UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 15-2038 (RC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	SUMMARY JUDGMENT REPLY
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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November 10, 2016

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INTRODUCTION

Plaintiffs' case boils down to two untenable propositions: (1) because the factual record compiled by the Federal Election Commission ("Commission" or "FEC") contains evidence that could support a finding that an administrative respondent was a political committee, the FEC was compelled to make that finding; and (2) because it was possible for the FEC to have been more aggressive in pursuing alleged violations, it was required to do so. But no principle of law requires a federal agency to pursue every potential enforcement avenue to the point of exhaustion. Indeed, an unbroken line of decisions from the Supreme Court, the D.C. Circuit, and other courts in this district makes plain that agencies like the FEC have the discretion to elect not to pursue enforcement of alleged statutory violations in particular cases. Or, put another way, the fact that an administrative agency *could* do something does not mean that it *must*.

Seeking to avoid this conclusion, plaintiffs miscast the FEC controlling group's analysis of the procedural and legal difficulties inherent in pursuing further enforcement in this matter as a set of absolute legal conclusions that no further enforcement was possible.[1] However, the statement of reasons under review never said that *all* enforcement avenues were completely foreclosed. On the contrary, it implicitly acknowledged that some remained open. The statement explained that given the defunct status of the respondent, the incomplete factual record then available even after a lengthy investigation, and the litigation risks that would attend proceeding with enforcement, the Commission's priorities lay elsewhere, and so the matter was dismissed as an exercise of prosecutorial discretion. Under the highly deferential standard that

[1] As explained in the FEC's initial brief, because the matter was dismissed after a 3-3 vote, the Commissioners who voted not to proceed with enforcement are considered the "controlling group" whose "rationale necessarily states the agency's reasons for acting as it did." (FEC Mem. at 27 (quoting *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)).)

governs judicial review of FEC decisions to dismiss administrative complaints, this analysis need only be reasonable to be affirmed. The dismissal decision here easily meets that standard.

Plaintiffs attack the bedrock principle that the Commission has prosecutorial discretion. Binding precedent, however, flatly contradicts plaintiffs' claim. Indeed, the Supreme Court has observed that the Commission has discretion not to pursue an enforcement matter *even if the agency agrees* that the law had been violated. *See, e.g., FEC v. Akins*, 524 U.S. 11, 24 (1998). *A fortiori*, therefore, the FEC has the authority to decline to proceed to a resolution of legal issues implicated in a particular enforcement matter by invoking its prosecutorial discretion to dismiss, so long as the agency offers a reasonable basis supporting its decision.

That is what happened in this case. A controlling group of FEC Commissioners reviewed the record and concluded that the costs of further enforcement — including the Commission's enforcement priorities, staff time, and litigation risks — outweighed the potential benefits of proceeding. That decision was reasonable and consistent with controlling law.

ARGUMENT

I. THE CONTROLLING GROUP'S INVOCATION OF PROSECUTORIAL DISCRETION NEED ONLY BE REASONABLE TO BE UPHELD

Plaintiffs spill much ink arguing that the invocation of prosecutorial discretion "does not alter" the contrary-to-law standard of review set forth in 52 U.S.C. § 30109(a)(8)(C). (Pls.' Reply Mem. at 10-12.) No one disputes, however, that the controlling decision to dismiss is subject to judicial review under the contrary-to-law standard, which the FEC cited on the first page of its opening brief. (FEC Mem. at 1.) Nor did the FEC contend, as plaintiffs assert, that "the FEC's discretion is absolute" because dismissal decisions based on prosecutorial discretion are "unreviewable." (Pls.' Reply Mem. at 10.) To the contrary, the FEC consistently argued that its dismissal decision easily meets the contrary-to-law standard of review. (*See, e.g.*, FEC Mem.

at 1, 29.) Under that standard, a Commission decision to dismiss an administrative complaint cannot be disturbed unless it was based on an impermissible legal conclusion or was otherwise arbitrary or capricious, or an abuse of discretion. (*See* FEC Mem. at 29 (citing *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir 1986)).)

When the Commission elects to exercise its prosecutorial discretion not to pursue a particular enforcement matter, that standard is "highly deferential" to the agency's decision, which need only be reasonable to be upheld. *See, e.g.*, *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) (affirming FEC dismissal of administrative complaint because "the agency has provided reasonable grounds for not proceeding further"), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("Indeed, the prosecutorial discretion given to the Commission is entitled to great deference as to the manner in which it conducts investigations and its decisions to dismiss complaints, provided it supplies reasonable grounds."). This is not a matter of "alter[ing]" the standard of review, as plaintiffs suggest. (Pls.' Reply Mem. at 12.) Rather, it is a simple application of the correct standard to the decision being reviewed.

That the controlling Commissioners' rationale for exercising prosecutorial discretion here touched upon statutes of general applicability like the statute of limitations does not affect the deference courts afford to FEC dismissal decisions. An agency's assessment of the likelihood of success in a matter will often involve analyzing legal doctrines outside of the organic statute it is tasked with enforcing, but that has never stopped courts from deferring to this analysis so long as it is reasonable. *See Akins*, 736 F. Supp. 2d at 16 (upholding FEC dismissal based, in part, on "problems of proof and the expiration of the applicable statute of limitations"). Deference is warranted not because the agency is engaging in some pure legal construction of the other

statute, but because the agency is in the best position to evaluate the alleged facts, its own resources and priorities, and the likelihood that it will prevail should it attempt enforcement. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); *Nader*, 823 F. Supp. 2d at 65.

Plaintiffs' repeated assertion that the FEC should not receive *Chevron* deference, therefore, is entirely beside the point. The controlling group's statement of reasons was not predicated on any substantive interpretation of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-146 ("FECA"), or a determination on the ultimate merits of plaintiffs' administrative complaint against the Commission on Hope, Growth and Opportunity ("CHGO"). The only legal assessment the controlling group relied upon was the recognition that the applicable statute of limitations effectively foreclosed the FEC from pursuing certain relief. As explained below, that assessment was not erroneous. *See infra* pp. 8-14. In essence, the controlling group merely decided not to pursue the matter any further in light of the legal and practical difficulties involved. That rationale easily meets the contrary-to-law standard.[2]

[2] Even if the controlling group had made a substantive determination regarding CHGO's political committee status, that determination would be entitled to deference notwithstanding the fact that it was decided by an evenly divided Commission. The D.C. Circuit has squarely held that it owes deference to an FEC legal interpretation supporting a decision not to proceed in an enforcement matter, even if it only "prevails on a 3-3 deadlock." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000); *see also FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173 185 (D.C. Cir. 2001). Plaintiffs contend that those binding cases should be ignored in light of the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and the D.C. Circuit's opinion in *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014), but those cases do not call into question the traditional deference the Commission receives in enforcement matters. *Mead* held that generally unexplained tariff classifications were not entitled to *Chevron* deference because there was "no indication that Congress intended such a ruling to carry the force of law." *Mead*, 533 U.S. at 221. But the *Mead* court also explained that the type of delegated authority that warrants deference "may be shown in a variety of ways, as by an agency's power to engage in adjudication . . . or by some other indication of comparable

II. THE DISMISSAL DECISION WAS NOT CONTRARY TO LAW

A. The Commission Was Not Required to Exhaust All Possible Enforcement Avenues

Plaintiffs conflate what is possible with what is required. Their primary argument that the dismissal decision was contrary to law is that, despite the age of the alleged violations at issue and the defunct status of CHGO, the Commission nevertheless had additional enforcement tools at its disposal that it could have deployed against CHGO or individuals associated with the entity. Specifically, plaintiffs assert that the Commission could have argued that the statute of limitations should have been tolled in light of CHGO's alleged fraudulent concealment, that the expiration of the statute of limitations does not bar equitable relief, and that the Commission could have sought monetary relief from individuals associated with CHGO under a fraudulent transfer doctrine. (Pls.' Reply Mem. at 14-22.)

