IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Campaign Legal Center and Democracy 21, by their undersigned counsel, and pursuant to Fed. R. Civ. P. 56, the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C), respectfully move this Court for a summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that F8 LLC/Eli Publishing L.C., *et al.* (Matter Under Review ("MUR") 6487 and MUR 6488) and Specialty Investments Group, Inc., *et al*. (MUR 6711) violated FECA and the FEC's subsequent dismissals of plaintiffs' administrative complaints were arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, and directing the Commission to conform with such declaration within 30 days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, and the joint appendix

containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than November 17, 2017. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated this 10th Day of July, 2017.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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TABLE OF ABBREVIATIONS

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

INTRODUCTION

Plaintiffs Campaign Legal Center and Democracy 21 seek a declaration from this Court under 52 U.S.C. § 30109(a)(8) that the Federal Election Commission's ("FEC" or "Commission") dismissals of their administrative complaints against F8 LLC, Eli Publishing L.C. and Steven J. Lund (Matter Under Review ("MUR") 6487 and MUR 6488), and Specialty Investments Group, Inc. ("SIG"), Kingston Pike Development, LLC ("KPD"), William D. Rose, Jr., Freedom Works for America, Richard J. Stephenson, and Adam Brandon (MUR 6711) (collectively, "respondents"), were arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

This is not a hard case. A central purpose of the Federal Election Campaign Act ("FECA" or "Act") is to ensure public disclosure of those persons who make significant campaign contributions and expenditures so that "the electorate . . . [can] make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). To this end, the Act prohibits persons from funneling contributions through a conduit, or "straw donor," to federal political committees for the purpose of evading public disclosure of their identities. 52 U.S.C. § 30122. In other words, FECA forbids money laundering.

The Act makes explicit that the use of any type of straw donor—whether an "individual, partnership, committee, association, *corporation*, labor organization, or . . . other organization"—is prohibited. *Id.* § 30101 (emphasis added). Thus, when news reports arose in 2011 and 2012 of several instances in which corporate LLCs appeared to have been used as straw donors for millions of dollars of contributions to super PACs, plaintiffs filed five separate complaints with the FEC,

alleging that there was reason to believe violations of section 30122 had occurred and asking the Commission to initiate an investigation.[1]

All six Commissioners readily agreed with the FEC's Office of General Counsel ("OGC") that "section 30122 applies to closely held corporations and corporate LLCs," AR86, and the use of a corporate LLC as a straw donor would violate this prohibition, AR82. But in the votes on each of plaintiffs' five complaints, the Commissioners deadlocked three-three on whether to find reason to believe any violation had occurred. Plaintiffs filed suit under 52 U.S.C. § 30109(a)(8), and this Court held that plaintiffs had standing to pursue their claims with respect to three of the five complaints: MURs 6487 (F8 LLC), 6488 (Eli Publishing), and 6711 (SIG).

In their Statement of Reasons ("SOR"), the three Commissioners who voted to dismiss the complaints ("controlling Commissioners" or "controlling group") acknowledged that the clear language of section 30122 applied to corporate LLCs. AR82. Nonetheless, they found that it would be "manifestly unfair" to enforce the law because—incredibly—they believed that respondents lacked sufficient notice that the clear language of section 30122 applied to corporate LLCs. *Id*.

This position defies reason and logic. As two dissenting Commissioners wrote, the controlling Commissioners had to "tie themselves up in knots" to come up with any rationale for why "they failed to enforce the law regarding some of the most crystal-clear violations this Commission has seen in recent memory." AR95. Moreover, the controlling Commissioners' position was not based on any construction of FECA, the statute to which they have been delegated interpretative authority, but rather on theories of constitutional due process and "First Amendment clarity," AR77, areas in which they have no particular expertise and receive no deference.

[1] Plaintiffs also argued that some of the corporate entities were required to register as political committees under 52 U.S.C. §§ 30102, 30103, and 30104 because it was likely that campaign activity was their major, if not sole, purpose.

The controlling group's due process argument boils down to a single observation: prior to *Citizens United* and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), corporations, including corporate LLCs, were prohibited from making any contributions in connection to federal elections, so the complaints presented an "issue of first impression." AR83. But that does not explain why respondents lacked notice. *Citizens United* did not address section 30122 or change its scope: the straw donor prohibition, by its terms, applied to corporations both before and after the decision. The corporate respondents here may be relatively new campaign contributors, but they had ample "notice" of the applicability of the longstanding prohibition on straw donors—the same notice that any "individual, partnership, committee, association, . . . [or] labor organization" had of its reach. And respondents themselves did not raise any concerns about notice. *See infra* Part III.B.3. Some actually conceded that their motivation for contributing through corporate entities was to avoid public disclosure. Enforcing the straw donor prohibition against all persons covered by FECA *except* respondents would not only be arbitrary, capricious, and contrary to law, but also, in the words of the controlling Commissioners, "manifestly unfair."

The controlling group also claimed that the respondents may have believed their conduct was sanctioned by the "the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions." AR85. Again, none of the FEC rules or precedents cited by these Commissioners involved section 30122 or purported to analyze its scope. Instead, this guidance stood for the proposition that contributions disbursed from corporate accounts have typically been deemed "corporate" in origin for the purpose of applying FECA's ban on corporate contributions, 52 U.S.C. § 30118. AR83-85. But this proposition is self-evident: contributions are assumed to come from their most immediate contributor. All straw donor contributions appear on their face to come from the straw donor, corporate or otherwise. That does

not relieve the FEC of its responsibility under section 30122 to determine whether the immediate source of a contribution is its "true" source when presented with evidence of a straw donor scheme.

What the controlling Commissioners ignore in their zeal to protect respondents from the consequences of their own fraudulent conduct is that the only statutory obligation at issue here is disclosure, the "least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). The true donors of the $15 million in contributions at issue here were not even personally subject to any reporting requirements. Had they contributed directly to the super PACs in question—rather than creating or repurposing shell corporations to make contributions on their behalf—they would have had no obligations under FECA whatsoever; the recipient super PACs would have borne the responsibility for filing the required disclosures with the FEC. *See* 52 U.S.C. § 30104. It would have been far easier for respondents to comply with section 30122 than to violate it. Their effort to evade the law gives lie to the controlling group's notice theory; no reasonable person could maintain that respondents stumbled unknowingly into a straw donor scheme.

In short, the controlling group's justifications for its dismissals of the plaintiffs' complaints do not even clear rational basis review, much less the standard for reasoned decisionmaking required under *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) and *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). Plaintiffs respectfully request that this Court reverse the dismissals.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. FECA's Disclosure Provisions

To serve the electorate's compelling interest in knowing "where political campaign money comes from," *Buckley*, 424 U.S. at 66, FECA contains multiple provisions to ensure accurate reporting from individuals, groups and, entities that give and spend money to influence elections. One such provision is FECA's prohibition on contributions in the name of another, *i.e.*, the "straw donor" prohibition. *See, e.g.*, *United States v. O'Donnell*, 608 F.3d 546, 553 (9th Cir. 2010) (noting that "congressional purpose" behind straw donor prohibition is "to ensure the complete and accurate disclosure of the contributors who finance federal elections"). It provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122. In turn, "person" is defined as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." *Id.* § 30101(11).

The Commission regulation implementing section 30122 provides the following examples of "contributions in the name of another":

- "Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4(b)(2)(i).
- "Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source." 11 C.F.R. § 110.4(b)(2)(ii).

To effectuate its critical disclosure function, FECA also sets forth a comprehensive registration and reporting system for "political committees." A political committee must register

with the FEC, file periodic reports for disclosure to the public, and identify itself through disclaimers on all of its political advertising, including its websites and mass electronic communications. 52 U.S.C. §§ 30102-30104; 11 C.F.R. § 110.11(a)(1)).

A "political committee" is any "committee, club, association, or other group of persons" that receives more than $1,000 in contributions or makes more than $1,000 in expenditures during a calendar year, 52 U.S.C. § 30101(4). The FEC employs a two-prong test for determining political committee status under the Act. The first prong asks whether an entity or other group of persons has made more than $1,000 in "expenditures" or received more than $1,000 in "contributions" during a calendar year. *Id.* § 30101(4)(A). The second prong asks whether the organization has as its "major purpose . . . the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.

Any entity that meets the definition of a "political committee" must file a "statement of organization" with the FEC, 52 U.S.C. § 30103, comply with organizational and recordkeeping requirements, *id.* § 30102, and file periodic disclosure reports of its receipts and disbursements, *id.* § 30104. The political committee disclosure reports required by FECA must disclose to the Commission and the public, including plaintiffs, comprehensive information regarding such committee's financial activities, including the identity of any donor who has contributed $200 or more to the committee within the calendar year. *Id.* § 30104(b).

