ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5072

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPRESENTATIVE TED LIEU, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY AFFIRMANCE

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INTRODUCTION

Appellee Federal Election Commission ("FEC" or "Commission") respectfully moves for summary affirmance because the parties' positions are so clear that further proceedings would offer no benefit. The decision below correctly held that the Commission had permissibly followed the D.C. Circuit's opinion in *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*), in dismissing an administrative complaint filed with the agency by Representative Ted Lieu and the other appellants here (collectively "Lieu"). (Addendum ("Add.") 22-23.) Lieu asserted below that the Commission had acted contrary to law in dismissing allegations that ten political committees that make only independent expenditures (commonly known as "super PACs") exceeded the contribution limits set forth in the Federal Election Campaign Act ("FECA").

However, in *SpeechNow*, the *en banc* Court of Appeals had unanimously concluded that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group" and so the FECA limits at issue are unconstitutional in that context. 599 F.3d at 695. Accordingly, the Commission unanimously voted to find no reason to believe the groups about which Lieu complained had violated the law, and so the agency dismissed the administrative complaint. The district court determined that the Commission had simply followed "binding precedent of the D.C. Circuit." (Add. 22.) The court

thus found the agency's decision not to pursue the administrative respondents lawful under the applicable standard of review. 52 U.S.C. § 30109(a)(8).

It is undisputed that this Court's *en banc* ruling in *SpeechNow* applies directly to the conduct Lieu alleged in his administrative complaint. The Commission also recognized in its decision that every other circuit court to decide this issue — courts in six other circuits — had agreed with *SpeechNow*. (Add. 109.) And the Commission acknowledged that the administrative respondents' conduct fell within the safe harbor of a prior advisory opinion that the Commission had issued following *SpeechNow*. (Add. 108.) Therefore, the Commission acted lawfully when it dismissed Lieu's administrative complaint.

Ultimately, this administrative review action is an attempt to challenge the correctness of this Court's *SpeechNow* decision. But in using the Commission's enforcement review process to do so, Lieu is asking the Court to find that the Commission acted contrary to law in declining to apply statutory provisions to regulated political groups in a context that *SpeechNow* held to be unconstitutional, and where the groups' conduct fell within the safe harbor of a Commission advisory opinion following that decision. This attempt must fail.

Because the parties' positions are so clear as to warrant summary action and no benefit would be gained from further briefing and argument, this Court should

summarily affirm the district court's granting of the Commission's motion to dismiss.

LEGAL AND FACTUAL BACKGROUND

I. THE COMMISSION

The FEC is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-46. Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, *id*. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id*. §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of FECA, *id*. § 30109(a)(1)-(2). The FEC has "exclusive jurisdiction" to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id*. §§ 30106(b)(1), 30109(a)(6). Certain actions, including many enforcement decisions, require the affirmative vote of at least four Commissioners. *Id*. § 30106(c).

II. THE FEDERAL ELECTION CAMPAIGN ACT AND THIS COURT'S DECISION IN *SPEECHNOW*

FECA defines a "political committee" as "any committee club, association, or other group of persons" that receives "contributions" or makes "expenditures" "for the purpose of influencing any election for Federal Office" "aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A), (8)(A)(i),

(9)(A)(i).[1] Once a group is designated as a political committee, FECA sets varying limits on political contributions it may receive, depending on the type of entity that makes the contribution. *See id.* § 30116(a). As relevant here, FECA's text limits any "person" from making a contribution of more than $5,000 to a political committee that is not authorized by a candidate or established by a national or state political party (referred to in the statute as an "other political committee"). 52 U.S.C. § 30116(a)(1)(C). Political committees similarly may not "knowingly accept any contribution" in excess of the applicable limits. *Id.* § 30116(f).