Even assuming these arguments might have been available, however, no legal principle requires an administrative agency to pursue every possible legal argument in favor of enforcement. Indeed, "[n]o one contends that the Commission must bring actions in court on every administrative complaint." *Citizens for Responsibility & Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). And the Supreme Court has expressly recognized the authority of the FEC to decline to pursue enforcement matters *even if* that means some potential

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congressional intent." *Id.* at 227. The D.C. Circuit in *Sealed Case* conducted a detailed analysis and found more than sufficient indications of Congressional intent. *Sealed Case*, 223 F.3d at 780. Therefore, there is "nothing in *Mead* that directly contradicts *Sealed Case*," and so the latter case remains good law. *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 1:14-cv-1419 (CRC), 2016 WL 5107018, at *5 n.5 (D.D.C. Sept. 9, 2016), *appeal docketed*, No. 15-5300 (D.C. Cir. Oct. 24, 2016). Similarly, *Fogo De Chao* rejected deference to an agency's decision that was "the product of *informal* adjudication within the [agency], rather than a *formal adjudication* or notice-and-comment rulemaking." 769 F.3d at 1136 (emphasis added). The dismissals at issue here are relatively formal adjudications that "fall on the *Chevron* side of the line." *Sealed Case*, 223 F.3d at 780.

FECA violations go unpunished. *See Akins*, 524 U.S. at 25. Similar to plaintiffs' case, the Court in *Akins* considered a challenge to an FEC decision that the American Israel Public Affairs Committee ("AIPAC") was not required to disclose its donors and expenditures because it was not a political committee as defined in FECA. *Id.* at 14-15. In the course of discussing the challengers' standing to sue, the Court explained that "[o]f course" the FEC could "still have decided in the exercise of its discretion not to require AIPAC to produce the information," and that remained true "*even had* the FEC agreed with respondents' view of the law" that FECA required production. *Id.* at 25 (emphasis added).[3]

Following the *Akins* Supreme Court decision, courts in the D.C. Circuit have repeatedly concluded that the FEC may decline to pursue certain arguments and enforcement tactics in particular matters. *See, e.g.*, *CREW*, 475 F.3d at 340; *La Botz v. FEC*, 61 F. Supp. 3d 21, 34-35 (D.D.C. 2014); *Akins*, 736 F. Supp. 2d at 16; *Nader*, 823 F. Supp. 2d at 65; *cf. Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) (deferring to "the Commission's discretion to determine where and when to commit its investigative resources").

Despite these cases, plaintiffs insist that the dismissal decision must be overturned because "[n]o [l]aw [b]ars [e]nforcement [a]gainst CHGO." (Pls.' Reply Mem. at 22.) But that argument turns the applicable standard of review on its head. Under FECA's clear statutory text, this Court may reverse the dismissal decision only if it was *contrary* to law; it is not sufficient for the plaintiffs to show that other enforcement options would have been permissible. 52 U.S.C.

[3] The Court held that the *Akins* plaintiffs had standing to sue, but remanded the case to the FEC to determine whether subsequently enacted regulations mooted the case. *See Akins*, 524 U.S. at 26-29. Ultimately the Commission elected not to pursue certain reporting violations against AIPAC for a number of reasons, including as an exercise of its "prosecutorial discretion" because "any further investigation would be frustrated by problems of proof and the expiration of the applicable statute of limitations" and "would not be an appropriate use of the FEC's limited resources." *Akins*, 736 F. Supp. 2d at 16. That rationale was upheld on judicial review of the Commission's dismissal decision. *Id.* at 21-24.

§ 30109(a)(8)(C); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("To satisfy [the contrary-to-law] standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

Plaintiffs also mischaracterize the controlling group's analysis. They have repeatedly suggested that the controlling group's statement of reasons was predicated on a legal determination that further enforcement was impossible, characterizing the controlling group's position as stating that "any further enforcement would be 'futile.'" (Pls.' Reply Mem. at 22 (citing AR 1519).) That is a fundamental misreading of the dismissal decision. The controlling group nowhere stated as a matter of legal interpretation that *any* further enforcement would be impossible, nor did it say that the statute of limitations totally foreclosed all possible enforcement avenues that the Commission might take. In fact, the controlling group's reference to futility applied only to the prospects of obtaining a negotiated settlement of alleged violations through conciliation, not to the prospects of enforcement in general. (AR 1519 ("we concluded that *any conciliation effort* would be futile" (emphasis added)).) Instead, the controlling group's language indicated that further enforcement efforts were possible, even though a victory was likely to be a "pyrrhic" one, and that the statute of limitations only "effectively," as opposed to totally, "foreclosed" further enforcement efforts. (*Id.*).

Thus, the controlling group implicitly acknowledged that further enforcement efforts were possible, but reached the unremarkable conclusion that undertaking those efforts would not be an efficient use of Commission resources. For this reason, the controlling group's analysis is perfectly consistent with the legal doctrines plaintiffs identify. Whether or not the Commission might have argued for equitable relief, that the statute of limitations should have been tolled for

fraudulent concealment, or that certain witnesses should have to disgorge funds on a fraudulent transfer theory, the controlling Commissioners were entitled to decide as a matter of discretion not to pursue the matter further.

Carried to its logical conclusion, plaintiffs' main argument would mean that an administrative agency must always press forward in an enforcement matter so long as there is at least some arguable basis for doing so, regardless of the agency's enforcement priorities or assessment of the likelihood of success. Plaintiffs provide no other logically defensible limit on their claim that the Commission must go on despite its analysis on the likelihood of success. Under the clear case law from the Supreme Court and the courts of this circuit, however, the Commission retains discretion to determine its own enforcement and litigation strategies and priorities. *See, e.g.*, *Akins*, 524 U.S. at 25; *CREW*, 475 F.3d at 340. Therefore, the dismissal decision here was not contrary to law.

B. The Controlling Group's Analysis of the Statute of Limitations Was Not Contrary to Law

Even if the Commission had been required to exhaust every possible enforcement avenue here, plaintiffs still fail to establish that the legal arguments they claim would have supported such a course are so clearly correct that it was contrary to law not to pursue them. Plaintiffs do not contest that: (1) 28 U.S.C. § 2462 sets the statute of limitations for any FEC enforcement litigation at five years; and (2) five years have, in fact, passed since the alleged violations first occurred.[4] Instead, plaintiffs fault the Commission for not pursuing claims for equitable relief or

[4] Plaintiffs assert that the FEC "now concedes that the statute of limitations has not run" on the claim that CHGO failed to register and report as a political committee (Pls.' Reply Mem. at 15-16, n.4), but the FEC has made no such concession. Rather, the Commission observed that the controlling group's dismissal decision did not purport to discuss whether the statute of limitations had expired on that claim as of October 2015, and that the dismissal decision did not depend on the expiration of that claim. (*See* FEC Mem. at 39-40 n.9.) Moreover, the mere fact that the controlling group reached no legal conclusion as to whether the political-committee

uncertain arguments that the statute of limitations should be tolled in light of the alleged fraudulent concealment of witnesses. Neither of these arguments, however, provides any basis for concluding that the dismissal decision was contrary to law.

1. The Uncertain Availability of Equitable Relief Does Not Make the Dismissal Decision Contrary to Law

The potential availability of equitable relief after the expiration of the statute of limitations does not render the dismissal decision contrary to law. As an initial matter, the unavailability of legal relief or monetary fines would alone be an eminently reasonable basis for the Commission to decline to pursue a matter. *Cf. Heckler*, 470 U.S. at 831. Moreover, and as plaintiffs concede (Pls.' Reply Mem. at 16), courts of appeals have held that the statute of limitations contained in 28 U.S.C. § 2462 also applies to claims for equitable relief, though there is a Circuit split on the question, *see Tri-Dam v. Schediwy*, No. 1:11-cv-01141, 2011 WL 6692587, at *6 (E.D. Cal. Dec. 21, 2011) (citing cases). The Ninth Circuit's decision in *FEC v. Williams*, which held that the FEC could not pursue equitable relief after the expiration of the statute of limitations, would alone be a reasonable basis to give the controlling group pause in pursuing such relief. *See* 104 F.3d 237, 240 (9th Cir. 1996); FEC Mem. at 47. But plaintiffs are wrong to suggest that the *Williams* decision is the only authority suggesting that equitable relief does not survive the expiration of the statute of limitations. *See, e.g., Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018-19 (8th Cir. 2010); *FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10 (D.D.C. 1996).