B. The Commission's Administrative Complaint and Enforcement Process

Any person may file an administrative complaint with the Commission alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). A complaint must identify the complainants and be sworn and signed, and any allegations in a complaint "not based upon personal knowledge" should identify the source of the information that "gives rise to the complainant's belief in the truth of such statements." 11 C.F.R. § 111.4(b), (d). The Commission, after reviewing the complaint and any

responses, may then vote on whether there is sufficient "reason to believe" that a violation has occurred to justify an investigation. FECA requires an affirmative vote of four Commissioners to undertake most agency actions, 52 U.S.C. § 30106(c), including a "reason to believe" finding necessary to initiate an investigation. *Id.* § 30109(a)(2).

After the investigation, the OGC can recommend that the Commission vote on whether there is "probable cause" to believe the law has been violated. *Id.* § 30109(a)(3). If the Commission determines, by an affirmative vote of at least four Commissioners, that there is probable cause to believe that a violation of the law has been committed, it attempts to correct the violation and enter a conciliation (settlement) agreement with the respondent, which may include payment of a civil penalty. *Id.* § 30109(a)(4), (5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may, by the affirmative vote of at least four Commissioners, institute a civil action against the respondent in federal district court. *Id*. § 30109(a)(6)(A).

Because it triggers only the initial phase in a Commission enforcement proceeding, the "reason to believe" standard is a low threshold. Although "reason to believe" is not defined in FECA, the Commission has described its views in a policy statement: "The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants further investigation or immediate conciliation." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). "The Commission finds 'no reason to believe' 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." *Id.* at 12546.

"Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in this Court seeking review of the Commission's action. 52 U.S.C. § 30109(a)(8)(A). If the Court finds that the Commission's dismissal of the complaint was "contrary to law," it may order the Commission to take other action. *Id.* § 30109(a)(8)(C). If the Commission fails to conform to the Court's order within 30 days, the complainant may bring a civil action against respondents to remedy the violation. *Id.*

II. STATEMENT OF FACTS

A. Plaintiffs File Five Complaints Alleging Use of Corporate Straw Donors in Connection to the 2012 Election.

As independent spending to influence federal elections surged in the wake of *Citizens United* and *SpeechNow*, there were also mounting efforts by some would-be contributors to find or create corporate entities to conceal their political activity. The most common method was to donate to politically active nonprofit organizations organized under section 501(c)(4) of the Internal Revenue Code, because those groups were frequently able to avoid public disclosure of their donors under both federal tax law and campaign finance law.[2] Between the 2008 election, which immediately preceded *Citizens United*, and the next Presidential election in 2012, the amount of money spent by non-disclosing entities, mostly 501(c)(4) groups, more than tripled; approximately $308 million in "dark money" was spent in 2012.[3]

1. MUR 6485 (W Spann LLC). In 2011, the media began reporting on what appeared to be a new technique for large donors to evade laws requiring public disclosure of campaign

[2] Kim Barker, ProPublica, *How Nonprofits Spend Millions on Elections and Call it Public Welfare* (Aug. 18, 2012), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

[3] Ctr. for Responsive Pol., *2012 Outside Spending, by Group*, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=A (last visited July 7, 2017).

contributions—namely, the use of LLCs and other corporate entities as straw donors. On August 4, 2011, NBC News reported: "A mystery company that pumped $1 million into a political committee backing Mitt Romney has been dissolved just months after it was formed, leaving few clues as to who was behind one of the biggest contributions yet of the 2012 presidential campaign."[4] Reportedly, a Delaware entity called W Spann LLC was created in March 2011; it made a $1 million contribution on April 28, 2011 to Restore Our Future ("ROF"), the super PAC that supported Romney's 2012 presidential run; and then, three months later, it dissolved.[5]

One day after this report, plaintiffs filed an administrative complaint with the FEC alleging that W Spann had been used as a conduit to hide the true source of a $1 million contribution to ROF. Compl., MUR 6485 (W Spann LLC) (Aug. 5, 2011).[6] The complaint asked the FEC to find "reason to believe" a violation had occurred and to authorize an investigation into whether (a) the true source of the contribution and W Spann had violated 52 U.S.C. § 30122 by making a contribution "in the name of another"; and (b) W Spann violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and file reports as a political committee.

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4 Michael Isikoff, *Firm gives $1 million to pro-Romney group, then dissolves*, NBC News (Aug. 4, 2011), http://www.nbcnews.com/id/44011308/ns/politics-decision_2012/t/firm-gives-million-pro-romney-group-then-dissolves.

5 *Id*.

6 Although this Court found that plaintiffs do not have standing to pursue their claims relating to the W Spann complaint, the documents in MUR 6485 were part of the administrative record before the Commission, and the controlling group addressed all five matters in their SOR. AR75-89. Their rationale must be evaluated in light of all the information they reviewed in formulating their position.

The FEC is in the process of transitioning to a new website, but most of the record documents from closed matters are ordinarily made public and can be accessed online. Materials from MURs 6485 and 6930 are currently available at https://www.fec.gov/data/legal/matter-under-review/6485 (W Spann) and https://www.fec.gov/data/legal/matter-under-review/6930 (Pras Michel).

Only after the contribution attracted public attention and plaintiffs filed their complaint did Edward Conard, Romney's friend and former business partner, come forward to state publicly that he was the true source of the W Spann contribution. Conard did not deny that he had created W Spann to avoid disclosure; he conceded that he was concerned that disclosing his contribution could jeopardize the security of his family and sought legal advice about how to make the contribution without revealing his identity. W Spann/ Conard Resp. at 2, MUR 6485 (Oct. 3, 2011). He further claimed he was told by counsel that he could set up an LLC, though "the FEC might seek to look through the contributing entity to the underlying contributor." *Id*.

After Conard came forward, the W Spann contribution "set off a furor over secrecy in politics."[7] Even Mitt Romney, then a candidate for the Republican nomination for President and the perceived beneficiary of the contribution, felt compelled to weigh in on the controversy. In an attempt to allay public concerns, he stated that "[Conard] came out and discussed who he is, so there's not much question anymore—no controversy because he said, 'Hey, it's me, and I've given to Mitt many times before.'"[8] Conard ultimately asked ROF to amend its disclosure reports with the FEC to list him instead of W Spann as the donor. *See* Conard Resp. at 5.

2. MUR 6487 (F8 LLC) and MUR 6488 (Eli Publishing). On the same day the W Spann story broke, a Utah television station reported that ROF "received two separate $1 million donations from companies located in Provo, but the companies don't appear to do any substantial business." AR202 (Compl., MUR 6488); AR2 (Compl., MUR 6487). The station identified the

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[7] Dan Eggen, *Mystery pro-Romney donor revealed as a former employee at hedge fund firm*, Wash. Post (Aug. 6, 2011), https://www.washingtonpost.com/politics/mystery-pro-romney-donor-revealed-as-a-former-employee-at-hedge-fund-firm/2011/08/06/gIQArcMlyI_story.html.

[8] Alexander Burns, *Romney: Pay no attention to the man behind W Spann LLC*, Politico, (Aug. 8, 2011), http://www.politico.com/story/2011/08/romney-pay-no-attention-to-the-man-behind-w-spann-llc-060895.

companies as Eli Publishing L.C. and F8 LLC, which share an address in Provo, AR202, and stated that the companies "don't seem to do any business. They incorporated with the state, but they have no presence on the internet and when Fox 13 went to their address, we found only an accounting firm whose employees weren't aware of the companies' activities." AR203. Available public information indicated that the gross annual sales of Eli Publishing were only $72,000 in 2011 and $70,000 in 2012. AR41 (First Gen. Counsel's Rep. ("FGCR"), MURs 6487 and 6488).

The news reports identified Steven J. Lund as the registered agent of Eli Publishing and suggested he may be the true source of the two $1 million contributions. AR202, 203. Lund then admitted to the public that he made the contribution through a corporation because it had accounting advantages, and because "he did not want '*to be real public* about being a part of the campaign.'" AR36.

Plaintiffs filed two administrative complaints on August 11, 2011 alleging that F8 LLC and Eli Publishing were used as conduits to hide the true source of two $1 million contributions to ROF, and asking the FEC to find reason to believe that Lund, Eli Publishing, and F8 had violated the straw donor prohibition, 52 U.S.C. § 30122, and the political committee registration and reporting requirements, *id.* §§ 30102, 30103, and 30104. AR7, 207. In their responses to the complaints, none of the respondents raised concerns about notice or contested whether section 30122 applied to corporate entities; instead, the responses argued that the "allegations in the complaint [were] insufficient" and plaintiffs' reliance on news reports inappropriate. AR28, 222.