FECA distinguishes between "independent expenditures" and other types of expenditures that are made for the purpose of influencing federal elections. 52 U.S.C. § 30101(17). Expenditures are "independent" when they "expressly advocate[] the election or defeat of a clearly identified candidate" and are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." *Id.*

In its unanimous *en banc* decision in *SpeechNow.org v. FEC*, the Court of Appeals for the District of Columbia Circuit concluded that the $5,000 limit on

[1] The Supreme Court has further limited FECA's definition of "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

contributions to other political committees in 52 U.S.C. § 30116(a)(1)(C) is unconstitutional as applied to a political committee that makes only independent expenditures. 599 F.3d at 696.[2] The court explained that, although restrictions on political contributions face a less-stringent standard of scrutiny than do restrictions on political expenditures, *id.* at 692, "contribution limits still do implicate fundamental First Amendment interests," and therefore those "'involving significant interference with associational rights must be closely drawn to serve a sufficiently important interest,'" *id.* (quoting *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008)). The *en banc* panel noted that preventing *quid pro quo* corruption or its appearance had been held sufficient to justify the contribution limits at issue, *id.* at 692, 694, but that in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court had "expressly decid[ed]" that "'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.'" *SpeechNow*, 599 F.3d at 694 (quoting *Citizens United*, 558 U.S. at 357). That was so, the Supreme Court held, because the "'absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also

[2] In 2014, the provisions of FECA at issue in this litigation were recodified into Title 52 of the United States Code from their prior codification in Title 2. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. Cases decided prior to 2014, including *SpeechNow*, refer to the previous codification.

alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" *Citizens United*, 558 U.S. at 357 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

"In light of the [Supreme] Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption," the *SpeechNow* court concluded that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." 599 F.3d at 694. Because "the government has no anti-corruption interest in limiting contributions to an independent expenditure group," the court stated, that interest cannot justify the burden contribution limits place on First Amendment rights, even assuming those intrusions are less extensive than an expenditure ban. *Id.* at 695. Thus, the court unanimously ruled that FECA's contribution limits "violate the First Amendment by preventing plaintiffs from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits." *Id.* at 696. As a result of this categorical holding, the district court on remand in that case permanently enjoined the Commission from enforcing contribution limits against the *SpeechNow* plaintiffs. *SpeechNow.org v. FEC*, No. 08-248, ECF No. 85 (D.D.C. Oct. 29, 2010).

Although the Supreme Court has not directly considered the issue in *SpeechNow*, the controlling opinion in *McCutcheon v. FEC* cited *SpeechNow* in explaining that FECA's contribution "limits govern contributions to traditional PACs, *but not to independent expenditure PACs*." 572 U.S. 185, 193 n.2 (2014) (plurality op.) (emphasis added). Thus, subsequent Supreme Court jurisprudence supports the case's applicability, albeit in dictum.

Moreover, in addition to the D.C. Circuit, five additional courts of appeals have considered the issue since *Citizens United*. Each court has similarly held that, as a categorical matter, the government cannot constitutionally limit contributions to political committees that make only independent expenditures.[3]

In the wake of the *SpeechNow* decision, the Commission issued an advisory opinion acknowledging the ruling and its effect on limits on contributions to groups that make only independent expenditures. FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). As that advisory opinion acknowledged, it "necessarily follows" from *Citizens United* and *SpeechNow* "that there is no basis to limit the amount of contributions to" an independent

[3] *Republican Party of N.M. v. King*, 741 F.3d 1089, 1095-97 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 697-99 (9th Cir. 2010). The Fourth Circuit had reached the same conclusion prior to *Citizens United*. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

expenditure committee "from individuals, political committees, corporations and labor organizations," which are covered by 52 U.S.C. § 30116(a)(1)(C). *Id.* at *2. Once the Commission issues an advisory opinion, FECA provides a safe harbor for "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects" from the activity described in the opinion, and those who do so in good faith "shall not, as a result of any such act, be subject to any sanction provided" by FECA. 52 U.S.C. § 30108(c)(1)(B), (c)(2).

Since issuing the *Commonsense Ten* advisory opinion, the Commission has not enforced the limits embodied in 52 U.S.C. § 30116(a)(1)(C) in the context of contributions to groups that make only independent expenditures. The Commission has, however, continued to enforce other statutory restrictions on the source of contributed funds, such as FECA's ban on contributions by federal government contractors, even when those contributions are made to super PACs, because those provisions serve interests distinct from the basic anticorruption interest discussed in *SpeechNow* and have not been invalidated. *See* 52 U.S.C. § 30119(a)(1); Conciliation Agreement, FEC Matter Under Review 7099 (Suffolk Construction Co.), https://www.fec.gov/files/legal/murs/7099/17044430547.pdf; *cf. Wagner v. FEC*, 793 F.3d 1, 21-22 (D.C. Cir. 2015) (*en banc*) (discussing the distinct interests supporting the ban on contributions by federal government contractors), *cert. denied*, 136 S. Ct. 895 (2016).

