IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21, Plaintiffs,	
v.	Civil Action No: 1:16-cv-00752-JDB
FEDERAL ELECTION COMMISSION, Defendant,	
F8, ELI PUBLISHING, and STEVEN J. LUND, Intervenors-Defendants.	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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BCRA	Bipartisan Campaign Reform Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
KPD	Kingston Pike Development, LLC (MUR 6711)
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
ROF	Restore Our Future
SIG	Specialty Investments Group, Inc. (MUR 6711)
SOR	Statement of Reasons

INTRODUCTION

It is rare to see the dismissal of an enforcement action in which no party—not the complainants who filed the administrative complaints, nor the respondents accused of wrongdoing, nor even the agency that dismissed the complaints—disagrees that violations of law likely occurred. But this case challenges three such dismissals.

In the three administrative complaints before this court, Matters Under Review ("MURs") 6487 (F8 LLC *et al.*), 6488 (Eli Publishing L.C. *et al.*), and 6711 (Specialty Investments Group, Inc. ("SIG") *et al.*), respondents are charged with devising and executing schemes to launder millions of dollars of contributions through LLCs and other corporate entities in order to conceal the original sources of these funds, in violation of the "straw donor" prohibition at 52 U.S.C. § 30122. Respondents did not deny the charges against them. Nor did they claim any confusion about the applicability of section 30122 of the Federal Election Campaign Act ("FECA") to corporate straw donors like those involved in the alleged schemes.

The three controlling Commissioners of the Federal Election Commission ("FEC") who voted against investigation, and whose Statement of Reasons ("SOR") provides the basis for the agency's action on review, likewise did not dispute that there was "reason to believe" that section 30122 violations may have occurred. Instead, they claimed that their decision to dismiss had been motivated by concern that respondents lacked adequate notice that their alleged conduct would violate the straw donor prohibition, speculating that respondents may have be "confus[ed] in light of recent legal developments," namely *Citizens United v. FEC*, 558 U.S. 310 (2010).

This justification does not meet even the bare test of credibility, much less the standards of reasoned decisionmaking required under *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). The theory of insufficient notice suffers from at least four fatal defects:

1. The governing statute is clear: section 30122 prohibits the use of straw donors, whether in the form of "an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11) (emphasis added). The controlling Commissioners explicitly admit that the statute proscribes corporate straw donors. AR81-82, AR86. They consequently must make the extraordinary and unsustainable argument that the corporate respondents lacked sufficient notice of the application of a law that all concede is clear and unambiguous. It is difficult to imagine a stance that would better exemplify an agency action that is "contrary to law."

2. *Citizens United* struck down the ban on corporate independent expenditures in federal elections, transforming campaign finance law and opening channels for corporate political giving that had been closed for decades. *See, e.g.*, 52 U.S.C. § 30118, formerly 2 U.S.C. § 441b. What the decision did *not* do, however, is address section 30122, much less alter its application to corporations. Grounding a theory of insufficient notice on a ruling that in no way impacted the operative statute is not only unreasonable, but irrational.

3. In terms of the FEC's guidance on the attribution of contributions to their true sources, there is nothing unique about corporations that would complicate the application of section 30122. The FEC cites a number of agency regulations and enforcement decisions, AR83-85, which it claims may have "misled" respondents because corporate contributions were attributed to the corporate entity, not the corporation's shareholders, even in the case of closely held LLCs. But—absent evidence of a straw donor scheme—the FEC's default attribution rules will always start from the presumption that a contribution comes from its immediate donor. FEC guidance thus does not explain why corporate respondents, but no other "individual, partnership,

committee, association, . . . [or] other organization or group" regulated by section 30122, should be excused from the straw donor prohibition for lack of understanding of the law.

4. Finally, the theory of insufficient notice is belied by the facts in the record. Although all respondents were represented by counsel in the administrative proceedings on the complaints before the FEC, *none* claimed in their responses to plaintiffs' complaints that they lacked notice or were in any way confused as to the law's scope. Nor was the control group's notice-based justification otherwise grounded in the administrative record—and even if it were, the question before the Court "'is not whether record evidence supports [plaintiffs'] version of events, but whether it supports *the FEC's*." *Hagelin v. FEC*, 411 F.3d 237, 244 (D.C. Cir. 2005) (emphasis added) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)). In this case, it plainly does not. The controlling Commissioners thus went one step beyond arguing that ignorance is an excuse: they attempted to manufacture ignorance about the parameters of the straw donor prohibition where there was none claimed.

The FEC devotes only a fraction of its summary judgment memorandum to attempting to overcome these defects or to defend the decision on the merits. FEC Mem. at 16-31. Instead, it makes a sweeping claim of almost unbounded prosecutorial discretion, leaping from the observation that "no principle of law requires a federal agency to pursue every enforcement matter" (FEC Mem. at 2), to the radical position that the FEC enjoys near absolute discretion to ignore alleged statutory violations—whatever its reasons and notwithstanding the parallel enforcement authority that FECA provides for private complainants. In other words, the FEC cannot justify the refusal to find "reason to believe" here, so it asserts that the Commission is never obligated to pursue an investigation even if there *is* reason to believe.

This invocation of prosecutorial discretion is both unfounded and extreme. Deferring to an agency's discretion may be appropriate where the decision "involves a complicated balancing of factors . . . including whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources to undertake the action at all." *La Botz v. FEC*, 61 F. Supp. 3d 21, 33-34 (D.D.C. 2014). But the FEC undertook no such analysis here, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Instead, the dismissals were based on a theory of inadequate notice founded on "principles of due process, fair notice, and First Amendment clarity." AR77. These are not even legal questions falling within the area of the Commission's statutory authority, much less in the terrain that is legitimately grounds for the exercise of prosecutorial discretion. The Commission is attempting to cloak its interpretations of law and constitutional theories in the language of prosecutorial discretion, and to shield what it cannot defend on the merits from meaningful judicial review.

This Court should reject the FEC's effort to insulate from review the controlling Commissioners' decision to condone a series of "crystal clear" schemes to launder money, AR95, for the purpose of evading federal disclosure law, and declare that the dismissals of plaintiffs' administrative complaints were contrary to law, arbitrary and capricious, and an abuse of discretion.

ARGUMENT

I. FECA Does Not Give the FEC Unqualified and Unreviewable Discretion over the Private Complaint Process.

A. "Prosecutorial discretion" does not insulate the FEC's dismissals from judicial review.

The FEC cannot invoke "prosecutorial discretion" to evade judicial review. The FEC contends that the Court must defer to its decision to dismiss plaintiffs' complaints without an

investigation, against the recommendation of its Office of General Counsel (OGC) and the three dissenting Commissioners, because it says it is afforded near complete discretion in making enforcement decisions, subject only to the most cursory rational basis review. FEC Mem. at 18-19. But none of the factors supporting deference to an agency's prosecutorial discretion are present here. And even if its prosecutorial discretion were properly invoked, the FEC's sweeping articulation of its discretion is inconsistent with the statutory text of FECA and the governing case law.

Courts afford agencies prosecutorial discretion about enforcement decisions where those decisions "involve[] a complicated balancing of factors . . . including whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources to undertake the action at all." *La Botz*, 61 F. Supp. at 33-34; *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) ("*CREW II*") ("[I]n cases where an agency *bases its decision on how to best allocate its resources* . . . the Court will not meddle with that decision unless the plaintiff shows that the FEC acted contrary to law by abusing its discretion." (emphasis added)). But if the reasons for the control group's dismissals do not relate to agency resources or predictions of litigation success, then it cannot defeat judicial review merely by invoking the phrase "prosecutorial discretion."