Indeed, the split of authority on the availability of equitable relief after expiration of the statute of limitations at 28 U.S.C. § 2462 is significant and an undoubted litigation risk. The

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claim was barred by the statute of limitations does not preclude the Commission from exercising its prosecutorial discretion as to that claim.

district court in *FEC v. Christian Coalition* concluded that statutes of limitations bar equitable relief only where the equity jurisdiction is "concurrent with that at law, or the suit is brought in aid of a legal right," which some courts term the concurrent remedy doctrine. 965 F. Supp. 66, 71 (D.D.C. 1997) (citation omitted). As the Eighth Circuit explained in *Sierra Club*, however, many courts construe that doctrine to find actions concurrent (and therefore similarly time-barred) when "an action at law or equity could be brought on the same facts." *Sierra Club*, 615 F.3d at 1019 (internal quotation marks omitted). In those courts, "where a legal and equitable remedy exist for the same cause of action, equity will generally follow the limitations statute." *Id.* (internal quotation marks omitted). Still other courts have held that section 2462 does not bar an action for equitable relief brought by the United States in its sovereign capacity. *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997). Plaintiffs contend that *Williams* and similar cases were wrongly decided, but the Commission is not required to initiate litigation to reverse existing authority. And even if plaintiffs are ultimately correct that those cases were wrongly decided, plaintiffs point to no principle of law stating that the Commission was required to make that argument in court at the earliest opportunity. Therefore, it was reasonable for the controlling group to elect not to pursue equitable relief in the face of such uncertainty.

Moreover, even assuming equitable relief remains available after the expiration of the statute of limitations, difficulties in establishing any risk of future harm in this particular case would at a minimum restrict the remedies the Commission could reasonably obtain. Plaintiffs concede that injunctions, one form of equitable relief, depend on a showing of risk of future harm. (*See* Pls.' Reply Mem. at 17-18.) Even though injunctive relief can in some cases be a remedy for past misbehavior, such a remedy is not exempt from the "general equity principle[]" that requires "'a cognizable danger of recurrent violation.'" *Madsen v. Women's Health Ctr.*,

Inc., 512 U.S. 753, 765 n.3 (1994) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see also SEC v. Graham*, 823 F.3d 1357, 1362 (11th Cir. 2016) ("[I]njunctions are equitable, forward-looking remedies . . . .").

Plaintiffs provide no specific information suggesting that CHGO is likely to engage in any future conduct in violation of FECA. Instead, plaintiffs note that some of the individuals associated with CHGO "remain[] heavily involved in politics and [are] in a position to engage in the same misbehavior." (Pls.' Reply Mem. at 19.) But the FEC has made that kind of argument in the past and it has been rejected. *Nat'l Right to Work Comm.*, 916 F. Supp. at 15 (rejecting FEC's "somewhat wry observation" that a respondent "remains in the position, and has the motivations to engage in activities similar to those it" previously undertook (internal quotation marks omitted)).[5] As to injunctive relief, at least, it would certainly be a challenge for the FEC to prove that an entity that has conducted no activities in recent years and has filed termination papers with the Internal Revenue Service would again commit FECA violations with "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.*

The ability of the Commission to obtain "backward focused equitable relief" is similarly uncertain. Plaintiffs point out that disgorgement is a "backward looking" remedy and therefore requires no showing of future risk of harm. (Pls.' Reply Mem. at 18.) But courts do not uniformly hold that disgorgement survives the expiration of the limitations period. *See Graham*, 823 F.3d at 1363-64. The Court of Appeals in *Graham* interpreted the language of 28 U.S.C. § 2462 — which bars suits to enforce "any civil fine, penalty or forfeiture" after five years — to

[5] Much of the evidence plaintiffs rely on was not submitted to the agency, is not part of the administrative record, and should not be considered by this Court. *See infra* pp. 34-37; Pls.' Reply Mem. at 19 (citing Pls.' MSJ Decl., Exhs. 9, 10).

bar disgorgement after the end of the statutory period because there was "no meaningful difference in the definitions of disgorgement and forfeiture." *Graham*, 823 F.3d at 1363. The D.C. Circuit has held that disgorgement is not a "penalty" under section 2462, but has never squarely addressed whether it is "a kind of forfeiture covered by § 2462." *Riordan v. SEC*, 627 F.3d 1230, 1234 n.1 (D.C. Cir. 2010).[6] Other circuits have held that disgorgement is not a forfeiture and therefore survives expiration of the statute of limitations. *SEC v. Kokesh*, 834 F.3d 1158, 1165 (10th Cir. 2016), *cert. filed*, No. 16-529 (U.S. Oct. 19, 2016). Undoubtedly, the FEC could elect to pursue such an argument in an appropriate case. It is not contrary to law, however, for the FEC to decline to do so in this matter.

In sum, nothing compels the Commission to pursue equitable relief in any particular case.

2. The Fraudulent Concealment Doctrine Does Not Compel the FEC to Conduct Further Enforcement in This Matter

Plaintiffs continue to press the notion that alleged fraudulent concealment by CHGO witnesses is a basis for extending the five-year statute of limitations, but that focus on the alleged bad acts of CHGO and those associated with it is misplaced in an argument regarding equitable tolling. (*See* FEC Mem. at 43-44.) Plaintiffs appear to argue primarily that the statute of limitations should be equitably tolled based on the Commission's inability to discover information bearing on the existence of its potential claims, rather than that CHGO would be equitably estopped from asserting a statute of limitations defense. (*See* Pls.' Mem. at 36 & n.17 (arguing that the statute of limitations is "subject to equitable tolling" and alluding to the

[6] The *Riordan* court found that the D.C. Circuit's prior holding that disgorgement was not a "penalty" under section 2426 "implicitly rejects" the argument that disgorgement is barred after the limitations period expires, but noted that it "could be argued that disgorgement is a kind of forfeiture covered by § 2462, at least where the sanctioned party is disgorging profits not to make the wronged party whole, but to fill the Federal Government's coffers." 627 F.3d at 1234 n.1. The panel found itself bound by the earlier decision. *Id.*

doctrine of equitable estoppel only in passing in a footnote (internal quotation marks omitted)).) Although the doctrines are "functionally similar," they have "distinct criteria" that courts "must be careful to distinguish." *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003); *see generally Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990) (explaining the distinctions between the accrual of a claim and the doctrines of equitable tolling and equitable estoppel). The primary distinction between the doctrines is that equitable tolling focuses on the "circumstances of the plaintiff," while equitable estoppel "revolv[es] around the conduct of the defendant." *Chung*, 333 F.3d at 278-79. Therefore, regardless of whatever inequitable conduct CHGO witnesses allegedly committed, equitable tolling only ensures a plaintiff has a "reasonable time" to file a lawsuit when, despite all due diligence, the plaintiff is "unable to obtain vital information bearing on the existence of his claim" during the limitations period. *Id.* (internal quotation marks omitted). If a plaintiff is on notice of his possible claim, the limitations period is not equitably tolled. *See id.*; *Williams*, 104 F.3d at 241; *Cada*, 920 F.2d at 451.

Plaintiffs do not respond to or even acknowledge this principle (*see* FEC Mem. at 44), but instead suggest that CHGO's alleged fraudulent conduct prevented the FEC from obtaining "a complete understanding" of CHGO's activities so that the Office of General Counsel was unable to "exactly determine" CHGO's spending (Pls.' Reply Mem. at 21). Even assuming the premise that CHGO's affiliates engaged in fraudulent conduct, however, the statute of limitations does not wait for the prospective plaintiff to learn all the facts about a claim with exact certainty. *See Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1494 (D.C. Cir. 1989) (stating that the statute of limitations is extended only until "a plaintiff is on notice of a *potential* claim" (emphasis added) (internal quotation marks omitted)); *see also Cada*, 920 F.2d at 451 ("If a plaintiff were

entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run – for even after judgment, there is no certainty."). These principles apply "whatever the lengths to which a defendant has gone to conceal the wrongs." *Riddell*, 866 F.2d at 1494 (internal quotation marks omitted).

