never been disclosed. *See id.* About three weeks later, CHGO paid Meridian $1 million. AR 683.

Despite Canfield's representations to the IRS, that payment to Meridian was not used to fund economic research or policy discussions. Meridian provided one service to CHGO: producing and placing independent expenditures and electioneering communications. AR 1309.[2]

***2. CHGO's Federal Campaign Activity and Political Solicitations***

Beginning in September 2010, CHGO broadcast advertisements in at least fifteen Congressional elections. AR 1496–1500. The FEC would eventually find that CHGO spent approximately $4.05 million on these advertisements, consisting of both independent expenditures and electioneering communications. AR 1484. The money CHGO spent on these ads would comprise approximately 85% of CHGO's entire expenditures over its lifetime. *Id.*

[1] CHGO's Form 990 Schedule B, which lists amounts of contributions but which does not publicly identify the source, disclosed only $4.5 million in contributions. AR 486. An earlier draft identified an additional $300,000 contribution, AR 467, but that contribution was left off of the filed version.

[2] Copies of fifteen of the advertisements were included on the CD attached as exhibit 1 to Plaintiffs' complaint with the FEC, and are included in the administrative record. *See* AR 39–40. In accordance with Local Civil Rule 5.4(e), plaintiffs have copies of the videos on the CD and will provide them to defendant and to the Court on request.

In particular, CHGO broadcast two ads from September to November 2010 attacking Rep. John Spratt (D-SC) and supporting his Republican opponent, Mick Mulvaney.[3] AR 1497, 1499. One ad, titled "Song and Dance," asked viewers to "pull the plug on" Rep. Spatt's "deficit spending" and to "join Mick Mulaney's fight against big spenders in Washington." *See* AR 213. On screen at the end of the advertisement appeared the words "Fight back. Join Mick Mulvaney. Stop the big spenders in Congress." *Id.* A second ad titled "Collectible Coin" attacked Rep. Spratt's voting for the agenda of House Speaker Nancy Pelosi, and told viewers "Mick Mulvaney has a better idea—stop the spending and get America working again." AR 210. On screen appeared the words "Help Mick Mulvaney." *Id*.

CHGO ran variants of these two ads between September and November 2010 against other Democratic candidates in ten additional congressional races. AR 927–28, 1496–1500.[4]

CHGO ran another ad, titled "Make America Work," attacking Rep. John Salazar (D-CO) and supporting his opponent, Republican Scott Tipton, in October 2010.[5] AR 212, 1496. In the ad, CHGO identified Rep. Salazar as a candidate, and stated he "squandered billions on a bogus stimulus bill as unemployment skyrocketed," and "led the charge with Pelosi for Obamacare, further crippling rural Colorado's economy." AR 212. The ad then stated Tipton "believes Coloradans know best how to create jobs and grow our economy" and encouraged voters to "help Scott Tipton make America work again." *Id.* CHGO ran a similar "Make America Work" ad against Rep. Dan Maffei (D-NY) and in support of his opponent. AR 206, 1496.

CHGO also ran slightly different versions of some of the ads which did not mention the

[3] Mick Mulvaney won election and is a current member of Congress. Ex. 1. Exhibits are attached to the Declaration of Stuart C. McPhail in Support of Plaintiffs' Motion for Summary Judgment, filed herewith. The Court may take judicial notice of this and the other exhibits.
[4] Candidates for whom CHGO advocated election won four of these ten races and continue to serve in Congress. Ex. 1 (listing as current members Mike Kelly, Andy Harris, Toddy Young, and Lou Barletta).
[5] Scott Tipton won election and is a current member of Congress. Ex. 1.

candidate's opponent. CHGO ran a version of the "Collectible Coin" ad in support of Rep. Walt Minnick (D-ID) between October 14 and 20, 2010. AR 211, 1500. CHGO also ran an ad attacking Rep. Carol Shea-Porter (D-NH) in October 2010, in which CHGO noted Rep. Shea-Porter's votes for the stimulus package and health care bill, adding "it gets worse" because she "voted for the Pelosi House agenda 93%" of the time. AR 215, 1500. CHGO ran another advertisement attacking Rep. Allen Boyd (D-FL) between October 27 and November 1, 2010, asserting that he was one of Speaker Pelosi's most loyal followers, and that he only voted to support Obamacare after Speaker Pelosi threatened him. AR 216, 1500.

While CHGO aired these ads, Wayne Berman—a man with no disclosed connection to CHGO—sent a fundraising request on behalf of the group to unknown recipients. AR 427. The request plainly stated that CHGO is "an organization which focusses on running independent expenditures in key districts to support the election of Republican candidates." *Id.* Nonetheless, Berman assured would-be contributors that CHGO "is organized as a 501c(4) organization, and contributions to the Commission are not tax deductible and *not disclosed*." *Id.* (emphasis added.) Shortly after this solicitation, CHGO received additional contributions of approximately $800,000. AR 684–87. The sources of those contributions have not been disclosed.

### *3. CHGO's Federal Campaign Activity Earns FEC Attention*

CHGO's electioneering did not go unnoticed. On October 7, 2010, the Democratic Congressional Campaign Committee ("DCCC") filed a complaint with the FEC, alleging that CHGO's ads to date constituted either independent expenditures or electioneering communications, but that CHGO had not filed required disclosure reports with the FEC for either type of communication. AR 1–6. The DCCC further alleged that the ads failed to include the requisite disclaimers, as required by federal law. AR 5.

The FEC forwarded the DCCC's complaint to CHGO on October 15, 2010.[6] AR 8. The FEC also informed CHGO, via a letter delivered to Canfield, of its "legal obligation to preserve all documents, records and materials relating to the subject matter of the complaint." *Id.*

Canfield responded to the FEC on November 30, 2010, designated himself as counsel for CHGO and moved to dismiss the DCCC complaint. AR 10–19. Canfield, however, did not provide a substantive response to the DCCC's allegations. AR 21–22.

Thereafter, on February 7, 2011, well after CHGO formed and spent more than $4 million on campaign advertisements, CHGO spent a small sum—$5,000, about 0.1% of CHGO's total expenditures—to purchase an economic "study." AR 46, 403, 690, 1485.

On April 27, 2011, the FEC notified CHGO that it would not dismiss the case. AR 23.

On May 23, 2011, Plaintiffs CREW and Melanie Sloan submitted a complaint to the FEC, identifying most, but not all, of CHGO's advertisements and alleging they were independent expenditures or electioneering communications and that CHGO failed to file required disclosure reports for them. AR 25–40. Plaintiffs alleged CHGO spent more than $2 million airing the ads based on cost estimates provided by the Campaign Media Analysis Group ("CMAG"). *Id.* As CHGO did not file disclosure reports for the ads, Plaintiffs did not have any more reliable data. Plaintiffs' complaint further alleged CHGO's ads did not include the legally required disclaimers. *Id.* On May 26, 2011, the FEC provided CHGO, via Canfield, notice of Plaintiffs' complaint and reminded CHGO of its obligation to preserve documents. AR 42.

On June 1, 2011, Canfield responded to the complaints, AR 45–52, asserting that CHGO was a "social welfare organization conducting its public education activities pursuant to section 501c(4) of the Internal Revenue Code." AR 46. He explained CHGO "commissions macro-

[6] Canfield claimed he received the complaint on November 29, 2010. AR 11. Nonetheless, he apparently had notice by October 5, 2010, when the complaint was reported "on the front page of the daily newspaper, the Politico." *Id.*

economic studies," providing, as an example, "An Agenda to Restore American Prosperity," AR 46, the study CHGO purchased only a few months earlier for $5,000, AR 690. Canfield definitively asserted, "CHGO may not and does not engage in electoral politics at the federal level and all communications made to the public by CHGO are specifically issue oriented and do not advocate the election or defeat of any identified federal candidate." AR 47.

With regard to CHGO's ads, Canfield stated that they did not "target[]" any "specific electoral constituency," and asserted that "none of the public communications 'attacked' any identified individual." *Id.* With regard to CHGO's failure to include a disclaimer, Canfield argued that the ads contained enough information. AR 48.

On August 31, 2011, the OGC issued its first report on the DCCC's and Plaintiffs' complaints. AR 53–84.[7] In the report, the OGC reviewed ads identified in Plaintiffs' complaint, and one additional version of the "Collectible Coin" ad that was identified by the OGC. AR 55. The OGC concluded that twelve of the ads constituted independent expenditures because they contained express advocacy asking viewers to "pull the plug" on candidates' congressional activities or "help" their opponent in the election. AR 60–69. The OGC concluded the remaining three ads constituted electioneering communications. AR 67–69. In particular, despite the statement from Canfield that "none" of CHGO's ads were targeted at a candidate's electorate, the OGC found evidence demonstrating that the ads were broadcast in, and only in, the identified candidates' districts. AR 69. The OGC also found CHGO failed to include the required disclaimers on its ads. AR 71–72.