3. MUR 6711 (Specialty Investments Group, Inc.). More than a year after the "furor" surrounding the straw donor contributions to ROF, reports surfaced of a "mystery Tennessee firm," which was founded shortly before it made over $5 million in contributions to the super PAC FreedomWorks for America. AR303 (Compl., MUR 6711). On October 27, 2012, the *Knoxville*

News Sentinel reported that FreedomWorks "received seven donations totaling $5.28 million from Knoxville-based Specialty Group Inc.," which accounted for about 90% of the contributions received by FreedomWorks during the first 15 days of October. *Id.* The report explained that "Specialty Group filed its incorporation papers on September 26, less than a week before it gave several contributions to [FreedomWorks] worth between $125,000 and $1.5 million apiece." *Id*. The registered agent of Specialty Investments Group, Inc. ("SIG"), William S. Rose, "did not respond to requests for comment. He did not answer a knock on the door . . . at his Knoxville home, which shares the same address registered to Specialty Group." *Id.*

On December 7, 2012, the *Seattle Times* reported that Rose, a "lawyer in Tennessee who is mysteriously linked to millions of dollars in campaign contributions steered to congressional candidates[,] doubled his investments in the weeks before Election Day and quietly funneled $6.8 million more" to FreedomWorks.[9] Rose "told The Associated Press that his business was a 'family secret' and he was not obligated to disclose the origin of what now amounts to more than $12 million that he routed [to FreedomWorks] through two companies he recently created," SIG and Kingston Pike Development, LLC ("KPD"), which Rose also "registered and owns."[10] The recipient political committee, FreedomWorks, reported receiving 17 contributions totaling $10,575,000 from SIG between October 1 and November 1, 2012, as well as three contributions totaling $1.5 million from KPD between October 25 and October 30, 2012.

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[9] Jack Gillum & Stephen Braun, *Shadowy donor behind record 'super' PAC checks*, Seattle Times (Dec. 7, 2012), http://www.seattletimes.com/seattle-news/politics/shadowy-donor-behind-record-super-pac-checks.

[10] *Id.* Business records on file with the Tennessee Secretary of State's office indicate that Rose created Specialty Group Inc. (later renamed Specialty Investments Group, Inc.) on September 26, 2012, and created Kingston Pike Development LLC on September 27, 2012. AR304.

Later stories reported that Richard J. Stephenson may have been the source, or one of the sources, of the $12 million contributed to FreedomWorks in the names of SIG and KPD. AR344-45 (Am. Compl., MUR 6711). According to the Washington Post, Stephenson, a FreedomWorks board member, had attended a FreedomWorks retreat in Jackson Hole, Wyoming, at which FreedomWorks prepared a budget in anticipation of a large influx of money. AR345.[11] At the retreat, Stephenson reportedly dictated some of the terms of how the money would be spent. AR345. Adam Brandon, FreedomWorks's executive vice president, was also reported to have met repeatedly with members of Stephenson's family who were involved in arranging the donations.

Plaintiffs filed an administrative complaint on December 20, 2012, alleging that SIG, KPD, Rose, and any other persons who made contributions in the names of SIG and KPD, had violated 52 U.S.C. § 30122, and that SIG and KPD violated 52 U.S.C. §§ 30102, 30103, and 30104. AR301-11. Plaintiffs filed an amendment to their complaint on April 24, 2013 to add Stephenson, Brandon, and FreedomWorks as respondents. AR343-48. The amendment further alleged that that by arranging the contributions, FreedomWorks and Brandon may have violated section 30122 by knowingly accepting contributions from Stephenson in the names of SIG and KPD. AR345-46.

None of the respondents denied—much less refuted—the allegations made in plaintiffs' administrative complaint, nor did they raise concerns about notice or contest whether section 30122 applies to corporate entities like SIG and KPD. Instead, their responses "rel[ied] exclusively on arguments about the sufficiency of the Complaint." AR387. For instance, Stephenson argued that the complaint was "legally and factually insufficient" because it relied on news reports and

[11] *See also* Amy Gardner, *FreedomWorks tea party group nearly falls apart in fight between old and new guard*, Wash. Post (Dec. 25, 2012), http://www.washingtonpost.com/politics/freedomworks-tea-party-group-nearly-falls-apart-in-fight-between-old-and-new-guard/2012/12/25/dd095b68-4545-11e2-8061-253bccfc7532_story.html.

not on plaintiffs' personal knowledge. A376-78. FreedomWorks argued that the complaint was "legally deficient" because it lacked "factual allegation[s]" and rested "entirely on unverifiable allegations" in news reports. AR370.

4. MUR 6930 (Pras Michel). Plaintiffs filed a fifth administrative complaint in April 2015, alleging that there was reason to believe that Prakazrel "Pras" Michel, SPM Holdings LLC/SPM 2012 Holdings LLC, Black Men Vote, and the Treasurer of Black Men Vote, William Kirk Jr., violated 52 U.S.C. § 30122. Compl., MUR 6930 (Pras Michel) (Apr. 13, 2015). The complaint cited FEC reports that showed that the super PAC Black Men Vote reported receiving a total of $1.325 million in itemized individual contributions during the 2012 election cycle. These contributions were reported as coming from only three donors: SPM Holdings ($875,000), Pras Michel ($350,000) and Earl Stafford ($100,000). *Id.* at 2-3.

B. The FEC Deadlocks Three-Three and Dismisses All Five of Plaintiffs' Complaints.

1. The FEC's Office of General Counsel recommends the Commission find "reason to believe" section 30122 violations occurred.

In August 2012, the OGC issued its first report on these matters, presenting to the Commission its findings of fact and legal analysis in the W Spann MUR. FGCR, MUR 6485 (Aug. 28, 2012). Based on the complaint and the responses, the OGC recommended the Commission find reason to believe that Conard and W Spann violated the straw donor prohibition, 52 U.S.C. § 30122, but no reason to believe W Spann violated the political committee requirements, 52 U.S.C. §§ 30102, 30103, and 30104. *Id*. at 19.

On June 6, 2012, the OGC issued its FGCR in the Eli Publishing/F8 MURs. AR31-49. Again, it concluded that "there is ample 'reason to believe' that, in violation of the Act, Lund was the true source of the $1 million contribution made by Eli Publishing," and that "there is also 'reason to believe' that F8 was a conduit and not the true source of the $1 million contribution by

F8 to ROF." AR41. The OGC recommended the Commission find reason to believe that F8, Eli Publishing, and Lund violated 52 U.S.C. § 30122, but not 52 U.S.C. §§ 30102, 30103, and 30104.

On June 6, 2014, the OGC issued its FGCR in MUR 6711. AR385-469. It recommended that the Commission find reason to believe that Stephenson made twenty contributions totaling over $12 million to FreedomWorks using the names of SIG and KPD. AR397-99. It also found that the available information demonstrated FreedomWorks executive Adam Brandon helped to arrange the contributions. *Id*. Based on the complaint and responses, the OGC recommended finding "reason to believe that respondents violated [52 U.S.C. § 30122]," but not 52 U.S.C. §§ 30102, 30103, and 30104. AR402-403.

On November 9, 2015, the OGC issued its FGCR in the Pras Michel MUR. FGCR, MUR 6930 (Nov. 9, 2015). It recommended that the Commissioners *not* find "reason to believe" that those respondents violated FECA, reasoning that it did not appear that Michel sought to elude the reporting provisions of the Act by using SPM Holdings as a pass-through for the funds contributed to Black Men Vote.

2. The FEC deadlocks three-three on whether to investigate and dismisses all complaints; two statements of reasons are issued.

Although the OGC recommended that the Commission investigate four of the five "straw donor" administrative complaints, in a series of votes in 2015 and 2016, the Commission deadlocked, three to three, on whether to find "reason to believe" with respect to each of the complaints. Unable to proceed, the Commission voted five to one to close the file in MURs 6485,

6487, 6488, 6711, and 6930, and to dismiss the cases.[12] Almost five years had elapsed between the filing of plaintiffs' first complaint and the FEC's first vote to find "reason to believe."

The three Commissioners who refused to find "reason to believe" a violation had occurred in any of the five MURs subsequently issued a single Statement of Reasons that addressed all five MURs. AR75-89. The three Commissioners who voted to find "reason to believe" that respondents in each of the MURs had violated FECA ("dissenting Commissioners") also issued a single Statement of Reasons addressing all five MURs. AR90-94 (SOR of Vice Chair Ravel and Comm'rs Walther and Weintraub).[13]

The controlling Commissioners took an extraordinary position. They acknowledged that "section 30122 applies to closely held corporations and corporate LLCs," AR86, and that the use of an LLC as a straw donor violates this prohibition "in certain circumstances." AR82. But "in an exercise of the Commission's prosecutorial discretion," and citing "principles of due process, fair notice, and First Amendment clarity," the three controlling Commissioners nonetheless concluded that all five of the administrative complaints should be dismissed because the respondents were not "on notice of the governing norm." AR77. To justify their conclusion that respondents lacked sufficient notice, the Commissioners asserted that:

- Judicial decisions concerning unrelated FECA provisions—including *Citizens United* and *SpeechNow*—made FECA's longstanding prohibition on straw donors unclear as applied to LLCs and other corporate entities. AR83.

- LLCs and other corporate entities "could have been" "misled or confused" by Commission precedent analyzing when funds deposited into a corporate

[12] AR65-66 (Am. Certification, MURs 6487 and 6488); AR539-44 (Certifications, MUR 6711); *see also* Certification, MUR 6485 (W Spann LLC) (Feb. 23, 2016); Certification, MUR 6930 (Pras Michel) (Feb. 23, 2016).

