ORAL ARGUMENT NOT YET SCHEDULED

NO. 18-5239

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER & DEMOCRACY 21,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

F8, LLC, ELI PUBLISHING, L.C. AND STEVEN J. LUND,
Intervenors-Appellees.

On Appeal from a Final Judgment of the
U.S. District Court for the District of Columbia
Before the Honorable Trevor McFadden

BRIEF OF INTERVENORS-APPELLEES F8, LLC, ELI PUBLISHING, L.C. AND STEVEN J. LUND

George J. Terwilliger, III
Robert J. Bittman
Nathan R. Pittman
MCGUIREWOODS LLP
2001 K St., NW
Suite 400
Washington, D.C. 20006-1040
202-857-1700
202-857-1737(fax)
gterwilliger@mcguirewoods.com
rbittman@mcguirewoods.com
npittman@mcguirewoods.com
Counsel for Steven Lund, F8, LLC, and Eli Publishing, L.C.

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Intervenors-Appellees, through counsel, hereby certify as follows:

(1) Parties and *Amici*.

Plaintiffs: The Plaintiff-Appellants are Campaign Legal Center, and Democracy 21.

Defendant: The Defendant-Appellee is the Federal Election Commission.

Intervenors and Defendants: Eli Publishing, L.C., F8, LLC, and Steven J. Lund, intervened in the district court as Defendants.

Amici: Citizens for Responsibility and Ethics in Washington has filed a brief as amicus curiae.

(2) Rulings Under Review

The District Court's order and opinion issued June 7, 2018, in *Campaign Legal Center, et al. v. FEC, et al.*, Civ. Action No. 1:16-cv-00752 (TNM) (ECF No. 44 and 45). *See Campaign Legal Center v. FEC*, 312 F. Supp. 3d 153 (D.D.C. 2018).

(3) Related Cases

Counsel is not aware of any cases related to this matter.

/s/ *George J. Terwilliger III*
Attorney for Steven Lund, F8, LLC, and Eli Publishing, L.C.

CORPORATE DISCLOSURE STATEMENT

I, the undersigned, counsel of record for Eli Publishing, L.C. and F8, LLC, certify that to the best of my knowledge and belief, Eli Publishing, L.C. and F8, LLC are privately-held limited liability companies registered with the state of Utah and that there are no parent companies, subsidiaries, affiliates, or companies which own at least 10% of the stock of Eli Publishing, L.C. or F8, LLC which have any outstanding securities in the hands of the public.

/s/ *George J. Terwilliger III*
Attorney for Steven Lund, F8, LLC, and Eli Publishing, L.C.

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GLOSSARY

FEC	**Federal Election Commission**
FECA	**Federal Election Campaign Act**
MUR	**Matter Under Review**
OGC	**Office of the General Counsel of the Federal Election Commission**

INTRODUCTION

It is the law of this Circuit that the FEC's decision to dismiss a complaint as an exercise of its prosecutorial discretion is not reviewable. *See CREW v. FEC*, 892 F.3d 434 (2018).[1] In this case, the Court is asked to review multiple such dismissals concerning contributions by closely held corporations or single member corporate LLCs to SuperPACs. Despite their attempts to contort the record to evade Circuit law, Appellants Campaign Legal Center and Democracy 21 ("Appellants") ultimately ask this Court to second-guess the FEC's clear, well-reasoned, and thoughtful exercise of its prosecutorial discretion. *CREW* controls this case, and even if it did not, the district court did not err when it concluded that the FEC's decision to dismiss these administrative complaints as an exercise of its prosecutorial discretion was not contrary to law.

Steven Lund, Eli Publishing, L.C., and F8, LLC (together, "Intervenors-Appellees"), were respondents in several complaints lodged by Appellants with the FEC that constitute Matters Under Review ("MUR") 6487 and 6488. All three intervened in the district court in order to defend the dismissals of the complaints against them and ensure that they would not be ensnared in FEC enforcement

[1] Given the proliferation of cases in this Court and in the United States District Court for the District of Columbia with the name *CREW v. FEC*, we will refer to the D.C. Circuit's June 2018 decision as "*CREW*" unless otherwise noted.

proceedings, with the associated cost and harm to their reputations. *See* JA 413. Intervenors-Appellees now urge this Court to affirm the district court's well-reasoned decision upholding the FEC's rational exercise of its prosecutorial discretion.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Plaintiff-Appellants ("Br.").