To successfully invoke equitable tolling in this case, then, the Commission would have had to establish not only that CHGO-affiliated witnesses engaged in sufficient acts of concealment but also that the Commission was not on notice of a potential claim. And it would have to do so despite three administrative complaints starting in 2010 that pleaded the very claims plaintiffs press here. (AR 1-6, 26-37, 164-94.) In addition, the record reflects that the Commission's Office of General Counsel was considering the claim that CHGO should have registered and reported as a political committee — the identical claim plaintiffs' argue was fraudulently concealed (Pls.' Reply Mem. at 21-22) — even before plaintiffs' amended their administrative complaint to explicitly plead it (AR 74-83). Given the significant factual problems that the Commission would need to overcome to successfully invoke equitable tolling, it was reasonable for the controlling group not to pursue this argument in this case.[7]

C. Plaintiffs' Suggestion That the FEC Should Release CHGO's Contributor Information Without First Determining That It Was a Political Committee Is Baseless

As they did in their opening brief, plaintiffs suggest that CHGO could not have terminated because it is a political committee and that the FEC could simply release the information plaintiffs allege CHGO failed to disclose without further enforcement proceedings.

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[7] In a footnote in their opening brief, plaintiffs obliquely suggest that CHGO "may further be prevented from asserting" the statute of limitations "under . . . equitable estoppel." (Pls.' Mem. at 36 n.17.) To the extent they are actually arguing equitable estoppel, however, plaintiffs do not identify the type of conduct, "such as promising not to raise the statute of limitations defense," that would permit the invocation of the doctrine even if the Commission were on notice of the potential claim. *Chung*, 333 F.3d at 278; *Cada*, 920 F.2d at 450-51.

(*See* Pls.' Reply Mem. at 22-26.) These arguments, however, remain circular and contrary to precedent.

While it is true that political committees must file a statement with the FEC prior to termination, 52 U.S.C. § 30103(d), it is obvious that an entity must do so only if it is, in fact, a political committee (FEC Mem. at 35-36). Plaintiffs are, of course, correct that the obligation of an entity to file as a political committee does not depend on a prior FEC determination that the entity is a political committee (*see* Pls.' Reply Mem. at 25-26), but that is beside the point. The FEC could hardly conclude that CHGO was required to file a termination statement with the Commission or find that CHGO violated the political committee reporting requirements without first concluding that it was a political committee. Thus, the issue remains whether the prosecutorial discretion granted to the FEC's decisions on enforcement matters permitted it to decline to proceed to decide CHGO's political-committee status. Because no statute or legal principle compels the FEC to pursue every potential violation of FECA, it was not contrary to law for the controlling group to dismiss the complaint without deciding whether CHGO violated FECA. *See supra* pp. 5-7.

Plaintiffs' suggestion that the Commission simply release the identities of CHGO's contributors also misses the mark. (Pls.' Reply Mem. at 22-25.) Initially, all of plaintiffs' arguments on this point remain dependent on the assumption that CHGO is a political committee. (*See Id.* at 23 n.9.) The only case plaintiffs cite in support of their suggestion that the FEC release the investigative information without a court order involved a matter where the Commission had found reason to believe that a violation occurred (*id.* at 23 (citing *CREW*, 475 F.3d at 339-40)), which is obviously not the case here.

Moreover, the FEC is subject to significant constraints in making public its investigatory files, or even a list of a group's contributors, without a finding that the group is a political committee. *See AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003). Prior to 2001, it was Commission policy to place on the "public record all documents that had been considered by the Commissioners in their determination of a case, minus those materials exempt from disclosure" by FECA or the Freedom of Information Act. Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,702 (Aug. 2, 2016) (citing 11 C.F.R. § 5.4(a)(4)). In *AFL-CIO*, however, the D.C. Circuit ruled that the FEC's policy of broadly releasing investigatory materials was impermissible because "the Commission made no attempt to tailor its policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." 333 F.3d at 178. The information at issue in *AFL-CIO* included the names of groups' "volunteers, members, and employees," as well as other information that would reveal private individuals' political affiliations and activities. *Id.* at 176-77. Noting that the "Supreme Court has long recognized that compelled disclosure" of this type of information "can impose just as substantial a burden on First Amendment rights as can direct regulation," the D.C. Circuit ruled that "the Commission must attempt to avoid unnecessarily infringing on First Amendment interests" when utilizing its subpoena power. *Id.* at 175, 179. After *AFL-CIO*, the Commission altered its policies to conform with the decision. *See* 81 Fed. Reg. 50,702, 50,703 (discussing 2016 and earlier version of policy). Under the FEC's new policy, the Commission has engaged in a delicate balancing of the Commission's interest in promoting its own accountability and in deterring future violations against a "respondent's interest in the privacy of association and belief guaranteed by the First Amendment." *Id.* These new policies specifically exempt from automatic public disclosure subpoenaed records obtained during the investigation of an

enforcement matter. *Id.* ("The Commission is not placing on the public record certain other materials from its investigative files, such as subpoenaed records . . . .").[8]

Despite the relevance of *AFL-CIO*, plaintiffs barely mention it, and they do not acknowledge that the case invalidated the Commission's disclosure policies. (*See* Pls.' Reply Mem. at 24.) Plaintiffs similarly decline to admit that the more-limited policies the Commission has followed since that decision do not support the blanket disclosure of CHGO's donor information obtained through subpoena. (*Id.*; *see* 81 Fed. Reg. 50,702, 50,703.) Instead, they suggest that that "there is *no* First Amendment concern created by the FEC's disclosure of CHGO's contributors." (Pls.' Reply Mem. at 24 (emphasis added).) That assertion, however, is flatly contradicted by the D.C. Circuit's determination that releasing the names of those affiliated with a group implicates those individuals' "First Amendment interests." *AFL-CIO*, 333 F.3d at 176.

Nor do the holdings of *Buckley v. Valeo* and *SpeechNow.org v. FEC* suggest that donors lack *any* First Amendment interest in having their affiliation with groups disclosed. (Pls.' Reply Mem. at 24 (citing 424 U.S. 1 (1976) (per curiam); 599 F.3d 686 (D.C. Cir. 2010) (en banc)).) In *Buckley*, the Supreme Court limited the sweep of FECA's political committee disclosure requirements to avoid their application to "groups engaged purely in issue discussion," 424 U.S. at 79, and the Commission accordingly analyzes an entity's major purpose to determine whether it is a political committee under the Act, *see* Political Committee Status, 72 Fed. Reg. 5595, 5601-02 (Feb. 7, 2007) (outlining standards that guide the Commission's analysis of the major

[8] The Commission's disclosure policies do not purport to delineate the scope of an administrative record in a case arising under 52 U.S.C. § 30109(a)(8), which is governed by case law and this Court's local rules. *See* Local Rule 7(n). Plaintiffs have not challenged the scope of the administrative record or the fact that the identities of CHGO's donors were redacted from those materials, and their time to do so has passed. (*See* Revised Scheduling Order at 2 (Docket No. 17) (setting May 20, 2016, deadline for motions challenging the administrative record).)

purpose requirement). The *Buckley* Court limited FECA in this way precisely because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. While it is true that *Buckley*, *SpeechNow*, and other cases confirmed that FECA's provisions requiring disclosure of donors is permissible in the context of entities that are *political committees*, they did so only after concluding that those disclosure requirements, as narrowed, were substantially related to a sufficient governmental interest. *See id.* at 80; *SpeechNow*, 599 F.3d at 434-35; *AFL-CIO*, 333 F.3d at 176. Of course, those provisions limited disclosure to groups meeting FECA's definition of a political committee; entities that do not meet that definition need not comply. *See* 52 U.S.C. § 30104(b)(3) (requiring only political committees to identify most persons who make contributions in excess of $200).

In sum, plaintiffs' suggestion that the FEC could simply release the identities of CHGO's contributors is circular reasoning and it adds nothing to their argument that the Commission's dismissal decision was contrary to law, which is the only legal issue before the Court. *See CREW*, 475 F.3d at 340 ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

D. The Controlling Commissioners Were Entitled to Consider the Potential Challenges of Any Future Litigation in Deciding Not to Pursue Further Enforcement

In dismissing the complaint against CHGO, the controlling group explained that it "did not agree" with the analysis conducted by the Commission's Office of General Counsel delineating which of CHGO's advertisements should count as evidence of CHGO's major purpose and that the case presented "novel legal issues" such as how to account for "vendor commissions and other general payments to officers or directors or vendors." (AR 1518-19.) The controlling group did not need to resolve those differences of opinion because it dismissed

the case as an exercise of prosecutorial discretion. (AR 1519.) But the existence of debatable issues as to the merits of plaintiffs' allegations affects the Commission's analysis of "whether the agency is likely to succeed if it acts," and therefore it was a permissible consideration for the controlling group to invoke. *Heckler*, 470 U.S. at 831.