[13] Commissioners Ravel and Weintraub released a second dissenting statement, AR95-97, and the controlling group subsequently issued a supplemental statement in response. AR98-101.

account and then used for contributions would be attributed to the corporation for the purpose of the statutory contribution restrictions. AR83-85.

- Application of section 30122 to respondents according to the standard recommended by the dissenting Commissioners would raise First Amendment concerns. The controlling group alleged that according to the "analysis of our colleagues, section 30122 makes all closely held corporations or corporate LLC contributions unlawful," which would "countermand *Citizens United* with respect to the First Amendment rights of these entities." AR82 n.48.

The controlling group also announced a standard for "enforcing section 30122," but only with respect to "future cases." AR86. These Commissioners would only find reason to believe a violation of section 31022 has occurred if they were presented with direct evidence that funds were "intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." AR86. In the absence of such evidence, they would require a showing that the LLC did not have sufficient business income to make the contribution or was created for the sole purpose of making campaign contributions. *Id*. But they declined to apply this standard to the MURs under review, *see, e.g.*, AR87 n.70, because to do so would be "unfair" given the "First Amendment rights . . . at stake." AR86, 88.

III. PROCEDURAL HISTORY

A series of letters from the FEC in March 2016 informed plaintiffs that the Commissioners had deadlocked on whether to find reason to believe that the parties named in plaintiffs' five administrative complaints had violated section 30122, and accordingly, the Commission had dismissed all of the complaints. AR70-71, 73-74, 546-47, 550-51. Plaintiffs filed this action on April 22, 2016, seeking declaratory and injunctive relief.

The FEC moved to dismiss this action on July 1, 2016 for want of jurisdiction, arguing that plaintiffs lacked Article III standing to obtain review of the Commission's dismissals of their complaints. FEC Mot. to Dismiss (July 1, 2016) (Doc. 13).

On March 29, 2017, this Court granted the FEC's motion in part and denied it in part (Doc. 22), holding that plaintiffs have standing to pursue their claims with respect to their administrative complaints in MURs 6487 (F8 LLC), 6488 (Eli Publishing), and 6711 (Specialty Investments Group, Inc.). Thus, although this memorandum discusses the Commission's actions with respect to all five complaints insofar as this material is relevant, plaintiffs seek relief only as to their complaints against F8 LLC/Eli Publishing L.C., *et al.*, and Specialty Investments Group, Inc., *et al*.

ARGUMENT

I. JURISDICTION

This action arises under FECA, 52 U.S.C. § 30101 *et seq*., and the APA, 5 U.S.C. §§ 551-706. This Court has jurisdiction pursuant to 52 U.S.C. § 30109(a)(8) and 28 U.S.C. § 1331. When the FEC's OGC recommends that the Commission pursue an administrative complaint, but the complaint is dismissed because of a deadlock vote among the Commissioners, the Commission's dismissal of the complaint is reviewable by this Court under 52 U.S.C. § 30109(a)(8)(A). *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) ("*DCCC*").

Plaintiffs CLC and Democracy 21 have standing under *FEC v. Akins*, 524 U.S. 11 (1998), because they have been deprived of specific information subject to disclosure under FECA and critical to their organizational activities. *See* Ryan Decl. (Aug. 2, 2016) (Doc. 18-1); Wertheimer Decl. (Aug. 2, 2016) (Doc. 18-2). The dismissals of plaintiffs' complaints effectively sanctioned the ongoing and unlawful "use of straw donors to make contributions 'in the name of another,'" and relieved the respondents from any obligation to disclose their donors fully and accurately—depriving the plaintiffs of information about the true sources of contributions to super PACs, impeding their activities in many programmatic areas, and "prevent[ing] them from carrying out a

central part of their mission." Compl. ¶ 16 (Apr. 22, 2016) (Doc. 1). As confirmed in *Akins*, that "is injury of a kind that FECA seeks to address." 524 U.S. at 20.

Plaintiffs' injury would be redressed by an order declaring that the FEC's decision to dismiss their administrative complaints was arbitrary, capricious, an abuse of discretion, based on an impermissible interpretation of FECA, and contrary to law, and ordering the FEC to conform to such declaration.

II. STANDARD OF REVIEW

A. Governing Standards of Law

The standard to be applied by this Court in reviewing the FEC's dismissals of plaintiffs' administrative complaints is whether the Commission acted "contrary to law." *See Orloski*, 795 F.2d at 161; 52 U.S.C. § 30109(a)(8)(C). When a complaint is dismissed due to a deadlock vote among the Commissioners, the three Commissioners who voted to dismiss "constitute a controlling group for purposes of the decision, [and] their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The Commission's dismissal of a complaint is therefore "contrary to law" if the controlling Commissioners' rationale for voting to dismiss (1) rests on an impermissible interpretation of law, or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. When "the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why." *DCCC*, 831 F.2d at 1132.

As to *Orloski*'s first prong, the Court evaluates whether the FEC's interpretation of a law used to justify dismissal, as set forth in the controlling SOR, is a permissible interpretation of that law. In certain circumstances, the FEC's interpretations of FECA may warrant deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). *See Citizens for Responsibility and Ethics in Wash. (CREW) v. FEC*, 209 F. Supp. 3d. 77, 86 (D.D.C. 2016). But such deference is only called

for when an agency is construing ambiguities in a statute as to which Congress has delegated it interpretive authority. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). Where, by contrast, the FEC interprets the Constitution or judicial precedent, no such deference is due. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 518-23 (2009).

Absent a basis for *Chevron* deference, an agency's legal interpretation is due only that deference warranted by the persuasiveness of its reasoning. *See Mead*, 533 U.S. at 234-35; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court should weigh the interpretation provided by the agency against the court's independent interpretation of the law to determine whether the agency's interpretation is "[]permissible." *Orloski*, 795 F.2d at 161.

As to the second *Orloski* prong—whether the FEC's dismissal of the complaint was arbitrary, capricious, or an abuse of discretion—the Court should apply a standard analytically similar to the "arbitrary [or] capricious" standard applied under the APA, 5 U.S.C. § 706(2)(A). *See In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring). A court must set aside an agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

The FEC's invocation of prosecutorial discretion does not change the standard of review to be applied. To be sure, the FEC is entitled to exercise its enforcement discretion by dismissing matters that, in its considered judgment, do not justify the use of agency resources relative to the magnitude of the violation at issue. That is not this case. "[A]n agency's decision not to take enforcement action . . . is only presumptively unreviewable," and that "presumption may be

rebutted [by the applicable] substantive statute." *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). FECA provides for private complainants to play an enforcement role alongside the FEC, and expressly authorizes judicial review of dismissals. Any FEC dismissal justified as an "exercise of discretion" therefore remains subject to review under the statutory "contrary to law" standard. *Orloski*, 795 F.2d at 161; *see also CREW*, 209 F. Supp. 3d at 88 n.7 (noting "FECA's express provision for the judicial review of the FEC's dismissal decisions" requires "apply[ing] the contrary-to-law standard, as Congress has instructed").

Moreover, the FEC must base its decision to exercise prosecutorial discretion on "reasonable grounds." *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010); *see also CREW*, 209 F. Supp. 3d at 88 ("[T]he court should also insist on a 'reasonable explanation of the specific analysis and evidence upon which the agency relied'" (quoting *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004)). An impermissible interpretation of law or an arbitrary and capricious rationale do not provide "reasonable grounds." A decision based on an error of law is by definition an "abuse of discretion." *See Crossroads GPS v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015).

B. *Chevron* Deference Is Not Warranted Because This Is Not a Case of Statutory Interpretation.

Although the FEC's authority lies in the interpretation of FECA, the reasons proffered for the dismissals here do not appear to be based on an interpretation of this statute. The controlling group concedes that the relevant provisions of FECA are clear and unambiguous and apply to closely held corporations and corporate LLCs, like the respondents here. AR82, 86. The dismissals of the complaints instead turned on their conclusion that respondents did not have sufficient notice that the statute applied to their conduct, and this conclusion in turn was founded on constitutional considerations of due process and "First Amendment clarity."

Chevron deference is thus not appropriate here. As the Supreme Court and D.C. Circuit have repeatedly explained, "[*Chevron*] deference comes into play, of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency." *Sea-Land Serv., Inc. v. Dept. of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868, 1874 (2013); *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 591-93 (D.C. Cir. 2015).[14] The controlling Commissioners did not dismiss the complaints based on their "interpretation" of section 30122, nor did they claim that this provision was ambiguous. Similarly, they do not claim that the political committee requirements at 52 U.S.C. §§ 30102, 30103, and 30104 are ambiguous. And the FEC precedents they cite, *see* AR83-85, do not "fill any gaps" in these provisions, but rather implement entirely separate sections of the Act, principally the corporate contribution ban, 52 U.S.C. § 30118.