The OGC recognized, moreover, that CHGO may have committed an additional FECA violation: CHGO may have failed to register as a political committee due to its extensive

[7] That report was later withdrawn. AR 116.

political activity. AR 72. The OGC concluded that CHGO made more than a $1,000 in independent expenditures during a calendar year, satisfying the FECA's statutory threshold for political committee status. AR 73–74. With regard to CHGO's "major purpose," the OGC first concluded that CHGO's extensive spending on campaign advertisements, when compared with its rather meager non-political activities, like the single $5,000 study, indicated that its major purpose was the nomination or election of federal candidates. AR 81–83. The OGC further found that public reporting indicated CHGO was created to serve a political purpose from its start, citing statements from CHGO's reported "founder, Scott Reed," indicating that "CHGO sought to raise $25 million to run ads in 20 House Districts and a few Senate contests in 2010." AR 80. The OGC further quoted Reed as stating that, in light of "*Citizens United*," "501cs are the keys to the political kingdom . . . because they allow anonymity." *Id.*

On or before October 4, 2011, the FEC notified CHGO that it was now also considering whether CHGO failed to register as a political committee and sent Canfield the public news articles that the OGC found indicated that CHGO was founded for political purposes. AR 85–115, 117. Canfield replied on behalf of CHGO on October 14, 2011. AR 118–61. While generally denying that CHGO violated the FECA by failing to register as a political committee, Canfield took particular exception to representations made in the newspaper articles, stating, "whoever Mr. Reed might be in the world of politics, he was not a 'founder' of the CHGO and was never spokesman for or an official of CHGO." AR 119. He stated that the three "founders" of CHGO were the three individuals listed on CHGO's application for tax-exempt status with the IRS, namely, himself, Powell, and Warring. AR 119, 1550. Canfield did not mention Mihalke. Canfield also continued to insist that CHGO's ads were "issue advertisements" that could not reasonably be seen to have any "electoral" purpose. AR 119. Finally, as evidence of CHGO's

activities in "advance of the entity's stated mission," Canfield attached the $5,000 study CHGO bought in early 2011. AR 122, 136–61.

On November 14, 2011, in the midst of the FEC's initial investigation, CHGO filed its Form 990 tax return for 2010 with the IRS. AR 1559–73. Canfield signed the submission under penalty of perjury, with Warring listed as the Form 990's preparer. AR 1559. Despite having spent millions on ads the FEC found to be independent expenditures and electioneering communications, where the Form 990 asked if CHGO "engage[d] in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office," it checked "No." AR 1561. CHGO also represented that it incurred no fundraising expenses that year. AR 1559, 1568. CHGO listed only two officers: Canfield and Powell. AR 1565. It identified Powell as the "person who possesses the books and records of the organization." AR 1564. The tax return also identified Meridian as its only independent contractor receiving more than $100,000 in compensation, listing about $4.6 million in expenses for "media placement" and "production." AR 1566. The Form 990 also listed CHGO's other expenses, including $5,000 for "economic research." AR 1568. Nonetheless, the tax return asserted CHGO's mission was to "share its research and findings with public policy formulators." AR 1560.

***4. CHGO Closes Shop "Most Quickly" to Evade the "Outstanding [FEC] Matter"***

On January 17, 2012, the FEC notified CHGO via Canfield that the FEC was still considering whether there was reason to believe CHGO violated the FECA and that the Commission was expected to vote on the matter "in mid-2012." AR 162. The FEC once again reminded Canfield of CHGO's "legal obligation to preserve all documents." *Id.*

By late March 2012, with the FEC vote pending, a decision was made to terminate CHGO. AR 607. On March 27, 2012, Warring emailed Mihalke—who again had no reported role in the operations of CHGO—listing the "few steps" CHGO would need to take to terminate.

*Id.* Canfield was quickly copied on the discussion and soon became an active participant. AR 606–07. Powell, the purported President and Executive Director of CHGO, was never included. AR 590, 600–01, 605–09. On April 15, 2012, Canfield emailed Mihalke stating that it was "[r]eally important for us to get this terminated ASAP." AR 609.

The next morning, Mihalke replied to Warring and Canfield, asking "What do we need to do to get this closed most quickly[?]" AR 609. Mihalke's stated reason was that "[t]here is an outstanding matter at the Federal Elections [sic] Commission and my sense is that we ought to shut it down to make things less complicated moving forward." *Id.*

Later that day, Warring wrote back "[w]e will make this a priority." AR 600.

***5. Plaintiffs' Amended Complaint***

On April 25, 2012, Plaintiffs, now armed with CHGO's Form 990 tax return, filed an amended complaint with the FEC. AR 164–96. Plaintiffs again alleged that CHGO failed to file reports for its independent expenditures and electioneering communications, and failed to include proper disclaimers. *Id.* Plaintiffs now also alleged that CHGO failed to register as a political committee. AR 176–78. In particular, Plaintiffs alleged CHGO's major purpose was to elect federal candidates, as evidenced by the fact that at least 51.5% of CHGO's total reported expenditures for 2010 went to the federal campaign ads. AR 177.

On May 2, 2012, CHGO filed its 2011 Form 990 with the IRS. AR 1575–91. This tax return was signed under penalty of perjury by Powell, with Warring again acting as preparer. AR 1575. Like the previous tax return, CHGO again represented that it engaged in no "direct or indirect political campaign activities." AR 1577. CHGO also again represented that it incurred no fundraising expenses. AR 1575, 1584. The tax return again listed only two officers of CHGO: Canfield and Powell. AR 1581. As planned, the 2011 Form 990 declared CHGO had terminated, asserting its remaining $31,000 in funds had been disbursed for expenses and that it

had "no assets" remaining. AR 1575, 1586–87.

On May 21, 2012, Canfield responded to Plaintiffs' amended complaint, simply incorporating and reiterating his June 1 and October 20, 2011 responses. AR 198. For the first time, however, Canfield stated that he had "had no contact with or provided legal services to, nor received any compensation from, the [CHGO] since late December 2010." *Id.* He stated that CHGO was "an inactive client." *Id.* Canfield did not mention his participation in the March 2012 conversations about terminating CHGO. Shortly after this representation to the FEC, Canfield emailed CHGO's accountants to discuss CHGO's Form 990 tax returns. AR 594–95.

On January 23, 2013, the FEC again contacted Canfield on behalf of CHGO, notifying him that the matter was still under review and that a vote was expected by mid-2013. AR 199. The FEC again reminded Canfield of CHGO's legal obligation to preserve evidence. *Id.*

On December 27, 2013, the OGC issued a second "First General Counsel's Report," replacing the initial withdrawn report. AR 201–41. In the revised report, the OGC again recommended finding reason to believe CHGO failed to disclose its independent expenditures and electioneering communications. AR 208–20, 240. As in the previous report, the OGC found most of CHGO's communications expressly advocated for the election or defeat of federal candidates because those ads asked voters to "pull the plug" on candidates' congressional service and to "help" or "join" their electoral opponents. AR 208–17. It again found that the remaining ads constituted electioneering communications. AR 217–20. The OGC also again recommended finding reason to believe CHGO did not include proper disclaimers. AR 220–23.

The OGC also again recommended finding reason to believe CHGO failed to register as a political committee. AR 223–39. In particular, the OGC concluded CHGO easily met the FECA's $1,000 statutory threshold, AR 231, and that CHGO's major purpose was the

nomination or election of federal candidates based on its extensive spending on independent expenditures and electioneering communications, AR 232–39. Based on its assessment of the content of the ads, the OGC concluded that CHGO spent at least $1.7 million on independent expenditures. AR 232–33, 238. The OGC recognized, however, that this figure did not represent the "full extent of CHGO's spending [on political ads] during the 2010 calendar year." AR 233, 238. The OGC also concluded that CHGO's electioneering communications should count toward finding CHGO's major purpose because those ads attacked or supported candidates. AR 233–37. Moreover, the OGC recognized that the "major purpose" test did not impose a hardline requirement that a group spend 50% of its budget on qualifying political activity. AR 238. Finally, the OGC stated that these facts at least justified further investigation and, accordingly recommending the approval of compulsory process. AR 239–40.

