IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HERRON FOR CONGRESS, Plaintiff,	:	
v.	:	
	:	Civil Action No. 11-1466 (RC)
FEDERAL ELECTION COMMISSION, Defendant.	:	

PLAINTIFF'S COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND ITS REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PLAINTIFF'S COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND ITS REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. STANDING

The three well-known minimum requirements for Article III standing are "'injury in fact' caused by the challenged conduct and redressable through relief sought from the court." *Shays v. Federal Election Comm'n,* 414 F.3d 76, 83 (D.C. Cir. 2005) ("*Shays*") citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). "The first element, 'injury in fact,' requires 'an invasion of a concrete and particularized legally protected interest.'" *Shays,* 414 F.3d at 82, (*citing McConnell v. Federal Election Comm'n,* 540 U.S. 93, 227 (2003)). For example, running for elected office in a legally conducted election where the Commission administers the campaign finance laws pursuant to its statute is a legally protected interest. "Harm must be 'actual or imminent,' not 'conjectural or hypothetical.'" *Shays,* 414 F.3d at 82 (*citing Lujan,* 504 U.S. at 560). "[C]ausation, demands 'a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' *Id.* "Finally, redressability requires that it be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.*

Separating questions of standing and mootness are essential for determining the burden of proof. The plaintiff has the burden of proof to demonstrate standing, but the defendant has the burden of proof to demonstrate mootness. "[S]tanding is based on the facts as they existed at the time the lawsuit was filed." *Steger v. Franco, Inc.,* 228 F.3d 889, 893 (8th Cir. 2000); *Advanced Mgmt. Tech., Inc. v. FAA,* 211 F.3d 633, 636 (D.C.Cir. 2000) (same); *Becker v. Federal Election*

Comm'n, 230 F.3d 381, 387 n.3 (1st Cir. 2000) (same). Mootness is determined thereafter. *Id.* "The confusion is understandable, given [the Supreme Court's] repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Becker*, 230 F.3d at 387 n.3 (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167 (2000) (citations omitted)). Questions of standing and questions of mootness are distinct, however, and it is important to treat them separately. *Id.* at 709-10. "The burden of establishing mootness rests with the party seeking its application, and '[t]he burden is a heavy one.'" *United States v. W.T. Grant Co*., 345 U.S. 629, 633(1953). Only where it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" will a case be dismissed as moot. *United States v. Concentrated Phosphate Export Ass'n, Inc*., 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)." *Natural Res. Council of Maine v. Int'l Paper Co*., 424 F.Supp.2d 235 (D. Me. 2006). Here, the Commission has titled its argument as "standing," but it is actually a mootness argument because it applies prospectively. Accordingly, the burden in this matter is on the Commission.

For purposes of Article III analysis at summary judgment, the parties may not rest on "mere allegations, but must set forth by affidavit or other evidence specific facts demonstrating standing." *Shays,* 414 F.3d at 84 (*citing Lujan,* 504 U.S. at 561) (quotation marks omitted). "[A] plaintiff 'can freely augment his pleadings with affidavits.'" *LaRoque v. Holder,* 650 F.3d 777, 787 (D.C. Cir. 2011) (*citing Haase v. Sessions,* 835 F.2d 902, 907 (D.C. Cir. 1987)). Accordingly, HFC is submitting declarations from Roy Herron and Bill Fletcher, Chief Executive Officer of Fletcher Rowley, Inc., political media consultancy based in Nashville,

Tennessee. Mr. Fletcher is both an expert in political campaigning and a witness to events relevant to this case.

A. BACKGROUND

"During the 2010 Congressional campaign in Tennessee's 8th Congressional District," Herron for Congress ("HFC" or the "Herron Campaign") "developed research from public sources that indicated Stephen Fincher had massive personal loans that he had failed to disclose as required by all candidates for Congress." Declaration of Bill Fletcher, attached hereto as Exhibit A ("Fletcher Decl.") ¶ 12. "In addition, [the campaign] discovered that Fincher had loaned his campaign $250,000 from his personal resources even though the amount of the loan vastly exceeded the net worth he has reported on required disclosure documents." *Id.* ¶ 13. The campaign "prepared a detailed briefing for news reporters outlining what [it] believed were real and serious violations of federal law committed by Fincher and his campaign." *Id.* ¶ 14. That briefing is attached as Exhibit A to the Fletcher Declaration. This briefing "generated significant news coverage." *Id.* ¶¶ 15, 16. HFC decided to make Fincher's loan and inaccurate federal reports a prime focus of the campaign, *id.* ¶ 21, after the Herron campaign's political consultant "related an experience to them about a Tennessee political campaign upon which [he] consulted in 1984 where a candidate put money from an unsecured bank loan into his federal campaign committee. When the loan came to light the campaign was forced by the bank to repay the loan, thus depriving the campaign committee of the use of the funds and effectively ending the candidate's campaign." *Id.* ¶ 22. The Herron campaign's pollster determined that "55% of registered voters would either vote against Stephen Fincher or had major or minor doubts about him because of the bank loan and his handling of his personal finances." *Id.* ¶ 23. Accordingly, the campaign "issued press releases and produced radio and television commercials detailing

Fincher's financial [misdeeds]." *Id.* ¶ 24 (Copies of television scripts used to produce those ads are attached as Exhibit B and Exhibit C to the Fletcher declaration); *see also* Declaration of Roy Herron, attached hereto as Exhibit B, ("Herron Decl.") ¶¶ 8-10.

"Fincher's campaign repeatedly denied any wrongdoing and even falsely claimed that the Federal Election Commission had approved of their actions in securing and reporting the loans." Fletcher Decl. ¶ 25; Herron Decl. ¶11. "When some of the truth came out, [the Herron] campaign and [Mr. Herron, himself,] criticized Fincher for not telling the truth and not following the law. Herron Decl. ¶ 10. Fincher and his campaign repeatedly and falsely claimed to the contrary, even falsely claiming the Federal Election Commission had approved of their actions, and alleging that [Mr. Herron] was not telling the truth about his wrongdoing. *Id.* ¶ 11. "[Mr. Herron believes] [t]his was not a fair election because [he] followed the law and told the truth and Fincher did not." Id. ¶12. Mr. Fletcher believes that Mr. Herron lost the 2010 election, "in part, because [the Herron campaign] had not been able to prove that Fincher's loan was in fact a violation of federal election laws and regulations." Fletcher Decl. ¶ 26.

From December 2010 through early 2012, Mr. Herron engaged in numerous conversations with his political consultant about running for Congress in 2012 or 2014. *Id.* ¶¶ 32, 35. In these discussions, Mr. Fletcher "advised Roy Herron that a ruling against Fincher by the Federal Election Commission would be a powerful political tool to wield against the incumbent congressman. [He] advised Roy Herron that a ruling against Fincher would validate the claims made by the campaign during 2010 and set the stage for a successful rematch with the disgraced congressman." *Id.* ¶ 35. Alternatively, "the FEC's dismissal of Roy Herron's administrative complaint would be used against him as an issue in any future campaign he undertakes. It is likely that an opponent would state that Roy Herron made claims against []

Fincher that were either exaggerated or false. *Id.* ¶ 40. "When the Federal Election Commission dismissed the Herron committee's administrative complaint against the Fincher campaign, [Mr. Fletcher] advised Roy Herron that this was a major negative blow to any future campaign he might undertake against Stephen Fincher. [He] expressed the opinion to Roy Herron that Stephen Fincher had 'lied his way to Congress' and that the Federal Election Commission's failure to hold Fincher accountable for his clear violations of federal election laws and regulations revealed a federal election system that was broken, in need of reform and effectively non-existent." *Id.* ¶ 39. Mr. Herron agrees that the 2010 election "was not a fair election because [Mr. Herron] followed the law and told the truth, and Mr. Fincher did not." Herron Decl. ¶ 12.[1]

Mr. Herron declared that "[i]n deciding whether to run against Fincher in 2012, a significant factor was the Federal Election Commission's dismissal of my committee's administrative complaint against the Fincher campaign. We had alleged, in essence, that Fincher had gained an unfair advantage by obtaining an illegal corporate contribution and lying about it to the public and the Commission. When the Commission dismissed all of the allegations

[1] "[A] dangerous precedent has been set by the inaction of the FEC. A candidate of sufficiently low character could now decide to lie or misstate details of his finances and bankroll his own campaign with large loans from banks. After the election, this candidate could simply amend his reports and raise the money to repay the banks from special interests. This turns what was meant to be an open and transparent system into a game of 'Liar's Poker.'" Fletcher Decl. ¶ 43. "[S]ince 2008 the commissioners have deadlocked 34 times along party lines over whether to investigate campaigns for violating election laws. On 25 of those occasions, its own lawyer recommended they do so. 'You've reached a real major shift here, when the commission can't even start investigations,' says Kent Cooper, who helped keep the agency's vast trove of records for two decades. 'It sends a bad signal to people who are regulated by the law and voters who count on the law to be fully implemented and carried out.'" Herron Decl. ¶18 *quoting and agreeing with* Businessweek, May 3, 2012.

without even conducting an investigation and after acknowledging reporting violations, two things happened. First, Fincher's representatives claimed vindication to the press. Second, and more importantly, my reputation and credibility were tainted for claiming that Fincher had violated the law. Accordingly, this was one of the factors that persuaded me not to run against Fincher in 2012." Herron Decl. ¶ 13. Since the "Commission failed to conduct an investigation when needed, and failed to find violations and sanction violators when all of the Commissioners agreed there was a violation, I face the possibility of an unfair election in any election in which I run for Federal office." Herron Decl. ¶ 14; Fletcher Decl. ¶ 38 (decision not to run in 2012 "was negatively impacted by the Federal election Commission's rulings with regard to Fincher's loans and campaign reports").