Plaintiffs argue that there was "no justification for dismissal on the merits" (Pls.' Reply Mem. at 28), but the question before this Court is whether the controlling group reasonably exercised its prosecutorial discretion in dismissing the case. As to that question, it is certainly permissible for the agency to decline to resolve contested factual or legal issues presented by the case. *See N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993). The issue here is *not* whether CHGO was, in fact, a political committee. The controlling Commissioners never decided that issue one way or the other.[9]

Even if the controlling statement had been required to resolve the legal issues plaintiffs identify, plaintiffs fail to show that the agency was required to do so in the way they suggest. Initially, plaintiffs' entire analysis takes the Office of General Counsel's categorization of CHGO's advertising as electioneering communications or independent expenditures for granted, when the controlling group expressly disagreed with that analysis. (*See* Pls.' Reply Mem. at 28-29; AR 1518-19.) That categorization is fundamental to the entire political-committee analysis, because whether an advertisement is evidence of an entity's major purpose of nominating or electing federal candidates will also affect how much of the organization's spending counts

[9] Plaintiffs are also incorrect that the dismissal must be found contrary to law because the controlling Commissioners observed that CHGO had engaged in "obvious" FECA violations. (AR 1516.) As explained above, there is no principle of law requiring the Commission to pursue every FECA violation, so long as it provides reasonable grounds for declining to do so in a particular case. *Akins*, 524 U.S. at 25; *La Botz*, 61 F. Supp. 3d at 35.

towards that purpose. But the controlling group was not required to accept that analysis, and the specific categorization of CHGO's advertising remains unresolved. *See infra* p. 27.[10]

Plaintiffs argue that the Commission has already decided how generalized payments and commissions should be accounted for, but the authorities plaintiffs cite fall short. (*See* Pls.' Reply Mem. at 31-33.) The primary transaction at issue is the "approximately $300,000" CHGO paid to Michael Mihalke, which Mihalke described as a payment "for his work on the CHGO project in general." (AR 1308.) While this amount accounted for Mihalke's "commission for media placement," it also covered other work such as "general media consulting, fundraising and strategy." (AR 1307-08.) Thus, this money represented payments for more than just the costs of CHGO's advertising that could be easily associated with particular advertisements.

Plaintiffs argue that the total amount of this $300,000 should be allocated to CHGO's advertising despite the fact that it included money for non-advertising work, but they do not cite a single enforcement matter in which the Commission treated generalized payments in that way. They rely on MUR 6683 (Fort Bend County Democratic Party), http://eqs.fec.gov/eqsdocsMUR/14044363331.pdf, but that matter did not even involve the major purpose test, much less any question of how to categorize generalized payments to vendors or directors. The question in

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[10] A recent decision in a separate CREW challenge to an unrelated FEC dismissal decision does not render the Commission's decision in this case contrary to law. *See CREW*, 2016 WL 5107018 (D.D.C. Sept. 19, 2016). That decision — which is on appeal — post-dates the Commission's dismissal in this case, so the controlling group cannot be faulted for failing to address it. Moreover, that decision *rejected* CREW's argument that "*all* electioneering communications" should be considered "indicative of a 'purpose' to 'nominat[e] or elect[] . . . a candidate.'" *Id.* at *11 (quoting *Buckley*, 424 U.S. at 79). Judge Cooper also held that the FEC's decisions on how the major purpose test should be implemented — such as a spending threshold for finding major purpose based on expenditures — are entitled to deference. *Id.* at *7. Even after that decision, then, the Commission would still need to resolve unsettled legal issues to determine which CHGO spending should count under the major purpose analysis and which should not. Given the Commission's analysis of the other challenges that would attend further enforcement proceedings in this case, it remains reasonable for the controlling statement not to have delved into resolving these issues here.

MUR 6683 was whether a county-level party organization that primarily advocated for candidates in state and local elections was nonetheless a federal political committee under FECA because it devoted three pages of a 32-page voter guide to advocating for federal candidates. *Id.* at 3-8. The Commission analyzed that question under a separate political committee definition now codified at 52 U.S.C. § 30101(4)(C), which provides in relevant part that "any local committee of a political party which . . . makes expenditures aggregating in excess of $1,000 during a calendar year" is a political committee. Unlike groups that meet the definition of a political committee at 52 U.S.C. § 30101(4)(A), which is the provision at issue in this case, the Commission has not applied the major purpose test to determine whether local committees of political parties are political committees under section 30101(4)(C). *See, e.g.*, Factual and Legal Analysis 1 n.1, MUR 5031 (Democratic Party of Illinois) (Sept. 17, 2002), http://eqs.fec.gov/eqsdocsMUR/00004420.pdf ("Courts have not extended the 'major purpose test' to local party committees required to register pursuant to [52 U.S.C. § 30101(4)(C)]."). MUR 6683 says nothing about how the Commission should or must apply the major purpose test because it does not address that test at all. Ironically, to the extent MUR 6683 is relevant here, it actually supports the FEC's position, because in that matter the FEC unanimously voted to invoke its prosecutorial discretion and dismiss allegations that the respondent violated FECA by failing to register and report as a political committee, despite concluding that the respondent's expenditures "may have exceeded" the political-committee expenditure threshold. Factual and Legal Analysis 7, MUR 6683 (Fort Bend County Democratic Party), http://eqs.fec.gov/eqsdocsMUR/14044363331.pdf. That is essentially the same analysis the Commission adopted in this case.

Along similar lines, MUR 6683 and the regulations plaintiffs cite do not specifically address how to allocate generalized payments to directors or vendor commissions. MUR 6683 addressed how costs for a voter guide that included advocacy on behalf of both federal and non-federal candidates should be allocated, and it determined that one possible method could be to divide the number of pages devoted to federal candidates by the number of total pages and apply the resulting ratio to the overall costs of producing the guide. MUR 6683, at 7. It is also true that costs charged by a vendor to produce or air electioneering communications, 11 C.F.R. § 104.20(a)(2)(i), and the "related production costs" of independent expenditure advertisements, Instructions for Preparing FEC Form 5 at 3, http://www.fec.gov/pdf/forms/fecfrm5i.pdf, generally must be reported to the FEC. But neither of those citations specifically govern the major purpose analysis or resolve how the Commission should allocate a group's generalized commission payment to an individual who both assisted with media placement and provided other services to the group.

To be sure, the Commission might have resolved these legal issues, had it reached them, in the way plaintiffs suggest. But plaintiffs have pointed to no statutory provision, judicial decision, regulation, or FEC precedent that precisely governs these questions. Given the lack of specific authority, and the other issues with enforcement in this matter, it was reasonable for the controlling Commissioners to leave unsettled legal issues for another day.

III. THE DISMISSAL DECISION WAS A REASONABLE EXERCISE OF PROSECUTORIAL DISCRETION

A. The Controlling Group Sufficiently Explained the Analysis Behind Its Invocation of Prosecutorial Discretion

As the FEC explained in its initial brief, although "an agency is required to adequately explain its decision," it "is enough that a reviewing court can reasonably discern the agency's analytical path." *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016); FEC Mem. at 30.

The statement of reasons here clearly shows the reasoning supporting dismissal, and so plaintiffs' claim that the statement does not adequately explain its invocation of prosecutorial discretion is incorrect. (*See* Pls.' Reply Mem. at 34-43.)

In its statement of reasons, the controlling group of FEC Commissioners explained the challenges the Office of General Counsel had faced during the course of its investigation into plaintiffs' allegations of FECA violations by CHGO, set forth its view on what information remained unknown following that investigation, and identified the procedural and legal difficulties that any further enforcement proceedings would have to overcome to be successful. The statement of reasons noted that: (1) five years had passed since the conduct at issue in plaintiffs' administrative complaint had occurred, meaning that the statute of limitations had "effectively expired"; (2) conciliation efforts would be "futile" because no people were willing to accept responsibility for CHGO or enter any legal agreement; and (3) any further enforcement would likely be a "pyrrhic exercise" because CHGO had terminated its existence through an IRS filing and appeared to have no remaining assets. (AR 1516-19.) Under those circumstances, the controlling group concluded that "this case did not warrant the further use of Commission resources" and exercised its prosecutorial "discretion" to close the file. (AR 1516, 1519.) The controlling statement further cited relevant authority establishing the general legal principle that administrative agencies possess prosecutorial discretion, as well as previous FEC matters that the controlling group viewed as similar to the CHGO matter. (AR 1519 (citing *Heckler*, 470 U.S. at 832).)