On September 16, 2014, the Commission voted on the OGC's recommendations. AR 242. The Commission deadlocked on the OGC's recommendation to find reason to believe that CHGO failed to register as a political committee. *Id.* Nonetheless, by a unanimous vote, the Commission found reason to believe CHGO failed to file required disclosure reports for its independent expenditures and electioneering communications and authorized compulsory process. AR 242–43. The Commission also approved by unanimous vote a recommendation to "[t]ake no action at this time" on CHGO's alleged violations of the FECA's political committee and disclaimer rules. *Id.* On September 30, 2014, CHGO, via Canfield, received notice of the FEC's vote and was once again reminded of its duty to preserve evidence. AR 246–47.

***6. The FEC Investigation Reveals CHGO's True Purpose Despite Cover-up***

Now authorized to examine the allegations against CHGO, the FEC launched an investigation that uncovered for the first time the lengths CHGO and its representatives went to conceal it true purpose and who actually ran the organization, as well as the full extent of

CHGO's political spending in 2010—information critical to the analysis of whether CHGO was a political committee and violated (and still violating) federal law.

OGC began by interviewing Powell, who was represented by Canfield, on November 25, 2014. AR 260. Powell confirmed that he was CHGO's president from 2010 to 2011, but stated that his "primary functions at CHGO [were] writing and producing the T.V. ads that CHGO ran around this time . . . [and] he did little else for [CHGO]." *Id.* Powell revealed that while he was supposedly the president of CHGO, he was actually working at Meridian. *Id.* Despite being president and one of only two officers listed on CHGO's 2010 990, Powell acknowledged he had "no involvement in the billing by Meridian or payments by CHGO for the T.V. ads he produced." AR 261. Despite CHGO's tax return identifying Powell as the custodian of records, AR 1564, he also stated that he had no records relating to the ads' production or placement because "records of [that] type [were] normally destroyed not long after the ads [had] run." AR 261. Powell and Canfield reviewed the fifteen ads that the OGC had thus far located, and told the OGC that those ads "were likely all of the ads that were produced by CHGO." AR 261.

On December 10, 2014, the OGC contacted Warring. Warring confirmed his role with Warring & Company, LLC and his "accounting and tax work" for CHGO. AR 264. Warring stated that Canfield was about the only person at CHGO with whom he had contact. *Id.* Warring confirmed he had no role in paying CHGO's bills and did not know who was responsible for that. AR 265. Warring stated he would have returned any financial records he received from CHGO back to the group. *Id.* Warring also "commented that his file for CHGO appears 'sketchy' because there [was] 'practically nothing' contained in it." AR 266.

The OGC then spoke with Canfield. AR 275. He stated that the witnesses so far interviewed, including the only two other officers ever publicly associated with CHGO, had

"compartmentalized knowledge of CHGO and the events that transpired." *Id.* When asked by the FEC "who at CHGO delegated the group's functions, Canfield stated that he did not know, adding that he just handled compliance issues relating to express advocacy." AR 276.

The OGC informed Canfield that it wanted to locate records relating to CHGO's ads. *Id.* Canfield told the OGC that it was the normal practice for Warring to return documents to CHGO and that Warring had "shipped records back to his (Canfield's) office" in a Washington, D.C. law firm. *Id.* Canfield claimed the records would have gone to the office's mail room, but "that they probably sat for some time, because the mail room staff would not be familiar with CHGO." *Id.* "Canfield went on to state that at some time, the mail room staff 'tossed' the records." *Id.* Canfield did not explain why staff at a law firm would throw records away or why he would have failed to go and retrieve the records, particularly after he received numerous notices of his duty to preserve CHGO's records. When the FEC flatly asked "where records are that relate to CHGO's expenses for these ads, Canfield replied, 'I don't know.'" *Id.*

On May 19, 2015, the FEC voted to authorize subpoenas. AR 278–323.

On June 24, 2015, an FEC investigator attempted to personally deliver the subpoena for Meridian after the previous attempt at mail service failed. AR 324. When the investigator went to the floor which purportedly housed Meridian's offices, he found it empty, save for one individual who stated that "no company called Meridian occupied office space on this floor." *Id.* A building manager then informed him that Meridian never rented office space at that address. *Id.* She "went on to state that a former tenant on the third floor named Scott Reed had accepted mail for Meridian while he rented office space there." *Id.* She added that Reed vacated the office five or six months ago to go work "for the U.S. Chamber of Commerce in Washington, DC." *Id.* The building manager recalled, however, the recent certified mail for Meridian; *i.e.*,

the attempted subpoena. *Id.* According to the building manager, "when the USPS initially attempted delivery, she called Reed, since he had accepted mail for Meridian in the past. Reed told [her] not to accept the certified mail for [M]eridian and she complied." *Id.*

Mihalke responded to the FEC's subpoena on June 26, 2015, providing information and documents that, in part, contradicted prior representations by Canfield and others about CHGO's purpose and management. AR 325–62. Contradicting Canfield, Mihalke stated that "Scott Reed, a political consultant" formed CHGO. AR 327. Mihalke stated his work for CHGO consisted of writing memos, "one or more PowerPoint presentations," proposing media buys, producing advertisements, and overseeing website development. AR 328. Mihalke identified Powell, Warring, and Canfield as associates of CHGO, but also identified Scott Reed and Wayne Berman as "consultant[s]." AR 328. Asked how Meridian billed CHGO, Mihalke stated that he would propose bills to "CHGO's board and consultant" and that "[a]pproved funds were transferred to Meridian." *Id.* Mihalke stated that, despite the repeated notices to Canfield, he "never received any document retention notice from CHGO or from any other person affiliated with CHGO with regard to this matter." AR 330.

Nonetheless, Mihalke produced the few documents he had, including a previously undisclosed internal memorandum and PowerPoint presentation. AR 332–43. The previously undisclosed documents candidly revealed CHGO's true organizational purpose, stating:

- 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," AR 332–33,
- CHGO "[s]upport[ed] pro-growth, free enterprise candidates in targeted Senate races," AR 334,
- 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 501c(4) groups could do "with donor names never made available to the public under

law," AR 335–36,

- 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, AR 337, 341–42, 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," AR 343.

On June 26, 2015, Powell responded to the FEC subpoenas. AR 363–69. Powell reiterated that the work he did for CHGO was actually done as an employee of Meridian, for whom he created and produced the TV ads that would air under CHGO's name. AR 364. He said he never signed any checks or authorized any transfers of funds for CHGO. AR 367. Powell confirmed Reed's involvement with CHGO. AR 365. As for documents, "Powell assume[d] such documents would be retained by CHGO's legal counsel and accountant to meet" CHGO's document retention obligations. AR 368. He did not recall receiving any notice to retain records related to CHGO. *Id.*; *see also* AR 1234–35.

Canfield submitted his responses to the FEC on June 29, 2015. AR 371–72. He claimed his work "was, exclusively, the provision of legal services and legal advice and counsel." AR 371. Canfield stated, "as outside counsel to the CHGO, [he] had no role in the review or preparation of any . . . funding, production or placement documents." *Id.* He stated he had no knowledge of how Meridian was retained or how Meridian billed CHGO. AR 371–72. Finally, Canfield asserted he had no knowledge of CHGO's document retention policy and all documents in his possession were covered by the attorney-client privilege. AR 372.

On July 1, 2015, Warring responded to the FEC subpoenas. AR 381–652. According to Warring, Canfield and Mihalke formed CHGO and Mihalke asked him, Warring, to act as CHGO's treasurer. AR 383. He stated that all questions related to CHGO's IRS filings "were answered or confirmed by William Canfield, III, and Michael Mihalke." AR 383. Warring also

stated he never received a notice requesting he retain CHGO documents because of the FEC investigation. AR 388. Nonetheless, as a result of his own accounting firm's retention policies, he had a number of CHGO-related documents and produced those to the FEC. AR 388, 391–652. Those documents, among other things, identified CHGO's contributors, and noted they "need[ed] info from Scott Reed on" one $40,000 contribution. AR 403. Produced checks from CHGO's accounts appeared to bear Mihalke's signature. Compare 441 *with* AR 503. Warring also produced correspondence with Powell, Canfield, and Mihalke, copies of which were not provided by those same individuals in response to the FEC subpoena. AR 590–652.

On July 7, 2015, the FEC finally reached Scott Reed, the man whom Canfield adamantly denied played any role in the organization. AR 80, 119, 653–54. Reed said he could not recall having "anything to do with [CHGO's] formation" because he was involved in "too many political committees since 2010 to have a clear recollection." AR 653. Reed did recall, however, that he "gave his advice [to CHGO] and moved on." AR 654. Asked to clarify, Reed stated only that he "was involved in some discussions on the strategic placement of TV ads." *Id.* Reed said he possessed no documents related to CHGO. *Id.*

Based on the information it had gathered thus far, the OGC issued a Second General Counsel's Report on July 28, 2015. AR 926–43. The OGC reached the same recommendations as to CHGO's reporting and disclaimer failures. AR 938–40, 943. Due to CHGO's failure to provide any documents related to these advertisements, however, the OGC could not identify the exact amounts CHGO spent on its ads. AR 939.