In this case, the FEC did not engage in an exercise of prosecutorial discretion—at least not the kind to which this Court owes deference. The controlling Commissioners did not cite agency resources or likelihood of success as the rationale for invoking the specter of "prosecutorial discretion." AR76-77. Instead, their sole basis for refusing to investigate was their supposition that respondents may be "confus[ed] in light of recent legal developments," namely *Citizens United*, as well as past FEC authority, and therefore "principles of due process, fair notice, and First

Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm." AR76. This is a pure interpretation of law. Their SOR does not reflect a "complicated balancing of factors which are appropriately within [the FEC's] expertise." *La Botz*, 61 F. Supp. 3d at 33. Rather, their rationale in this case falls squarely within *the Court's* expertise: interpreting judicial decisions and constitutional rights. *De novo* review would therefore hardly put this Court at risk of "run[ning] the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

It is well established that agencies are due no deference for their views of judicial decisions or the Constitution. "In case after case, courts have affirmed this fairly intuitive principle, that courts need not, and *should not*, defer to agency interpretations of opinions written by courts." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) ("*CREW I*") (emphasis added).[1] That is especially so where, as here, the court decision "is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). "[I]n contrast with other aspects of [an agency] decision, which we review deferentially . . . a reviewing court owes no

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[1] The FEC cites *CREW I* as support for the expansive and all but unreviewable discretion it claims for its enforcement decisions (*see* FEC Mem. at 21, 22 n.7), but that reliance is misplaced. In *CREW I*, Judge Cooper expressly found that the FEC's interpretations of Supreme Court case law are not due deference, 209 F. Supp. at 87 ("[T]he Court will not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment and the related contours of *Buckley*'s major purpose test."), and further held that FECA's express judicial review provision effectively rebutted the claim that the FEC's dismissal decisions are "presumptively unreviewable," *id.* at 88 n.7 (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). Although certain "implementation" decisions *applying* the case law to concrete factual scenarios were within the agency's "sphere of competence," *id.* at 88 (deferring to FEC only as to calculation of group's overall campaign spending in implementing the "major purpose" test), there was no such application in this case. The dismissals at issue here are not akin to the determinations in *CREW I* about what timeframes and spending amounts are relevant to the application of *Buckley*'s major purpose test.

deference to the agency's pronouncement on a constitutional question." *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) (internal quotation marks omitted). As the D.C. Circuit explained in *J.J. Cassone*, such questions are reviewed by the court "*de novo*," *id.*, and thus this Court's review of whether the FEC's dismissals were "contrary to law," *Orloski*, 795 F.2d at 161, must be made independently.

In its opposition brief, the FEC seeks to avoid this "intuitive principle" by creating a *post hoc* litigation explanation for the controlling Commissioners' decision—that their invocation of constitutional principles was actually an "assessment of the likelihood of success" in light of *Citizens United*. FEC Mem. at 20. But the Court will search in vain for this explanation in the controlling Commissioners' statement. They did not express concern that finding reason to believe respondents violated section 30122 would be difficult to defend in court because the administrative complaints raised issues of first impression; they simply explained that enforcing the plain statutory text was unfair because this precise fact pattern had not previously arisen. AR76-77. They did not assess the likelihood of success and the Court cannot credit a *post hoc* litigation position that does not reflect the actual basis for the agency decision. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.").

Moreover, even if this Court owed some deference to the Commission's prosecutorial decisions, the level of deference is not nearly as extreme as the FEC claims. FECA expressly sets forth a role for private complainants to enforce the law, and authorizes those complainants to seek judicial review in the event the Commission dismisses their complaint. 52 U.S.C. § 30109(a)(8). A sweeping level of deference to prosecutorial decisions of the FEC would be incompatible with a statutory scheme that grants private complainants a critical role in enforcing FECA's provisions.

The FEC also cites the Commission's 3-3 partisan split of the Commissioners as further reason for affording its enforcement decisions substantial deference. FEC Mem. at 21-22. This, the Commission asserts, ensures the agency will "take action with care and without the appearance of partisan politics." *Id.* at 21. As recent history with the FEC, and this case in particular, demonstrates, however, Congress was prudent to authorize private enforcement actions and judicial review. The most acute problem is not the Commission *acting* for partisan reasons, but rather *refusing to act* for partisan reasons. The overwhelming deference sought by the Commission is incompatible with the congressional design, and would hinder the mechanism Congress put in place to ensure FECA would be enforced not only on a nonpartisan basis, but also in a manner that effectuates the public interests in the law. *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007) (noting propriety of judicial intervention where agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" (internal quotation marks omitted)).

B. *Chevron* Deference Does Not Apply Because the Controlling Commissioners Did Not Interpret FECA.

As the FEC acknowledges, deference under *Chevron U.S.A.. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is "beside the point" here, FEC Mem. at 20, because the controlling Commissioners did not base their decision to dismiss on the text of FECA at all, let alone any interpretation of it. They did not indicate that the statute prohibiting contributing in the name of another, 52 U.S.C. § 30122, was ambiguous, nor did they purport to interpret any of the words of the statute, *see* AR86-88.

The controlling Commissioners did announce a "purpose based" standard for the application of section 30122 in future cases, AR86-88, but did not base the standard on an interpretation of FECA. Rather, they added an additional scienter requirement to the statute based

exclusively on constitutional avoidance concerns and not the actual statutory text, *see id.* at 13 n.69. *See also* Section II.B.4, *infra*. Whether constitutional avoidance concerns require that scienter requirement is not a determination to which *Chevron* deference would apply, because the Court, and not the FEC, has the primary obligation to interpret the Constitution and judicial precedents. *See Univ. of Great Falls*, 278 F.3d at 1341 ("There is . . . no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where . . . the Supreme Court precedent, and subsequent interpretation, is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence. In short, *Chevron* deference is not required." (internal quotation marks and citations omitted)). *Chevron* deference plays no role in this case.

Even if the control group's "purpose" standard were based on an interpretation of FECA, however, *Chevron* deference is not appropriate where, as here, no position garners the four votes necessary to have the force of law.

To the extent prior district court and Circuit precedent might have suggested non-majority decisions were due *Chevron* deference, *see* FEC Mem. at 20-21, those cases have been abrogated by subsequent Supreme Court and Circuit precedent, *see* Pls.' Mem. at 23-24. The FEC's attempt to distinguish *Fogo de Chao (Holdings), Inc. v. U.S. Dep't of Homeland Security*, 769 F.3d 1127, 1137 (D.C. Cir. 2014), is misplaced, *see* FEC Mem. at 21 n.6.[2] The FEC contends that *Fogo de Chao* is inapplicable because the court cited the non-formality of the process at issue in that case. But that was just one factor, and indeed not the most important. As the D.C. Circuit explained, the most important factor was that the decision was non-precedential: "the expressly non-precedential

[2] Notably, the Commission does not even attempt to distinguish *United States v. Mead Corp.*, 533 U.S. 218 (2001).

nature of the . . . decision *conclusively confirms* that the Department was not exercising . . . any authority it had to make rules carrying the force of law." *Fogo de Chao*, 769 F.3d at 1137.

The FEC does not contend that a legal standard advocated by three Commissioners declining an enforcement action has the force of law, nor could they. Indeed, if the FEC attempted to adopt a rule incorporating the controlling Commissioners' "purpose" standard, they would fail along the same 3-3 split. In these deadlocked enforcement proceedings, the "purpose" standard is the controlling one; in a deadlocked rulemaking on the same issue, the "purpose" standard would be rejected. That scenario illustrates the illogic of applying *Chevron* deference to a non-majority position: to do so would obligate the Court to defer to entirely *opposite* agency interpretations simply based on whether they were advanced in affirmative rulemaking or as a "no vote" in an enforcement action.

Moreover, although these proceedings might have been "relatively formal adjudications," FEC Mem. at 21 n.6, they were not formal in the sense identified in *Fogo de Chao*. There were no hearings, no opportunity for notice and comment, and no ability for the parties (or the public) to brief or comment upon the newly announced, three-Commissioner legal standard. The fact that there was a formal complaint filed, and a formal response, does not mean the non-majority legal standard has the force of law or bears the hallmarks of a formal rulemaking process.

Because the controlling Commissioners did not interpret FECA and did not rely upon any factors that require deference to prosecutorial discretion, but rather exclusively on their own views of constitutional law and Supreme Court precedent, this Court's review is *de novo*.

II. The Dismissals of Plaintiffs' Complaints Were Arbitrary, Capricious, and Contrary to Law.

The Commission wholly failed to provide a reasoned justification—or even a rational basis—for its failure to investigate potential violations of two key federal disclosure measures: the

straw donor prohibition at 52 U.S.C. § 30122 and the political committee disclosure requirements at 52 U.S.C. §§ 30102, 30103, and 30104. This lapse enabled groups to spend more than *$15 million* to influence the 2012 presidential election without disclosing the true sources of those funds, and will likely have repercussions in future elections as well. The three Commissioners who voted to dismiss the complaints did so "in an exercise of the Commission's prosecutorial discretion" because they believed the respondents did not have adequate notice that corporate straw donors were prohibited. AR77. But the controlling Commissioners' notice-based rationale is irreconcilable with FECA's clear and unambiguous statutory text, arbitrarily ignores record evidence demonstrating that respondents fully understood the law, and finds no support from any past agency decisions or statement that would condone the use of corporate straw donors.