III. FECA'S ADMINISTRATIVE ENFORCEMENT PROCESS

FECA permits any person to file an administrative complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. Upon receiving a complaint, the Commission must notify any person alleged in the complaint to have committed a FECA violation (*i.e.*, the "respondent") and provide fifteen days for a response. 52 U.S.C. § 30109(a)(3). After considering the complaint and any such response, the Commission must then determine whether there is "reason to believe" that the respondent has committed a violation of FECA. *Id*. § 30109(a)(2). If at least four FEC Commissioners vote affirmatively to find there is reason to believe a respondent has violated FECA, the Commission "shall make an investigation of such alleged violation." *Id*.; *see also id*. § 30106(c). Any investigation under this provision is confidential until the administrative process is complete. *Id*. § 30109(a)(12).

If an investigation is conducted, the agency must then determine whether there is "probable cause" to believe FECA has been violated. 52 U.S.C. §§ 30106(c); 30109(a)(4)(A)(i). If the agency makes such a determination, it must attempt to reach a conciliation agreement with the respondent. *Id.* If the FEC is unable to reach a conciliation agreement, FECA authorizes it to institute a *de novo*

civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). All of these steps require the affirmative vote of at least four Commissioners.

If, at any point in the process, the Commission lacks the required four affirmative votes to proceed on a matter, it may dismiss the administrative complaint. 52 U.S.C. § 30109(a)(8)(A). After such a dismissal, "[a]ny party aggrieved" by the dismissal may file suit against the Commission in the federal district court for the District of Columbia to obtain review. *Id.* If the court finds that the dismissal was "contrary to law," it may order the Commission to conform to the court's decision within 30 days. *Id.* § 30109(a)(8)(C).

IV. LIEU'S ADMINISTRATIVE COMPLAINT AND THE ADMINISTRATIVE PROCEEDINGS

In July 2016, Representative Lieu, Senator Jeff Merkley, State Senator (ret.) John Howe, Zephyr Teachout, and Michael Wager, who are appellants here, filed an administrative complaint with the Commission. (Add. 44.) The administrative complaint alleged that ten political committees that make only independent expenditures "knowingly accepted multiple contributions that exceed $5,000 per person per year, in violation of 52 U.S.C. § 30116(a)(1)(C) and (f)." (Add. 44.) The complaint asserted that 39 specific contributions to these super PACs from 27 identified contributors violated FECA. (Add. 39-43, 57-62.) The administrative complainants admitted that *SpeechNow* had declared contribution limits unconstitutional in these circumstances, while expressing disagreement with that

decision, and they acknowledged that the FEC had announced its intention to follow *SpeechNow* in its *Commonsense Ten* advisory opinion. (Add. 44, 51.) Nevertheless, the complainants asked "the FEC to reconsider, in light of later experience, its previous decision to acquiesce to *SpeechNow*." (Add. 52.)

In May 2017, the Commission unanimously voted to find no reason to believe that the administrative respondents had violated FECA, and accordingly it dismissed the administrative complaint. (Add. 21, 94-95.) The Commission also adopted a "Factual and Legal Analysis" explaining its decision to dismiss. (Add. 44, 95, 96-109.) After acknowledging the complainants' factual allegations and arguments about *SpeechNow*, the Commission observed that they "concede that *SpeechNow* and" the *Commonsense Ten* advisory opinion "permit the conduct described in the" administrative complaint. (Add. 108.) The Commission further noted that "every circuit court that has considered this issue has ruled that [super PACs] may accept unlimited contributions." (Add. 105 & n.38 (citing cases from six additional circuits).) In light of the fact that "seven federal courts of appeals" had ruled that limits on contributions to super PACs "are unconstitutional," the Commission declined "to accept [Lieu's] invitation not to acquiesce" in those decisions. (Add. 108.)

V. PROCEEDINGS BEFORE THE DISTRICT COURT

In the court below, Lieu challenged the Commission's dismissal of the administrative complaint as "contrary to law" under 52 U.S.C. § 30109(a)(8). The court granted the Commission's motion to dismiss, concluding that the agency's dismissal of the administrative complaint was lawful because the Commission had properly applied *SpeechNow*. The district court considered Lieu's arguments that *SpeechNow* was wrongly decided, but the court determined that no subsequent ruling of the Supreme Court or the *en banc* D.C. Circuit purported to overrule *SpeechNow*. Therefore, the district court concluded, the FEC had permissibly followed binding precedent in dismissing the administrative complaint against the super PACs identified in this matter. (Add. 22-23.)[4]

ARGUMENT

This Court should summarily affirm the district court's judgment for the Commission. The Commission's dismissal of Lieu's administrative complaint was, as the district court found, based upon the *en banc SpeechNow* decision, which is binding in this Circuit. Therefore, Lieu cannot show that the agency's dismissal was contrary to law under the standard of 52 U.S.C. § 30109(a)(8).