STATEMENT OF THE CASE

This case concerns the FEC's decision to dismiss a number of administrative complaints filed by Appellants as an exercise of its prosecutorial discretion. These complaints generally alleged that individuals and corporations, including Intervenors-Appellees, violated 52 U.S.C. § 30122, which provides in relevant part that "[n]o person shall make a contribution in the name of another person." Appellants alleged that $1 million contributions by F8 and Eli Publishing during the 2012 election cycle to Restore Our Future, an independent-expenditure-only political committee, also known as a "SuperPAC," were illegal conduit contributions. JA 84, 178. Intervenors-Appellees responded, noting that the corporations had been formed years before the contributions, which were lawful on their face. JA 103-105, 190-192.

The filing of these complaints triggered the FEC's administrative enforcement process. Under the Federal Election Campaign Act ("FECA" or the "Act"), after a complaint is filed, the Commission votes whether there is "reason to believe" that a violation occurred, and if four Commissioners so find, the FEC conducts an investigation of the allegations. 52 U.S.C. § 30109(a)(2). In this case, the Commissioners deadlocked 3-3 regarding whether there was "reason to believe" Intervenors-Appellees violated FECA. JA 138-39.

The three Commissioners who voted against finding reason to believe issued a statement of reasons, as required by this Court's law. They are the "Controlling Commissioners" for purposes of judicial review of the FEC's decision. The Controlling Commissioners explained that they voted against proceeding as an exercise of the Commission's prosecutorial discretion. JA 149. The Controlling Commissioners recognized that the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), had changed the legal landscape by permitting corporate contributions to certain political committees, which raised the novel question of "whether, or under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor under section 30122." JA 153. Thus, the application of § 30122 here was a case of first impression. JA 155. Further, pre-*Citizens United* guidance emphasized that corporate funds belonged unequivocally to the corporation. JA 155-57. Therefore, the Controlling Commissioners reasoned

that respondents "may have reasonably concluded" that their contributions did not violate the law. JA 159.

The Controlling Commissioners therefore exercised their prosecutorial discretion not to proceed against respondents, reasoning that doing so might raise due process and First Amendment concerns. JA 159-60. The Controlling Commissioners announced a standard they would apply to § 30122 cases featuring corporate contributions going forward, but did not apply that standard to respondents. JA 158. The Commission dismissed the complaints. JA 400.

Appellants exercised their right under 52 U.S.C. § 30109(a)(8) to challenge the Commission's dismissal of their complaints as "contrary to law." *See* JA 9-30. The district court, applying the then-prevailing standard for reviewing Commission dismissals on the basis of prosecutorial discretion, concluded that the Controlling Commissioners' decision was not contrary to law because there was a "rational basis" for its decision and granted summary judgment to defendants. JA 407. Appellants filed this appeal.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *See AFL-CIO v. FEC*, 333 F.3d 168, 172 (D.C. Cir. 2003).

FECA provides that an FEC dismissal may be remanded to the agency only if the FEC's decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). A dismissal

is contrary to law if "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act . . . or (2) 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). When the Commission splits 3-3 on the question of whether to commence enforcement proceedings, the court reviews the statement of reasons of the Commissioners who voted not to proceed. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

1. *CREW* held that the FEC's exercise of its prosecutorial discretion to dismiss an administrative complaint is not reviewable by a court, because FECA does not provide the necessary "law" by which a court can determine whether an exercise of prosecutorial discretion was "contrary to law." FECA does not contain any meaningful guidelines to cabin FEC enforcement discretion. Congress established the FEC as a bipartisan Commission that required consensus to operate and then gave that Commission exclusive civil authority to enforce the Act. While FECA has a citizen suit provision, it is triggered only when the FEC completely abandons the field. When the FEC decides that an investigation is not warranted as an exercise of its prosecutorial discretion, the FEC has not abandoned the field but instead made a non-reviewable decision regarding whether to enforce in a particular

instance. The structure and history of FECA demonstrate that Congress intended for that decision to be final, not a license for often-partisan activists to pursue their own enforcement priorities. That conclusion is not in conflict with prior decisions of this Court or the Supreme Court. Those prior decisions dealt with the threshold question of whether FECA authorized review of a Commission dismissal that resulted from a deadlock or whether the complainants had standing to bring an action challenging the dismissal. None dealt with the question the Court decided in *CREW*: what law a court is to apply when the Commission declines to enforce not on the merits but through the exercise of its prosecutorial discretion.