A. The FEC's refusal to find reason to believe that violations of FECA had occurred was contrary to law.

1. The controlling Commissioners' rationale for their failure to investigate cannot be squared with the clear language of section 30122.

No party to this action disputes that the language of section 30122 is clear and unambiguous. No party disputes that section 30122, by regulating "persons," applies to "an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11) (emphasis added). Indeed, the controlling Commissioners acknowledge that "closely held corporations and corporate LLCs may be considered straw donors in violation of section 30122," AR82, 86, and that the straw donor prohibition specifically covers "partnerships, corporations and other organizations." AR81.

The controlling Commissioners thus face the impossible task of justifying their dismissals by arguing that a clear statute fails to provide the regulated community with sufficient notice of the prohibited conduct. The argument is legally unsustainable. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense

applies whether the law be a statute or a duly promulgated and published regulation."); *cf. General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("[W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations."). This should be the end of their case.

In an attempt to manufacture some uncertainty with respect to application of section 30122, defendants repeatedly invoke *Citizens United*. Intervenors declare, for instance, that "it was reasonable for the controlling Commissioners to conclude that *Citizens United* had changed the legal landscape." Intervenor-Defendants' Mem. Supp. Summ. J. (ECF No. 32) at 15 ("F8 Mem."). Plaintiffs do not dispute that *Citizens United* worked a sea change in the legal landscape: just not in any way that is directly bears on this case. Defendants' numerous appeals to *Citizens United* are a diversion. To be sure, the ruling authorized corporations to make certain independent expenditures for the first time in decades, but the ruling in no way altered the straw donor prohibition. Section 30122 explicitly barred the use of corporate straw donors both before and after *Citizens United*; respondents here had exactly the same notice of this prohibition both before and after this decision.

The FEC nevertheless claims that the controlling Commissioners' concerns about notice were reasonable because *Citizens United*, and the changes it wrought, underscores that Congress did not contemplate application of section 30122 to corporations and therefore did not "intend the straw donor prohibition to encompass situation where a corporate entity was the purported straw donor." FEC Mem. at 25. But it is black-letter law that "the best evidence of Congress's intent is the statutory text." *NFIB v. Sebelius*, 567 U.S. 519, 544 (2012). And FECA on its face prohibits straw donors in the form of an "individual, partnership, committee, association, *corporation*, labor organization, or any other organization." 52 U.S.C. § 30101(11) (emphasis added). Even if the

statute were not crystal clear, the FEC's claims as to congressional intent are pure supposition. It cites not a lick of legislative history for its radical claim that Congress did not intend to regulate corporate straw donors and its conclusion is self-serving in the extreme. As plaintiffs pointed out in their opening summary judgment brief, Congress in the last decades was hardly unaware of corporate political giving, having observed, for instance, the millions of dollars of "soft money" donated by corporations to federal party committees in the 1990s.[3]

Finally, the FEC cannot even remain consistent in its views of congressional intent, as in the same breath it concedes that Congress likely would *not* "have wished to exempt corporations from the prohibition on straw donors." FEC Mem. at 26. It appears the Commission is trying to have it both ways. But the FEC cannot assert that congressional intent is so unclear as to provide respondents with insufficient notice of section 30122's scope and simultaneously concede that Congress could not have meant to exempt entities that the straw donor prohibition clearly covered. In the words of the dissenting Commissioners, the FEC is "tying itself up in knots," AR95, in its attempts to justify the control group's decision to defy the plain language of FECA.

[3] The FEC tries to erase the entire "soft money" experience by nitpicking whether the massive corporate donations going to federal party committees in that era were technically "'contributions' under FECA." FEC Mem. at 25. First, whether the FEC classified corporate party soft money donations as "contributions" is irrelevant to the overarching point—which is that Congress certainly was aware of at least one example of large-scale corporate giving in connection to federal elections, and specifically enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA") to shut down this abuse. *McConnell v. FEC*, 540 U.S. 93, 122-23 (2003). And money contributed directly to federal party committees was always a "contribution" under the statute; the fact that the FEC, purely through its own administrative guidance, attempted to exempt from "contributions" certain types of soft-money giving is immaterial. *Id*. at 123-24 & 24 n.7 (noting that "literal reading" of FECA would have required "hard money" limits on all donations to parties but tracing FEC's development of soft-money loophole). Congress clearly disagreed with the FEC's perspective on regulable contributions and it has the last word.

2. The controlling Commissioners entirely failed to address whether the disclosure requirements for political committees applied to respondents.

Plaintiffs claimed, in conjunction with, and as an alternative to, their straw donor allegations, that there was reason to believe the corporate respondents had met the two-pronged test for "political committee" status under FECA, because they (1) had a "major purpose" of influencing the "nomination or election of a candidate," as set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), and (2) had received "contributions" or made "expenditures" of $1,000 or more. AR4-7, AR204-07, AR306-09. Indeed, in the case of F8 LLC and SIG, both entities appeared to have campaign activity as their *sole* purpose in the relevant period.[4] Because respondent corporations appeared to have met the two-pronged test for political committee status, there is reason to believe their failure to register and file reports as committees violated 52 U.S.C. §§ 30102, 30103, and 30104.

No party contests that the statutory political committee disclosure requirements are clear and potentially apply to corporations that meet the requirements for "political committee" status. But the controlling Commissioners made no attempt to analyze whether respondents violated the political committee disclosure requirements; their silence on this question makes the SOR inadequate on its face. *State Farm*, 463 U.S. at 43 ("In reviewing the agency explanation, we must consider whether the decision was based on a consideration of the relevant factors . . . . [or]

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[4] SIG and its subsidiary, Kingston Pike Development LLC ("KPD"), for example, were formed shortly before making a series of contributions to FreedomWorks for America totaling $12 million, and were concededly "funded with private capital." AR393. But there is nothing in the administrative record, or anywhere else, that suggests either generated $12 million in revenue during the six days between the entities' formation and SIG's first contribution to FreedomWorks. AR394, AR398. Nor did respondents "identify the source of the 'private capital,'" explain "what, if anything, the sources of the capital received in exchange for their funds," or "state who—[Rose] or the source that provided SIG and KPD those funds—decided that the funds would be contributed to FreedomWorks." AR393.

entirely failed to consider an important aspect of the problem."). And although the FEC asserts otherwise, the control group never "determined" anything with respect to the alleged violations of FECA's political committee disclosure provisions. *See* FEC Mem. at 11 (citing AR80 n.36, the control group's single reference to these provisions—made in a footnote and without any analysis). "Stating that a factor was considered . . . is not a substitute for considering it." *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (citation omitted).

The FEC attempts to justify this failure by citing OGC for the proposition that "an entity can be a conduit or a political committee, but not both." FEC Mem. at 38 n.11 (citing OGC's recommendation in MURs 6487 and 6488 that the Commission find reason to believe that section 30122 had been violated, making analysis of the political committee requirements unnecessary *at that time*). But the FEC misunderstands the principle articulated by OGC. Plaintiffs agree that if a section 30122 conduit violation were found, it might be unnecessary to thereafter analyze whether the political committee requirements were violated as well: if respondent corporations were mere conduits, then under OGC's theory, they cannot be political committees. But the reverse is not true. Here no section 30122 violation was found, and thus it is incumbent upon the controlling Commissioners to analyze whether plaintiffs' alternative theory of violation merited initiating an investigation: if respondent corporations are *not* conduits, then they may indeed qualify as political committees. Because section 30122 was the threshold inquiry does not mean it was the only inquiry. OGC recognized as much in recommending only that the Commission "take no action at [that] time" to determine whether Eli Publishing, F8, SIG, and KPD failed to organize, register, and report as political committees, *see* AR46, AR404, "because the resolution of this allegation may depend on the disposition of the section [30122] allegation," AR4. The SOR addresses only

half of the legal allegations in plaintiffs' administrative complaints, and by any measure, it is therefore fatally incomplete.