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[4] In light of this conclusion, the district court did not address Lieu's arguments that the Commission had erroneously decided to acquiesce to *SpeechNow* and that the agency's reliance on Advisory Opinion 2010-11 (Commonsense Ten) adopting the holding of *SpeechNow* was contrary to law. (Add. 22 n.8.)

I. STANDARD OF REVIEW

"Summary affirmance is appropriate where the merits are so clear as to justify summary action." U.S. Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 35-36; *see also Jenkins v. District of Columbia*, No. 18-5021, 2018 WL 3726280, at *1 (D.C. Cir. July 20, 2018) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam)). In circumstances where the merits are so clear, "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog*, 819 F.2d at 298; *Cascade Broad. Grp. Ltd. v. F.C.C.*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam) ("[S]ummary disposition will be granted where the merits of the appeal or petition for review are so clear that 'plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision.'" (quoting *Sills v. Fed. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985))).

II. THE JUDGMENT BELOW SHOULD BE SUMMARILY AFFIRMED BECAUSE THE COMMISSION DID NOT ACT CONTRARY TO LAW UNDER 52 U.S.C. § 30109(a)(8)

Summary affirmance is appropriate here because the merits are so clear that further briefing or argument will provide no benefit: The Commission did not act contrary to law under the standard of section 30109(a)(8) when it followed a binding, *en banc* ruling of this Court in refusing to pursue enforcement against the

administrative respondents named in Lieu's complaint. Lieu's theory of the case is that the FEC's dismissal of the administrative complaint was contrary to law because it followed *SpeechNow*, which Lieu believes was wrongly decided. (Add. 19.) In fact, Lieu conceded that the *SpeechNow* decision, if accepted as correct, would compel the Commission to dismiss the administrative complaint. (Add. 25-26.) Lieu argues in essence that the FEC, an administrative agency, was *required* to disregard a clear and binding judicial holding on a constitutional issue. But "[g]iven that obeying judicial decisions is usually what courts expect agencies to do, [Lieu] face[s] an uphill battle." *Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 703 (D.C. Cir. 2017).

That battle cannot be won here. The district court correctly determined that "the D.C. Circuit has spoken on the issue — limits on contributions to Super PACs are unconstitutional — and the D.C. Circuit's reasoning is binding." (Add. 21.) And because Lieu's "allegations about the violations of the Super PACs fall squarely within the holding of *SpeechNow*" (Add. 21), "[i]t cannot be said that the FEC's determination, which was based on *SpeechNow*, was contrary to law" (Add. 21-22).

A. The Conduct at Issue in the Administrative Complaint Is Governed by This Court's *SpeechNow* Decision

The allegations in Lieu's administrative complaint plainly fall within the rule announced in *SpeechNow*. Each super PAC identified in that complaint had registered with the FEC as an independent expenditure-only committee, and Lieu did not claim that any of the committees had coordinated their expenditures with a candidate. (Add. 26.) Furthermore, Lieu admitted in the administrative complaint that the *SpeechNow* ruling had declared contribution limits unconstitutional in the precise circumstances presented in the complaint. (Add. 50-51.)

B. The FEC Permissibly Applied *SpeechNow* in Dismissing the Administrative Complaint

Under FECA's provisions for judicial review, a court "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law.'" *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (quoting FECA provision now codified at 52 U.S.C. § 30109(a)(8)(C)). A decision is "contrary to law" if "the FEC dismissed the complaint as a result of an impermissible interpretation of" FECA or "if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). While this standard is "[h]ighly deferential" to Commission enforcement decisions, *Hagelin*, 441 F.3d at 242 (internal quotation marks omitted), courts are not obligated to give binding deference to an

administrative agency's interpretation of judicial precedent or of the Constitution, *see, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