2. The Commission's exercise of its prosecutorial discretion here is precisely the kind of discretionary decision that *CREW* held was not subject to judicial review. The Commission carefully considered the legal landscape and decided to proceed incrementally, which it was entitled to do. Appellants' argument that the dismissals are not entitled to deference because the Commission's exercise of prosecutorial discretion allegedly involved legal considerations is not well founded. First, the decision involved no legal determination and was an exercise of prosecutorial discretion. Second, even if the Commission's decision involved legal analysis, that is true of almost every exercise of prosecutorial discretion, as recognized in *Heckler v. Chaney*, 470 U.S. 821 (1985) and *CREW*. The latter's recognition of the longstanding rule that an agency's interpretation of its enabling statute is reviewable

does not mean that any arguably legal consideration the agency undertakes as part of the exercise of its discretion renders its decision subject to review.

3. The district court did not err in concluding that the Commission's dismissals were not contrary to law. The Commission reasonably concluded that the Supreme Court's decision in *Citizens United* worked a sea change in campaign finance law. For the first time, corporations could contribute to SuperPACs. The Commission reasonably concluded that its prior guidance could create confusion regarding how § 30122's prohibition on giving in the name of another was to be applied to contributions from closely held corporations or corporate LLCs, because the Commission had traditionally treated all funds in the corporate treasury as corporate funds for purposes of FECA, even though these entities were necessarily controlled by a natural person. The Commission rationally concluded that, even though § 30122 applied to such corporations, it was not clear when a corporate contribution violated the statute. It was not arbitrary or capricious for the Controlling Commissioners to decide to proceed incrementally, announcing a standard to be applied in future cases.

ARGUMENT

I. *CREW* Controls this Case Because FECA Provides no Standard for Reviewing the FEC's Discretionary Decisions and *CREW* is Consistent with Prior Precedent

It is axiomatic that "[o]ne three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). This "law-of-the-circuit doctrine" derives from "legislation and from the structure of the federal courts of appeals," and without it "the finality of [the Court's] appellate decisions would yield to constant conflicts within the circuit." *Id.* Therefore, the panel's holding in *CREW*, that the FEC's dismissal of an administrative complaint as an exercise of its prosecutorial discretion is not reviewable, 892 F.3d 434, 438-39 (D.C. Cir. 2018), is the law of the circuit and cannot be disturbed by another panel. However, Appellants suggest that, if *CREW* applies to the FEC's dismissal of their administrative complaints in this case, then it is "in potential tension" with Supreme Court authority and "would be unsustainable." Br. 26-27. Amicus, the losing party in the *CREW* case, goes even further and ask this panel to "dispense with" and "recognize that the *CREW* cases are an aberration and declare that they are not binding here or on any future decision." Amicus Br. 28.

This Court plainly lacks the power to do what Appellants and Amicus ask it to do. Indeed, Amicus advances the same argument here that it did when seeking

rehearing en banc in *CREW*. *See* Pet. for Reh'g En Banc, *CREW v. FEC*, 17-5049 at 5-12 (July 27, 2018). This Court declined to rehear *CREW* en banc, 923 F.3d 1141, 1142 (2019), suggesting that, whatever their view of the panel decision's merits, the argument presented by Amicus was not sufficient to convince this Court to take the matter en banc. Moreover, the *CREW* decision is neither unsustainable nor in tension with prior Supreme Court and Circuit precedent.

A. *CREW*'s Holding that the FEC's Exercise of Prosecutorial Discretion is not Reviewable is Rooted in Supreme Court Precedent

This Court held in *CREW* that "federal administrative agencies in general, and the Federal Election Commission in particular, have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." 892 F.3d at 438-39 (citations omitted). That conclusion followed from the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), which this Court held controls where a federal administrative agency invokes its prosecutorial discretion.

In *Heckler*, the Supreme Court held "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. This discretion was "attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* The Court identified the familiar reasons for this general unsuitability:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. at 831. The Supreme Court also recognized that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32. Thus, *Heckler* established what has been called a "presumption of non-reviewability." *See Assoc. of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007).