Finally, intervenors attempt to sweep the alleged political committee violations under the rug by claiming that plaintiffs have waived these claims because, in their eyes, plaintiffs "make no real effort to advance the argument that the controlling Commissioners acted contrary to law by dismissing their administrative complaints with respect to this allegation." F8 Mem. at 30. This is absurd. Plaintiffs pled the political committees allegations in their administrative complaints, AR4-7, AR204-07, AR306-09, their complaint in this action, Compl. (ECF No. 1) ¶¶ 59, 62, 65, their opposition to the FEC's motion to dismiss, Opp'n to FEC Mot. to Dismiss (ECF No. 18) at 8-11, 14, and in their summary judgment memorandum, Mem. Supp. Summ. J. (ECF No. 30) at 5-6, 29. If plaintiffs did not dwell upon the control group's analysis of these allegations in their submissions that is because there was, quite literally, *no such* analysis. The inadequacy of the controlling SOR is plain on its face and plaintiffs need not repeat this fact *ad infinitum* to maintain these claims.

3. Investigation of the section 30122 violations alleged in the complaints is well within the FEC's statutory authority and consistent with the First Amendment and principles of due process.

In concluding that the administrative complaints should be dismissed because the respondents were not "on notice of the governing norm," AR77, the controlling Commissioners cited "principles of due process, fair notice, and First Amendment clarity" in support of their decision. The control group did not elaborate on these constitutional and legal considerations in the SOR, but defendants now suggest that even if the First Amendment did not outright bar investigation of the administrative complaints, the FEC was nonetheless entitled to refrain from "pursu[ing] every enforcement matter that could vindicate a disclosure interest." FEC Mem. at 23. But, if anything, political disclosure laws, like section 30122, *advance* important First Amendment values. Thus the dismissals of plaintiffs' complaints were contrary to both the well-recognized

disclosure objectives of FECA and the First Amendment interests this disclosure is meant to advance: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

In addition to constitutional considerations, defendants also question whether the Commission had the authority to pursue the violations alleged in the complaints. Intervenors assert that section 30122 does not prohibit "conduit" schemes like those alleged in MURs 6487, 6488, and 6711, but only the use of a false name when making a contribution. F8 Mem. at 19. But FEC regulations are clear that section 30122 proscribes attempts to hide the identity of the true donor through use of an intermediary and provides the following example of a prohibited contribution: "Giving money or anything of value, *all or part of which was provided to the contributor by another person* (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4(b)(2)(i) (emphasis added).

Intervenors' constricted view of section 30122 has been rejected time and time again by courts; it is telling that the only authorities that intervenors can muster are two judicial decision that flatly *reject* their theory. *Id*. at 19 n.7 (citing *United States v. O'Donnell*, 608 F.3d 546, 553-54 (9th Cir. 2010), and *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011)). Indeed, this is hardly a new argument: it has been invoked not infrequently by persons facing charges under section 30122, like intervenors here, in an attempt to circumscribe the reach of the straw donor prohibition to only the least sophisticated straw donor schemes, namely, the simple submission of false statements. But as the Seventh Circuit recently declared, "We disagree, and today we join the

Ninth Circuit in holding that § 441f unambiguously proscribes straw man, as well as false name, contributions." *Boender*, 649 F.3d at 660.[5]

The controlling Commissioners also claimed to lack the authority to pursue an investigation in any of these matters before "examin[ing] a sufficient number of factual scenarios to ensure a sound application of the Act." AR76. They claimed that the review of multiple fact patterns was necessary to the development of a "new" "governing interpretation" of section 30122—a "purpose-based" interpretation that the control group also confoundingly maintains has been the law all along, *see* AR99-100. Moreover, even though satisying a "purpose-driven standard" would necessarily obviate any notice concerns, the controlling Commissioners refused to consider whether the plaintiffs' administrative complaints adequately alleged violations of section 30122 under any standard, including their own. *See also infra* Section II.B.4.

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[5] In a further attempt to bolster their untenable construction of section 30122, intervenors also invoke provisions of FECA that permit indirect contributions to candidates through an intermediary, provided that all such contributions are attributed to the original source for the purpose of the contribution limits and that "the intermediary or conduit . . . *report[s] the original source* and the intended recipient of such contribution to the Commission." 52 U.S.C. § 30116(a)(8) (emphasis added). This scenario, of course, is the opposite of what is alleged in the administrative complaints. Respondents here are charged with making contributions through intermediaries *without reporting the "original source"* of such contributions and for the express purpose of avoiding any such public disclosure. The conduit provisions thus regulate wholly different conduct than does section 30122.

Nonetheless, intervenors claim that because the conduit provisions only regulate indirect contributions "in the context of contributions to or on behalf of candidates or their committees," and intervenors did not make any candidate contributions, "Congress has not enacted any rules that would govern [intervenors'] conduct here." F8 Mem. at 19. It is true that section 30116(a)(8) does not govern intervenors' straw donor scheme: their contributions were neither directed to candidates, nor compliant with FECA's contribution limits and disclosure requirements. But it does not follow that section 30122 does not prohibit this apparent fraud and it is mystifying how intervenors even arrive at this conclusion. It is tantamount to claiming that because irrelevant provisions of law do not apply to their conduct, then relevant provisions must also not apply.

The controlling Commissioners' statement lacks any analysis that would support their claim that investigating the specific allegations in plaintiffs' administrative complaints before the development of this new standard would be "manifestly unfair." However, they do contend that investigation is only appropriate if "the available evidence *establishes* the requisite purpose." AR76 (emphasis added). If the controlling Commissioners' refusal to apply their "new" standard to the conduct alleged here was at all based on their conclusions about the *sufficiency* of those allegations—as remarks impugning the allegations' evidentiary foundations in the SOR[6] would seem to suggest—that refusal was manifestly contrary to law and unreasonable. *Cf. Huerta v. Ducote*, 792 F.3d 144, 153 (D.C. Cir. 2015) (finding NLRB imposed "a heightened pleading standard that departed so severely from regulatory text and precedent, and was accompanied by only the most superficial [] analysis, that it [had to] be vacated as arbitrary and capricious"). The FEC ordinarily does not entertain such arguments at the preliminary "reason to believe" stage, in light of its clear obligation to investigate credible allegations that FECA may have been violated. *See, e.g.*, AR39-41; AR397 & n.13. Here, however, the control group appears to have embraced the respondents' theory that the FEC could not investigate plaintiffs' uncontroverted allegations because they were based, in part, on news reports. Ultimately, discerning the control group's reasoning is no easy task, because these Commissioners never actually do what they claim to be doing: "examin[ing]" the "factual scenarios" at hand to "provide clear public guidance." AR76.

B. The controlling commissioners' rationale for dismissing plaintiffs' complaints was arbitrary, capricious, and manifestly unreasonable.

The controlling Commissioners' theory of insufficient notice rests on two legal premises: (1) "the issue in these matters is one of first impression," and (2) respondents may have been

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[6] *See, e.g.*, AR79 n.28 (suggesting allegations were entirely based on "unsourced statements" and "news articles").

confused by "Commission precedent [that] treated funds from a corporation as the corporation's contribution." AR86. Neither premise bears the slightest scrutiny. And both ignore the glaring lack of any genuine notice concerns raised by the respondents themselves. The control group's legal reasoning is thus arbitrary, capricious, and an abuse of discretion, and—as much as the dismissals themselves—"unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165.

1. All evidence corroborates that respondents had sufficient notice that FECA's straw donor provisions applied to their activities.

In this lengthy summary judgment briefing, one point is not in dispute. None of the respondents, all of whom were represented by counsel, raised issues of notice in their responses to plaintiffs' admininistrative complaints. *See* AR28-30, AR222-24, AR337-38, AR339-42, AR370-75, AR376-78, AR379-89. None professed any confusion about the applicability of section 30122 in even the most general of terms. Neither the FEC nor intervenors dispute that respondents were silent with respect to notice. Nevertheless, despite the lack of any statutory ambiguity regarding section 30122's application to the administrative respondents' alleged conduct, and without any prompting from the respondents themselves, the controlling Commissioners refused to investigate on the basis of conclusory and unwarranted "fair notice" concerns.