Mr. Herron continues to remain politically active. Herron Decl. ¶¶ 20-23, 29; *see also Id*. ¶¶ 24-28 (continuing interest in specific legislative issues). He still has a passion for public service and meets with political supporters and potential contributors. *Id.* ¶¶ 22, 29. He has maintained HFC and the Herron for Congress web site, and has authorized the continued expenditure of funds for those purposes. Indeed he "was surprised to learn from the Commission's memorandum that the Commission considers it significant that [he] specifically tell the committee that [he] will redesignate that committee as [his] principal campaign committee in a 2014 campaign. Just to be clear, [he has] maintained the committee for that purpose, and [he has] now told the treasurer of Herron for Congress that [he] will redesignate the committee as [his] principal campaign committee for any future run for federal office. *Id.* at ¶ 20.

Mr. Herron will decide next summer of fall whether to run for Congress in 2014. Herron Decl. ¶ 30; Fletcher Decl. ¶¶ 36, 37, 42. He is in contact with his political advisor and is

monitoring this case and will monitor the Commission's decision on remand. *Id.* ¶ 42. Mr. Herron has been advised "that if the Federal Election Commission should finally decide to punish Fincher for his clear violations of federal law he should reconsider becoming a candidate for Congress in Tennessee 8th Congressional District in 2014 or some future election." *Id.* ¶ 41. "Unless the Commission's actions in this case are reversed, it will also impact [Mr. Herron's] decision whether to run for federal office in 2014. If [he does] decide to run for federal office in 2014, [his] campaign will face the real possibility of an opponent obtaining illegal campaign contributions for his or her campaign and lying about the source of funds because the Commission has demonstrated that it will not deter such conduct by punishing it." Herron Decl. ¶¶ 15-16. "Alternatively, if the Commission reconsiders [HFC's] complaint, finds violations and provides an appropriate penalty, that would have a positive impact on [Mr. Herron's] decision to run for office in 2014 and how to run a campaign." Herron Decl. ¶ 19.

B. INJURY IN FACT

In the political arena, Article III injury by a government election regulator includes, among other things, competitive injury in an election; unfair elections due to a regulatory failure; injury caused by the failure to follow internal procedures; injury to a candidate's political decision making by the regulator;, injury to political reputation by a regulator's action, and informational injury. All of these injuries are present here.

1. Competitor Injury and Fair Election Fights

In the Federal political arena, where there is no private right of action, *see* HFC Mem. at 4–5, traditional economic competitor standing principles and standing to sue the election regulator for providing one candidate with a competitive advantage over another are often merged. Thus, it is well recognized that a candidate has competitor standing when the

Commission permits his or her opponent to obtain an illegal benefit, such as violating the law without a sanction. *See Becker*, 230 F.3d at 388 n.5 (*citing In re: United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir.1989) (*quoted in Fulani v. Bentsen*, 35 F.3d 49, 54 (2d Cir.1994))); *Vote Choice v. DiStafano*, 4 F.3d 26, 37 (1st Cir. 1993); *see also Gottlieb v. Federal Election Comm'n*, 143 F.3d 618, 620-21 (D.C. Cir.1998); *Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C.Cir. 1991); *c.f. Shays v. Federal Election Comm'n*, 337 F.Supp.2d 28, 43 n.9 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005) ("*Becker* and *Vote Choice* involved candidates alleging that election laws and regulations provided opponents with a competitive advantage.").

A candidate's interest in "fair" election fights pursuant to the laws and regulations administered by the Commission is a "substantive" and a procedural right. *Shays*, 414 F.3d at 91.

Substantively, a candidate's "asserted interest in getting elected through legally financed campaigns is fully cognizable. Accordingly, their claimed injury, having to seek reelection in illegally structured contests . . . may support Article III standing." *Id.* at 90.

Procedurally, a candidate's "right to [Federal election law] compliant electoral contests is also 'procedural' insofar as campaign finance rules establish procedures through which candidates seek reelection. When parties claim standing based on violations of a procedural right, they 'can assert that right without meeting all the normal standards for redressability and immediacy." *Shays*, 414 F.3d at 91 (citations omitted). "[Candidates] may challenge [the Commission's] subversion of [the Federal election laws'] guarantees without 'establish[ing] with any certainty,"' . . . that the challenged rules will disadvantage their reelection campaigns. Indeed, given the multiplicity of factors bearing on elections and the extreme political sensitivity of judgments about what caused particular candidates to win, requiring candidates to establish

that, but for certain campaign finance rules, they could have won an election seems no more reasonable than requiring plaintiffs to 'demonstrate that, but for the procedural defect, the final outcome of the rulemaking process would have been different'- precisely the showing that administrative cases do *not* require. . . . Because BCRA establishes campaign procedures 'designed to protect [the candidate's] threatened concrete interest'. . . in winning reelection, [Candidates] possess standing to insist on those procedures based on the 'distinct risk' . . . documented in their affidavits, that political rivals will exploit the challenged rules to their disadvantage." *Id.* at 91-92.

Here, HFC filed its administrative complaint on September 29, 2010 in the midst of a congressional race alleging that Steve Fincher for Congress ("SFC") obtained an illegal contribution and filed incorrect reports with the Commission. Administrative Record ("AR") at 1-18. As the declarations attest, Mr. Herron and HFC were injured during the 2010 election by their opponent's violation of the election laws and will be injured again in 2014 by the Commission's failure to enforce the law. The Commission's decision that the $250,000 signature loan was not an illegal contribution and the dismissal of the knowing and willful reporting violation creates that same unfair election arena that supported the *Shays* plaintiffs' standing. Although HFC is not in competition with the Commission, the Commission's dismissal of the administrative complaint and created an unfair competitive advantage and continues to create an unfair competitive advantage that harmed and continues to harm Mr. Herron and HFC.

2. Procedural Injury

Plaintiffs possess standing "'to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.'" *Shays,* 414 F.3d at 85 (*quoting Lujan,* 504

U.S. at 572-73 & nn. 7-8 and *citing Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc) (holding that litigants may establish injury in fact by "show[ing] that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff")).

As shown in HFC's initial Memorandum, the Commission failed to follow its own Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (2007), to obtain and evaluate relevant publically available information. *See* HFC Mem. at 5, 25 and 24. The Commission reaffirmed this policy on May 9, 2012 in its Guidebook for Complaints and Respondents on the FEC Enforcement Process (May 2012):

> The Commission will make a determination of "no reason to believe" a violation has occurred when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a no reason to believe finding would be appropriate when (1) a violation has been alleged, but the respondent's response or other evidence demonstrates that no violation has occurred, (2) a complaint alleges a violation but is either not credible or is so vague that an investigation would be unwarranted, or (3) a complaint fails to describe a violation of the Act.

Id. at 13 (emphasis added). HFC's initial Memorandum showed how the Commission followed this policy when it analyzed other administrative complaints making similar allegations. There, the Commission obtained and analyzed evidence absent in the responses to the HFC administrative complaint, or applied the adverse inference rule in cases when such evidence was not submitted by the respondents. HFC Mem. at 27 – 36. By failing to follow its own policy and practice, the Commission arrived at an indefensible, unsupported, errant result regarding the corporate contribution. "[Candidates] may challenge [the Commission's] subversion of [the

Federal election laws'] guarantees without 'establish[ing] with any certainty, . . . that the challenged [Commission decision] will disadvantage their reelection campaigns." *Shays,* 414 F.3d at 91 (emphasis added, citations omitted).

Furthermore, if the Commission had followed the procedure in its own statute, 2 U.S.C. § 437g(a)(2), it would have found a violation of the reporting requirements and imposed an appropriate sanction.

3. Campaign Strategy and Planning

Article III injury occurs when "a candidate campaign strategy from the outset," is impacted by a "choice 'on the strategy and conduct of the candidate's political campaign'" caused by an improper government decision. *Shays,* 414 F.3d at 91 (*citing Vote Choice* 4 F.3d at 37) Hence, "there is no need to wait for injury from specific transactions to claim standing." *Shays,* 414 F.3d at 91 (*citations omitted*). "[W]e do not think it proper to second-guess a candidate's reasonable assessment of his own campaign. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 120 S. Ct. 693, 706, 145 L.Ed.2d 610 (2000) (finding standing to turn on the reasonableness of plaintiffs' fear that defendant's conduct would interfere with their activity)." *Becker,* 230 F.3d at 387. "To probe any further into these situations would require the clairvoyance of campaign consultants or political pundits -- guises that members of the apolitical branch should be especially hesitant to assume." *Id*.