The analysis in the statement of reasons provides valid, reasonable considerations for the decision, and plaintiffs fail to show otherwise. Instead, they focus on the final sentence of the statement of reasons, which notes that the case "did not warrant the further use of Commission

resources," and suggest it is "conclusory" and inadequate to support the invocation of prosecutorial discretion. (Pls.' Reply Mem. at 38.) But plaintiffs ignore the preceding pages of the statement of reasons, which explain precisely why the controlling group viewed the most prudent course as being dismissal. The statement of reasons initially explains that the costs of pursuing enforcement outweighed its benefits, and the remainder of the statement sets forth in more detail why that was the case. (AR 1516 (noting CHGO's defunct status, its lack of agents willing to conciliate, and the statute of limitations, and explaining that "[t]herefore . . . this case did not warrant the further use of Commission resources").) This analysis focused on the circumstances of this particular enforcement matter, contradicting plaintiffs' claim that the statement of reasons "does not explain why enforcement in *this case* was unwarranted." (Pls.' Reply Mem. at 38.)

Moreover, plaintiffs' assertion that it is difficult for a court to review the controlling group's subjective analysis regarding which cases warrant enforcement in fact weighs in favor of granting executive agencies great deference to such determinations in the first instance. *See Heckler*, 470 U.S. at 831 (noting the "general unsuitability for judicial review of agency decisions to refuse enforcement"). Of course, in the context of the FEC, judicial review remains available to ensure that a Commission dismissal decision is reasonable and not contrary to law. *See* 52 U.S.C. § 30109(a)(8). But even under that standard of review, the Commission's "decision not to pursue a potential violation involves a complicated balancing of factors which are appropriately within its expertise." *La Botz*, 61 F. Supp. 3d at 33.

Nor do plaintiffs' cases establish that the dismissal decision was inadequately explained. Plaintiffs cite *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n* (Pls.' Reply Mem. at 9, 39), but they fail to indicate that the language they quote actually comes from the

dissenting opinion, 789 F.2d 26, 48 (D.C. Cir. 1986) (Wald, J., dissenting). Two other cases plaintiffs cite expressly support the Commission's position and uphold FEC dismissals for prosecutorial discretion. *La Botz*, 61 F. Supp. 3d at 33; *see also Nader*, 823 F. Supp. 2d at 65. Plaintiffs also rely on the D.C. Circuit's decisions in *Siegel v. SEC*, 592 F.3d 147 (D.C. Cir. 2010), and *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75 (D.C. Cir. 2006), but they are inapposite. (*See* Pls.' Reply Mem. at 38.) Those cases did not involve dismissals for prosecutorial discretion, but rather were agency orders that failed to explain even the basic standards by which the agency would decide. *See Siegel*, 389 F.3d at 149 (granting petition for review because agency "failed to articulate any meaningful standards governing the level of causation required"); *Tripoli Rocketry Ass'n*, 437 F.3d at 81 (granting petition for review because agency "has never articulated the standards that guided its analysis"). The controlling Commissioners, by contrast, explained with specificity why they viewed further enforcement efforts as unwarranted in this case, and they did so under the clear legal standards that govern agency assertions of prosecutorial discretion. That explanation is more than sufficient so that "a reviewing court can reasonably discern the agency's analytical path." *Van Hollen*, 811 F.3d at 496-97.

B. Plaintiffs Fail to Show that the Controlling Commissioners' Reliance on Prosecutorial Discretion Was Unwarranted in This Case

There is also no basis to question the controlling group's substantive analysis that a prosecutorial-discretion dismissal was warranted in this case. Plaintiffs argue that the Commission's budgetary and staffing resources were sufficient to pursue this case, claiming that the Commission's dismissal here relied on an "objective" assertion about the agency's budget or capacity to pursue enforcement. (Pls. Reply Mem. at 39-40.) But no such assertion exists in the controlling group's statement of reasons or the Commission's briefing to this Court. Rather, the

controlling group relied on the Commission's prerogative to select enforcement priorities and allocate resources after consideration of the age of the factual issues involved, the status of the respondent as a terminated legal entity, and the potential legal difficulties that would attend further enforcement. (*See, e.g.*, FEC Mem. at 33 (stating that the controlling group determined that pursuing further enforcement was "an inefficient use of limited Commission resources"); AR 1516 ("we concluded that this case did not warrant the further use of Commission resources").)

It was plainly permissible for the controlling Commissioners to rely on their subjective judgment about the agency's enforcement priorities and the legal difficulties that might attend further enforcement. An agency making a decision not to bring an enforcement action "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. Plaintiffs myopically focus on only the last of these considerations, but the controlling group's analysis was not so limited. (*See* AR 1516-19.) Instead, the controlling group identified several problems presented by this case — including limitations of evidence, the inability to conciliate, the statute of limitations, and others — that would reduce the likelihood that the Commission would succeed if it pursued further enforcement. (*Id.*) Even plaintiffs concede that FEC prosecutorial discretion includes consideration of "the probability of the investigatory difficulties" it might face. (Pls.' Reply Mem. at 11 (quoting *Nader*, 823 F. Supp. 2d at 65).) Much of the analysis the controlling Commissioners conducted in this case involved precisely that consideration.

Thus, while the invocation of prosecutorial discretion must be supported by "reasonable grounds," *Nader*, 823 F. Supp. 2d at 65, it does not require the FEC to prove that the agency lacks the budgetary resources to pursue enforcement in a particular matter it elects to dismiss. *See La Botz*, 61 F. Supp. 3d at 35 (stating that a FEC conclusion that "its resources would be better utilized elsewhere" is "a decision *entirely within* its discretion" (emphasis added)); *cf. Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007) (noting that "court[s] should not attempt to review" an agency's evaluation of "factors bearing on the agency's enforcement authority, including policy priorities, allocation of resources, and likelihood of success"). This is because the judiciary is not well positioned to set an agency's enforcement priorities or "direct[ ] where limited agency resources will be devoted." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

It is also not relevant that the Office of General Counsel recommended pursuing further enforcement. (*See* Pls.' Reply Mem. at 40.) An agency generally has no obligation to accept its staff's views or recommendations, and the D.C. Circuit has specifically declined to give any weight to staff views in judicial review of agency decisions. *See, e.g., Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" the argument that an agency's decision was unreasonable due to its conflict with "General Counsel's understanding of the case law before the present decision"). Courts reviewing FEC actions that are contrary to staff recommendations have thus done little more than note that background fact. *See, e.g., In re Sealed Case*, 223 F.3d at 781 (noting General Counsel's position but analyzing Commission's decision); *Akins*, 736 F. Supp. 2d at 24 (granting summary judgment to Commission despite contrary recommendation from General Counsel to find reason to believe).

Plaintiffs insist that because "*every* contested enforcement action involves risk and difficulties," the controlling group should not be permitted to invoke prosecutorial discretion on that basis. (Pls. Reply Mem. at 39.) But that is a reason why courts defer to reasonable explanations of an agency's decision to invoke prosecutorial discretion, not a basis to overturn such an analysis. It is the FEC itself that is in the best position "to evaluate its own resources and the probability of investigatory difficulties." *Nader*, 823 F. Supp. 2d at 65. As a result, courts have never held that an agency dismissal for prosecutorial discretion requires specific proof that the agency lacked resources to pursue the particular case, and that remains true in the context of FECA. *See, e.g.*, *id.* (affirming dismissal without requiring budgetary evidence); *La Botz*, 61 F. Supp. 3d at 33 (same). A reasonable basis for the exercise of discretion is sufficient.