The lynchpin of the Court's holding in *Heckler* was its conclusion that there was "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. "Agency actions in these circumstances are unreviewable because 'the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion.'" *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)). Therefore, "if the statute in question does not 'give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another' and if it provides no meaningful guidelines defining

the limits of the agency's discretion," then the agency's decision is not reviewable. *Id.* at 855. Whether there is "law to apply" is ultimately a question for Congress: "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' . . . ." *Heckler*, 470 U.S. at 834-35.

The decision in *CREW* followed directly from the application of *Heckler*. The Court first held, consistent with longstanding Circuit law, that the decision of three Commissioners (short of the four required for the FEC to take action) to vote against continued enforcement proceedings could be attributed to the full Commission because their votes prevented the Commission from taking action. *CREW*, 892 F.3d at 437-38. After analyzing the detailed enforcement structure required by FECA, this Court found that this enforcement regime "imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action." *Id.* at 439. Therefore, "[t]he consequence is that the operative 'statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* at 439 (quoting *Heckler*, 470 U.S. at 830)). There was thus no "law" for the Court to apply when determining whether a dismissal pursuant to the FEC's prosecutorial discretion was "contrary to law." *Id.* at 440.

Just as in *CREW*, Appellants and Amicus have failed to identify in this case what "law" could be applied by a Court to determine whether the Commission's exercise of its prosecutorial discretion here was "contrary to law." Indeed, Amicus's position is that the FEC enjoys no prosecutorial discretion at all, and that "any dismissal not based on the merits of the complaint is 'contrary to law.'" Amicus Br. 23 n.13. However, "[t]here is no doubt the Commission possesses such prosecutorial discretion." *CREW*, 892 F.3d at 438. Because FECA provides no guidelines limiting the FEC's prosecutorial discretion, it cannot be "contrary to law" merely to exercise that discretion.

B. FECA Provides no Meaningful Guidelines to Cabin the FEC's Prosecutorial Discretion

FECA proscribes an elaborate procedure for the Commission to follow when it conducts enforcement proceedings. Appellants and Amicus urge that the unique structure of FECA, in particular its bipartisan structure and citizen suit provision, warrants minimizing or outright disregarding *CREW*. *See* Br. 34-37; Amicus Br. 14-24. To the contrary, the rule in *CREW* flows from FECA, which grants the FEC "the exclusive civil remedy for the enforcement of the provisions of this Act," 52 U.S.C. § 30107(e), anticipates "partisan" deadlocks, and provides no meaningful guidance to a reviewing court. *CREW* is also consistent with the citizen suit provision, properly understood.

Both the dissent from the majority's opinion in *CREW* and Amicus argue that the structure of FECA, an explicitly bipartisan agency that requires four votes in order to take action, mandates reviewability of "partisan" deadlocks. *See CREW*, 892 F.3d at 442 (Pillard, J., dissenting); Amicus Br. 14-19. They reason that, because four votes are required to dismiss an administrative complaint, three Commissioners who vote against enforcement proceedings for reasons of prosecutorial discretion cannot speak for the Commission as a whole, and therefore the entire premise of *Heckler* cannot apply under these circumstances. *Id.* This view is contrary to this Court's longstanding rule regarding review of FEC dismissals and the structure of FECA.

This Court has rejected the idea that a vote of less than four Commissioners "decides nothing." *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). While an affirmative vote of four Commissioners is required to take any action, 52 U.S.C. § 30106(c), including a "vote to dismiss," *see* 52 U.S.C. § 30109(a)(1), this Court has never understood that provision to state that a court may only review a rationale for dismissal that was endorsed by four Commissioners. To the contrary, this Court *mandates* that the three Commissioners opposing further enforcement action set out their views in order "to allow meaningful judicial review of the Commission's decision not to proceed." *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). Indeed, under certain circumstances *no statement* of any

Commissioner is required for judicial review: when the Commission votes "in conformity with" the Office of General Counsel's ("OGC") recommendation not to pursue an enforcement action, a reviewing court looks to OGC's report to explain the Commission's decision. *See DCCC*, 831 F.2d at 1132; *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1186 n.2 (D.C. Cir. 1985) ("Reasons supporting FEC's decision may be gleaned from General Counsel's . . . post-decision memorandum.").