For example, in a case challenging a rule imposing ballot-access costs, one of the candidate's decisions was whether to "abandon[] his aspiration of appearing on the general-election ballot. This option, however, is available to all candidates challenging ballot-access requirements, yet that has hardly stopped the Supreme Court from holding that political

candidates have 'ample standing' to bring such challenges." *LaRoque v. Holder*, 650 F.3d 777, 789 (D.C. Cir. 2011) (citation omitted).

Here, the Herron campaign has faced and is continuing to face a decision whether to run for Congress and, if so, how to structure its campaign when the Commission refuses to enforce the corporate contribution prohibition and filing requirements against its opponent. One consequence of the Commission's failure has already occurred: Roy Herron decided not to run for Congress in the 2012 election, in part, because the Commission failed to enforce the law. Mr. Herron faces another question next year -- whether to run in the 2014 election. That decision will also be affected by the Commission's decision. There is no question in Mr. Herron's mind that a finding of that fact by the Commission will enhance his probability of running and winning the 2014 election.

4. Reputation Injury

A candidate suffers "substantial harm" based on "reputational damage where plaintiff's 'chances for reelection' suffered." *Meese v. Keene*, 481 U.S. 465, 473–74 (1987)("*Keene*"); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (finding a "concrete" injury to plaintiff's reputation where the government's action "effectively brand[ed] him a child abuser and an unfit parent"). In *Keene*, the candidate had standing to challenge the government's decision due to his "suspicion" that showing a film that the government designated as "'political propaganda' . . . would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Keene*, 481 U.S. at 474(emphasis added). The Court reasoned that "would be a substantial detriment to Keene's reputation and candidacy," *Id*. at 475; *see also Advanced Management Technology, Inc. v. F.A.A.*, 211 F.3d 633, 636-637 (D.C. Cir. 2000) (same).

As demonstrated by the declarations, Mr. Herron's political reputation was harmed by the Commission's incorrect summary dismissal of his complaint. The administrative complaint was reported in the media along with statements that Mr. Herron believed that his opponent violated significant provisions of the federal election laws. When the Commission improperly dismissed the administrative complaint, his credibility and judgment suffered reputational harm and chances for election.

5. Informational Injury

Informational injury is well recognized in this Circuit. Voters and candidates plainly have standing when they have been denied information about who is funding campaigns. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 16 (1998) (injury to voters); Shays v. Federal Election Comm'n, 528 F.3d 914, 923 (D.C.Cir. 2008) (injury to candidates); *see also Van Hollen v. Federal Election Comm'n*, 2012 WL 1066717, *7 (D.D.C. 2012). Here, SFC initially denied HFC information about the true provider of funds to the Fincher campaign and is still denying information about the true nature of the funds, *i.e*. that the funds were an illegal corporate contribution. SFC made the first informational injury moot by filing an amendment to its Commission report admitting that Gates Bank had provided $250,000 to the Fincher campaign. However, if Mr. Herron does decide to "run for federal office in 2014, [his] campaign will face the real possibility of an opponent obtaining illegal campaign contributions for his or her campaign and lying about the source of funds because the Commission has demonstrated that it will not deter such conduct by punishing it." Herron Decl. ¶ 16. Because the Commission has refused to meet its responsibility under its statute to find a violation and sanction SFC, there is no deterrent to another similar violation in the future. Now, the burden is on the Commission to demonstrate that this injury is not capable of repetition yet evading review. *LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir.

2011). Accordingly, unless this Court corrects the Commission's errant decisions, SFC's violations will escape review.

6. The Injury is Imminent

As noted above, the injury must also be imminent. "[I] mminence is an 'elastic concept' that does not lend itself to mathematical precision." *Mead v. Holder*, 766 F.Supp.2d 16, 24 (D.D.C. 2011) (*citing Lujan,* 504 U.S. at 564 n. 4). "In addition, it is significant that our Circuit held that temporal remoteness alone does not automatically defeat standing." *Id*. Thus, "a candidate who filed a complaint in April 2010 alleging that he intend[ed] to run for election . . . in November of 2011" satisfied the requirement for imminent injury. *LaRoque,* 650 F.3d at 788. "[A] contrary holding would place courts and candidates in an untenable position." *Id*. "Since federal litigation often takes at least two years to resolve, agency orders 'of less than two years' duration ordinarily evade review' for purposes of the 'capable of repetition, yet evading review' exception to mootness." *Id*. (internal quotation marks and citation omitted).

HFC brought this claim a month before the 2010 election. The Commission's errant decision had a significant impact on his decision not to run in the 2012 election. Next year, Mr. Herron must decide whether to run for Congress and begin campaign organizing for the 2014 election. These decisions all meet the imminent test. Indeed, considering the probable schedule for Commission action after a remand, Mr. Herron's decision is well within the period that this Circuit found imminent in the *LaRoque* case.

C. CAUSATION AND REDRESSABILITY

As the Commission noted, causation and redressability are closely related in this case. FEC Mem. at 20. Mr. Herron's declaration and the discussion above describe the injuries caused by the Commission's errant action and how correcting that action will redress those injuries.

Remanding this case to the Commission so that it may find that Fincher and SFC violated the law will:

- Restore the legally required competitive balance when Mr. Herron runs against Mr. Fincher, or any other candidate inclined to accept an illegal corporate campaign contribution, and to file false campaign finance reports.
- Permit Mr. Herron and HFC to plan a campaign strategy free of illegal campaign contributions and false reports by its competitors.
- Permit Mr. Herron and HFC to plan a campaign strategy in an atmosphere of fair elections.
- Permit Mr. Herron and HFC to plan a campaign strategy with his reputation and credibility restored.
- Permit Mr. Herron and HFC to plan a campaign strategy where Fincher's reputation and credibility have been affected by a finding by the Commission that he and his campaign violated the law.
- Cure the procedural defects in the Commission's consideration of HFC's complaint that led to the above injuries.
- Prevent informational injuries in the future.

D. THE COMMISSION'S STANDING ARGUMENTS ARE MISPLACED

Mr. Herron has been harmed both by the Fincher campaign and then by the Commission when it failed to take any action in response to the violations described in HFC's complaint. Although the Fincher campaign's harm occurred in 2010, the Commission's harm occurred first in 2010 and is continuing to this day because Mr. Herron has to make a decision next year whether to commit time, resources and reputation to run for office.

As described above and in declarations, SFC obtained a $250,000 illegal contribution and knowingly and willfully misreported that contribution. Because the Commission's decided to dismiss HFC's complaint, there is no deterrent to the Fincher campaign or any other political opponent of Mr. Herron to engage in similar violative conduct. Moreover, Mr. Herron's reputation for credibility was harmed by the Commission's errant decision, which will impact every campaign he enters, and every political decision he makes. The Commission's errant decision has already had an impact on his decision not to enter the Congressional race in 2012 and, unless corrected, will have a significant impact on his decision whether to enter the 2014 congressional race. In fact, if Mr. Herron decides to enter the 2014 race, the Commission's decision also will impact his campaign strategy.

The Commission argues that Mr. Herron's future injury is too speculative and remote to satisfy Article III standing because Mr. Herron has announced that he is not running for election in 2012, and has not announced that he is definitely running for Congress again. FEC Mem. at 17-19.[2] As described in Mr. Herron's declaration, although he is not running in 2012—in significant part, due to the Commission's errant conduct—he has not abandoned political activity in preparation for a run in 2014. He stated in his declaration that he will make that decision next

[2] The Commission cites *McConnell v. FEC*, 540 U.S. 93, 226 (2003), implying that an impact on a future election is not an actual or imminent injury. FEC Mem. at 18 n.3. Here, after remand, a Commission decision, in all likelihood, will be less than a year before Mr. Herron must make a decision to run for election and plan his campaign. *See LaRoque* 650 F.3d at 788 ("But when plaintiffs filed their complaint, the election in which Nix planned to run was only nineteen months away, a far cry from the more than four-year gap that sank Senator Mitch McConnell's standing in *McConnell*"); *see also Mead* 766 F.Supp.2d at 25 ("As the Court noted in Lujan, however, imminence is an 'elastic concept' that does not lend itself to mathematical precision." *Lujan*, 504 U.S. at 564 n. 4, 112 S.Ct. 2130. In addition, it is significant that our Circuit held, in a case decided shortly after McConnell, that temporal remoteness alone does not automatically defeat standing. In *Village of Bensenville v. FAA*,[766 F.3d 1114(D.C. Cir. 2004] our Court of Appeals found standing where the plaintiffs were challenging a fee scheduled to be collected thirteen years in the future.") (footnote omitted).

summer or fall, and that decision that will be impacted by this Court's decision in this case and the Commission's response on remand. For example, HFC continues to expend resources to maintain the Herron for Congress website, and HFC continues to expend funds to file reports with the Commission. Mr. Herron continues to maintain contact with his political consultant, supporters and past (and potential) contributors. He speaks to community groups (most recently the Rotary Club) and Democratic organizations about current political issues. HFC and Mr. Herron are actively pursuing this litigation, which will ultimately support Mr. Herron's credibility, which was harmed by the Commission's errant decision, and simultaneously harm the reputation and credibility of the incumbent Congressman. Mr. Herron's recent announcement that he would not seek re-election for the Tennessee Senate was not specifically related to a run for Congress, but in fact, not being an incumbent State Senator will make it easier to run for a Congressional seat in 2014. Short of announcing to this Court that he will definitely run for Congress in 2014, there is not much more that he could do to satisfy the Commission's argument that he must be running in a current election. And even if he were running now and filed a complaint that the same violative activity was recurring, as the Commission admits, "it would have been virtually impossible to complete work on HFC's administrative complaint before the election." FEC Mem. at 21.