To be sure, the controlling group announced a standard for applying the straw donor prohibition to corporate LLCs and other corporations in "similar *future* cases." AR86 (emphasis added). But they declined to apply that standard to the respondents and made clear that they would dismiss the complaints regardless of whether the respondents violated their prospective standard for the enforcement of section 30122. AR87 & n.70. Thus, even insofar as the controlling Commissioners claim that they were interpreting FECA in formulating their standard, it did not have any apparent effect on the outcomes of the MURs at issue here.

Instead of applying an interpretation of FECA, the controlling group appears to be driven by its interpretation of rights protected by the Constitution and judicial decisions reviewing those

[14] Insofar as the controlling Commissioners indeed believe that the relevant provisions of FECA are ambiguous or unconstitutionally vague, deference to that belief is still not appropriate. Even in circumstances where the *Chevron* framework applies, agencies receive no deference on the question of whether statutory ambiguity exists because that question is properly reserved for the courts. *American Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

rights. But to the extent that the controlling Commissioners acted based on their understanding of *Citizens United* or considerations of "First Amendment clarity," *Chevron* deference does not apply. *See, e.g.*, AR75-76 (discussing impact of *Citizens United* and nature of the First Amendment rights it recognized). By the same token, the FEC's interpretation of Fifth Amendment due process rights does not fall within its statutory authority. *See, e.g.*, AR86-88, AR88 n.73 (discussing due process rights protected by the Fifth Amendment, and citing *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) and *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Chevron, which is premised on congressional delegation of authority to give authoritative constructions to ambiguous statutory language, does not require deference to an agency's interpretation of judicial opinions, and still less to its views of the constitutional issues underlying them. In *Negusie*, for example, the Supreme Court rejected a plea for deference to an agency decision that was based not on the agency's construction of ambiguous statutory language, but on its interpretation of a prior Supreme Court decision. 555 U.S. at 521. Likewise, the D.C. Circuit has repeatedly held that courts "are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (quoting *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998)); *accord New York, New York LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

Finally, even if the controlling group's SOR turned on matters of statutory construction, their reasoning would not receive *Chevron* deference because it commanded the votes of only three Commissioners, and therefore lacks the force of law. In *Mead*, the Supreme Court significantly clarified the parameters of *Chevron* deference by limiting it to circumstances where "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the

agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. The D.C. Circuit has interpreted *Mead* to hold that "the expressly non-precedential nature" of a decision "conclusively confirms" that it is not an exercise of authority "to make rules carrying the force of law" that are entitled to deference. *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014). A tie three-three vote by the FEC lacks the precedential effect essential to actions with the force of law under *Mead* and *Fogo de Chao*. The FEC has admitted as much: "[S]tatements from declining-to-go-ahead Commissioners in three-three dismissals are '*not law*' and . . . such statements 'would not be binding legal precedent or authority for future cases.'" FEC Reply Supp. Mot. to Dismiss, at 4, *CREW v. FEC*, No. 14-cv-1419 (D.D.C. Dec. 16, 2014) (emphasis added by FEC) (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 & n.32 (D.C. Cir. 1988)). Because a three-three dismissal is "not law"—as all parties concede—the dismissals under review here are not entitled to *Chevron* deference.[15]

III. THE DISMISSALS OF PLAINTIFFS' COMPLAINTS WERE CONTRARY TO LAW.

The issue that must be ultimately decided in this case is whether the Commission has adequately justified its failure to investigate potential violations of two key federal disclosure measures: the straw donor prohibition at 52 U.S.C. § 30122 and the political committee disclosure requirements at 52 U.S.C. §§ 30102, 30103, and 30104. Because the Commission failed to proceed with any investigations, none of these disclosure obligations—despite their clear centrality to the FEC's statutory mission—will be applied to respondents. There will be no disclosure of the true donors who funneled more than *$15 million* through the respondent corporations to super PACs that spent huge sums in the 2012 federal elections.

[15] *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) does not counsel otherwise. It was decided before the shift in *Chevron* deference doctrine worked by *Mead*'s holding that agency legal interpretations that lack the force of law are "beyond the *Chevron* pale." 533 U.S. at 234.

The three Commissioners who voted to find "no reason to believe" did not base that decision on their interpretation of ambiguous statutory language. Instead, they voted to dismiss the complaints "in an exercise of the Commission's prosecutorial discretion" because they believed the respondents did not have adequate notice that corporate straw donors were prohibited. AR77. The queston before this Court is whether the controlling Commissioners provided a reasoned justification for their belief that respondents lacked sufficient notice, despite the unambiguous language of the statutory provisions at issue.

The controlling group has not even come close to such a justification. Because their theory of inadequate notice appears to be grounded in constitutional concerns, their conclusions are owed no deference, and this Court should instead conduct a *de novo* review of the relevant law and judicial precedents. *Orloski*, 795 F.2d at 161. But even under a far more deferential level of review, the controlling Commissioners do not present reasonable, or even rational, grounds for their failure to authorize an investigation of "some of the most crystal-clear violations this Commission had seen in recent memory." AR95. *See* 52 U.S.C. § 30109(a)(8)(C); *Orloski*, 795 F.2d at 161.

A. The Dismissals of Plaintiffs' Administrative Complaints Were Contrary to the Plain Language and Purpose of the Act.

In their SOR, the controlling Commissioners acknowledge that "closely held corporations and corporate LLCs may be considered straw donors in violation of section 30122," AR82, 86, and that the straw donor prohibition specifically covers "partnerships, *corporations* and other organizations." AR81 (emphasis added). Their contention that FECA failed to provide respondents with sufficient notice is thus contrary to law and wholly irrational.

Application of section 30122 to corporate straw donors is not only mandated by the plain language of the statute, but is also necessary to effectuate Congress' interest in preventing the laundering of campaign money through political entities whose names do not reflect the true

sources of their funds. Any review of the adequacy of the FEC's reasons for its decision in this case must consider that the decision has the effect of depriving the public of critical information concerning millions of dollars of expenditures aimed at influencing the 2012 elections.

1. The straw donor prohibition is vital to the fundamental and well-established purposes of FECA.

Disclosure has been a "cornerstone" of American campaign finance law for more than a century. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 222-23 (1999) (O'Connor, J., dissenting). As Justice Brandeis famously recognized nearly a century ago, "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." *See Buckley*, 424 U.S. at 67 (quoting Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)).

The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment values. Three "important state interests" served by disclosure have been repeatedly recognized: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. Disclosure laws ensure that voters are "fully informed about the person or group who is speaking" and "able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368 (citations and internal quotation marks omitted). "The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67.

Importantly, disclosure serves these goals while only minimally burdening the exercise of First Amendment freedoms. *Id*. at 68. As the Supreme Court recently reaffirmed in *McCutcheon*

v. FEC, 134 S. Ct. 1434 (2014), disclosure does not "impose a ceiling on speech" and "[f]or that reason, . . . often represents a less restrictive alternative to flat bans on certain types or quantities of speech." *Id.* at 1434, 1459-60 (citations omitted).

FECA's ban on making contributions in the name of another promotes this crucial informational interest. *United States v. Boender*, 649 F.3d 650, 661 (7th Cir. 2011). It was "originally enacted . . . as part of the Federal Election Campaign Act of 1971, which overall sought to regulate campaign finance through a regime of disclosure requirements." *O'Donnell*, 608 F.3d at 553. "[T]he congressional purpose behind § 441f—to ensure the complete and accurate disclosure of the contributors who finance federal elections—is plain." *Id.* The Third Circuit discussed the importance of section 30122 to political transparency at length:

> *Buckley* carefully considered the danger posed by compelled disclosure. It held that the state interests promoted by the FECA's reporting and disclosure requirements justified the indirect burden imposed on First Amendment interests, and that the compelled disclosure requirements were constitutional . . . . Proscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to *be at the very core* of the Court's analysis.

United States v. Mariani, 212 F.3d 761, 775 (3rd Cir. 2000) (emphasis added); *see also O'Donnell*, 608 F.3d at 554. And the FEC has long recognized that disclosure is a central and distinct purpose of the straw donor prohibition. *See, e.g.*, FEC Advisory Op. 1986-41, at 2 (Dec. 5, 1986) (noting that section 30122 "serves to [e]nsure disclosure of the source of contributions to Federal candidates and political committees *as well as* compliance with the Act's limitations and prohibitions." (emphasis added)).

FECA's political committee disclosure requirements at 52 U.S.C. §§ 30102, 30103, and 30104—which plaintiffs' administrative complaints also alleged were violated—similarly advance the compelling governmental interests in "providing the electorate with information, deterring

actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196.

Congress's longstanding concern about contributions made in the name of another is in no way limited to *individual* straw donors. Indeed, contributions anonymously funnelled through entities like corporate LLCs are precisely the type of undisclosed "dark money" that Congress has sought to eliminate through the passage of federal disclosure laws. For instance, in upholding a federal disclosure requirement enacted in 2002 by the Bipartisan Campaign Reform Act ("BCRA"), the Supreme Court cited evidence of organizations with "misleading" or "mysterious" names that participated in elections while disguising their funding sources. *Id.* at 128 & n.23 ("'Citizens for Better Medicare' . . . was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers."). This is precisely the problem described in plaintiffs' administrative complaints. The donors of over $15 million in campaign contributions are hidden behind groups with "misleading" or "mysterious" names like "F8" and "Specialty Investments Group." Like the plaintiffs challenging the BCRA disclosure requirements, the controlling Commissioners here apparently "want to preserve the ability" of big donors to "hid[e] behind dubious and misleading names." *Id.* at 197 (internal quotation marks omitted). But the controlling Commissioners "never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public." *Id*. (internal quotation marks omitted).