C. The Dismissal Decision Was Consistent with FEC Precedent

In its statement of reasons, the controlling group cited several prior FEC matters that were relevant to its consideration of the CHGO matter. (AR 1519-20.) Those matters included cases in which the FEC had dismissed administrative complaints because the committee at issue was terminated or because the age of the allegations suggested dismissal was appropriate. (*Id.*) The controlling group also noted that the CHGO matter was unlike previous instances in which the FEC had pursued other "dormant but registered candidate committees" because "negotiation was possible" in those cases "by working with the former candidate who authorized them and who served as an agent of the committee for certain purposes." (*Id.*)

In response, plaintiffs attempt to conjure a binding contrary "precedent" from a single instance in which the FEC successfully entered into a conciliation agreement with an entity that had recently terminated, and plaintiffs fault the FEC for failing to distinguish that matter specifically. (*See* Pls.' Reply Mem. at 37 (citing MUR 6413 (Taxpayer Network) (May 19, 2014)).) The wealth of prior Commission matters cited in the statement of reasons easily refutes

plaintiffs' argument. (AR 1519-20.) As those matters make clear, the Commission routinely considers potential difficulties with the statute of limitations, problems of proof, and whether the group in question remains active in analyzing whether to proceed with an enforcement matter. (*Id.*) Of course, the circumstances of a particular matter will sometimes lead the Commission to continue pursuing enforcement, and at other times that will not be the case. *See, e.g.*, *Nader*, 823 F. Supp. 2d at 63. But the Commission has no particular policy or precedent that must be distinguished when making the kind of fact-specific determination it made here. There was, therefore, no departure from precedent that the controlling group needed to explain.

Moreover, the dismissal here was consistent with MUR 6413, and in any event the controlling group did not err in failing to cite that matter. "An agency is by no means required to distinguish every precedent cited to it by an aggrieved party," *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60-61 (D.C. Cir. 2004), and the agency need not provide an "elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears," *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). The text of the statement of reasons shows why MUR 6413 does not affect the controlling group's analysis. As the controlling group explained, the CHGO matter was materially different from other matters in which "negotiation was possible by working with" individuals "who served as an agent of the committee" to resolve the matter. (AR 1520.) Of course, the existence of an agent with whom to negotiate is not a condition precedent to FEC enforcement — the controlling group never intimated that it was. (*See id.*) But the lack of any agent willing to negotiate with the Commission certainly affects the likelihood of successful enforcement. An effort to settle FEC matters through negotiation and conciliation is not only required by FECA, but that path of resolution is also a quicker, more efficient enforcement

process, and it eliminates litigation risk. In addition, although plaintiffs suggest that "the ads at issue" in MUR 6413 "were approximately five years old," they fail to mention that the FEC and the respondent entered into the conciliation agreement *less than four years* after the advertisements were aired, reducing the likelihood that the statute of limitations would be a barrier to any enforcement litigation. Conciliation Agreement, MUR 6413 (Taxpayer Network) (May 19, 2014), http://eqs.fec.gov/eqsdocsMUR/14044353947.pdf (noting that the advertisements were aired during "the 60 day period prior to the 2010 general election"). Those considerations certainly form a reasonable basis for the controlling group to decline to pursue this matter as an exercise of prosecutorial discretion. *See La Botz*, 61 F. Supp. 3d at 35; *Nader*, 823 F. Supp. 2d at 65. Thus, while the statement of reasons did not cite MUR 6413, the logic of the controlling group's reasoning is completely consistent with the Commission's treatment of that matter.

Plaintiffs venture far afield in trying to show that the statement of reasons in this case was unreasonable by reference to other cases in which the Commission did not find that a particular entity was a political committee, but those efforts are unavailing. Relying on a chart purporting to summarize recent Commission votes, plaintiffs argue that the controlling group's failure to find reason to believe each entity was a political committee means that those Commissioners have abdicated their role in enforcing FECA here.[11] (*See* Pls.' Reply Mem. at 40-43.) These unrelated matters are simply irrelevant to the fact-specific determination under review here.

[11] This Court should not consider plaintiffs' exhibits, because they were not part of the administrative record before agency decision-makers at the time the decision was made. *See infra* pp. 34-37. Moreover, plaintiffs' Exhibit 2 should also be disregarded because it is in excess of plaintiffs' page limits. (*See* Revised Scheduling Order at 2 (Docket No. 17) (granting plaintiffs 45 pages for reply brief).) Plaintiffs "could have simply included [that] chart[] within their briefing itself" had they wished to comply with the page limitations. *Banner Health v. Burwell*, 126 F. Supp. 3d 28, 64 (D.D.C. 2015).

FECA's judicial review provision is case-specific, not a mechanism for the federal courts to police the agency's overall enforcement practices. *See Citizens for Responsibility & Ethics in Washington v. FEC*, 164 F. Supp. 3d 113, 118 (D.D.C. 2015) (noting that a complainant's "recourse" for challenging an adjudication it disagrees with "is to seek a declaration under FECA that *specific* FEC enforcement decisions are contrary to law" (emphasis added)).

In any event, the cases cited in that chart do not suggest anything other than differing views regarding the legal standards applicable to the political-committee analysis. First, plaintiffs do nothing to establish that the controlling Commissioners' votes in those cases were impermissible. The majority of matters plaintiffs cite in which the controlling Commissioners opposed finding reason to believe an entity had violated the political committee provisions of FECA have not been held contrary to law by the courts and are not under review here.[12] Second, even plaintiffs admit that the Commissioners in the controlling group voted in favor of finding reason to believe a political-committee violation occurred in some of those matters. (*See* Pls.' Reply Mem. at 42 (citing "four cases in which one of the controlling commissioners voted to find reason to believe").) Third, while the plaintiffs complain that in other matters the controlling Commissioners invoked prosecutorial discretion only "in boilerplate footnotes," plaintiffs do not claim that the statement of reasons here includes the supposedly boilerplate language to which they object. (*See* Pls.' Reply Mem. at 41-42.) Plaintiffs may favor different policy choices in FECA enforcement, but their analysis of aggregated voting patterns does not address the specific factors at issue in *this* case, and it does not suggest that the controlling

[12] In one of these matters, a district court judge declared the Commission's dismissal of a complaint alleging that a group had violated the political committee provisions of FECA contrary to law. *CREW*, 2016 WL 5107018. That decision has been appealed to the D.C. Circuit.

group's analysis in the statement of reasons here was contrary to law, which is the proper limit of judicial review.

D. The FECA Provision Allowing Administrative Complainants to File Enforcement Suits in Very Limited Circumstances Does Not Vitiate the Commission's Well-Established Prosecutorial Discretion

Plaintiffs argue that "FECA's contrary to law standard . . . should not be interpreted to allow dismissals for prosecutorial discretion." (Pls.' Reply Mem. at 44.) That breathtaking claim is squarely contradicted by this Circuit's longstanding case law. *See, e.g.*, *CREW*, 475 F.3d at 340 ("the Commission, like other Executive agencies, retains prosecutorial discretion"); *La Botz*, 61 F. Supp. 3d at 33 (acknowledging the FEC's prosecutorial discretion).

Ignoring these cases, plaintiffs instead cite "other statutory schemes" such as environmental or employment discrimination statutes. (Pls.' Reply Mem. at 43 n.16.) Those other statutes, however, contain explicit language permitting citizen suits upon mere notice of the alleged violation to the relevant administrative agency and inaction by that agency. *See, e.g.*, 33 U.S.C. § 1365 (authorizing "any citizen" to commence a civil action for certain environmental protection violations upon sixty days' notice to the EPA); 42 U.S.C. § 2000e-5(f)(1) (permitting "persons aggrieved" to file employment discrimination lawsuit if the Equal Employment Opportunity Commission dismisses or fails to act on a charge filed with that commission within a specified time). The text of those statutes does not require any judicial finding as a condition precedent to a citizen suit.[13]

[13] For the same reason, the Ninth Circuit's decision in *Sierra Club v. Whitman* does not support plaintiffs' argument that the FEC has no prosecutorial discretion. 268 F.3d 898 (9th Cir. 2001). That case discussed the citizen suit provision of the Clean Water Act in a suit against the administrator of the Environmental Protection Agency ("EPA"). *Id.* at 900. The Clean Water Act does not require a court to find an EPA decision contrary to law as a condition precedent to a citizen suit. 33 U.S.C. § 1365.