Instead of raising due process concerns, or refuting any of the factual allegations leveled against them, the respondents focused almost exclusively on attacking the facial sufficiency of the allegations in the complaints. *See*, *e.g.*, AR28, AR222 (Eli Publishing/ F8) (claiming "allegations in the complaint [were] insufficient" and plaintiffs' reliance on news reports inappropriate); AR370 (FreedomWorks) (arguing complaint was "legally deficient" because it lacked "factual allegation[s]" and rested "entirely on unverifiable allegations" in news reports). Respondents thus sought to discredit—rather than to deny—the evidentiary foundations of the plaintiffs' claims. All

evidence thus indicates that the notion of insufficient notice was entirely concocted by the controlling Commissioners, who made no attempt to consider whether these respondents were in any respect unaware of the law's requirements.

The theory of inadequate notice is also belied by the chronology of events that led up to the controlling Commissioners' dismissals of plaintiffs' complaints. As discussed in plaintiffs' opening brief (Pls.' Mem. at 42), the W Spann straw donor scheme commanded national attention, drew widespred press coverage, and provoked comment from a major party presidential nominee. It strains credulity to suggest that the SIG respondents in particular, who devised their $12 million straw donor operation over a year after this media coverage, were somehow ignorant of these events or the legal controversy that produced them.

Despite these real world events, the FEC attempts to find support in the W Spann proceeding for the controlling Commissioners' finding that respondents "could have reasonably concluded 'that the contributions made by their closely held corporations and corporate LLCs were lawful.'" FEC Mem. at 26. To bolster the control group's theory, the FEC points to the legal opinion that Edward Conard received from the law firm Ropes & Gray, asserting that legal counsel told him "he could lawfully make a contribution through a corporate LLC without disclosing his identity." *Id.* at 27 (citing Conard Resp. at 1-2).

Even putting aside questions about the adequacy of a legal opinion that apparently omitted *any* analysis of section 30122—a provision that all parties here concede at least potentially applies to corporate straw donors—the FEC does not accurately describe the opinion's contents. Although Ropes & Gray did suggest Conard create an LLC for the purpose of concealing that he was the true source of W Spann's contributions to Restore Our Future ("ROF"), it also highlighed that "the FEC might seek to look through the contributing entity to the underlying contributor." W Spann/

Conard Resp., Decl. of Kimberly E. Cohen ¶ 8, MUR 6485 (Oct. 3, 2011). A fair reading of this legal opinion would hardly lead the reasonable person to believe that laundering a contribution through a corporation was a lawful way of avoiding disclosure; on the contrary, Ropes & Gray explicitly warned Conard that the FEC might pierce the corporate veil to ascertain "the underlying contributor" funding W Spann's contributions.[7]

In any event, the W Spann matter is no longer before this Court,[8] making the control group's views of the Ropes & Gray opinion irrelevant to its analysis of whether the respondents to the Eli Publishing, F8, and SIG complaints understood that section 30122 prohibited corporate straw donors. The respondents here would have been far more aware of the very public political scandal that arose from Conard's activities than the legal advice he received on a confidential basis. Indeed, if anything, Conard's response in the W Spann MUR underscores the relative silence of respondents on questions of notice. Unlike Conard, none of the respondents in MURs 6487,

[7] Efforts to comply with the law, including by obtaining the advice of counsel, have sometimes been a factor in FEC enforcement decisions in later stages of the process, e.g., during conciliation, but the FEC does not accept an "advice of counsel" defense as alone sufficient to ward off an investigation in the first instance. *See, e.g.*, Gen. Counsel's Rep., MURs 4568, 4633, 4634, and 4736 (Triad, Inc.) (Mar. 20, 2002) (noting that "reliance on the advice of counsel might negate the mens rea required for finding that a particular violation was 'knowing and willful,' " and "might appropriately be considered as a mitigating factor during conciliation," but "is not legally relevant as to liability"); First Gen. Counsel's Rep. at 10, MUR 5410 (Oberweis Dairy, Inc.) (Nov. 11, 2004) (recommending against "knowing and willful" findings given good faith reliance on advice of counsel, but proceeding with enforcement and imposition of civil penalties).

[8] The FEC insinuates that plaintiffs have not "clearly distinguish[ed]" the three administrative complaints that are still live, MURs 6487, 6488, and 6711, from the complaints as to which the Court determined plaintiffs lack informational standing to pursue, MURs 6485 (W Spann LLC) and 6930 (Pras Michel). FEC Mem. at 39 n.12. But all parties appear to agree that those two complaints are still relevant to the Court's assessment of whether the FEC's actions were "contrary to law," because the control group's statement of reasons—the rationale for the agency's decision subject to review by this Court—was explicitly based upon an analysis of all five complaints. And indeed, the only MUR that the FEC specifically addresses in support of its summary judgment arguments is one of those dismissed matters. *See* FEC Mem. at 26-27 (discussing W Spann LLC).

6488, or 6711 claimed any confusion about the scope of the law. None suggested that they relied upon legal counsel to conclude that their straw donor schemes were lawful. These omissions all but prove that insuffcent notice was not a true concern and consequently not a rational basis for the controlling Commissioners' dismissals of these complaints.

Moreover, the controlling Commissioners' supposed concerns about providing fair notice to the regulated community ring hollow when that guidance is arbitrarily withheld for almost three full election cycles—especially if that guidance, when it finally materializes, has no grounding in the actual record evidence. The FEC attempts to recast this portion of plaintiffs' argument as "'an across-the-board challenge' to FEC enforcement matters." FEC Mem. at 38. But enforcement patterns are inherently at issue in a case spanning five distinct administrative complaints that it took almost as many years to resolve,[9] and where the delay was attributable to the same three Commissioners whose decisionmaking is now under review. *See* AR95-96 (noting that controlling Commissioners "refused to consider the first three matters for several years," and "delayed the consideration of these matters repeatedly over the course of almost four years"). Under the circumstances, the control group's intransigence cannot reasonably be seen as anything other than

[9] Intervenors suggest that the apparent expiration of the applicable statute of limitations weighs against finding the dismissals contrary to law, but that argument misses its mark. Disclosure and political committee registration are equitable remedies that lie outside the bounds of 28 U.S.C. § 2462, which provides a five-year limitations period for suits seeking a "civil fine, penalty, or forfeiture." As the D.C. Circuit has held, however, section 2462 bars only punitive government actions. *Johnson v. SEC*, 87 F.3d 484, 487-88 (D.C. Cir. 1996). Equitable remedies under FECA are compensatory: violations of the straw donor prohibition obscure the "true sources" of campaign spending from the public, so enforcing the prohibition restores the transparency mandated by FECA. The statute thus allows suits seeking compliance with disclosure laws, even where monetary penalties would be time-barred, and regardless of whether the plaintiff is the government or a private actor in a FECA-authorized citizen suit. *See FEC v. Christian Coal.*, 965 F. Supp. 66, 71-72 (D.D.C. 1997); *FEC v. Nat'l Repub. Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995). In any event, the control group never made this argument, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

a calculated effort to excuse purposeful violations of the straw donor prohibition. The court need look no further than the record in this case to appreciate that the agency has abdicated its statutory enforcement obligations.

2. That these five complaints presented questions of first impression is irrelevant to whether respondents had adequate notice.

Much of the control group's notice argument can be reduced to the contention that the administrative complaints presented an "issue of first impression" in light of the *Citizens United* ruling. But even accepting that characterization of the legal claims in the complaints, their novelty proves neither statutory ambiguity nor inadequate notice. Any "regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards" applicable to violations of section 30122, because those standards are evident on the face of the statute; therefore, the FEC's asserted "notice" rationale is illusory. *General Electric*, 53 F.3d at 1329.