The Second Report also recommended finding reason to believe that CHGO failed to register and report as a political committee, in violation of the FECA. AR 934–38. The OGC found CHGO easily cleared the statutory requirement of making more than $1,000 in

expenditures in the calendar year, AR 934, and, based on its previous knowledge of CHGO's spending on political advertisements and newly discovered evidence in the investigation, concluded there was ample evidence to support a reason to believe CHGO's major purpose was the nomination or election of candidates, AR 935–38. The OGC argued that, because approximately 77% of the money CMAG estimated CHGO spent on advertisements went to ads the OGC concluded were independent expenditures, one could infer that 77% of CHGO's total reported media spending, or 74% of CHGO's total expenses, likely went to independent expenditures. AR 936. The OGC further found that "evidence obtained as a result of the Commission's issuance of compulsory process directly controverts CHGO's public disavowals of an electioneering purpose." AR 937. In particular, the memorandum and PowerPoint produced by Mihalke in June, 2015, explicitly admitted that CHGO was formed to influence specific federal elections using express election advocacy. *Id.*; *see also* AR 332–43. The OGC recognized that the internal documents discussed Senate races, while the ads CHGO eventually ran targeted House races, but concluded that a change in the type of federal election targeted did not alter its major purpose. AR 937. The OGC further identified the fundraising letter from Wayne Berman, first revealed by Warring on July 1, 2015, which plainly admitted that CHGO was "an organization which focuses on running independent expenditure campaigns in key districts to support the election of Republican candidates." *Id.*; *see also* AR 427.

The Commission, however, did not take a formal vote on the recommendations in the OGC's Second Report, apparently because the OGC was still unable to identify the exact sums CHGO spent on each particular ad. *See* AR 1518–19.

As CHGO either destroyed all relevant documents or refused to produce them, the OGC was forced to use another tactic to identify CHGO's specific expenditures: reaching out to

individual television stations to locate records of CHGO's purchase. The OGC contacted 144 stations and collected records from three. AR 1472. From the records collected, the OGC was able to locate a previously undisclosed vendor for CHGO: New Day Media. AR 1159–62.

The OGC contacted the owner and operator of New Day Media, Karen Boor, on August 25, 2015. AR 1168–70. Boor confirmed working with CHGO and Meridian, and she recalled that Mihalke "would give her a set of markets" and that she would handle securing the placement of the ads. AR 1168–69. She stated that she knew of Powell, but that he had no role in approving ad buys. AR 1170. She stated that she was paid by Meridian for her services. AR 1169. Two days later, in response to an FEC subpoena, AR 1176, New Day provided its bank records, AR 1178–208. Those records indicated Meridian paid New Day approximately $3.2 million dollars and included the specific amounts New Day paid each station in turn for placing ads. *Id.* These records provided substantial new information about CHGO's political spending.

On August 31, 2015, the FEC unanimously approved subpoenas for Meridian's and New Day's bank records, and approved a deposition subpoena for Mihalke. AR 1209.

On September 14, 2015, the FEC contacted Wayne Berman. AR 1236. Berman responded through counsel, who stipulated Berman had no role in creating CHGO's ads, that he had no documents in his possession related to CHGO, and that the work he performed for CHGO was "informal and infrequent fundraising advice strictly on a volunteer basis." AR 1302. Berman also stipulated that he received no compensation for his work. *Id.*

On September 21, 2015, the FEC spoke with Mihalke again. AR 1307. Mihalke confirmed work with New Day as the "only vendor hired by Meridian for the placement of CHGO TV ads." AR 1308. Mihalke stated he received a commission for his work of "around

$300,000." Asked to describe how the CHGO project worked, Mihalke said:

> Meridian put together the plans for the ad buys and provided them to CHGO. Mihalke said that the CHGO Board also had to approve the production and placement of all TV ads. Mihalke said the CHGO Board also had to approve the content of all ads. *Mihalke identified Canfield and Scott Reed as the individuals who provided final approval for the ads for CHGO*.

AR 1309 (emphasis added).[8]

Mihalke then confirmed CHGO paid Meridian approximately $4.3 million for ad placement, work done exclusively by New Day. AR 1309–11. Mihalke confirmed Meridian paid New Day only $3.2 million for that work. AR 1311. Asked about the discrepancy,

> Mihalke stated that as ad placement proceeded, he kept CHGO advised as to what was spent on its ads and that it was his intention to return any unused funds to CHGO. He stated that when ad placements ended, approximately $1,100,000 of CHGO funds remained. Mihalke said that these *unused funds were to be given back to CHGO*. Mihalke went on to state that, at this time, he told Scott Reed of the unused CHGO funds. *He said that Reed told him that the remaining $1,100,000 would be evenly divided among Reed, Mihalke and Wayne Berman.* Mihalke said that Reed had said that this would cover costs of "fundraising" and would be a "fundraising commission." Mihalke said that the conversation between Reed and Mihalke regarding the division of these funds occurred after the 2010 election and that the actual distribution occurred "sometime in the following year."

AR 1311–12 (emphasis added). Mihalke clarified that this one-third share of the $1.1 million was separate from his $300,000 commission for his work. AR 1312. Mihalke also stated that he made no decisions about "what ad ran in what congressional district," and that "Reed and Canfield made those decisions." AR 1312. "Reed led CHGO," he said. *Id.*

### *7. The Final OGC Report, the Deadlock, and the Dismissal*

On September 24, 2010, the OGC released its Third General Counsel's report. AR 1467–

[8] Kira Swencki, a Meridian employee who worked on CHGO matters, confirmed Reeds and Canfield's roles in the running of CHGO. AR 1305–06 (stating she worked "frequently" with Reed and "mostly" with Canfield).

93. Once again, the OGC recommending finding reason to believe CHGO failed to file required reports for its independent expenditures and electioneering communications, although, now finally in possession of bank records, the OGC could identify the exact sums CHGO spent on each ad. AR 1486–88, 1492. The OGC also again recommended finding reason to believe CHGO failed to include required disclaimers on its ads. AR 1488–89, 1492.

The OGC also again recommended finding reason to believe CHGO failed to register and report as a political committee. AR 1482–86. OGC easily found CHGO met the statutory definition of a political committee, AR 1482–83, and found overwhelming evidence that CHGO's major purpose was the nomination or election of candidates based on the fact that nearly all of its expenses went toward political advertisements and its concealed internal documents admitted CHGO's purpose was to influence elections, AR 1483–86. In particular, the OGC was able to use the bank records and media placement records to identify the exact sums spent on each type of ad, concluding CHGO spent more than $4 million on political advocacy, of which nearly $3 million went to independent expenditures. AR 1484–85. Thus, the OGC concluded that regardless of whether one looked at all of CHGO's political ad purchases or merely its independent expenditures, the vast majority, 85% or 61% respectively, of CHGO's expenditures during its existence went to ads demonstrating CHGO's major purpose was to nominate or elect candidates. *Id.* Supporting these conclusions, the OGC also provided a breakdown of its cost calculations. AR 1494–502.

The OGC further calculated the figures under various theories of how to treat the $1.1 million of unspent CHGO funds that Reed, Mihalke, and Berman took for themselves. AR 1485–86. If the funds were disregarded entirely, CHGO devoted about 76% of its lifetime expenses to express advocacy. AR 1485. If, however, the unspent funds counted towards

CHGO's total expenditures but not its independent expenditures—a calculation the OGC believed ignored Mihalke's and Meridian's role as CHGO's exclusive media vendor and Reed's role in approving ads—CHGO's express advocacy would still constitute 56% of its total spending over its life. AR 1485–86. In short, OGC concluded that, no matter how CHGO's political spending was calculated, its major purpose was to influence federal elections.

The Commission voted on the OGC's recommendations on October 1, 2015. AR 1503. Despite the OGC recommendations and support, the Commission deadlocked, three to three, on every one of the OGC's recommendations. *Id.* Unable to proceed, the Commission voted five to one to close the file and dismiss the case. AR 1504.

Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, the three commissioners who voted against adopting the OGC's recommendations, and whose votes were thus controlling, issued a statement of reasons on November 6, 2015. AR 1516–20. In that statement, the controlling commissioners explained that they voted against the OGC's recommendations because "the statute of limitations [had] effectively expired" and enforcement was "futile" because "CHGO was a defunct organization that had no money, and apparently no officers or directors to bind it in any legal agreement." AR 1516, 1519. With regards to the substance of the OGC's recommendations, the controlling commissioners admitted that the reporting violations were "obvious," AR 1516, but did not explain why they saw no reason to believe such obvious violations occurred. The controlling commissioners mentioned the alleged disclaimer violations in passing, *id.*, but did not otherwise discuss their vote on them. With regard to the OGC's recommendation to find reason to believe CHGO violated the FEC's political committee requirements, the controlling commissioners asserted that CHGO's purpose was to "educate the public on matters of economic policy formulation," adopting the purpose

Canfield asserted in the responses while ignoring the internal documents that revealed CHGO's true purpose. AR 1516–17. They further concluded that the information collected in the OGC's investigation "did not definitively resolve" that CHGO violated the FECA's political committee rules, AR 1519, without explaining how the evidence was not definitive, what kind of evidence they would take as definitive if not what the OGC uncovered, and why a definitive resolution was even required in order to find a mere "reason to believe" a violation may have occurred. The controlling commissioners also made no mention of the impact of witnesses' false and misleading statements and CHGO's destruction of evidence on the OGC's investigation.

Chair Ann M. Ravel and Commissioner Ellen L. Weintraub, who voted in favor of proceeding against CHGO, also issued a statement of reasons. AR 1511–15. They cited the "overwhelming evidence" that CHGO was a political committee. AR 1511. They noted it was "evident at every stage of the Commission's proceedings that CHGO, a dark money group, was a political committee," and that, even under the controlling commissioners' theory of how to calculate a group's major purpose, CHGO would qualify as a political committee. AR 1512, 1514. They recognized that the controlling commissioners "obviously have not drawn any negative inferences from the fact that CHGO was not only uncooperative with our Office of General Counsel, but kept almost no records despite being told to do so at the beginning of these proceedings, and made almost no attempt to comply with campaign finance rules." *Id.* They further noted that "[i]t apparently bears little significance [to the controlling commissioners] that CHGO leaders decided to close up shop 'most quickly' because of the pending Commission matter, leaving our lawyers and investigators to piece together records from television stations and previously undisclosed sub vendors to determine CHGO's media spending." *Id.*

On November 23, 2015, Plaintiffs brought this suit pursuant to 52 U.S.C. § 30109(a)(8)

in federal court to challenge the dismissal.

Finally, on March 21, 2016, Commissioner Steven T. Walther released a statement of reasons explaining his vote. AR 1528–616. Walther stated he was issuing his statement to explain why a court should find the controlling commissioners' rationale was "arbitrary and capricious" and therefore "contrary to law." AR 1531. Walther noted the "overwhelming" evidence "demonstrat[ing] that there was reason to believe CHGO is a political committee," AR 1533, easily satisfying the "very low" reason to believe standard of proof. AR 1541. Walther also observed "that OGC encountered a number of obstacles in the post-RTB period that severely hampered its investigation of CHGO, caused in no small part by CHGO's failure to abide by the law (as well as its failure to adhere to timely notices provided to it by the OGC that cautioned OGC's counsel to follow the law) to preserve documents related to complaints." AR 1537. He stated that the controlling commissioners' "conclusory dismissal—without explanation—of OGC's express advocacy spending calculation easily meets the 'arbitrary and capricious' standard of review." AR 1542. He further stated that it "was premature to assume . . . that the Commission's enforcement options were completely foreclosed" and that CHGO's officers "have been previously identified and contacted by OGC." AR 1543. According to Walther, "a respondent's financial condition or legal status has never served as a bar to Commission enforcement." AR 1543. Moreover, the FEC could have required CHGO to "register with the Commission and file all applicable reports." AR 1543. In conclusion, Walther stated "[i]f CHGO's termination report effectively allowed it to dissolve itself and drain its remaining assets, this method may become a preferred strategy of any fly-by-night group that—although in existence for a very short period—may exert a large influence on the political process without

registering as a political committee with the Commission." AR 1545.[9]

**C. The Fallout of CHGO's Strategy**

Unfortunately, CHGO's exploitation of 501(c) status has become a preferred strategy for laundering huge sums of money spent on elections to avoid disclosure. The amount spent on campaigns by "dark money" groups like CHGO that do not disclose their donors has grown by 244% percent from this time in the last presidential election cycle, to more than $43 million as of July 2016. Ex. 2 at 1. If dark money spending keeps pace with the 2012 cycle, more than $750 million in dark money will be spent in this election cycle. *See id.* at 2. With regard to Senate races alone, nearly 60% of outside spending as of May has come from section 501(c) groups that do not disclose donors. Ex. 3. Moreover, those numbers may be too low, as some of the spending by groups that do disclose donors is first laundered through dark money groups. Ex. 4 at 5. Thus, even if a voter can identify the immediate contributor to a political entity, the true source of the money may be hidden behind a curtain of dark money groups like CHGO. *Id.*

The use of section 501(c)(4), spearheaded by CHGO, has proved a popular means to launder this dark money and shield its ultimate source. For examples, Crossroads GPS, a group recently granted 501(c)(4) status by the IRS, Ex. 5, spent approximately $71 million to influence the 2012 elections, Ex. 6, and $26 million to influence the 2014 mid-term elections, *id.* American Action Network, another section 501(c)(4) organization, spent approximately $11.6 million to influence the 2012 elections, Ex. 7, $8.9 million to influence the 2014 elections, *id.*, and is active in the 2016 elections, *id.*. Neither Crossroads GPS nor AAN disclose their contributors. Ex. 6, Ex. 7. These groups are far from unique. Ex. 8.

Indeed, Canfield has continued to use CHGO's spend-mislead-and-disappear model.

[9] On March 3, 2016, Commissioner Lee Goodman issued a procedurally unusual supplemental statement of reasons that did not purport to explain his vote. AR 1524–27.

Canfield became general counsel for another section 501(c)(4) organization called the Arizona Future Fund ("AFF") in 2014. Ex. 9 at p 1, 2. In 2014, AFF was forced by Arizona's Citizens Clean Elections Commission to admit to spending $315,575 on independent expenditures on a state election, roughly 66% of its total spending that year, without filing required reports. Ex. 9, Ex. 10, Ex. 11. Canfield signed the conciliation agreement which confessed to the unreported independent expenditures. Ex. 10. Nonetheless, only two months after admitting to the state of Arizona that AFF spent more than $300,000 dollars on independent expenditures, AFF submitted its Form 990-EZ to the IRS and declared, under penalty of perjury, that it did not engage in any political activity. Ex. 9 at p 4. Following the path of CHGO, AFF also voted to terminate after it was forced to concede its political activities to Arizona. *Id.* at p. 5–8.

The massive amounts of dark money are not wasted. While such spending may not always sway an election, elected officials and candidates value money contributed to dark money groups and see that money as useful for their own election efforts. Ex. 12. Contributors see such spending as useful as it curries favor that may be exploited for official actions, Ex. 13, Ex. 14, while avoiding the disclosure that might allow the public to connect the official act to the contribution.

Although *Citizens United* assumed that, in the absence of direct restraints on corporate funding, mandated disclosure would be sufficient to "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages," 558 U.S. at 371, groups like CHGO have circumvented that disclosure and prevented the electorate from exercising their franchise in an informed way. CHGO's acts were egregious and paved the way for these types of fly-by-night dark money organizations to spend millions to influence campaigns and to disclose none of it, leaving voters in the dark.

## ARGUMENT

### A. Jurisdiction

This action arises under the Federal Election Campaign Act of 1971 ("FECA"), 52 U.S.C. § 30101 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. This Court has jurisdiction pursuant to 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1331.

### B. Standard of Review

A court reviews an FEC decision to dismiss a complaint to determine whether it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (finding dismissals resulting from deadlocked FEC votes are subject to judicial review). The "contrary to law" analysis requires a court to evaluate two separate questions: (1) did the FEC dismiss "the complaint as a result of an impermissible interpretation of the Act," and, (2) even if the FEC dismissal was based on a permissible interpretation of the statute, was it nonetheless "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (internal citations omitted). The court analyzes the reasons provided by the commissioners who refused to find reason to believe a violation occurred as they represent the group that prohibited the FEC from going forward. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

#### *1. Impermissible Interpretations of Law*

Under the first test, the court evaluates whether the FEC's stated interpretation of a law used to justify dismissal is a permissible interpretation of that law. In determining the permissible interpretation of the law, the court may defer to interpretations that warrant such deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). If deference is unwarranted, however, the court determines the permissible interpretation *de novo*. *Orloski*, 795 F.2d at 161.