The plain text of FECA, by contrast, contains just such a prerequisite. That law permits private parties to undertake enforcement litigation only when (1) a court declares that an FEC dismissal decision is "contrary to law," and (2) the FEC fails to conform to that ruling within 30 days. 52 U.S.C. § 30109(a)(8)(C).[14] Because the statutory language is "plain and unambiguous," this Court need not address the policy arguments presented in plaintiffs' brief. *Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006) (internal quotation marks omitted).

Recognizing the prosecutorial discretion afforded to the FEC also does not "nullify" any other portion of FECA's text. (*See* Pls.' Reply Mem. at 43.) Because the courts have recognized that the Commission retains prosecutorial discretion, discretionary dismissals on that basis will not be contrary to law so long as the Commission provides reasonable grounds. *See, e.g.*, *Nader*, 823 F. Supp. 2d at 65. That situation is consistent with the citizen-suit provision, because a complainant's right to bring a private action is never triggered without a contrary-to-law finding. 52 U.S.C. § 30109(a)(8)(C); *cf. Bd. of Trade of City of Chi. v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) ("[E]ven when the aggrieved party cannot vindicate its own rights, . . . decisions about the best use of the staff's time are for the prosecutor's judgment." (citation omitted)). In the event that the Commission relied on unreasonable or impermissible grounds, however, that exercise of prosecutorial discretion would be rejected on judicial review as contrary to law, and if the FEC later failed to conform to the court's declaration, a complainant could bring a civil action. *See La Botz*, 61 F. Supp. 3d at 33 n.5. Either circumstance is fully consistent with the plain statutory text.

[14] In pertinent part, 52 U.S.C. § 30109(a)(8)(C) provides that if a court declares any dismissal of a complaint is contrary to law, it "may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint."

IV. PLAINTIFFS' BELATED ATTEMPTS TO EXPAND THE SCOPE OF JUDICIAL REVIEW SHOULD BE REJECTED

Plaintiffs continue to rely on facts outside the administrative record and factual determinations the controlling group did not make. (*See, e.g.*, Pls.' Reply Mem. at 2-3 (presenting as "facts" such disputed conclusions as "Scott Reed . . . founded CHGO," that certain witnesses made "false or misleading statements to the IRS and, later, to the FEC," and that "Reed obstructed the service of a[n] FEC subpoena); *id.* at 40-41 (citing studies purporting to summarize public records).) As explained in the FEC's opening brief, this reliance is improper in an action under section 30109(a)(8), where the court is "limited to correcting errors of law." *CREW*, 475 F.3d at 340; *see also* FEC Mem. at 31-33. Reviewing such actions based on a closed administrative record ensures "reasoned decisionmaking based on the record" by the agency, and "judicial review of the agency decision based on the data and reasoning before the agency at the time the decision was made." *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23-24 (D.C. Cir. 1979) (per curiam); *see also IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997) (rejecting "*ex post* supplementation of the record" with affidavits "that should have been submitted to the agency before [the] dispute reached the courts").

Seeking to justify their reliance on materials that were not before the FEC, plaintiffs argue that the Court may "take notice of certain legislative facts . . . 'to enable it to understand the issues clearly.'" (Pls.' Reply Mem. at 12 (citing *Beach Commc'n, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992)).) In fact, plaintiffs' primary case does not support that conclusion. In *Beach Communications*, the D.C. Circuit concluded that an administrative record did not contain sufficient material to permit the reviewing court to understand the rationale behind an agency rule. *See* 959 F.2d at 987. Instead, the court concluded that it needed "additional 'legislative facts'" to understand the issue clearly. *Id.* Rather than simply taking judicial notice of those

facts, as plaintiffs suggest this Court do, the D.C. Circuit remanded the record to the administrative agency for supplementation with sufficient facts to permit judicial review. *Id.* at 987-88.[15] *Beach Communications* thus simply reflects the black-letter principle of administrative law that an agency's decision must stand or fall based on the administrative record before the agency when it made its decision or be remanded to the agency for further development of the record. *See Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). It does not suggest that a Court may itself take judicial notice of legislative facts that were not before the agency decision-makers.

Many of the materials plaintiffs submit, moreover, are not properly characterized as legislative facts. For example, plaintiffs' initial brief cited extra-record material to explain the activities of CHGO affiliates after the events under consideration in this matter and to show the purported "[f]allout of CHGO's [s]trategy." (Pls.' Mem. at 29-30.) These facts "concern the immediate parties" and therefore fall outside the definition of legislative facts. *Individual Reference Servs. Grp., Inc. v. FTC*, 145 F. Supp. 2d 6, 45 (D.D.C. 2001) (quoting *Alaska Airlines, Inc. v. Civil Aeronautics Bd.*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976)).

Similarly, judicial notice principles do not permit plaintiffs to expand the scope of the administrative record in this case. "[T]aking judicial notice is typically an inadequate mechanism for a court to consider extra-record evidence when reviewing an agency action" because "review of an agency decision is limited to the administrative record before the agency

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[15] The D.C. Circuit's decision to remand to the agency for additional development of legislative facts was disapproved of by the Supreme Court, but only because those additional facts were irrelevant to the legal analysis. *See FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 315 (1993). As the Court reasoned, the "absence of legislative facts explaining the" agency's rationale "has no significance in rational-basis analysis." *Id.* (internal quotation marks omitted).

at the time of the decision." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n.14 (D.D.C. 2013). As a result of this limitation, "judicial notice of an adjudicative fact *not* part of the administrative record generally is *irrelevant* to the court's analysis."[16] *Id.* Moreover, much of the evidence plaintiffs cite does not appear to meet the standard for judicial notice. *See* Fed. R. Evid. 201(a). The studies conducted by Public Citizen and a local NBC television affiliate purport to summarize FEC votes in a variety of enforcement matters (Pls.' Reply Mem. at 40), but the conclusions they reach are certainly subject to reasonable dispute.

Rather than providing any valid basis for expanding the record, plaintiffs resort to asserting that the "controlling commissioners' good faith is in question" merely because those Commissioners did not vote in the way plaintiffs would like. (Pls.' Reply Mem. at 13.) To go beyond the administrative record on this basis, plaintiffs must make a "strong showing of bad faith or improper behavior," *IMS*, 129 F.3d at 624 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)), but plaintiffs utterly fail to meet that standard. The only specific evidence plaintiffs cite to support their argument that the controlling Commissioners acted improperly in this case is their disagreement with the controlling Commissioners' approach to enforcement of FECA generally and with the decision in this case in particular. (Pls.' Reply Mem. at 13-14.) "While plaintiff[s are] free to challenge the legal merits of that decision, the mere fact of that decision, without any specific allegations of impropriety, does not show bad faith." *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009).

Finally, the controlling group's suggestion that this case did not "warrant the further use of Commission resources" is not an invitation to conduct wide-ranging discovery into the

[16] Of course, the FEC concedes that plaintiffs may cite government records explaining the reasoning of prior Commission matters. (FEC Mem. at 32.) However, the FEC has never conceded that studies, news articles, or other sources that purport to summarize those documents or reasoning may be considered in a challenge to an agency administrative action like this one.

enforcement priorities, staffing, and resources of the FEC. (AR 1516; *see* Pls.' Reply Mem. at 14 n.2.) Discovery is inappropriate here because this is an action for judicial review on an administrative record, not litigation between two parties where the court or a jury would be required to resolve disputed facts. Plaintiffs suggest that the FEC's supposed reliance on a lack of budgetary resources "creates a genuine dispute of material fact." (Pls. Reply Mem. at 14 n.2.) That summary judgment standard, however, has no applicability in a case involving judicial review of agency action. *Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, No. 14-1991, 2016 WL 1436646, at *5 (D.D.C. Apr. 11, 2016) ("The summary-judgment standard set forth in Federal Rule of Civil Procedure 56(c), therefore, does not apply because of the limited role of a court in reviewing the administrative record."). As explained above, plaintiffs' description of the controlling group's rationale as being based solely on budgetary considerations is a misrepresentation of the statement of reasons in this matter. *See supra* pp. 25-27. There is simply no basis to expand the scope of administrative review in this case.

CONCLUSION

For the foregoing reasons, the FEC's motion for summary judgment should be granted, and plaintiffs' motion for summary judgment should be denied.

Dated: November 10, 2016

Respectfully submitted,

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