A decision will have to be made next year to mount an effective campaign, and correcting the Commission's errant conduct will have a significant impact on that decision. In the meantime, HFC and Mr. Herron are doing what candidates do to prepare to run. These are not "some day intentions" asserted by the Commission, FEC Mem. at 17; rather, they are current actions and definite plans.

The Commission asserts that it is too conjectural to allege that punishing Fincher will have an effect on Mr. Herron's future campaign against him because there are an "endless number of diverse factors potentially contributing to the outcome of . . . elections." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980); *see* FEC Mem. at 18. The alleged harm in *Winpisinger* was the discretionary use of federal resources by a President to impact an election. "Appellants here identify the harm which they have suffered as the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination. *Id*. at 138. "The *Winpisinger* court refused to hear the case, reasoning that this would 'unquestionably bring the court and the Executive Branch into conflict because the court would be placed in the position of evaluating every discretionary consideration . . . for traces of political expediency." *United States v. Durenberger,* 48 F.3d 1239, 1245 (D.C. Cir.1995) (quoting *Winpisinger* 628 F.2d at 140).

This case demonstrates a completely different harm and is closer to the facts in *Shays,* 414 F3d 76 than *Winpisinger*. In *Shays*, as here, the alleged harm was caused by the Commission's failure to correctly implement the law. *Shays* holds that diverse factors at play in an election are not a detriment to standing. "Indeed, given the multiplicity of factors bearing on elections and the extreme political sensitivity of judgments about what caused particular candidates to win, requiring candidates to establish that, but for certain campaign finance rules, they could have won an election seems no more reasonable than requiring plaintiffs to 'demonstrate that, but for the procedural defect, the final outcome of the rulemaking process would have been different'- precisely the showing that administrative cases do <u>*not*</u> require . . .." *Shays*, 414 F.3d at 91(emphasis in original).

In any case, as described above, correcting the Commission's errant decision will not only have a significant impact on a future election (according to Mr. Fletcher and Mr. Herron), it will have a more immediate impact on Mr. Herron's reputation and planning for the 2014 election. Harms that are independent of Mr. Herron's opponent.

Unlike the speculative harms described in *Winpisinger*, Mr. Fletcher noted, there was polling evidence and at least one historical example that the candidate's credibility would have made a difference in the 2010 race, and it is his expert opinion that it would be a significant determinant in a 2014 race. Regardless of the factors influencing the 2014 race, Mr. Herron was personally injured by the Commission because he has to decide whether to run for office and, if so, what his strategy will be. His credibility is a prime factors in those decisions and the Commission's errant conduct has already and will continue to impact his credibility.

The Commission implies that, because HFC is the plaintiff and not Mr. Herron,[3] HFC has not been injured because (1) Mr. Herron has not informed the committee that he intends to redesignate it as his principal committee for another future campaign, and (2) HFC exists to serve a limited purpose for a specific candidate for a specified election which is over. FEC Mem. at 18-19. As the Commission knows, HFC has not been closed, has unspent contributions in its bank account and is still active making appropriate expenditures and filing reports. The committee has and is continuing to take actions to keep Mr. Herron's campaign website public, and Mr. Herron has stated in his declaration what should have been obvious to the Commission: "Just to be clear, we have maintained the committee for that purpose [of running for election],

[3] For various purposes, the candidate is the agent of the committee and the committee exists solely to carry out the campaign plans of the candidate. *See e.g.* 2 U.S.C. § 432(e), 11 C.F.R. § 300.2(b)(3).

and I have now told the treasurer of Herron for Congress that I will redesigate the committee as my principal campaign committee for any future run for federal office." Herron Decl. ¶ 27.

The Commission seeks to deflect responsibility for its own actions by arguing that, even if an injury exists, it was solely Fincher's fault and not the Commission's, and because the election is over, the Commission cannot correct Fincher's violation. FEC Mem. at 20. As described above, both were at fault. "A plaintiff is not deprived of standing by the possibility that a third party might take 'the extraordinary measure of continuing [its] injurious conduct in violation of the law.'" *LaRoque* , 650 F.3d at 788 (*citing Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004)); *see also Shays*, 414 F.3d at 93-94 (same). Nor can the Commission claim it is too late to challenge its decision to dismiss the allegations against the Fincher campaign: "[s]ince federal litigation often takes at least two years to resolve, agency orders 'of less than two years' duration ordinarily 'evade review' for purposes of the 'capable of repetition, yet evading review' exception to mootness." *LaRoque*, 650 F.3d at 788 (internal citations omitted); *see also* FEC Mem. at 21 (FEC enforcement decisions typically occur after the election in which they occurred.). Furthermore, Mr. Herron's reputational injury was caused by the Commission not Fincher.

The Commission also argues that asking the Commission to punish Fincher for his violations is a generalized grievance that affects all citizens. FEC Mem. at 19. All citizens have not and are nor considering running for Congress. All citizens' reputations have not been harmed by the Commission. All citizens have an informational injury, but they still have standing for such injury. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 16 (1998)(informational injury to voters); *see also* Shays 528 F.3d at, 923 (informational injury to candidates); *Van Hollen,* 2012

WL 1066717, at *7(same). Injury to all candidates does not deprive one candidate of standing. *LaRoque,* 650 F.3d at 789.

Finally, the Commission asserts that all HFC is asking this Court to do is to order the Commission to "vote to formally 'characterize' the actions of a third party as unlawful." FEC Mem. at 21. To be clear, HFC believes it has shown that HFC, Fincher and Gates Bank & Trust Company violated the prohibition against corporate contributions, and HFC knowingly and willfully violated the reporting requirements. HFC expects the Commission to fulfill its responsibilities to investigate and eventually conclude that HFC's allegations are well founded. Consequently, the Commission should impose a significant civil penalty on all those who it finds have violated the law. This will correct the harm the Commission has done to Mr. Herron's reputation and enhance his ability to be elected in the future in fair elections.

The Commission implies that HFC's request for relief from this Court is inconsequential. As Mr. Herron stated in his declaration, "I cannot stress enough how the Commission's decision has affected my credibility and affects my decision whether to run for office next year." Herron Decl. ¶ 31. In fact, HFC has asked for all the relief the 2 U.S.C. § 437g(a)(8) allows. This Court does not have the authority to replace the Commission's decisions with its own, order the Commission to make a specific finding, or order the Commission to engage in any specific activity whatsoever. HFC has asked this Court to take the maximum action it can take, which is limited by statute to declare the Commission's dismissal of HFC's complaint as "contrary to law," remand this matter to the Commission, and "direct the Commission to conform to" this Court's declaration. 2 U.S.C. § 437g(a)(8). The statute does not even provide this Court with the power to enforce its order. *See* FEC Mem. at 5. If this request does not satisfy the redressability prong of standing, then no one would have standing under 2 U.S.C. § 437g(a)(8).

II. AGENCY DEFERENCE IS NOT APPLICABLE IN THIS CASE

The Commission's argument that this Court must give deference to its decisions in this case ignores most of HFC's discussion in its opening memorandum at 16-20, and instead, comes down to one abstract argument independent of the facts in this case: deference is due to the Commission's application of its own regulations if the regulation is authorized by its organic statute regardless of any facts or the regulation. However, deference is not applicable in this case for, at least, four reasons.

First, the Commission claims deference due to its authority to "formulate policy" or interpret its statute or its regulation. FEC Mem. at 23. However, none of the Commission's reasons for dismissing the administrative complaint included either policy or interpretations of statutes and regulations that differ from the plaintiff's. Rather, HFC has shown that the reasons supplied for the dismissals were not reasonable because they did not make logical sense and were not based on credible factual grounds, as described in HFC's opening memorandum and below. The Commission's response totally ignores the Supreme Court's and this Circuit's instructions (as described in HFC's opening memorandum) that deference does not apply unless the agency considers all relevant factors, and supplies reasonable grounds for its decision. HFC Mem. at 16 -17. No deference is due to the Commission because it has not supplied reasonable grounds for its dismissal.