Deference is unwarranted where the FEC interprets the Constitution or judicial

precedent,[10] or where the FEC's interpretation lacks "force of law" because it has no binding effect on third parties, such as where it is expressed in a statement of reasons of three members of the FEC commission. *United States v. Mead Corp.*, 533 U.S. 218, 221–23, 232–34 (2001) (finding that decision lacks "force of law" because its "binding character as a ruling stops short of third parties); *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (finding a statement of reasons of three commissioners "would not be binding legal precedent or authority for future cases").[11] Deference is also unwarranted where the FEC interprets a statute other than the FECA. *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991) ("[R]eviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer."). In those situations, the court evaluates the interpretation proffered by the FEC against the court's *de novo* interpretation of the law to determine whether the FEC's interpretation is "[]permissible." *Orloski*, 795 F.2d at 161. Where the FEC's interpretation conflicts with the court's *de novo* interpretation, the dismissal is contrary to law. *Id.*

***2. Arbitrary, Capricious, or an Abuse of Discretion***

With regard to the second test, courts employ the same standard as under the APA to decide whether an action is "arbitrary or capricious, [or] an abuse of discretion." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550–51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (providing factors for arbitrary and capricious analysis).

***3. Invocation of Prosecutorial Discretion Does Not Alter the Standard of Review***

Like other agencies, the FEC enjoys prosecutorial discretion, *La Botz v. FEC*, 61 F. Supp.

[10] *See McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1005 (D.C. Cir. 2003); *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).
[11] Cases predating *Mead*, like *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), are no longer good law. *Am. Fed'n. of Gov't Emps. v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) ("plain error" to rely on pre-*Mead* jurisprudence).

3d 21, 33–34 (D.D.C. 2014), but the FEC's exercise of that prosecutorial discretion is still subject to the FECA's "contrary to law" analysis, *id.*; *see also Antosh v. FEC*, 599 F. Supp. 850, 856 n.5 (D.D.C. 1984) ("While the Commission is vested with some prosecutorial discretion, its actions cannot escape review."). The FEC's invocation of prosecutorial discretion must be supported by "reasonable grounds." *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011), *vacated by* 725 F.3d 226; *accord Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010). The FEC's impermissible interpretation of law would not provide reasonable grounds to dismiss a complaint. *See Crossroads GPS v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[A] court, by definition, 'abuses its discretion when it makes an error of law.'").[12] Moreover, an arbitrary or capricious rationale does not provide reasonable grounds for dismissal. *La Botz*, 61 F. Supp. 3d at 34 (subjecting exercise of prosecutorial discretion to arbitrary and capricious review).

Finally, the FEC must actually invoke prosecutorial discretion, *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012), and a "terse" reference to such discretion is insufficient to justify dismissal on those grounds, *Robertson v. FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995).[13]

**C. The Dismissal of Plaintiffs' Complaint Was Contrary to Law**

The three controlling commissioners justified their votes not to find reason to believe CHGO may have violated the FECA because (1) the "the statute of limitations expired" and (2) "CHGO no longer existed," it "had no money," and it had "no agents," and thus any attempt to enforce the law would be "futile." AR 1519. The conclusions, however, were arbitrary and

[12] For example, in *Akins v. FEC*, the FEC voted to dismiss based, in part, on a decision to exercise prosecutorial discretion. *See* Ex. 15. Nonetheless, on review, the D.C. Circuit evaluated the FEC's interpretation of law against the court's *de novo* interpretation to conclude that the FEC's dismissal was contrary to law. *Akins v. FEC*, 101 F.3d 731, 743 (D.C. Cir. 1997) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998). The FEC's invocation of prosecutorial discretion did not alter the court's analysis under the contrary to law standard.

[13] *See also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."); *Antosh*, 599 F. Supp. at 853 (holding "meekly" asserted grounds do not adequately explain agency action).

capricious and based on misinterpretations of relevant law. Moreover, the terse discussion of the merits of the claims does not salvage the unlawful dismissals.

***1. The Statute of Limitations Has Not Expired***

The controlling commissioners argued that dismissal was appropriate because, during the time the FEC was investigating Plaintiffs' claims against CHGO, "the statute of limitations effectively expired" and the violations "became time barred in October" of 2015. AR 1516, 1519. To reach that conclusion, the controlling commissioners must have interpreted the federal statute of limitations applicable to violations of the FECA, 28 U.S.C. § 2462, which provides a five-year statute of limitations period. *FEC v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997). Section 2462 does not bar the FEC from seeking relief, however, and thus the controlling commissions dismissal on that ground is contrary to law.

As a preliminary matter, the controlling commission's dismissal on the basis of the statute of limitations is contrary to law because they fail to provide an adequate—or indeed any—explanation of their interpretation. In fact, they do not even cite to the relevant statutory authority. *See* AR 1516–19. An unexplained agency decision, like the controlling commissioners' interpretation of section 2462, is *per se* arbitrary and capricious. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962).

Putting aside the absence of adequate explanation, however, section 2462 does not bar FEC enforcement of the FECA against CHGO. First, section 2462 does not bar the FEC from seeking equitable relief. Second, section 2462 is tolled by CHGO and its agent's fraudulent concealment. Third, section 2462 is tolled while a violation is continuing, such as where a group continues to fail to file required disclosure reports.[14]

[14] The controlling commissioners' interpretation of section 2462 does not warrant *Chevron* deference. The interpretation is contained in a non-binding statement by three commissioners which lacks the force of law, *Mead*,

Notwithstanding the five-year limit imposed by section 2462 on claims arising under the FECA, the FEC remains free to pursue equitable remedies against violators. Section 2462 bars claims "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise . . . unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The FEC, however, has not only the authority to impose civil fines and penalties for violations of the FECA, but also enjoys authority to seek a "permanent or temporary injunction, restraining order, or *any other appropriate order*." 52 U.S.C. § 30109(a)(6) (emphasis added). Section 2642 "provides no . . . shield from declaratory or injunctive relief" sought by the FEC. *Christian Coalition*, 965 F. Supp. at 71; *accord FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995).[15]

Indeed, the FEC has sought to enforce the FECA even after the expiration of section 2462's five-year time limit. In *Christian Coalition*, the FEC filed suit in 1996 to remedy violations that occurred six years earlier, well after the five-year limitations period purportedly would have expired. 965 F. Supp. at 68–69. The FEC pursued those claims to final judgment. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). Similarly, in *National Republican Senatorial Committee*, the FEC brought suit in 1993 asserting violations occurring nearly a decade before. 877 F. Supp. at 17. Yet again, the FEC pursued its surviving claims for equitable and injunctive relief to final judgment, including an injunction ordering the Committee to properly report contributions. Final Judgment, *FEC v. Nat'l Republican Senatorial Comm.*, No. 93-cv-01612-JHP (D.D.C. June 13, 1995), ECF No. 37.

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533 U.S. at 221–23, 232–34, and relates to a statute of general application over which the FEC enjoys no expertise or congressionally delegated authority, *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C .Cir. 2000) ("Because § 2462 is a statute of general applicability . . . , we interpret it *de novo*.").

[15] *See also Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). Although *FEC v. National Right to Work Commission*, 916 F. Supp. 10 (D.D.C. 1996), found that section 2462 bars all relief, *id.* at 14–15, it did so in a cursory discussion relying on *Cope v. Anderson*, 331 U.S. 461, 464 (1947). As Judge Green explained in *Christian Coalition*, however, *Cope* does not support that result. 965 F. Supp. at 71–72.

As explained below, equitable relief could do much to remedy Plaintiffs' and the public's injuries caused by CHGO's violations of the FECA. For example, the FEC could require CHGO's agents to disclose its contributors: relief that would provide the public with an understanding of the support behind a number of officials who currently hold office and are again up for election in 2016.[16] Thus, even assuming section 2462 bars a civil penalty, the FEC can seek equitable relief to remedy the violations of the FECA, and the controlling commissioners' interpretation of 2462 to bar "any further enforcement" was contrary to law.

Nor does section 2462 bar legal relief. Rather, it was tolled by CHGO's and its agents' fraudulent concealment of their violations.[17] "It is well established that, like all federal statutes of limitation, § 2462 is subject to equitable tolling." *U.S. S.E.C. v. Brown*, 740 F. Supp. 2d 148, 158 (D.D.C. 2010) (citing *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946); *3M Co. v. Browner*, 17 F.3d 1453, 1461 n.15 (D.C. Cir. 1994)). "[I]f . . . the plaintiff did not discover the injury because the defendant fraudulently concealed material facts related to its wrongdoing, then the court will deem the cause of action not to have accrued during the period of such concealment—unless the defendant shows that the plaintiff would have discovered the fraud with the exercise of due diligence." *Sprint Comm. Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996). The record here is replete with evidence that CHGO and its agents concealed CHGO's violations of the FECA, preventing the FEC from discovering the wrongdoing despite the FEC's investigation.