2. The straw donor prohibition unambiguously applies to the corporate respondents in this case.

The language of section 30122 is clear and unambiguous: "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the

name of another person." 52 U.S.C. § 30122. In turn, FECA defines "person" as "an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons . . . ." *Id.* § 30101(11) (emphasis added).

The applicability of the straw donor prohibition to the corporate respondents here was thus plain on the face the law. Similarly, the controlling Commissioners do not even attempt to argue that the federal political committee registration and reporting requirements were unclear. Any "committee, club, association, or other group of persons" that receives more than $1,000 in contributions or makes more than $1,000 in expenditures "during a calendar year" is a political committee. 52 U.S.C. § 30101(4). The Commissioners do not deny that a corporation could qualify as a political committee, and indeed the Commission had found in the past that certain corporations were required to register as political committees. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) (finding that Triad Management Services, Inc. "operated as a 'political committee' in 1996" and illegally failed to register as a political committee).

The controlling Commissioners instead suggest that because corporations could not make contributions to super PACs prior to *Citizens United* and *SpeechNow*, the respondent LLCs could not be expected to understand the potential application of section 30122 to their conduct. These decisions, in tandem, authorized corporations to make independent expenditures, and to make contributions to certain federal political committees that made only independent expenditures, often called "super PACs." *See* FEC Advisory Op. 2010-11, at 2 (July 22, 2010). But neither case altered the scope of the straw donor prohibition, which has always applied to corporations, *see* 52 U.S.C § 30101(11).[16] Corporate LLCs had ample "notice" of the applicability of the longstanding

[16] Indeed, far from unsettling the principle that contributions must be made in the name of the true contributor, both cases reaffirmed the compelling interest in disclosure that underlies the

prohibition on straw donors; indeed, they had precisely the same notice of the law as did an "individual, partnership, committee, association . . . [or] labor organization" subject to its terms. *Id.* If it is appropriate for the FEC to enforce section 30122 against the straw donors in this latter group, it is appropriate to enforce it against the corporate respondents in this case.

Furthermore, it is not even true that corporations had never made contributions under FECA before *Citizens United*. During the "soft money" era prior to BCRA's enactment, corporations gave huge sums to political party committees under the pretext that such funds were not given "for the purpose of influencing any election for Federal office," but instead to finance "issue advocacy" or non-federal activities in the states. *McConnell*, 540 U.S. at 122-26. Indeed, BCRA's strict limits on soft money contribution to federal party committees were in part motivated by the desire to shut down these corporate contributions. *Id*. at 124-25 (noting that largest corporate donors "often made substantial contributions to both parties" giving rise to concerns that "many corporate contributions were motivated by a desire for access to candidates . . . rather than by ideological support for the candidates and parties"). Before BCRA, it was certainly possible for disclosure-averse contributors to funnel huge amounts of money through corporate straw donors to political parties. Given the abuses of the soft-money era, it is not far-fetched to assume that some probably did so, even though it was illegal.

There is thus no reason to assume that Congress "did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions." AR83. The federal ban on corporate contribution has historically been far from airtight, and Congress has long expressed concerns about the use of the corporate form to evade

straw donor ban. *Citizens United*, 558 U.S. at 368; *SpeechNow*, 599 F.3d at 698 ("[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech").

federal campaign law and defeat disclosure. *See McConnell*, 540 U.S. at 128 n.23 (listing "mysterious groups," including corporate entities such as American Seniors, Inc., as examples of a disclosure loophole addressed by BCRA); *FEC v. Beaumont*, 539 U.S. 146, 160 (2003) (explaining that corporations were "susceptible . . . to misuse as conduits for circumventing" FECA).

Further, as multiple courts have reiterated, the important informational interest animating section 30122 is clear. *See, e.g.*, *O'Donnell*, 608 F.3d at 553 (noting that "congressional purpose" was "plain"—"to ensure the complete and accurate disclosure of the contributors who finance federal elections"). To suggest, as the controlling group does, that Congress would have wished to exempt corporations from the prohibition on straw donors is absurd. As the dissenting Commissioners noted, "Congress certainly did not intend for donors to be able to conceal their identities by routing their personal contributions through corporate entities." AR94 & n.22.

The controlling Commissioners ignored clear evidence that respondents not only violated the letter of the law, but also intentionally sought to frustrate the statutory purpose served by section 30122—"complete and accurate disclosure of the contributors who finance federal elections." *O'Donnell*, 608 F.3d at 553. The controlling group's refusal to enforce the straw donor provision thus was contrary to both the clear language and well-recognized purpose of the law.

B. The Dismissals of Plaintiffs' Administrative Complaints Were Arbitrary, Capricious, an Abuse of Discretion, and Otherwise Contrary to Law.

Under *State Farm*'s "arbitrary and capricious" standard,[17] the Court must determine whether the FEC has "articulate[d] a satisfactory explanation for its action including a rational

[17] For the reasons stated in Part II, *Chevron* deference is not warranted in this case. But to the extent it may apply, the *Chevron* Step Two inquiry, as applied under *Orloski* to FEC dismissals of administrative complaints when they rest on constructions of ambiguous statutory language, overlaps with the APA "arbitrary and capricious" standard applied under *In re Carter-Mondale*

connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted). Under *Orloski*, this Court should also consider whether the FEC's dismissals of plaintiffs' administrative complaints "unduly compromise[s] the Act's purposes" or "create[s] the potential for gross abuse." 795 F.2d at 165. Applying these standards here, the Court should conclude that the controlling Commissioners' dismissals of plaintiffs' administrative complaints were arbitrary, capricious, an abuse of discretion, and contrary to law.

1. Respondents could not have been "misled" by Commission precedents addressing funds deposited in corporate accounts because none of these authorities addressed corporate disclosure obligations.

The fiction at the heart of the controlling SOR is that respondents, surveying the legal landscape after *Citizens United* and *SpeechNow*, could have reasonably concluded "that contributions made by their closely held corporations and corporate LLCs were lawful and not contributions in the name of another" because of "the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions." AR85. But any such conclusion would have been illogical, irreconcilable with FECA's plain text, and unsupported by any precedent from the courts or the FEC.

The controlling SOR contends that plaintiffs' administrative complaints were novel because the alleged straw donors were corporate entities, whereas the FEC had previously "considered alleged violations of section 30122 almost exclusively in contexts where individuals were the purported straw donors." AR83. As discussed in the foregoing section, the terms of section 30122 explicitly covered "corporations" and "any other organization or group of persons,"

Reelection Committee, 642 F.2d at 550-551, "for whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable." *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (internal quotation marks, citation, and brackets omitted). A federal agency interpretation of a statute is impermissible if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

and thus gave clear notice of the provision's applicability to non-individuals, like the corporate respondents here. But the controlling group also fails to mention that in prior enforcement efforts, the FEC has scrutinized various straw donors who were not individuals—specifically, political action committees. For example, the FEC found reason to believe that two individuals violated section 30122 (formerly 2 U.S.C. § 441f) by making disguised contributions that were "funneled through" various PACs to a candidate. *See* Notification with Factual and Legal Analysis to John and Ruth Stauffer at 10, MUR 4634 (Sam Brownback for Congress) (Jun. 8, 1998); *see also* Notification with Factual and Legal Analysis to John Shadegg's Friends *et al.* at 7-8, MUR 5968 (John Shadegg's Friends) (Nov. 10, 2008) (proceeding from the premise that a contribution knowingly funneled to a candidate through a PAC would violate § 441f, but finding no reason to believe a violation occurred). Given these precedents, regulated parties could not have reasonably believed that the FEC would regard non-individual entities as categorically incapable of being straw donors under FECA.

Nor was there anything in the FEC's precedents to suggest that *corporate* entities would be treated differently from PACs or individuals for section 30122 purposes, despite the controlling Commissioners' attempt to conjure up ambiguity on this point. The controlling Commissioners observe that contributions disbursed from corporate accounts have historically been held to violate FECA's ban on corporate contributions, 52 U.S.C. § 30118, irrespective of whether the corporation was controlled by a single shareholder. AR83-85 (citing, *inter alia*, *FEC v. Kalogianis*, No. 8:06-cv-68, 2007 WL 4247795 (M.D. Fla. Nov. 30, 2007); Conciliation Agreement at 2, 4, 8, MUR 3191 (Christmas Farm Inn, Inc.) (June 23, 1995); FGCR at 33, MUR 4313 (Coalition for Good Government) (Oct. 18, 1996)).