Second, HFC explained that the courts have given deference to the Commission because it is a bipartisan agency that decides issues charged with the dynamics of party politics, but the dynamics of party politics are not an issue in this case.[4] HFC Mem. at 17. The Commission did not contest this description of the decisions here, but instead asserted that there are other reasons

[4] The Commission's impasse in this case was caused by its inability to act in a bipartisan manner.

for deferring to the Commission. However, the Commission did not provide any other reason – much less a reason that is relevant here. FEC Mem. at 24. As noted in our opening memorandum, "Courts must judge the propriety of the agency's action solely on the grounds invoked by the agency." *Common Cause v. Federal Election Comm'n*, 906 F.2d 705, 706 (D.C. Cir 1990). HFC Mem. at 16

Third, the Commission did not follow its own policy and practice, and provided no explanation for this deviation. *See Federal Election Comm'n. v. Democratic Senatorial Campaign Comm*, 454 U.S. 27, 37 (1981) (deference to an agency depends on the thoroughness, validity and consistency of an agency's reasoning). As noted many times in HFC's opening memorandum, the Commission stated its policy not to dismiss a case unless the information filed by the complainant and "publically available in formation, when taken together, fail to give rise to a reasonable inference that a violation has occurred." HFC Mem. at 6, 25, 33 – 34 (*citing* 72 Fed. Reg. 12,545 (Mar. 16, 2007). Indeed, the Commission reaffirmed this policy on May 9, 2012 in its Guidebook for Complaints and Respondents on the FEC Enforcement Process (May 2012), *supra*, at 10. In Commission cases with similar issues regarding purported bank loans, the Commission followed correct practices, *see* HFC Mem. 36, or applied the adverse inference rule when information was not provided by the respondent, HFC Mem. at 27. In its explanation for dismissing the administrative complaint and in its opening memorandum, the Commission gave no reason for ignoring this re-affirmed policy. Therefore, no deference is appropriate where agency policy is not followed and no explanation is provided for ignoring that policy.

Fourth, the Commission admitted that it lacked knowledge of Tennessee banking law and secured transactions law. *See* Answer ¶ 42; HFC Mem. 18-19. The Commission does not deny this lack of knowledge, but argues that "does not alter the standard of review." FEC Mem. at 24.

Instead, the Commission argued that its statute and regulation required the Commission to determine whether a purported loan was made in the ordinary course of business, but did not offer a defense of its ability to make such a determination in this case, or explain why this Court should defer to the Commission's lack of expertise. FEC Mem. at 25. Although the Commission argued that it employs auditors of campaigns (and HFC noted that the Commission has the statutory authority to request the assistance of other federal agencies), there is no evidence in the administrative record that any such auditors were involved in this matter. *Id*. In fact, the Commission asserts that it is not required to consider state law requirements, FEC Mem. at 40, but it is state law – not Federal election law – that determines whether there is collateral and whether there is a security interest on the collateral, among other things. Accordingly, the Commission offered no evidence that, in this matter, it has expertise in banking law that is not available to this Court, or that this Court should defer to the Commission's analysis of the adequacy of collateral and whether the collateral was properly secured for any reason.

Even if, *arguendo*, this Court owed deference to the Commission, the Commission's decisions and explanations in this case would still be arbitrary and capricious. Deference is owed only "[s]o long as the Commission has examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choices made." *Shays*, 528 F.3d at 930 (citations omitted). Deference to an agency depends on the thoroughness, validity and consistency of an agency's reasoning. *Federal Election Comm'n. v. Democratic Senatorial Campaign Comm*, 454 U.S. 27, 37 (1981). As described in HFC's opening memorandum and below in response to the Commission's assertions, the Commission's decisions and explanations are not based on credible facts and are not logical.

Regardless of the Commission's claim of deference for all of its enforcement decisions, the issue here is that the Commission did not understand the evidence presented by the respondents, accepted counsel's unsupported arguments as uncontroverted credible evidence, did not obtain the information necessary to make a factually reasonable supported decision, and failed to take an adverse inference when the respondents did not supply relevant and necessary information in their possession. Therefore, deference is irrelevant to the question whether SFC accepted an illegal corporate contribution.

The deference issue is also irrelevant to the reporting issues. All the commissioners agreed there was a violation. The only decision provided by all of the commissioners for its decision to dismiss the reporting violations was the irrational decision that, because they could not agree on a violation, they dismissed the matter without finding a violation that they all agreed occurred. With respect to the "knowing and willful" issue, as described in HFC's opening memorandum, the rationale was not logical and not based on any relevant fact.

III. THE FEC'S FAILURE TO FIND RTB THAT THE REPORTING VIOLATION WAS KNOWING AND WILLFUL WAS ARBITRARY AND CAPRICIOUS AS WAS THE COMMISSION'S RATIONALE

HFC's opening memorandum described the law and the facts that demonstrated that SFC knowingly and willfully violated the Commission's reporting regulations regarding the purported bank loan. The Commission's memorandum here fails to discuss, and thus does not contest, that SFC admitted its responsibility to file accurate and timely reports of contributions to the Commission; that the $250,000 contribution was extremely large for the SFC campaign; that SFC admitted merely reviewing the filing revealed the error; and, that SFC's treasurer certified the accuracy of the inaccurate report of the $250,000 contribution. *See* HFC Mem. at 23. Nor does the Commission Memorandum discuss SFC's failure to provide a "reasonable explanation

for the error." *Id.* The Commission's memorandum does not seriously contest that "the Commission's [General Counsel] explanation for not finding the violation of the reporting provisions to be knowing and willful did not even refer to the admitted violation." *Id.*

None of the Commissioners disagreed with the General Counsel's analysis, and they agreed with the recommendation. Instead of even attempting to justify the General Counsel's rationale, however, the Commission's counsel relies on statements from the Statement of Reasons by Commissioners Hunter, Peterson and McGahn ("SOR"). First, all six of the commissioners agreed with the General Counsel's recommendation not to find a knowing and willful violation of the reporting provisions, and none expressed any disagreement with the General Counsel's rationale. Even if less than a majority of commissioners provided an additional rationale, which as explained below they did not, the General Counsel's report provides the rationale for the Commission. FEC Mem. at 30 n.7 ("In general, when the Commission accepts the General Counsel's recommendations without specifying its own reasoning, the General Counsel's report serves as the basis for judicial review."). Accordingly, all of the Commission's discussion of this issue in its Memorandum at 30 about a purported additional rationale is irrelevant.

Second, even if this Court considered the counsel's assertion that the Court should consider excerpts from the SOR, it would not help the Commission's cause. It is clear from the statement that the commissioners had already decided that the reporting violation was not knowing and willful based on the General Counsel's report and recommendation, and the excerpts in the Commission's memorandum were discussing the appropriate penalty—not whether the violation was knowing and willful. This is clear from the context. *See* AR 728-29. In addition, it is clear from the excerpts themselves that the SOR only described the three

commissioners' reasoning regarding the appropriate penalty. FEC Mem. at 30. The excerpts concern the issue of intent: "not the first to make a mistake," "technical violation," etc. *Id.* Intent may be a relevant consideration of the amount of a penalty, but as demonstrated by the Commission's own citations, intent is not an element of a knowing and willful violation. *See* FEC Mem. at 29-30 ("'knowing and willful' indicates that 'actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law.") (citations omitted). Moreover, even the Commission's memorandum concedes that the SOR was not based on facts in the record, but instead was based on the "possibility" that there was no intent and the violation was "likely inadvertent." FEC Mem. at 29-30. Accordingly, the Commission's attempt to create a new rationale now from less than a majority of commissioners, is not supported by the law, is based on speculation of facts not in the administrative record, and ascribes a rationale to three commissioners that does not appear in their SOR.

IV. THE FEC DISMISSAL OF THE REPORTING VIOLATION WAS ARBITRARY AND CAPRICIOUS AS WAS THE COMMISSION'S RATIONALE

It is uncontested that all six commissioners agreed that SFC had violated the reporting provisions of the election laws but dismissed HFC's complaint without finding RTB a violation had occurred after the Commission split 3-3 on the appropriate sanction. HFC asserted that the dismissal and this rationale is arbitrary, capricious and contrary to law. HFC Mem. at 20-22.