CHGO, through its agents Canfield and Powell, repeatedly provided false or misleading statements, under penalty of perjury, to the IRS and the FEC denying that CHGO attempted to influence elections or engaged in any campaign activities. AR 47, 1551, 1561, 1577. These

[16] *See infra* notes 3–5.

[17] CHGO may further be prevented from asserting any benefit of section 2462 under the related doctrine of equitable estoppel. *Smith-Hayne v. D.C.*, 155 F.3d 575, 580–81 (D.C. Cir. 1998) (noting defendant estopped from asserting untimeliness if "affirmative misconduct on the part of a defendant lulled the plaintiff into inaction").

statements are directly contradicted by (1) CHGO's internal documents, only disclosed to the FEC in June 2015, clearly stating that CHGO was created for the explicit political purpose of running express advocacy advertisements in targeted races, AR 325–62; (2) CHGO's advertisements, the full extent of which was not revealed until 2015, AR 1473–75; and (3) the testimony of CHGO's agents in late 2014 and 2015, who described no activity other than the creation and dissemination of campaign advertisements. AR 276, 654, 1234–35, 1309. CHGO also falsely denied Scott Reed's involvement in the organization, AR 119—his involvement first gave rise to the FEC's suspicion that CHGO was organized for political purposes—and Reed's true role in the organization did not become clear until Mihalke finally acknowledged in September 2015 Reed's control of CHGO. AR 1312. Such false representations are affirmative acts of concealment sufficient to toll the statute of limitations. *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998) (holding "affirmatively misleading statements" toll the statute of limitations); *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).

Further, CHGO, through its agents, destroyed or failed to preserve documents directly relevant to its violations of the FECA, AR 261, despite repeated notices from the FEC that CHGO had a duty to preserve those documents, AR 8, 42, 162, 199.[18] Consequently, the FEC

[18] Indeed, Canfield admitted that he failed to collect documents related to CHGO that were sent to his mail room from Warring after Warring completed his work on the Form 990 tax returns. As the Form 990s were not filed until

was unable to obtain relevant records until its investigation revealed the existence of a previously undisclosed sub-vendor who was able to provide records of CHGO's political activities. AR 1178–208. Those records were not made available to the FEC until August 2015. *Id.* The destruction of or failure to retain evidence is an affirmative act of concealment that tolls the statute of limitations. *New York v. Hendrickson, Inc.*, 840 F.2d 1065, 1084–85 (2d Cir. 1988) (holding removal of documents and destruction of documents were affirmative acts of concealment under the fraudulent concealment doctrine); *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *3 (holding destruction of documents is affirmative act of concealment).

In addition, CHGO failed to file the required independent expenditure and electioneering communication reports, reports CHGO had a duty to file and that would have provided clear records of CHGO's political activities. *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (finding defendants' failure to file statutorily required reports tolled statute of limitations). CHGO also attempted to "terminate[]" itself "most quickly" simply to obstruct the FEC investigation. AR 609. These acts are more than sufficient to demonstrate that CHGO fraudulently concealed the wrongs from the FEC and, despite the FEC's ongoing and active investigation, prohibited the FEC from discovering the basis for the alleged improprieties.

Finally, the statute of limitations is tolled by CHGO's continuing violations of the FECA. *Earle v. D.C.*, 707 F.3d 299, 307 (D.C. Cir. 2012). A continuing violation exists when "the text of the pertinent law imposes a continuing obligation to act or refrain from acting." *Id.* Where such an obligation exists, "a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does." *Id.* A "nondisclosure violation is continuing one." *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980);

November 14, 2011, and May 2, 2012, respectively, AR 1559–73, 1575–91, Canfield would have received the documents from Warring no earlier than those dates, well after he received notice of his duty to preserve documents.

*see also CityFed Fin. Corp. v. Office of Thrift Supervision*, 919 F. Supp. 1, 6 (D.D.C. 1994). To date, CHGO has never publicly disclosed the information required by the FECA, and continues to violate the FEC by failing to file timely political committee reports.[19] Accordingly, its violations are continuing, and the statute of limitations is tolled.

In sum, the controlling commissioners' conclusion that the statute of limitations barred the FEC from seeking relief, despite the availability of equitable relief, CHGO's fraudulent concealment tolling the statute, and the continuing nature of CHGO's violations, rests on an impermissible interpretation of 28 U.S.C. § 2462. The dismissal of Plaintiffs' complaint on the grounds that the statute of limitations had run, therefore, is contrary to law and warrants reversal.

***2. Remedy of CHGO's Violations Is Not "Futile"***

In addition to the running of the statute of limitations, the controlling commissioners concluded that pursuing an action against CHGO would be "futile." AR 1519. In support of that conclusion, they said "[t]he organization no longer existed, . . . [i]t had no money," and "[t]here were no people acting on its behalf" and no "agents of CHGO with whom the Commission could conciliate." *Id.* The controlling commissioners' conclusion, however, is unsupported by the record and relies on impermissible interpretations of law. Indeed, none of the conclusions reached by the controlling commissioners, even if correct, render enforcement futile.

First, the controlling commissioners' conclusion that CHGO "no longer existed" simply contravenes the FECA's prohibition on political committees terminating prior to filing a "written statement" with the FEC stating it "will no longer receive any contributions or make any disbursements and that such committee has no outstanding debts or obligations." 52 U.S.C. § 30103(d). The controlling commissioners neither cited that provision of the FECA nor

[19] CHGO's obligation to file political committee reports would only cease if it files the required termination papers with the FEC, 52 U.S.C. § 30103(d), which it has not done, or the FEC terminates it, 11 C.F.R. § 102.4.

discussed how CHGO, which indisputably met the definition of a political committee, could have terminated without following the provisions of section 30103(d). That failure renders the controlling commissioners' decision arbitrary and capricious. *Motor Vehicle Mfr's Ass'n*, 463 U.S. at 43 (holding arbitrary and capricious for agency to "entirely fail[] to consider an important aspect of the problem"); *Seigel v. SEC*, 592 F.3d 147, 111 (D.C. Cir. 2010) (holding decision not "adequately explained" is arbitrary and capricious); *Quantum Entm't, Ltd. v. U.S. Dep't of Interior*, 597 F. Supp. 2d 146, 153 (D.D.C. 2009) (agency's "incomplete" consideration of a statute rendered decision arbitrary and capricious).

Moreover, the FEC has previously pursued remedies against dissolved corporations. In MUR 6413, the FEC reached a conciliation agreement with Taxpayer Network, a section 501(c)(4) organization that dissolved before the conciliation agreement was reached. Conciliation Agreement ¶ 1, MUR 6413 (Taxpayer Network) (May 16, 2014), Ex. 16. The controlling commissioners neither cited nor distinguished MUR 6413, rendering their decision arbitrary and capricious. *Motor Vehicle Mfr's Ass'n*, 463 U.S. at 42 ("[A]n agency changing its course . . . is obliged to supply a reasoned analysis for the change."); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008) (holding an agency may not "depart from a prior policy *sub silentio*" and "must show that there are good reasons for the new policy").

Second, the controlling commissioners' conclusion that CHGO "had no money" rested solely on CHGO's 2011 Form 990. AR 1587. Putting aside the general lack of credibility in CHGO's representations, the controlling commissioners' conclusion that it accurately reflected CHGO's available assets was arbitrary and capricious. At 'termination' CHGO possessed $1.1 million in unspent funds, held by Meridian. AR 1311–12. The mere fact that these funds were fraudulently transferred to Mihalke, Reed, and Berman does not change the fact that the FEC

may seize them. 28 U.S.C. § 3304(b)(1)(A) (government may reclaim funds transferred with intent to hinder enforcement); *see also* AR 609.[20] Additionally, the $1.1 million was distributed at the request of Reed, an individual who had no reported authority over CHGO and thus could not have lawfully transferred CHGO's interest in the money. Accordingly, the FEC could seek to disgorge the $1.1 million to satisfy any civil penalty. The controlling commissioners, however, failed to discuss any of these facts in concluding that CHGO had "no money," and thus their decision on that point is arbitrary and capricious.

Moreover, even if CHGO lacked money to pay a civil fine, that fact would not bar FEC enforcement. As noted above, the FEC has the power to seek remedies beyond the imposition of civil fines, including an injunction ordering CHGO or its agents to disclose its contributors. The viability of equitable relief is not dependent on CHGO's assets. Indeed, the FEC has imposed just such equitable relief in a situation in which the respondent had limited resources to pay a fine. Conciliation Agreement ¶ VI.1, 3, MUR 6413 (Taxpayer Network) Ex. 16 (ordering group with "limited funds" to file missing electioneering communications). The controlling commissioners never addressed why it would be impossible to seek similar relief against CHGO.