The controlling Commissioners exercised the Commission's prosecutorial discretion at the "reason to believe" stage. JA 144-45. There is no statutory language that cabins the FEC's discretion at this point in the enforcement process. FECA does not mandate that the Commission make a "reason to believe" determination. It states only that (1) the Commission "shall notify, in writing, any person alleged in the complaint to have committed such a violation"; (2) that such person "shall have the opportunity to demonstrate, in writing . . . that no action should be taken against such person" "[b]efore the Commission conducts any vote on the complaint"; and (3) that the Commission "shall notify" such person and "shall make an investigation" only "[*i*]*f* the Commission . . . determines, by an affirmative vote of 4 of its members, that it has reason to believe" a violation has been committed. 52 U.S.C. § 30109(a)(1)-(2) (emphasis added). The statute requires four affirmative votes to proceed and phrases the "reason to believe" determination in

permissive terms ("if"), meaning that Congress must have anticipated that the Commission could fail to find reason to believe without concluding that there was "no" reason to believe. Deadlocks are built into the statute.

FECA does not proscribe any limit on the Commission's decision not to proceed on a "reason to believe" vote, except that such decision must not be "contrary to law." 52 U.S.C. § 30109(a)(8). What law, the statute does not say. This Court has held that other enabling statutes with stronger language, providing that the agency "shall take" action "as necessary," *Sierra Club*, 648 F.3d at 856, or that an agency "[*i*]*f*, upon inspection or investigation . . . believes" a violation has occurred, it "shall . . . issue a citation to the operator," *Twentymile Coal Co.*, 456 F.3d at 157, do not strip the agency of enforcement discretion. Thus, the analytical mistake Appellants and Amicus make is to "confuse[] the presence of a standard of review with the existence of law to apply." *Steenholdt v. Fed. Aviation Administration*, 314 F.3d 633, 639 (D.C. Cir. 2003). If a generic review provision like § 30109(a)(8) was sufficient to permit judicial review of the FEC's exercise of its prosecutorial discretion, then "no agency action could ever be committed to agency discretion by law." *Id.*

Appellants and Amicus argue in effect that this law *must* exist, otherwise the enforcement of campaign finance law will be frustrated. *See* Br. 29; Amicus Br. 17-24. But this is a question for Congress, which designed the FEC so that disagreement

about the scope of the campaign finance laws, even partisan disagreement, would result in non-enforcement. This is plain in FECA's design; it is not an aberration in Congress's scheme. The FEC is an unusual agency, because "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). "Thus, more than other agencies whose primary task may be limited by administering a particular statute, every action the FEC takes implicates fundamental rights." *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). The Commission, with the unique bipartisan structure Congress gave it, "must decide issues charged with the dynamics of party politics, often under the pressure of an impending election," and thus is "precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981).

Against this backdrop, where a divided-by-design FEC must make decisions that risk impinging upon fundamental First Amendment rights to political participation, there is no reason to believe that Congress would seek to limit the FEC's prosecutorial discretion more than other agencies without explicitly stating

so. Indeed, there is reason to believe Congress did exactly the opposite. The Chairman of the Senate Rules Committee that reported the 1979 version of FECA stated that "if the Commission considers a case and is evenly divided as to whether to proceed, that division which under the act precludes Commission action on the merits is not subject to review any more than a similar prosecutorial decision by a U.S. attorney." 125 Cong. Rec. 36,754 (1979).[2] This intent is evident in the structure of the Act, which was designed to be responsive to partisan politics. Appellants and Amicus fear that the FEC may not enforce campaign finance law consistent with their priorities, but it was within Congress's power to provide the FEC with the discretion to decline to adopt their enforcement priorities and leave activists like Appellants and Amicus without recourse. Indeed, this Court has held that the right to seek review of a decision does not "invite[] the reviewing body to substitute its views of enforcement policy for those of the" agency. *See Twentymile Coal Co.*, 456 F.3d at 158.

The fact that FECA has a citizen suit provision does not compel a contrary conclusion. *See CREW*, 892 F.3d at 440 (Pillard, J., dissenting); Amicus Br. 19-24. FECA permits the complainant to file an action against a person to enforce the federal campaign finance laws only where the United States District Court for the

[2] While the Chairman's statement is not "controlling," *see DCCC*, 831 F.2d at 375, together with the structure of the statute it is persuasive evidence of Congress's intent when it enacted the judicial review provision in 1976.