Relying on these authorities, the controlling Commissioners speculate that "the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions" might have misled the respondents into thinking their conduct would not violate section 30122. AR85. But determining that funds in corporate accounts are "corporate" for the purpose of applying the ban at section 30118, does not mean that the original source of those funds is the corporation for the purpose of applying section 30122. Contributions are *always* assumed to come from their immediate sources; that presumption is not unique to corporations. As the OGC explained, "[e]very contribution made 'in the name of another' appears 'on its face' to have been made from that source." AR39; *see also* AR399 ("[T]hat SIG or KPD may have transmitted the money to FreedomWorks—that is, 'made' the contribution in the literal sense—does not refute the allegation that SIG and KPD were merely intermediaries for the contributions of others."). If the FEC's refusal to enforce section 30122 could be justified simply by stating that the FEC generally assumes that the immediate donor is the original source of the funds, section 30122 would be rendered a nullity.

By way of analogy, suppose that Simon gives money to Garfunkel, who then, acting on Simon's instructions, transfers the money from his bank account to a political committee. This contribution would appear on its face to be Garfunkel's money, in the same way that a contribution disbursed from a corporate account would appear to be the corporation's money. But it would be plainly absurd to argue that just because the money was Garfunkel's, Simon could not have been using Garfunkel as a straw donor in violation of section 30122. And it would be *equally* absurd to make that argument if Garfunkel were replaced with a corporate entity. Contrary to the controlling Commissioners' speculation, the regulated community was perfectly capable of understanding that

FEC precedents applying the corporate contribution ban did not imply that section 30122 condones the laundering of money through corporate accounts for the purpose of evading disclosure laws.[18]

Similarly, no FEC regulation could have misled respondents about the application of section 30122 to corporate straw donors. As the controlling group points out, the FEC declined to adopt a *per se* rule treating all "contributions by closely held corporate LLCs as contributions from their individual owners," but instead promulgated a rule that "treat[s] corporate LLCs as distinct from their individual owners, including single-member corporate LLCs." AR85.[19] The controlling group suggests that this regulation could lead to reasonable misunderstandings about section 30122 because the regulation, like the FEC's section 30118 precedents, treats money in corporate accounts as distinct from the personal funds of controlling shareholders. *Id.* This argument suffers

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[18] There is nothing strange or unfamiliar about the idea of the FEC looking behind a corporate veil to examine the true source of corporate funds. The FEC has applied analogous reasoning in examining political activity by U.S. subsidiaries of foreign corporations.

Federal law prohibits foreign nationals from "directly or indirectly" making "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election" or "an expenditure, independent expenditure, or disbursement for an electioneering communication." 52 U.S.C. § 30121(a)(1). The FEC has found that this prohibition does not bar a domestic subsidiary owned by a foreign corporation from spending money in connection with an election, but "the donations and disbursements [must] derive entirely from funds generated by the Subsidiaries' U.S. operations" rather than from foreign persons. FEC Advisory Op. 2006-15, at 2 (May 19, 2006). Therefore, the fact that funds are deposited into the account of a domestic subsidiary corporation does not end the analysis; the FEC will look into the *derivation* of the funds to make sure their true source is not a foreign corporation. Considered alongside this approach to the foreign-money issue, there was no reason for regulated parties to assume that the mere fact that money was disbursed from a corporate LLC's account would preclude inquiry into where that money came from and whether it constituted a straw donor contribution.

[19] The FEC's LLC regulation provides, in relevant part: "A contribution by an LLC that elects to be treated as a partnership by the [IRS] . . . , or does not elect treatment as either a partnership or a corporation pursuant to that section [of IRS rules], shall be considered a contribution from a partnership." 11 C.F.R. § 110.1(g)(2). An LLC "that elects to be treated as a corporation" by the IRS, or that has "publicly-traded shares, shall be considered a corporation" by the FEC. *Id.* § 110.1(g)(3). Finally, a contribution "by an LLC with a single natural person member that does not elect to be treated as a corporation" by the IRS "shall be attributed only to that single member." *Id.* § 110.1(g)(4).

from the same glaring flaw as the controlling group's reliance on the section 30118 precedents: it conflates the question of whether particular funds are "corporate" with the question of whether the corporation is the true source of those funds. *Cf.* FGCR at 8, MUR 6485 (explaining that an LLC's "[tax] treatment as a corporation or partnership only affects the [section 30122] analysis if the contribution was from the LLC itself," not if the true contributor was the LLC's shareholder).

Moreover, the purpose behind the LLC regulation provides no support for the view that the regulation could have created misperceptions about section 30122. As the FEC explained at the time of the regulation's promulgation, the Commission intended to protect the electoral process from unrestricted corporate LLC money, in accordance with the congressional purpose behind FECA's prohibition on corporate contributions. Nowhere in the regulation's explanatory preamble did the FEC suggest any intent to shield corporate LLCs from disclosure requirements or exempt them from the straw donor prohibition. Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37397, 37399 (June 12, 1999) (Explanation & Justification). Given the text and purpose of the LLC regulation, no one could have rationally interpreted the regulation to suggest that section 30122 would not prohibit corporate straw donors.

In light of FECA's plain text and the relevant FEC precedents, the respondents had more than sufficient advance notice of their legal obligation not to launder money through corporate straw donors.[20] The controlling Commissioners fail to articulate any rational basis for their conjecture that regulated parties were misled or confused about the application of section 30122.

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[20] The controlling Commissioners also suggest that a vote to investigate respondents would violate their due process rights under the Fifth Amendment. But the FEC has no particular authority to interpret the Fifth Amendment, and the controlling group's fair notice argument is no more persuasive when dressed up in constitutional garb.

As the controlling group correctly notes (AR76-77), the Supreme Court in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), recognized a "due process concern[] . . . that

2. The controlling Commissioners' standard for "similar future cases," which they refused to apply here, is arbitrary, capricious, and contrary to law.

In addition to asserting their meritless argument for insufficient notice, the controlling Commissioners also purported to announce a standard for "enforcing section 30122," but only with respect to "future matters." AR86. The Commissioners declined to apply this standard to the MURs under review, however, *see, e.g.*, AR87 n.70, stating this would be "unfair" in light of the "First Amendment rights . . . at stake." AR86, 88. Although the Commissioners' refusal to apply this standard was dispositive of the MURs in question, the standard itself is overly narrow, and as such, arbitrary, capricious, and contrary to law.

The controlling Commissioners stated they would only find "reason to believe" a violation of section 31022 has occurred if they were presented with "direct evidence" that funds were "intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." AR86. In the absence of such evidence, they would also consider evidence indicating that "the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the sole purpose of making political contributions." AR86. They also

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regulated parties should know what is required of them so they may act accordingly" before being subjected to enforcement action. But the facts in *Fox Television* were nothing like this case. There, the FCC sanctioned Fox and ABC for broadcasting indecent content in violation of 18 U.S.C. § 1464, even though prior FCC decisions applying § 1464 had found that equivalent broadcasts were not indecent. *Id.* at 255-57. Because of this change of direction, the FCC "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 254 (citation omitted). In contrast, there was no risk of trapping the respondents here in a regulatory bait-and-switch. Unlike the FCC precedents that misled the broadcasters in *Fox Television*, the FEC precedents invoked by the controlling Commissioners here did not interpret section 30122. Because the controlling group cites guidance that interprets entirely different statutory provisions—*e.g.*, the corporate contribution ban—that guidance could not have misled any reasonable person about the application of the straw donor ban, as discussed in Part III.B.1, nor effected a change of direction. No due process concern was implicated because the regulated parties knew "what [was] required of them." 567 U.S. at 253.

criticized the alternative standard formulated by the dissenting Commissioners, suggesting that it would "make[] all closely held corporations or corporate LLC contributions unlawful, even if the LLC was formed for and conducted other legitimate business activities." AR82 n.48.

As an initial matter, the controlling Commissioners made no attempt to apply their new standard to the facts alleged in plaintiffs' complaints—except to suggest in a footnote that even if they *had* applied their standard to W Spann, "other factors" would have still supported their decision to dismiss. AR87 n.70. Their standard appears to be entirely prospective in nature.

Although the parameters of the controlling group's standard have not been tested, it appears to be unduly narrow and absolute. Its intent prong requires evidence that "funds used to make a contribution were *intentionally* funneled through a closely held corporation or corporate LLC *for the purpose of evading the Act's reporting requirements*." AR86 (emphases added). As the dissenting group pointed out, this may be "virtually impossible to prove" because donors can simply "claim[] publicly that they funneled contributions through a single member or closely held LLC for any reason other than evading disclosure." AR96. Further, in the absence of any evidence of intent, the controlling Commissioners suggest they would permit schemes wherein the corporate straw donor was "multipurpose" in nature—where the corporation had some business income or an incidental non-campaign purpose, even if its campaign contributions exceeded its business income. For instance, it is unclear whether their standard would capture use of Eli Publishing as a straw donor because it had been established as a publishing company and had approximately $70,000 in 2012 revenue. Arguably, then, Eli Publishing was not "created and operated for the sole purpose of making political contributions," AR86, although the overwhelming majority of the funds comprising its contribution to ROF came from an undisclosed donor.