With regard to the controlling commissioners' conclusion that CHGO has "no people acting on its behalf" and that there are no "agents of CHGO with whom the Commission could conciliate," that conclusion is both arbitrary and capricious and irrelevant. First, the conclusion is belied by the FEC's ability to locate five individuals who control CHGO or act on its behalf: Canfield, Powell, Warring, Reed, and Mihalke. Warring has in his possession, and produced to

[20] Even if not transferred with such intent, the transfer constituted a constructive fraud because CHGO received no reasonably equivalent value from Mihalke, Reed, or Berman. 28 U.S.C. § 3304(b)(1)(B). Mihalke and Reed provided no fundraising services to warrant the fundraising commission their share of the $1.1 million purportedly covered. AR 654, 1308. While Berman provided some fundraising services, AR 427, he testified that his services were "voluntary" and "informal," AR 1302, not warranting a six-figure commission. Further, CHGO represented on its tax filings that it incurred no fundraising expenses at any time. AR 1559, 1575.

the FEC, documents that could be used to satisfy CHGO's reporting obligations under the FECA. AR 381–652. Canfield may have similar records. AR 372.

Further, even if none of these individuals are currently agents of CHGO, CHGO's treasurer may be held personally responsible. Warring, as treasurer for CHGO, was responsible under the FECA for filing accurate and complete disclosure reports with the FEC. 52 U.S.C. §§ 30102(c), (d), 30104(a)(1); *see also 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); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 3 (Jan. 3, 2005). The controlling commissioners provide no explanation why Warring could not be named as a respondent and ordered to file the reports as a remedy for his failure to ensure reports were properly filed with the FEC.

Moreover, the controlling commissioners impermissibly interpreted the FECA to preclude enforcement in the absence of a conciliation agreement. AR 1519. FEC enforcement, however, is not limited to conciliation agreements. Rather, in situations where the FEC is "unable to correct or prevent any violation" of the FECA by means of a conciliation agreement, then the FEC may "institute a civil action for relief." 52 U.S.C. § 30109(a)(6)(A).[21] If there are truly no agents with whom the FEC may negotiate a conciliation agreement, that merely shows that the FEC is "unable" to correct CHGO's violations by means of such agreement and provides grounds for the FEC to file a civil action. It does not justify dismissal.

Even if there were no individuals who could be named in that lawsuit and legally bind CHGO, as the controlling commissioners incorrectly surmised, that would still not render

[21] The controlling commissioners' surreptitious interpretation of 52 U.S.C. § 30109(a)(6)(A) does not warrant *Chevron* deference as it does not bear the force of law, *Mead*, 533 U.S. at 221–23, 232–34, and is unexplained, *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012) (denying deference to "uncited, conclusory assertions").

enforcement of the FECA futile. After all, the FEC currently possesses records, as a result of its investigation, which include the information CHGO was required to disclose, like the identity of CHGO's contributors. *See, e.g.*, AR 403, 410, 411–12, 422, 426, 427, 466–68, 486. If the FEC determines that CHGO is a political committee, it could release that information as part of its duty to "make the fullest possible disclosure of records to the public." 11 C.F.R. § 5.2. In that way, the FEC could remedy the violation of the FECA without any affirmative support from any individual associated with CHGO.[22] If need be, the FEC could also seek judicial approval to make those documents public by means of a default judgment.

Simply put, the controlling commissioners failed to provide a valid reason to conclude that proceeding against CHGO would be "futile." Accordingly, the dismissal on the basis of those conclusions was contrary to law and warrants reversal.

***3. There Is No Justification for Dismissal on the Merits***

Although the controlling commissioners relied on the purported running of the statute of limitations and futility of enforcement, their limited discussion of the substance of the allegations also would not justify dismissal.

Notably, the controlling commissioners did not even attempt a justification on the merits for their failure to find reason to believe CHGO violated the FECA's reporting and disclaimer rules. AR 1516 (referring to "obvious" violations); *see also* AR 242 (finding reason to believe reporting violations occurred).

Rather, the sole allegation for which the controlling commissioners mentioned any potential uncertainty related to CHGO's role as a political committee. AR 1518. By the time of

[22] The release of that information, even if not contained in a proper filing with the FEC, would do much to remedy Plaintiffs' and the public's injuries. *CREW v. FEC*, 475 F.3d 337, 339–40 (D.C. Cir. 2007) (holding publication by FEC of materials gathered in its investigation of plaintiff's complaint, and which FEC made public without court order to do so, provided citizens with "the details of the transaction" and satisfied plaintiffs' informational injury).

the third OGC Report, however, it was "obvious" that CHGO devoted more than 50% of its expenditures over its life to express advocacy communications, AR 1485–86,[23] the very metric the controlling commissioners have stated satisfies *Buckley*'s "major purpose test" to qualify a group as a political committee under the FECA, *see, e.g.*, AR 1518 (stating metric was whether "CHGO had made sufficient expenditures to qualify as a political committee"); AR 1527 (stating the amount of a group's "express advocacy" over its "entire existence is the truest measure of an organization's major purpose").[24] Moreover, not only was it obvious that CHGO operated with the major purpose of nominating or electing federal candidates, internal documents made it obvious that CHGO was organized for that very purpose as well. Documents hidden from the FEC revealed that CHGO's true organizational goal was to "win Senate seats" by means of "direct, express advocacy for [the] election or defeat of candidates." AR 335, 337. Nonetheless, the controlling commissioners never discussed these documents.

How "obvious" the violations were, however, is not the standard the controlling commissioners were called on to apply. The FECA requires only that the controlling commissioners determine whether there is "reason to believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). That is a "very low" standard that only asks whether a complaint "credibly *alleges* that a significant violation *may* have occurred." 72 Fed. Reg. at 12545; AR 1541. The controlling commissioners impermissibly interpreted the FECA, however, to impose

[23] In an attempt to evade this conclusion, the controlling commissioners argue that the OGC's recommendation "raised novel legal issues that the Commission had no briefing or time to decide." AR 1519. The question they identify was how to treat "vendor commissions and other general payments to officers or directors or vendors." *Id.* n.16. The OGC analysis, however, took this into account and calculated that even if the unusual vendor commissions are counted towards CHGO's total expenditures but not its political expenditures, 56% of CHGO's expenditures over its life went to express advocacy. AR 1486. Accordingly, these "novel" questions still would not justify a failure to find reason to believe CHGO was a political committee.

[24] This standard is based on an impermissibly narrow interpretation of the "major purpose" test imposed by *Buckley*, 424 U.S. at 79. That standard is currently the subject of litigation. *See CREW v. FEC*, No. 14-cv-1419 (CRC) (D.D.C. Aug. 20, 2014); *Public Citizen v. FEC*, No. 14-148 (RJL) (D.D.C. Jan. 31, 2014). Nonetheless, as CHGO met even this erroneously constrained test, the proper scope of the "major purpose" test need not be decided here.

a much higher standard, one that demanded that it be "obvious" or "clear" from the "spending breakdown available to the Commission that CHGO had made sufficient expenditures to qualify as a political committee." AR 1516, 1518. The reason to believe standard does not require that a violation be "clear" or "obvious": imposing such an absurdly high burden before the FEC even formally investigates a claim would render (and has rendered) the FEC impotent.

Accordingly, the proposed explanation of the controlling commissioners' failure to find reason to believe CHGO violated the FECA's political committee provisions does not justify that failure. To the extent the dismissal was based on that explanation, it was contrary to law.

## CONCLUSION

The conduct of CHGO presents an egregious case of the evasion of justice. CHGO was created with the explicit purpose of spending millions of dollars on campaign ads while evading any legally required disclosure, and it did so by defrauding the IRS, the FEC, and the American people as to its intentions. When its overtly political activities earned the attention of Plaintiffs and the FEC, CHGO officers and others provided false or misleading testimony to FEC investigators, destroyed or failed to retain documents in violation of their legal duties of which they had express notice, and then tried to "shut it down" "most quickly" while three individuals who had no legal authority over CHGO absconded with any leftover funds, likely with the intent to obstruct FEC enforcement. Despite these deplorable actions, conduct that had a direct effect and likely intent to undermine and delay the OGC investigation, the controlling commissioners decided to give the scofflaws a free pass. The controlling commissioners, however, provide no justifiable basis to dismiss the complaint against CHGO. Their dismissal was contrary to law, in violation of the FECA, and warrants reversal by this Court to ensure that CHGO does not become a template for future organizations to evade the law.

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Respectfully submitted,

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