The Commission argues that the Court must defer to the Commission's prosecutorial decision to dismiss a matter due to a scarcity of resources, even though that was not the reason given by the commissioners themselves. Second, the Commission argues that prosecutorial discretion is at its zenith when the decision involves the appropriate remedy, even though the Commission did not impose a remedy and a sanction is not under review. Third, the Commission

argues that it was not arbitrary and capricious to dismiss HFC's complaint when the Commission reaches an impasse, but this case, in fact, supports HFC's argument that the Commission's rationale was arbitrary and capricious. Fourth, in two brief sentences and without explanation and analysis, the Commission cites a licensing case that supports a vote by agency commissioners on reconsideration of a prior vote, which is irrelevant to this case. Fifth, the Commission argues that 2 U.S.C. § 437g(a)(2) does not prevent the Commission from dismissing a case when it cannot decide on an appropriate sanction. Even though Section 437g(a)(2) does not prevent the Commission from doing many things, including engaging in arbitrary and capricious behavior, Section 437g(a)(2) does require an RTB finding when a violation has occurred. And section 437g(a)(8) provides a remedy when the Commission does act arbitrarily and capriciously or contrary to law. Sixth, the Commission argues that it would be a futile waste of resources.to find RTB and negotiate a conciliation agreement, which would not garner the support of four Commissioners. Of course, that argument is speculative because the administrative record does not predict what facts the Commission would discover and consider, and even if the same impasse occurred, an arbitrary and capricious reason a dismissal would be subject to a 2 U.S.C. § 437g(a)(8) suit. Seventh, the Commission argues that if it made an error, the error was harmless, but as described above and in Mr. Herron's and Mr. Fletcher's declaration, the Commission's decision was not harmless because it significantly injured HFC and Mr. Herron and benefited SFC and Fincher.

Before addressing each of these arguments in turn, HFC notes that it is unnecessary for the Court to resolve this issue if it remands either the Commission's decision that the reporting violation was not knowing and willful or that the purported Bank loan did not violate the corporate contribution prohibition. A change in either of those decisions will require a

reconsideration of the sanction for the reporting violation because those violation are more serious than the reporting violation the Commission considered.

A. SCARCITY OF RESOURCES

The Commission argued that it is due deference when it dismissed the reporting violation due to a balancing test involving allocation of resources, and in support of that argument it cited *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). FEC Mem. at 26. *Heckler* discretion is "a very narrow exception" that only applies to "action committed to agency discretion." *Id*. at 830 (citation omitted). 2 U.S.C. § 437g(a)(2), does not provide such discretion; it requires the Commission to find RTB and initiate an investigation or proceed directly to conciliation when all of the commissioners agree that a violation has occurred. *See,* HFC Mem. at 5-7.

In this case, even if *Heckler* discretion applied here, it is irrelevant. Neither the General Counsel' Memorandum nor any commissioner's statement of reasons indicated that scarcity of resources was an issue, nor could they. As the Commission admits, no investigation was necessary as all of the relevant facts about the reporting violation were known, and conciliation does not consume a significant amount of time or other Commission resource. FEC Mem. at 29. Because scarcity of resources was not a reason for the dismissal, counsel cannot offer it now.

B. DISCRETION TO DETERMINE THE APPROPRIATE PENALTY

The Commission argues that it has discretion to determine the appropriate penalty "unless it is 'unwarranted in law' or 'without justification in fact.'" FEC Mem. at 26. The situation here, however, is not the measure of the appropriate penalty, but that no penalty was imposed at all. And that is not even the issue before this Court. The question here is the dismissal itself (not the appropriate sanction or remedy), and whether the justification for the dismissal is arbitrary and capricious. For example, it may not be arbitrary or capricious to determine whether a

criminal found guilty of a homicide should be sentenced to 30 years or 40 years in prison, but it would be arbitrary and capricious to dismiss the indictment because there was no agreement on the penalty. The same issue exists here, everyone agrees there was RTB a violation occurred, everyone agrees that the case was dismissed, but there was no factual or legal substantive reason given for the dismissal. Failure to agree on a penalty is not a rational reason to ignore the Commission's responsibility under 2 U.S.C. § 437g(a)(2) to find RTB.

C. COMMON CAUSE v. FEC

The Commission relies on only one unreported case, *Common Cause v. FEC*, Civ. No. 94-02104 (D.D.C. 1996) ("*Common Cause*"), to support its position here. FEC Mem. at 27. In addition to being unreported, this case was dismissed on appeal for lack of standing, *Common Cause v. Federal Election Comm'n*, 108 F.3d 413 (D.C. Cir. 1997), which raises questions about its precedential value. In fact, the Commission relies only on a single conclusory sentence in a footnote: "Where, as here, the Commission has split over the amount and nature of a violation, and the commissioners have supported their respective positions with reasoned explanations that are not clearly erroneous, the Court must defer to the agency's decision to dismiss the complaint." *Common Cause*, Civ. No. 94-02104 at 8 n.3 (emphasis added). The difference in that case was over an interpretation of the law and whether ether was a violation at all. In this case, unlike the issue in the footnote in *Common Cause*, all of the commissioners agreed on both the amount and the nature of the violation—they only disagreed on the appropriate penalty.

The *Common Cause* case, like this one, involved a review of a number of Commission decisions including another Commission split decision to dismiss an alleged violation. The rationale there, like the one here, did not involve a difference about whether a violation had occurred. In the body of the opinion the Court found" that the plurality's rationale on the second

issue [to find no violation], when all five Commissioners agreed on both the nature and scope of the solicitation costs violation, is arbitrary and capricious." *Common Cause,* Civ. No. 94-02104 at 19. In this case, like the issue described at page 19, all of the commissioners agreed on the nature and the scope of the reporting violation. Accordingly, if there is presidential value in *Common Cause*, that case supports HFC's position that dismissing the reporting violation without finding RTB, when there was agreement that a violation occurred and the amount of the violation, was arbitrary and capricious.

D. PUBLIC SERVICE COMMISSION v. FPC

The Commission quotes one sentence from *Pub. Serv. Comm'n v. FPC*, 543 F.2d 757 (D.C. Cir. 1974), without explanation or analysis, and HFC fails to see any relevance to this case. FEC Mem. at 27-28. For the Court's convenience, the following is the paragraph that includes the sentence quoted by the Commission:

> We do not mean to suggest that a commissioner's vote, once made, imprisons him in an intellectual strait-jacket. The point is that an individual change of mind cannot change an institutional decision unless it garners a majority vote to do so. Nor is there any requirement, statutory or otherwise, that members of administrative agencies maintain consistent positions throughout the course of lengthy proceedings. Commissioners, no less than judges, may cast their votes solely to void an impasse, or otherwise to draw the administrative phase to a close. Commissioners Carver and Brooke utilized their votes on Opinion No. 565–A to achieve an objective deemed more important than adherence to personal precept. Commissioner O'Connor voted against rehearing of Opinion No. 565–A despite his differences with that opinion because he felt that the litigation was ripe for judicial review. But, in each instance, what counted in the definition of agency action was the vote rather than the individual view.

Id. at 777 (footnotes omitted).

E. FUTILITY

The Commission argues that it does not have to engage in a futile act, and finding RTB would be futile because conducting an investigation was unnecessary, as all of the relevant facts

already are known, and engaging in pre-probable cause conciliation would only result in another impasse on the appropriate remedy. FEC Mem. at 28-29. Since this is entirely speculative and the issue before the Court is the current decision, the Commission's argument is either irrelevant or not ripe.

Even if, *arguendo*, the Court considered this argument, the Commission's presumed result is not a foregone conclusion. Procedurally, the posture of this matter under the Commission's speculative scenario would be different than at the RTB stage. Assuming the Commission's facts, SFC would offer to execute a conciliation agreement with a remedy, and the Commission would come to an impasse on whether to accept the conciliation agreement. At this point, the Commission, following its statute, would vote whether there was probable cause to believe ("PCTB") a violation has occurred. 2 U.S.C. § 437g(a)(4). The Commission asks the Court to assume that, based on the commissioners' statements of reasons, they would have PCTB a reporting violation had occurred but would not accept the negotiated conciliation agreement. At that point the Commission, pursuant to its statute, could find PCTB a violation occurred and sue SFC in District Court to let the Court decide the appropriate remedy pursuant to 2 U.S.C. § 437g(a)(6). Thus, the Commission would not have to decide the appropriate remedy and would not have to come to an impasse. If, on the other hand, the Commission failed to file a case in District Court after finding PCTB or dismissed this matter based on an impasse, the Commission could be subject to a suit under 2 U.S.C. § 437g(a)(8) only if it offered an irrational reason for the dismissal. Therefore, going forward with this case would not necessarily result in a repeat of the situation here and would not be futile.[5]

[5] The Commission's responsibility under 2 U.S.C. § 437g(a)(a) to find RTB when appropriate does not disappear if the Commission follows its procedure to combine the RTB finding and

The Commission's futility argument has another flaw. Essentially, the Commission is arguing that its finding of RTB, independent of imposing a remedy, has no value, positive or negative, to the complainant, the respondent or the public.[6] That is not what Congress decided when it used the word "shall" to command the Commission to make findings. 2 U.S.C. § 437g(a)(2). As demonstrated by the declarations attached hereto, the complainant and the respondent have publicly described the value to them of the RTB finding (or dismissal) and they believe there is a value to making a finding as opposed to dismissing this case.

The Commission has not supported its futility argument with any citations and that is not surprising. It would certainly be arbitrary and capricious if a criminal court adjudicating a criminal violation of the campaign finance laws dismissed a matter after a jury unanimously found a violation but disagreed over a $10,000 or $1,000 violation. It certainly would not be inconsequential to the Commission that there was no finding of a violation itself. Futility due to impasse on the penalty does not justify a failure of an administrative agency from completing its congressionally mandated task to find RTB.