The controlling group also suggested that the dissenting Commissioners' standard would subject all contributions from closely held corporations to suspicion under the straw donor prohibition. They imply that had they agreed to investigate plaintiffs' complaints, this would have created a "presumption" that all corporate contributors are straw donors, rendering the "speech rights recognized in *Citizens United*" "hollow." AR76. But this is a straw man. No one—not plaintiffs, the OGC, or the dissenting Commissioners—have suggested that all, or even most, contributions from closely-held corporations to super PACs should be subject to investigation or even scrutiny. The dissenting Commissioners merely stated that "[w]here an individual is the source of the funds for a contribution and the LLC merely conveys the funds at the direction of that person, the Act and Commission regulations require that the true source—the name of the individual rather than the name of the LLC—be disclosed as the contributor." AR93. Only where there is evidence that (1) "an individual is the source of funds," and (2) an LLC "conveys the funds at the direction of" that individual, would section 30122 even come into play.

There is no justification for the controlling Commissioners' introduction of a "*post hoc* subjective intent standard." AR96. And insofar as they rested their dismissals on the concern that investigation of plaintiffs' complaints would have created a presumption that all closely held corporations were straw donors, their reasoning was arbitrary, capricious, and based on a distortion of plaintiffs' position and the standards articulated by OGC and the dissenting Commissioners.

3. The controlling Commissioners' allegations that respondents lacked notice are not credible.

This Court should not accept an administrative decision "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). The controlling Commissioners could have issued

guidance on section 30122 if they believed its application to corporate entities was unclear. Instead, they repeatedly delayed consideration of plaintiffs' complaints over the course of more than four years—needlessly prolonging any "uncertainty" by withholding guidance as well-publicized violations continued to mount. That unjustifiable delay casts doubt on the sincerity of their "acute" notice concern, which was entirely a problem of their own making. *See, e.g.*, AR95. They cannot now rely on their own obstinacy as the justification for further inaction.

There are other reasons to question the validity of the controlling group's ostensible desire to put the regulated community "on notice of the governing norm." AR76. The recent history of the FEC is one of mounting dysfunction, deadlock, and delay. Since 2008, a three-Commissioner bloc has increasingly voted in lockstep to thwart enforcement of campaign finance law.[21] Complaints languish for years, and deadlocked votes prevent the Commission from taking action even in cases with clear evidence of a violation, like this one.[22] Deadlock rates have accelerated dramatically over the last decade. The FEC deadlocked at least once on 37.5% of MURs closed in

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[21] In 2008, a three-member bloc began "to vote in lockstep," "essentially deadlocking the agency's decision-making" and "[grinding] the FEC to a slow crawl." Nancy Cook, *He's Going to Be An Enabler*, Politico (Feb. 21, 2017), http://www.politico.com/magazine/story/2017/02/trump-mcgahn-white-house-lawyer-214801.

[22] Though FECA contemplates that a complaint will trigger a response within 120 days, 52 U.S.C. § 30109(a)(8)(A), recent enforcement times have greatly exceeded this limit. A 2015 analysis found "the FEC had 'a backlog of 191 serious enforcement cases, with more than a quarter of these still unresolved more than two years after'" a complaint was filed. R. Sam Garrett, Cong. Research Serv., *The Federal Election Commission: Enforcement Process and Selected Issues for Congress* 11 (Dec. 22, 2015), https://fas.org/sgp/crs/misc/R44319.pdf ("CRS Report") (citation omitted).

Another report by Commissioner Steven Walther identified 78 pending cases, of which 50% had been pending for more than a year, and 23% for more than two years. Comm'r Steven T. Walther, Motion to Set Priorities and Scheduling on Pending Enforcement Matters Awaiting Reason-to-Believe Consideration 2, app. 1-6 (July 14, 2015), https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-41-a.pdf.

2016, and, while no MURs were *closed* due to a deadlocked vote in 2006, 12.5% were by 2016.[23] The MURs at issue in this case were among them.

This three-Commissioner bloc has all but admitted that delay and deadlock are part of a concerted effort to reduce enforcement, based on their contested views about issues beyond the scope of their statutory mandate. "No action at all, they say, is better than overly aggressive steps that could chill political speech."[24] This nullification campaign has led the no-action Commissioners to take positions at odds with FECA itself, resulting in "lack of disclosure and political committee registration, employer coercion, candidates' personal use of campaign funds, and foreign national contributions."[25]

This Court should not reward the FEC for refusing to enforce the laws as Congress wrote them, nor should it treat three Commissioners' blanket refusal to carry out their statutory mandate as a permissible exercise of discretion. These Commissioners have "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007) (internal quotations omitted). When this happens, even where prosecutorial discretion is invoked,

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[23] Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 10 (Feb. 2017), https://assets.documentcloud.org/documents/3474279/Ravelreport-feb2017.pdf ("Ravel Report"). The Congressional Research Service found that the FEC deadlocked on 13% of matters in 2008-2009, and 24.4% in 2014. CRS Report at 9-10. Commissioner Ravel found further deterioration: deadlock accounted for 30% of all enforcement votes for MURs that closed in 2016, compared to only 2.9% for MURs closed in 2006. Ravel Report at 9.

[24] Eric Lichtblau, *FEC Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. Times (May 2, 2015), https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html.

[25] Ravel Report at 2, 12-20.

meaningful judicial review is crucial. *Id.*; *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc).

Moreover, real-world events undercut the controlling group's claim that respondents had insufficient notice. The straw donor contribution from W Spann to ROF was widely reported in national newspapers. *See supra* Part II.A. Indeed, it drew enough attention to trigger comment from the candidate who would become the 2012 Republican Presidential nominee. *Id*. It strains credulity that the respondents here—million-dollar donors who were sophisticated enough to create corporate entities to conceal their campaign activity—were unaware of these events, or confused about the law's requirements.

The Specialty Investments Group respondents hatched their straw donor scheme *over a year* after these widely reported events. And although the Eli Publishing/F8 respondents made their contribution at the same time as W Spann, Lund and any other donors associated with the effort had *years* to come forward while plaintiffs' complaints were pending and to correct the reporting at issue. Moreover, many of the persons involved in the straw donor schemes conceded their intent to evade FECA disclosure requirements. Lund admitted to the public that he made the contribution through his LLCs because "he did not want 'to be real public about being a part of the campaign.'" AR41. Conard was even more explicit, conceding that "he set up the business entity for the sole purpose of conveying his funds to ROF without disclosing his identity," FGCR at 9, MUR 6485, and that he "did not want to disclose his name when making the contribution because he feared for the safety and security of his family," *id.* at 11 n.6.

Finally, none of the respondents claimed to lack familiarity with the law or its requirements in their responses to plaintiffs' administrative complaints. All respondents overwhelmingly focused their defenses on the evidentiary foundations of the claims against them, characterizing

the complaints as "factually inadequate" and "weakly based," AR28-30, or "unadorned speculation," AR377. But they said nothing whatsoever about the law being *unclear*. Nor could they; the statute provides, in clear and broad terms, that "[n]o person shall make a contribution in the name of another." Indeed, even one of the most outspoken critics of campaign finance regulation acknowledged—in early 2012—that the W Spann "contribution was *almost certainly* an illegal contribution given in the name of another." Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 6 U. St. Thomas J.L. & Pub. Pol'y 257, 270 (2012) (emphasis added). The theory of insufficient notice was an invention of the controlling Commissioners, who made no attempt to consider whether these respondents were actually aware of the law's requirements. *Cf. Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("[A] regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." (citation omitted)).

The controlling group's unsupported and unreasonable "fair notice" rationale lacks any foundation in law or in the facts of this case, and is belied by the plain and unambiguous language of section 30122. Crediting it here would frustrate the vital transparency purposes of FECA and all but guarantee continued inaction at the agency charged with FECA's enforcement.

IV. THE COURT SHOULD DECLARE THAT THE DISMISSALS OF PLAINTIFFS' ADMINISTRATIVE COMPLAINTS WERE UNLAWFUL AND DIRECT THE FEC TO CONFORM WITH SUCH DECLARATION WITHIN 30 DAYS.

The Court has the authority to declare that the FEC's dismissal of plaintiffs' administrative complaints was contrary to law and direct the FEC to conform with such declaration within 30 days. 52 U.S.C. § 30109(a)(8)(c).

The question before this Court is not whether the FEC should have found that respondents violated the law. Instead, this Court must determine whether the FEC's rationale for refusing to even investigate that *possibility*, based on the law and on the record before it, was arbitrary and

capricious, or contrary to law. In light of the foregoing discussion, the Court should answer that question in the affirmative, and issue a declaration to that effect.

CONCLUSION

For the reasons stated, we respectfully urge the Court to grant plaintiffs' motion for summary judgment; declare that the FEC's dismissals of plaintiffs' administrative complaints are contrary to law, arbitrary and capricious, and an abuse of discretion; and direct the Commission to conform with such declaration within 30 days consistent with the Court's judgment.

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Respectfully submitted,

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