First, the FEC highlights the control group's observation that the Commission had "never before considered whether a closely held corporation or corporate LLC could be deemed a straw donor under section 30122." FEC Mem. at 24. But this observation cannot speak to notice; section 30122 unambiguously applies to corporate straw donors, and its clarity is not in dispute here. Moreover, as discussed in Section II.A.1 *supra*, *Citizens United* did not impact section 30122 because its terms applied to corporations both before and after the decision. The corporate respondents thus had the same "notice" of the applicability of the longstanding prohibition on straw donors to corporations after the decision as they did before. Indeed, they had exactly the same notice as all other persons subject to section 30122—whether an "individual, partnership, committee, association, corporation, labor organization, or any other organization." 52 U.S.C. § 30101(11). The control group's reasoning here, taken to its logical conclusion, would mean that enforcement is never appropriate when a statute is new or has not been applied to a certain class

of regulated persons. But due process surely does not demand that an agency allow every regulated class one bite of the apple before it will enforce the law.[10]

Second, defendants argue that this is a case of first impression because "prior cases involving conduit contributions involved excessive and/or prohibited contributions, which were not at issue here." FEC Mem. at 24. Defendants do not even attempt to explain why this distinction is pertinent—nor could they. To be sure, one objective of section 30122 is to prevent circumvention of the contribution limits and source restrictions. *See, e.g.*, *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990). But it is clear, and undisputed here, that a central and independent goal of the straw donor prohibition is to ensure meaningful disclosure of the true sources of campaign money. *See, e.g.*, *O'Donnell*, 608 F.3d at 553 (noting that "congressional purpose" behind section 30122 was "plain"—"to ensure the complete and accurate disclosure of the contributors who finance federal elections"). And the FEC has long recognized that disclosure is a distinct purpose of the straw donor prohibition. *See, e.g.*, FEC Advisory Op. 1986-41, at 2 (Dec. 5, 1986) (noting that section 30122 "serves to [e]nsure disclosure of the source of contributions to Federal candidates and political committees *as well as* compliance with the Act's limitations and prohibitions." (emphasis added)). A reasonable person could not construe FECA to permit straw donor schemes where the true sources of a contribution were deliberately misreported but the contribution was within the applicable contribution limits.

[10] The FEC has enforced section 30122 (and its predecessor, section 441f) against a wide array of colorful schemes to violate the law, many of which were factually "novel" at the time. *See, e.g.*, Conciliation Agreement, MURs 4818 and 4933 (Roberts *et al.*) (Jan. 28, 2004) (applying 441f to a scenario involving a sham cattle sale and fictitious bank loans); Conciliation Agreement, MUR 4399 (State Univ. Retirement Sys. of Ill.) (July 8, 1997) (finding that straw donor prohibition was violated by public pension fund's payment of conference fees directed in part to federal elections). Applying the law to new factual scenarios is a core agency function; opining about the law's constitutionality based on intervening Supreme Court decisions is not.

Nevertheless, intervenors attempt to cast doubt on the strength and centrality of the disclosure interests animating section 30122, claiming they are "minimal at best." F8 Mem. at 24. They argue that the overriding rationale for disclosure is to "gather the data necessary to detect violations of the contribution limitation," *id.*, but here, because only contributions to super PACs are at issue, "there is no violation to detect." *Id.* This claim is a distortion of all Supreme Court precedents on the subject, which make clear that the paramount governmental interest in disclosure is "providing the electorate with information." *McConnell*, 540 U.S. at 196. Indeed, eight Justices in *Citizens United* rested their decision to uphold BCRA's "electioneering communications" disclosure law on this interest, finding it "alone" was "sufficient to justify" compelled disclosure. 558 U.S. at 369. Last November, a three-judge court of this circuit reaffirmed that the informational interest "alone is sufficient" to uphold disclosure laws, and the Supreme Court summarily affirmed. *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *aff'd*, 137 S. Ct. 1204 (2017).[11]

This informational interest has served as both policy rationale and constitutional justification for all federal disclosure laws—the original FECA "independent expenditure" disclosure provisions upheld in *Buckley*, 424 U.S. at 74-82, the BCRA requirements for electioneering communications approved in both *McConnell*, 540 U.S. at 194-202, and *Citizens*

[11] Judge Millett also emphasized that disclosure helps "to ensure that foreign nationals or foreign governments do not seek to influence United States' elections," and observed that "the vital importance of determining if foreign nationals are supporting candidates" had been underscored in the 2016 election. *Indep. Inst.*, 216 F. Supp. 3d at 191 & n.11. The straw donor prohibition works in tandem with FECA's prohibition on contributions from foreign nationals, 52 U.S.C. § 30121, and meaningful enforcement of both provisions is essential to preventing and detecting hostile efforts to infiltrate our democratic processes. The FEC has recognized as much in past MURs involving both provisions. *See, e.g.*, MUR 4884 (Future Tech, Inc.); MUR 4398 (Thomas Kramer *et al.*); MUR 3460 (Sport Shinko).

United, 558 U.S. at 366-71, and the anti-fraud provisions of section 30122 under consideration here. Intervenors may disparage the informational interest as a "pseudo-constitutional" "right" that is at its "lowest ebb" in the context of independent expenditures, F8 Mem. at 23, 24, but at least seven Justices[12] on the Supreme Court unequivocally disagree.

Finally, in a variation of their first attack on political disclosure, intervenors also suggest that even if Congress did indeed have "the power to require disclosure in certain instances," it does not follow that Congress "required disclosure in this instance." F8 Mem. at 23. But section 30122 clearly does just this, proscribing any person from "mak[ing] a contribution in the name of another person," including in the name of a corporation. Insofar as intervenors suggest that the controlling Commissioners based their dismissals on the premise that Congress either could not, or did not, require the disclosure of the true sources of campaign contributions, the controlling SOR is unsustainable. The argument that the First Amendment bars legislation to prevent fraud in the reporting of campaign activity does not pass muster under even the most deferential review.

3. Defendants cannot justify the dismissals by claiming that respondents were "misled" by past FEC precedents wholly unrelated to section 30122.

The crux of the FEC's defense of the dismissals is the claim that although section 30122 may be clear, the FEC's own administrative guidance on the attribution of corporate contributions has "muddied the waters" to the extent that the scope of the statute was uncertain. AR85. The controlling Commissioners cited various enforcement actions, regulations and other administrative

[12] Justice Gorsuch has not had an opportunity to rule on this question, but Justice Scalia was strongly supportive of disclosure: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

guidance to bolster this theory of insufficient notice. AR83-85. The problem, however, is that none of this authority is on point.

The administrative guidance cited by the controlling Commissioners, and now the FEC, does not purport to address section 30122, but rather concerns the *default* rules for attributing corporate contributions to their original source. This guidance establishes the regulatory framework for determining the sources of contributions in the *absence* of any evidence of fraud or straw donor activity, most often for the purposes of applying the corporate contribution ban at 52 U.S.C. § 30118. *See* AR83-85 (citing, *inter alia*, Conciliation Agreement at 2, 4, 8, MUR 3191 (Christmas Farm Inn, Inc.) (June 23, 1995); First Gen. Counsel's Rep. at 33, MUR 4313 (Coalition for Good Government) (Oct. 18, 1996)). It is irrational to rely on the default rules in exceptional circumstances—*i.e.*, deliberate fraud—in which the "normal" rules, by definition, do not apply. This basis for insufficient notice cannot stand.

a. Commission precedents analyzing the application of the corporate contribution ban are not relevant to cases concerning straw donor schemes.

The FEC complains that plaintiffs "minimize the significance of prior Commission precedent analyzing . . . section 30118," arguing that these precedents are relevant because "the Commission considered *arguably similar circumstances* yet reached results seemingly inconsistent with the announced approach of determining that some contributions from closely-held corporations or corporate LLCs may have been made in the name of another." FEC Mem. at 28 (emphasis added). But the FEC's fundamental premise is wrong: these are not "similar circumstances." The FEC's precedents concerning whether a contribution is "corporate" for the purpose of the section 30118 ban apply only in the absence of evidence that the corporation is a conduit or straw donor. Where there is evidence of conduit fraud, it would make no sense to assume that the immediate donor is the true source.

In recommending that the Commission initiate investigation of the three administrative complaints at issue here, OGC articulated the distinction between the default attribution rules and section 30122 at length. It noted that respondents to the F8/ Eli Publishing complaint, for instance, defended their actions by arguing that the contribution from F8/ Eli Publishing to ROF was drawn from Eli's "corporate funds, a lawful transaction on its face." AR 38-39 (internal quotations omitted). But as OGC pointed out, whether the corporate contribution to the super PAC was permitted by section 30118 was the incorrect inquiry in a straw donor proceeding:

> But [respondents'] assertion simply elides the critical factual question—who was the true source of the contribution. And to the extent it is meant to imply that simply because the contribution came from an Eli Publishing account, it is "a lawful transaction," the contention fails as a matter of law. *See O'Donnell*, 608 F.3d at 554 ("the relevant contributor" is not "the intermediary who merely transmitted the campaign gift"). Every contribution made "in the name of another" appears "on its face" to have been made from that source. Thus, respondents' assertion simply begs the question.