In sum, finding RTB as compared to a dismissal, when every decision maker agrees there has been a violation, is not futile. Following the Congressionally-mandated procedure is not futile. An RTB finding here has value to HFC and Mr. Herron, and Congress has determined that HFC is entitled to the RTB finding.

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pre-PCTB conciliation, as suggested by the Commission. FEC Mem. at 29. Indeed, the General Counsel's report here recommended finding RTB and following the pre-PCTB conciliation procedure. AR 697 (recommendation 1 and 4).

[6] HFC has never suggested that the Commission should not impose a penalty. Indeed, HFC believes the commissioners have not offered a reasoned explanation for not seeking a significant penalty. However, that is a decision for the Commission to address after a remand.

F. HARMLESS ERROR

Finally, the Commission argues that, even if it erred by did not finding RTB, the error was harmless because the commissioners announced that they believed SFC violated the reporting provisions, and after finding RTB they would have dismissed the matter based on the same impasse. FEC Mem. at 31. The Commission's first argument is a repeat of its standing argument, as even the Commission admits. FEC Mem. at 32 (HFC "has failed to show injury in fact"). In fact, HFC was harmed by the Commission's failure to find RTB as described above and in the attached declarations.

The Commission repeats, in various forms, its own assumption that HFC has no complaints about the rationality of the commissioners statements of reasons ("SORs") and therefore HFC would not complain under 437g(a)(8) about one or both of them. To be clear the reason for the dismissal was an impasse, and that is HFC's complaint here. If HFC complained about the irrationality of one or both SORs, the Commission could rightly respond that issue was not ripe because no one knows what the commissioners would do or say when this Court remands this matter for failing to find RTB on the reporting violation, the reporting violation was knowing and willful, and there was a corporate contribution violation. Indeed, the Commission's counsel is speculating that a "remand would serve no purpose – it would not affect the ultimate disposition of the administrative complaint." *Id*. at 31. Counsel cannot know what a remand would look like nor know who the commissioners will be in the future (many of the commissioners are serving past their term limited appointments) or what they will decide.

V. THE FEC'S FAILURE TO FIND RTB THAT THERE WAS A CORPORATE CONTRIBUTION WAS ARBITRARY AND CAPRICIOUS

The issues presented by the Commission's errant conclusion that SFC accepted a permissible contribution rather than an illegal corporate contribution are: (1) whether the Commission followed its own procedures, and if not, (2) was there relevant evidence it should have considered if it had followed its own procedures, and (3) independent of its failure to follow its procedures, whether the Commission's decision was based on a reasonable evaluation of credible evidence. In contrast, the Commission asserts that "[t]he question before the Court is not whether further investigation might have revealed that the loan at issue was not made in the ordinary course of business, but whether the Commission abused its discretion, based on the evidence before it, in deciding not to pursue an investigation." FEC. Mem. at 33. The Commission supports this assertion with selective quotes form *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 168 (D.C. Cir. 1986) (the full quotation from *Orloski* is provided in the footnote below for the Court's convenience).[7] FEC Mem. at 33.

[7] "Orloski also challenges FEC's decision on procedural grounds. He argues that the FEC was required either to give him an opportunity to reply to Eaton's response or to make its "reason to believe" determination solely on the basis of Orloski's well-placed allegations without making any credibility determinations. In the alternative, he argues that the FEC impermissibly failed to consider the evidence he presented.

"We reject Orloski's first argument as a basis for reversing the FEC's decision for three reasons:

"(1) Section 437g(a)(1) requires the FEC to notify parties charged in a complaint and to give them an opportunity to respond. This suggests that Congress determined that the FEC should make preliminary investigative decisions on the basis of all the information submitted to it by the charging and responding parties. *See also Antosh v. FEC,* 599 F.Supp. 850, 855 (D.D.C.1984); *Common Cause v. FEC,* 489 F.Supp. 738, 744 (D.D.C.1980); *In re Federal Election Campaign Act Litigation,* 474 F.Supp. 1044, 1046 (D.D.C.1979). The "reason to believe" standard also itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims**.** *See Common Cause v. FEC,* 489 F.Supp. at 738. Orloski appears

The Commission's assertion is incorrect, and its reliance on *Orloski* is misplaced. However, even assuming, *arguendo*, the Commission's premise, this Court should remand this matter to the Commission, because the Commission did not base its decision on credible evidence and its rationale is not logical.

A. THE COMMISSION'S RELIANCE ON *ORLOSKI* IS MISPLACED

Orloski does not support the Commission's assertion that "the Commission's assessment of this and other evidence . . . was clearly within the Commission's prosecutorial discretion to evaluate and credit responses and documents provided by the Bank and the Committee." FEC Mem. at 33. *Orloski* does not discuss "prosecutorial discretion." *Orloski* merely states that the Commission, like any other trier-of-fact makes a subjective evaluation of evidence and claims. Such evaluation must be supported by credible evidence and the evaluation must be reasonable, as opposed to arbitrary and capricious. In fact, the Commission's quote from *Orloski* is *dicta*

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to concede this when he argues that a district court must review the FEC's decision not to investigate by considering, *inter alia*, the credibility of the allegations and all of the information available to the FEC.

"(2) Although we are troubled by the secretive nature of these preliminary investigative proceedings in which disputed factual questions may be resolved without giving the parties an opportunity to argue the questions fully. In this case, the material facts are not in dispute. The major factual disputes center on which Ritter staff members were present at the picnic and in what capacity they appeared and whether Orloski's supporters were physically barred from attending the affair. Even if these disputes had been resolved in favor of Orloski it would not have affected the FEC's conclusion that there was no "express advocacy" as defined by the FEC or no solicitation, making, or acceptance of any campaign contributions.

"(3) Finally, Orloski did have an opportunity to read Eaton's first set of responses filed on October 22, 1982 before filing his first district court complaint. In that complaint, Orloski included a line-by-line rebuttal to each of Eaton's responses. This line-by-line rebuttal was also presented to the FEC in Orloski's supplemental complaint filed on June 11, 1983. And Eaton's second set of responses did not materially differ from his first set. Thus, Orloski did have the opportunity to respond to any facts alleged by Eaton.

"We also find Orloski's alternative argument to be without merit. The FEC clearly carefully considered all of the evidence presented by Orloski." *Orloski*, 795 F.2d at 167-68 (emphasis added).

because the Court found that no material facts were in dispute. Second, *Orloski* does not prohibit the Commission from considering relevant public information and specifically declined to decide whether the Commission should permit the complainant to provide additional information to the Commission after the Commission receives a response form the respondent. Finally, *Orloski* was decided in 1986. As described in HFC's opening memorandum, the Commission reviewed and issued its enforcement procedures in 2007, and as noted above, the Commission re-affirmed its policy this month "to obtain and evaluate relevant publically available information." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007); FEC Guidebook for Complaints and Respondents on the FEC Enforcement Process (May 2012), at 13. *See also* HFC Mem. at 5, 25 and 24. The Commission is bound by its post *Orloski* procedures and practices or it must provide a rational explanation for not doing so. Here the Commission did neither.

B. THE COMMISSION DID NOT HAVE SUFFICIENT INFORMATION TO MAKE A RATIONAL, DEFENSIBLE DECISION THAT THE PURPORTED LOAN MET THE COMMISSION'S REGULATORY CRITERIA

The Commission's rationale is arbitrary and capricious because the Commission failed to follow its procedures and practices to obtain relevant public facts, and the Commission failed to provide a rationale reason for not following its procedures. For example, compare the holding in *Orloski* that additional information was not necessary because the information the plaintiff suggested was missing would not have made any difference in the outcome -- the Commission had credible facts, and it had all of the relevant facts necessary to make a decision:

> In this case, the material facts are not in dispute. The major factual disputes center on which Ritter staff members were present at the picnic and in what capacity they appeared and whether Orloski's supporters were physically barred from attending the affair. Even if these disputes had been resolved in favor of Orloski it would not have affected the FEC's

> conclusion that there was no "express advocacy" as defined by the FEC or no solicitation, making, or acceptance of any campaign contributions

Orloski, 795 F.2d at 168. Here, the issues are in dispute and the Commission is missing relevant facts.