The Commission's enforcement decision here reasonably adhered to precedent that is binding in this jurisdiction. In *SpeechNow*, the *en banc* D.C. Circuit unequivocally held that FECA's limits on contributions could not be constitutionally applied to contributions to groups that only make independent expenditures. 599 F.3d at 694-96. The *SpeechNow* Court reasoned that the Supreme Court's decision in *Citizens United* had established as a matter of law that "the government has *no* anti-corruption interest in limiting independent expenditures." *Id.* at 693; *see Citizens United*, 558 U.S. at 357-58. "In light of" this holding, the D.C. Circuit concluded that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *SpeechNow*, 599 F.3d at 694. Thus, the Court unanimously ruled that FECA's contribution limits violate the First Amendment when applied in that situation. *Id.* at 696.

In addition to *SpeechNow*, six other courts of appeal have likewise held that the contribution limit at issue here cannot constitutionally be applied to super PACs. *See supra* p. 7 & n.3; *Republican Party of N.M. v. King*, 741 F.3d 1089, 1095-97 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538

(5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 697-99 (9th Cir. 2010); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *see also Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1066 (11th Cir. 2016) ("Other Circuits, applying the logic of *Citizens United*, have uniformly invalidated laws limiting contributions to PACs that made only independent expenditures."), *cert. denied sub nom. Ala. Democratic Conference v. Marshall*, 137 S. Ct. 1837 (2017). As those courts have explained, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress & Prot. PAC*, 733 F.3d at 488; *see also Texans for Free Enter.*, 732 F.3d at 537 (noting that this is a "well-worn path").

As the district court concluded, recognizing the authority of *SpeechNow* is all that is needed to resolve this case. Add. 21-22; *see United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("panels of [the Court of Appeals are] obligated to follow controlling circuit precedent until either [the Court of Appeals], sitting en banc, or the Supreme Court, overrule it."). It is common ground among the parties that the Commission's dismissal decision adhered to *SpeechNow*. In fact, Lieu did not argue in the district court that the Commission misapplied *SpeechNow*, that the decision is compatible with his claims, or that the respondents named in his

administrative complaint could be distinguished from the organization at issue in *SpeechNow*. Rather, Lieu argued that *SpeechNow* was wrongly decided. (Add. 19.) The real goal of this litigation is to overturn that decision. (Add. 24-27.)

But the Commission's enforcement process does not present the appropriate vehicle by which to pursue Lieu's goal. If the Commission had pursued enforcement action against the numerous respondents named in Lieu's administrative complaint, those respondents would have had to defend their conduct in further administrative proceedings — and potential enforcement litigation — even though the D.C. Circuit and other jurisdictions have held that such conduct cannot be limited consistent with the First Amendment. Pursuing enforcement under these particular circumstances was so unwarranted that, had the Commission attempted it, it might have been exposed to an award of legal fees for pursuing a litigation position that was not "substantially justified." 28 U.S.C. § 2412.[5] In Lieu's view, the Commission should have pursued enforcement in the face of clear contrary circuit precedent, and any other course was contrary to law.

[5] One court in this circuit ordered the Commission to pay nearly $125,000 in legal fees for arguing that it could restrict political committees that make direct contributions to candidates from also raising unlimited contributions for independent expenditures. *See Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012). That court criticized the FEC for "failing to appreciate binding precedent," including *Citizens United* and *SpeechNow*. *Id.* at 61.

Yet it was clearly lawful for the Commission to elect not to defy binding precedent in this Court and the consistent rulings of six other courts of appeals to pursue enforcement against the named administrative respondents, particularly where the conduct at issue fell within the safe harbor of an FEC advisory opinion.

In any event, summary affirmance would not insulate the legal issues in *SpeechNow* from potential Supreme Court review. But today, *SpeechNow* is binding precedent that the Commission permissibly applied in deciding not to pursue further administrative proceedings. Ultimately, as the district court correctly held, because "[t]he FEC followed [the *SpeechNow*] opinion in deciding to dismiss the administrative complaint against the Super PACs in this case," "the FEC did not act contrary to law." (Add. 22-23.)

Accordingly, the Commission's dismissal of the administrative complaint was clearly permissible.

CONCLUSION

Because the parties' positions are so clear as to warrant summary action and no benefit would be gained from further briefing and argument, this Court should summarily affirm the district court's decision in favor of the Commission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 4,248 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2019, I electronically filed the Federal Election Commission's Motion for Summary Affirmance with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Tanya Senanayake
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