AR 38-39. As OGC suggested, asking whether funds drawn from a corporate account are "corporate" or lawful under section 30118 "simply begs the question" in a section 30122 enforcement action. The FEC's approach to alleged violations of the corporate contribution ban has no bearing on its inquiry under section 30122.

b. There is nothing unique about corporations in terms of attributing their contributions to their original sources.

As the OGC explained, "[e]very contribution made 'in the name of another' appears 'on its face' to have been made from that source," AR39; that presumption is not unique to corporations. The FEC has a well-established system of "default rules" governing the attribution of contributions to their true sources for the purpose of the contribution limits and reporting requirements:

- Contributions from a corporation's general treasury are typically deeemed to have the corporation as their original source, not the corporation's shareholders or owners. *See*, *e.g.*, 11 C.F.R. § 110.1(g).[13]

- A contribution from a partnership is is attributed to the partnership and to each partner in direct proportion to their share of the partnership profits, absent a contrary argument of the partners. 11 C.F.R. § 110.1(e).

- Contributions from a political committee are deemed to come from the political committee, even though committees are typically funded by the contributions of other persons. *See*, *e.g.*, 52 U.S.C. § 30116(a)(2), *but compare id.* § 30116(a)(8) (permitting indirect "earmarked" contributions if properly reported).

None of these default presumptions affect the application of section 30122. In fact, the entire utility and purpose of section 30122 is to proscribe fraudulent conduct where there is evidence that application of the default rule would not result in the disclosure of the true donor. This was exactly the conclusion drawn by the Commission in earlier enforcement actions where it found straw donor violations when individuals "funneled" contributions through PACs to a candidate. Notification with Factual and Legal Analysis to John and Ruth Stauffer at 10, MUR 4634 (Sam Brownback for Congress) (June 8, 1998); *see also* Notification with Factual and Legal Analysis to John Shadegg's Friends *et al.* at 7-8, MUR 5968 (John Shadegg's Friends) (Nov. 10, 2008). The fact that a PAC contribution is typically attributed to the PAC, not its underlying donors, was not deemed so confusing as to defeat application of section 30122. There was evidence

[13] Commission regulations provide that LLCs are treated as individuals, partnerships, or corporations for FECA purposes, consistent with the tax treatment they elect under the Internal Revenue Code. 11 C.F.R. § 110.1(g). The default for attributing such contributions is therefore that a contribution by a corporate LLC is attributed to the corporate entity, whereas a contribution by an non-corporate LLC with a single natural person member is attributed only to that member. *Id.* § 110.1(g)(3), (4); *see also* FEC Advisory Op. 2009-02 (Apr. 17, 2009) (treating expenditures by a single-member LLC, like contributions, as attributable solely to the LLC's single member). A contribution from an LLC that elects to treated as a partnership for tax purposes is is considered a contribution from a partnership and attributed to each partner. 11 C.F.R. § 110.1(e), (g)(2).

that the PAC was being used as a straw donor and the respondents to the PAC MURs were expected to be on notice that section 30122 prohibited such activities regardless of the default rules.

The FEC attempts to distinguish these PAC enforcement actions on the ground that "political committees have not only been legally permitted to make contributions for decades, but they can also be formed for that exact purpose." FEC Mem. at 27. But this statement simply reiterates that the FEC had not applied section 30122 to corporate straw donors; it does not explain why corporations are unique or why the corporate respondents here are distinguishable from the PAC respondents in the earlier MURs with respect to their understanding of section 30122. As outlined above, a contribution is typically attributed to its immediate donor, corporate or otherwise. If the existence of these default rules for the attribution of contributions were to cast doubt on the application of section 30122, any person engaged in a straw donor scheme, regardless of their identity, could claim confusion about the reach of the straw donor prohibition.

4. The controlling Commissioners' "purpose-based" standard is arbitrary, capricious, and contrary to law, and provides no "rational basis" for their votes to dismiss.

In dismissing plaintiffs' administrative complaints, the controlling Commissioners suggested that their reluctance to investigate respondents was based, in part, on their fear that doing so would vindicate the dissenting Commissioners' alternative "functional" standard for application of section 30122, which they deemed overbroad and chilling of corporate First Amendment activities. AR82 n.48, 86-88. To pursue plaintiffs' complaints, according to the control group, would create a "presumption" that all corporate contributors are straw donors, rendering the "speech rights recognized in *Citizens United*" "hollow." AR76.

This reasoning is arbitrary, capricious, contrary to the First Amendment and judicial precedents interpreting its exercise, and based on a distortion of plaintiffs' position and the standards articulated by the dissenting Commissioners.

First, the controlling Commissioners mischaracterize the dissenters' "functional standard" whose application they claim would "countermand *Citizens United* with respect to the First Amendment rights of" corporate entities. AR82 n.48. This standard for applying section 30122 asks two questions with respect to a corporate LLC contribution: is there evidence that (1) "an individual is the source of funds" of the LLC contribution, and (2) did the LLC "convey[] the funds at the direction of" that individual. AR93. Thus only when a corporation makes a contribution from funds that did not derive from its business activities and at the direction of the source of such funds would questions under section 30122 even arise. There is no cause to believe that this standard, or that investigating respondents here pursuant to such a standard, would result in a regime in which all closely-held corporations—or even a small fraction thereof—come under suspicion.

Intervenors make much of the Commission's consideration of the Pras Michel complaint, MUR 6930, a matter no longer before this court, arguing that the dissenting Commissioners' vote to investigate there represented an inconsistent application of their preferred standard and exposed their true invidious aim: to "impermissibly chill LLCs from exercising the rights recognized in *Citizens United*." F8 Mem. at 27. Specifically, intervenors complain that the dissenting Commissioners found reason to believe a straw donor violation had occurred even though, according to intervenors, "one of the prongs of their test, that the individual was the source of the funds, was plainly not met." *Id.* But even if their description of the dissenting Commissioners' actions were accurate—and it is not[14]—this would not justify the control group's failure to

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[14] In fact, their concern does not even explain the control group's decision not to investigate the Pras Michel complaint. Contrary to intervenors' claims, the degree to which SPM Holdings LLC "held" Michel's personal funds was very much under debate and was precisely the type of controversy that further investigation could resolve. *Compare, e.g.*, AR90 n.2 *with* First Gen. Counsel's Rep. at 8, MUR 6930 (Pras Michel) (Nov. 19, 2015).

investigate the three matters before this court. In MURs 6487, 6488, and 6711, there was no dispute that an individual had provided the funds for the corporate contributions in question. Intervenors' fears about the dissenters' inconsistent application of their standard or their invidious intent thus has no bearing on the matters currently under consideration.

Even if the controlling Commissioners' concerns about the overbreadth of the dissenting Commissioners' standard were credited, this does not explain their failure to investigate the allegations in plaintiffs' complaints pursuant to *their* preferred standard. Importantly, the proceedings here were only at the preliminary "reason to believe" stage, 52 U.S.C. § 30109(a)(2), and the Commissioners did not yet have to find "probable cause" to believe a violation of FECA had been committed, *id.* § 30109(a)(4)(A). As the FEC has explained elsewhere, finding "reason to believe" does not mean it has "evaluated the evidence and concluded that the respondent has violated the Act," but instead simply "means that, after evaluating the complaint, the respondents' responses to the complaint . . . and information available on the public record, the Commission believes a violation *may* have occurred." *See* FEC Legislative Recommendations – 2005, *Modifying Terminology of "Reason to Believe" Finding*, http://classic.fec.gov/law/legislative_recommendations_2005.shtml (emphasis added). Thus, if the control group were uncertain whether the respondents had violated the law with the requisite intent, this was *reason* to initiate an investigation, not a justification for declining to pursue plaintiffs' complaints.