The Commission relies *Branstool v. FEC*, No. 92-0284 (D.D.C. Apr. 4, 1995), an unreported case decided before the present policy was promulgated. The *Branstool* Court found that the Commission had all of the necessary relevant facts, after an RTB investigation, to reach the more stringent PCTB decision without further investigation. Specifically, it found that: the Commission could rely on a telephone interview of a witness, Raiford, and did not require a formal deposition, *id*. at 7; "the evidence [developed during the investigation] rebutted the presumption of coordination by noting that all of the principal parties had provided credible consistent accounts" (the court also deferred to the controlling Commissioners' interpretation of the coordination standard), *id*. at 10; "[i]n dismissing the administrative complaint, the FEC here precisely followed the procedure contemplated in its regulation: it took note of the inferences of coordination created by the telephone call, but then concluded that the evidence in the record adequately rebutted this presumption by demonstrating that the Bush campaign had not actually coordinated the expenditure," *id*. at 12; "whether or not the presumption of coordination attached, the evidence in the record demonstrates that Raiford's employment status did not allow any actual coordination of the activities of the Bush campaign and NSPAC," *id*. at 15. *Branstool* is not relevant here because: (1) the decision to dismiss that matter without additional investigation, such as a deposition, occurred after the controlling Commissioners determined that the additional investigation recommended by the General Counsel was irrelevant to the legal issues at the PCTB stage; (2) the Court did not consider whether Commission had issued an

enforcement policy describing its investigatory practice at the RTB stage or, if so, whether it followed its policy; and, (3) the controlling commissioners provided a rational reason for their decision that additional information was not necessary for a PCTB decision.

In this case, the General Counsel noted the absence of information rather than evidence. *E.g.*, The Commission admitted that it lacked relevant evidence regarding Gates Bank's usual and customary interest rate, AR at 705; the value of Fincher's Farm, AR 706; the value of the 2010 crops, *id*; the value of Fincher's residence, *id.*; the amount of personal funds in Fincher's non-interest bearing deposit account, *id.*; and "whether the collateral was adequate to satisfy Fincher's total indebtedness." *Id.* In fact, unlike *Orloski* and *Branstool*, here the Commission relied on the absence of evidence when it dismissed the complaint.

HFC demonstrated in its opening memorandum that the Commission could have obtained public information relevant to some of its missing information pursuant to its current enforcement practice, unlike the absence of a written practice in place when *Orloski* and *Branstool* were decided. The Commission does not contest that such information was available or that it was relevant to the Commission's decision. Instead, the Commission argues that obtaining relevant public information pursuant to its statement of policy is not obligatory. FEC Mem. at 38. Whether or not the General Counsel is required to follow the policy the Commission issued, in this case it was arbitrary and capricious not to review public information when it admitted that it was missing relevant information. The Commission did not explain why it did not follow the policy to obtain information it found necessary to review in other cases involving purported bank loans described in HFC's opening memorandum, HFC Mem. at 36-37.

The Commission also argues that whether it expends resources is a discretionary decision immune to Court review under *Heckler*. FEC Mem. at 36-37. That argument has many flaws.

As explained above, because Section 437g(a)(2) is not discretionary, it is questionable whether *Heckler* discretion applies. In any case, the Commission did not claim a resource issue. In fact, it gave no reason for not even attempting to review public information to obtain answers to its own open factual issues. Counsel cannot create a reason in its arguments to this Court that was not already provided by the Commission in the administrative record. The decision to dismiss this matter without reviewing the relevant facts that were available -- when such facts were reviewed in similar prior cases and when sufficient facts to make a legal determination were not provided -- is arbitrary and capricious. It is also arbitrary and capricious to fail to explain the decision to ignore the Commission's enforcement policy.

HFC agrees with the Commission that it was not required by law or regulation to ask the respondents for additional materials to answer its own open factual questions. FEC Mem. at 38. The issue is whether the Commission's decision not to request those materials and to dismiss the matter is arbitrary and capricious. Of course, if the respondent admits to having such information and declines to provide it, the Commission can find RTB and formally seek that information. Indeed, when a respondent fails to provide necessary information relevant to a legal conclusion, the Commission does not have to request it at the pre-RTB stage. The Commission can use and has used the adverse inference rule as a basis for finding RTB and conducting an investigation.

Here, the respondents failed to submit any witness statements – the responses were made by the respondents' lawyers without supporting affidavits or documents from the loan file, such as the loan analysis. Gates Bank admitted that it had a loan analysis, which would have included, among other things, the value of the collateral, and the total indebtedness of the Fincher related entities, but Gates Bank did not provide it to the Commission. HFC's opening

memorandum demonstrated that in similar circumstances the Commission used the adverse inference rule as evidence in enforcement proceedings. HFC Mem. at 27-28.

The Commission curiously cites *Int'l Union (UAW) v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972) to suggest drawing an adverse inference is discretionary. FEC Mem. at 39. In fact, that case holds that agencies should draw the adverse inference unless there is a strong reason not to do so.

> Rather, absent a valid reason for bypassing the rule, the inference should actually be drawn and its impact evaluated. While this requirement may seem like no more than a technicality, it in fact has some important consequences. If the Board had actually drawn the inference, it would have had to conclude that the company's records would have shown that the discharged men were in fact replaced. This conclusion leads, in turn, to the further conclusions that Papadakos had perjured himself on the stand and that the cost-cutting defense was a blatant sham. To be sure, these propositions are not, in themselves, sufficient to make out a Section 8(b) (3) violation. But when they are put together with the other facts appearing in the record, they point very strongly to the ultimate conclusion that such a violation occurred. Indeed, any other decision by the Board might well be irrational.

Id. at 1343 (emphasis added). Here, the Commission fails to explain in its memorandum and, more importantly, in its decision in this matter why the Commission had a practice of drawing an adverse inference in other cases but did not do so here.

C. THE COMMISSION'S DECISION WAS NOT BASED ON CREDIBLE EVIDENCE.

Even if this Court were to accept the Commission's assertion that the issue before this Court is "whether the Commission abused its discretion, based on the evidence before it, in deciding not to pursue an investigation," FEC Mem. at 33, it must remand this matter to the Commission because the Commission has not "has examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choices made." *Shays*, 528 F.3d at 930 (citations omitted). Indeed, the Commission's rationale lacks

"thoroughness, validity and consistency." *Federal Election Comm'n. v. Democratic Senatorial Campaign Comm*, 454 U.S. 27, 37 (1981).

The Commission notes that its decision was based on the following evidence: Multipurpose Note and Security Agreement, FEC Mem. at 35-35, and "the Bank's statement that its loan analysis showed that showed that the equity in its existing secured loans with Fincher, as well as in his non-interest bearing account, 'substantially exceed the campaign loan amount.'" *id*. at 35. The Commission argues that this evidence is credible because "[i]t is hardly unusual for prosecutorial investigations to take into account unsworn witness statements and documentation." *Id*. at 35-36 (emphasis added).

As noted in HFC's opening brief at 33, there were no witness statements – only unsupported assertions by counsel.[8] The opening memorandum also noted that counsel's statement was ambiguous at best because counsel's statement applies to all of the collateral instead of only Mr. Fincher's equitable interest that could support a loan as required by the Commission's regulations. HFC Mem.. at 33. The Commission has not contested this analysis of counsel's statement or that it was unsupported by a witness with knowledge of the value of the collateral or the bank's analysis. Indeed, this statement was more than ambiguous, it was misleading. When someone asks the value of your house, the response is the market value, and not the net value or equity that could support a loan. Counsel's statement regarding the market value of the Fincher family's residence and crops might be accurate, but it is irrelevant to the

[8] The Commission suggests that unsworn statements are credible because making false statements to the government is subject to criminal prosecution. That is not true here because counsel never attested to witnessing any documents or other evidence. Counsel has merely made an argument. As always, the credibility of counsel's argument is based on supporting evidence, witness statements and the logic of the argument itself. None of that support exists in the administrative record.

purpose for which it was submitted – whether there was adequate equity in the collateral to support a $250,000 signature loan by Fincher.

The Commission also ignored in its memorandum and did not discuss in the General Counsel's report the Congressional financial statement provided with HFC's complaint that demonstrated the value of Fincher Farms crops and his income did not provide sufficient collateral to support the $250,000 signature loan.

The documents themselves do not demonstrate the value of the collateral. HFC explained in its opening brief that the maximum loan on the residence was $200,000 and that was the original amount of the loan on the residence. There was no evidence that any of the original loan was repaid that could support the signature loan. *Id*. at 35. Again, the Commission does not contest HFC's analysis.

Therefore, there is no credible evidence of the value of Mr. Fincher's equitable interest in the purported collateral sufficient to support the signature loan in the Administrative Record. The General Counsel's report discussing the collateral issue did not present a logical reason for its conclusion that the signature loan was secured by adequate collateral – unless the lack of evidence and conclusory re-statements of counsel's unsupported arguments meet the arbitrary and capricious test. *See* HFC mem. 28-38.

Indeed, the Commission does not contest any of the analysis in HFC's opening brief at 28-38, which describes why the documents offered by the respondents and counsel's statements do not provide credible evidence that the signature loan was secured by adequate collateral. Thus, the Commission's argument -- without contesting HFC's showing that the documents themselves and counsel's assertions unsupported by a witness statement or a document failed to

provide credible evidence of the value of the collateral and the collateral was secured – is nothing more than another unsupported argument by a different counsel.

VI. CONCLUSION

In view of the above, Herron For Congress respectfully requests that this Court remand the dismissal of the administrative complaint to the Commission for action in conformance with the Court's opinion that the Commission should have found reason to believe that Steve Fincher For Congress violated the federal election laws.

Respectfully submitted,

_____/s/_____

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