Moreover, although plaintiffs believe that the "purpose based standard" is overly restrictive, it appears that the evidence already collected in MURs 6487, 6488, and 6711 would demonstrate the intent required by the control group's standard. The controlling Commissioners all but admit this, obliquely, with respect to the W Spann complaint. AR87 n.70 (indicating that W Spann respondents may have violated section 30122 but suggesting that "other factors,"

including the Ropes & Gray legal opinion, Conard's public admission of involvement, and their belief that the public suffered "little to no informational harm," would still justify decision to dismiss). And there is little material difference between the facts alleged in the W Spann complaint and those in the F8 and SIG complaints, where the respondent corporations similarly appeared to be funded and operated exclusively, or almost exclusively, for the purpose of making straw donor contributions.[15]

Furthermore, certain respondents openly admitted an intent to evade FECA's disclosure requirements, fulfilling even the strictest of scienter requirements. *See*, *e.g.*, AR41 (noting that Lund publicly admitted that he made the contribution to ROF through Eli Publishing/ F8 because "he did not want 'to be real public about being a part of the campaign.'"). Thus, the evidence already before the control group supported a finding of "reason to believe" even under their own restrictive "purpose-based" standard; initiating an investigation of the allegations in MURs 6487, 6488, and 6711 would only uncover further evidence that could clarify respondents' intent. The controlling Commissioners' adoption of an intent standard, and their skepticism about their colleagues' alternative standard, thus provides no reasonable grounds or rational basis for their failure to investigate allegations that established a prima facie case of section 30122 violations even under their preferred standard.

The FEC defends this aspect of the controlling Commissioners' rationale principally by attacking plaintiffs' challenge to the "purpose-based" standard as not ripe for review. FEC Mem. at 31-38. First, insofar as the control group's "purpose" standard—and their critique of the

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[15] Indeed, despite the considerable attention they devote to the purported "refinement" of OGC's analysis over time, intervenors—like the controlling Commissioners, AR82 n.49—elide the fact that OGC's "revised" analysis expressly "d[id] not alter [OGC's] stated conclusions" or recommendations with respect to W Spann. Suppl. to FCGR, MUR 6485 (Feb. 23, 2016).

dissenting Commissioners' alternative standard—formed an additional rationale for the decisions to dismiss, it is directly relevant to the adequacy of the control group's reasoning and ripe for review. Plaintiffs chiefly challenge the controlling Commissioners' intent standard because is an integral part of the Commissioners' unfounded First Amendment-based justification for their failure to proceed with respect to plaintiffs' complaints.

But even standing independently of the dismissals here, the "purpose based" standard is constitutionally ripe for review because plaintiffs can show an impending injury in fact. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427-28 (D.C. Cir. 1996). At its core, the straw donor prohibition is meant to ensure accurate disclosure of campaign spending, and thus the harm at stake here cuts to the very heart of Congress's intent when it created informational rights under FECA.[16] This Court has already held that plaintiffs have standing here due to the informational injury they have suffered from the dismissals of three of their administrative complaints. Because the FEC's restrictive "purpose-based" standard will likely lead to non-disclosure of further information to which plaintiffs are legally entitled, plaintiffs "ha[ve] asserted an informational injury that is both imminent and certain—assuming [their] view of the law wins the day—and therefore ripe for judicial review." *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, 2017 WL 3028832, at *6 (D.D.C. 2017)

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[16] Courts have recognized congressional purpose as a factor in ripeness analysis when delay would frustrate that purpose. *See, e.g.*, *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 202 (1983) (finding that because challenged state law undermines a key congressional purpose behind federal law, resolution should not be delayed on ripeness grounds); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978) ("[D]elayed resolution would frustrate one of the key purposes" of the law in question.); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (noting presence of constraints that might not ordinarily factor into a ripeness consideration were relevant because "here we have the additional authority of a congressional determination that such constraints should not impede the access to information for appellants such as these.").

(citing *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Plaintiffs would also prevail on prudential ripeness because (1) the issue is fit for judicial resolution and (2) plaintiffs would suffer harm in the absence of such a resolution. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).[17]

Finally, the control group's "purpose" standard has no basis in FECA, nor is it compelled by the First Amendment. The statutory text contains no intent or scienter requirement, a fact the FEC is forced to acknowledge. FEC Mem. at 34-35. The Commission then spills much ink attempting to argue that this clear omission in the statute is not dispositive, but it is a fundamental principle of statutory interpretation that Congress is understood to mean what it says—or in this

[17] Judicial review is appropriate because the issue "is purely legal": the FEC has imposed upon FECA's straw donor provision a specific intent-based scienter standard on grounds that the First Amendment demands a narrow test. Plaintiffs disagree and argue that this standard is contrary to law. *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2002) ("Claims that an agency's action is . . . contrary to law present purely legal issues."). Resolving this issue also does not require a more concrete factual setting. Plaintiffs' claim does not rest on the notion that the FEC might sometimes err in applying its standard to new fact patterns, but rather that FECA's plain text and the congressional intent behind that text prohibit straw donations even without a scienter element. "[T]he ripeness doctrine is inapplicable because [the] claim rests not 'on the assumption that the agency will exercise its discretion unlawfully' in applying [its announced standard] but on whether 'its *faithful* application would carry the agency beyond its statutory mandate.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (citation omitted). And, despite the FEC's suggestion that the controlling group may yet change its mind, D.C. Circuit precedent makes clear that the finality test is a functional one and that courts must look beyond agency claims. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986). The controlling Commissioners based these dismissals on their belief not only that FECA *allows* for an intent-based requirement, but that the Constitution requires it. This conclusion does not admit easy amendment.

Withholding review would also cause harm to plaintiffs. As this Court has recognized, plaintiffs are harmed when information to which they are statutorily entitled remains undisclosed. This informational injury is particularly acute in the election context, because any litigation to challenge another failure by the FEC to investigate section 30122 allegations would stretch past election day, far past the time that political disclosure is most useful for voters. Plaintiffs' ability to engage in a core institutional function—ensuring that the electorate can access information to which it is legally entitled—will be hampered as a result.

case, does not say. This Court should reject the FEC's invitation "to create ambiguity where the statute's text and structure suggest none." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008).

Indeed, the only counterexample to this principle that the FEC can muster are cases in the *criminal* context where a scienter requirement was added. But the proceedings here are purely civil in nature, and the FEC has only civil enforcement authority, 52 U.S.C. § 30106(b). Moreover, as the FEC admits, FECA already has established an alternative enforcement regime when a section 30122 violation is "knowing and willful," providing for higher civil fines and the possibility of referral to the Attorney General for criminal prosecution. *Id*. § 30109(a)(5)(B) & (C), (d)(1)(D). These provisions—and the stepped-up penalties they prescribe—would make no sense if scienter was a requisite element for all violations of section 30122. In short, the controlling Commissioners are injecting a criminal intent element into a statutory provision that has none, to govern the adjudication of a civil enforcement proceeding. This is self-evidently "contrary to law."

The FEC also offer cases and hypotheticals where it believes a "purpose" element would be useful to the determination of whether a section 30122 violation occurred. It suggests that the dissenting Commissioners would agree with this perspective (FEC Mem. at 36), highlighting their statement that "whether or not the source transmitted the money with the *purpose* that it be used to make or reimburse a contribution" is a "critical consideration in determining the 'true source' of a contribution." AR 93 n.15 (emphasis added). But this is not the scienter requirement that the controlling Commissioners actually proposed in their SOR. They did not contemplate a purely "functional" purpose standard that merely looked to whether the original source tranmitted funds to an intermediary *with the purpose* that it be used for a contribution. Instead, their inquiry was whether "funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that *evades the Act's reporting requirements*." AR86

(emphasis added). This scienter element requires a respondent to both have knowledge of section 30122 and willfully violate the law. As the dissenting Commissioners pointed out, this type of "purpose" would be "virtually impossible to prove" because donors can simply "claim[] publicly that they funneled contributions through a single member or closely held LLC for any reason other than evading disclosure." AR96.

The controlling Commissioners' "post hoc subjective intent standard," AR96, is contrary to law and basic principles of statutory interpretation, and arbitrary, capricious, and an abuse of discretion. Their decision to dismiss plaintiffs' administrative complaints—insofar as it was grounded in this standard and the scienter requirement it proposed—is equally so.

CONCLUSION

This Court should grant plaintiffs' motion for summary judgment; deny defendants' cross-motions for summary judgment; declare that the FEC's dismissals of plaintiffs' administrative complaints are contrary to law, arbitrary and capricious, and an abuse of discretion; and direct the Commission to conform with such declaration within 30 days.

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Respectfully submitted,

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