District of Columbia has declared either that the dismissal of a complaint or the Commission's "failure . . . to act on such complaint during the 120-day period beginning on the date of the complaint" was "contrary to law," and the Commission does not take action thereafter "to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(A), (a)(8)(C). As a district court in this circuit recognized, this provision must be read narrowly, given that Congress otherwise provided the FEC with exclusive jurisdiction to enforce FECA and established a detailed, comprehensive enforcement process, including a mandated effort at conciliation, before the FEC may bring suit against an alleged violator. *See CREW v. FEC*, 363 F. Supp. 3d 33, 43 (D.D.C. 2018).

Indeed, a close reading of the citizen suit provision demonstrates how narrow it actually is. A complainant does not have the right to sue an alleged violator just because the FEC got the law wrong, or even because the FEC sat on their complaint without action for many months. The complainant must first have a federal district court declare that the FEC's action was "contrary to law" (raising, again, the question that confronted this Court in *CREW*: what law?), and then the FEC must abandon the field entirely by failing to take any action in response to the district court's order. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) (holding that, even after a remand, the FEC "might later, in the exercise of its lawful discretion, reach the same result for a different reason"). Indeed, the requirements for the citizen suit provision are so

stringent that it has only been meaningfully invoked once,[3] and then only because a Commissioner made the conscious decision to prevent the FEC from taking *any* action. *See* Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (April 19, 2018).

But an exercise of prosecutorial discretion is not akin to abandoning the field entirely. As the Supreme Court explained in *Heckler*, an agency's exercise of its prosecutorial discretion is not the absence of a decision, or ignoring an issue, but can represent an agency's "complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. As the Court observed in the criminal context, "[p]rosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Bond v. United States*, 572 U.S. 844, 865 (2014). By giving it the exclusive civil jurisdiction to enforce FECA, and by failing to create standards to govern the FEC's prosecutorial discretion, Congress entrusted these judgments about when FECA should be enforced to the bipartisan agency it created to administer the Act.

The FEC is thus no mere "gatekeep[er]," as Amicus asserts. Amicus 22. By requiring the FEC to, in essence, defy a court order before a complainant can bring

[3] Amicus is currently litigating what to our knowledge is the first ever FECA citizen suit to proceed to the motion to dismiss phase. *See CREW v. American Action Network*, No. 18-cv-00945 (D.D.C.).

a suit, FECA provides that the FEC, in all but the most extraordinary circumstances, decides when FECA is to be enforced, and how. The judicial review provision was "not intended to work a transfer of prosecutorial discretion from the Commission to the courts." 125 Cong. Rec. 36,754 (1979). If Congress did not intend for the judicial review provision to transfer prosecutorial discretion to the courts, it cannot have intended for the citizen suit provision to transfer prosecutorial discretion to individual complainants. FECA's enforcement structure is built around bipartisan consensus; Congress could not have intended to place the enforcement of the campaign finance laws in the hands of potentially politically-motivated complainants if the FEC determined, for example, that enforcement in a particular case did not "fit[]the agency's overall policies." *Heckler*, 470 U.S. at 831. Thus, the citizen suit provision is not implicated when the FEC dismisses a complaint as an exercise of its prosecutorial discretion.

The holding in *CREW* therefore reflects Congress's judgment in enacting FECA. That case does not eliminate the role of judicial review, it merely limits it. As the Supreme Court held in *Heckler*, an agency's exercise of its prosecutorial discretion is not the same as when an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n. 4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)). In addition, where there is law

to apply to a dismissal, judicial review will remain available. Thus, "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion." *CREW*, 892 F.3d at 441 n.11. Presumably, a dismissal that contravened the Constitution would also be reviewable.[4]

Therefore, FECA does not provide the "law" against which the FEC's decision to dismiss an administrative complaint as an exercise of prosecutorial discretion may be compared, and recognizing the FEC's unreviewable prosecutorial discretion is not at odds with FECA's purpose.

[4] Amicus's assertion that recognizing the FEC's prosecutorial discretion violates the First Amendment is not persuasive. *See* Amicus Br. 24-27. Amicus fails to identify authority supporting a conclusion that the First Amendment guarantees the right of access to information required to be disclosed under FECA. Amicus cites to *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014), for the proposition that this Court has recognized that the public has a First Amendment right to know the identity of those who are seeking to influence their votes. *Id.* at 24-25. An examination of that opinion, however, reveals that this Court merely quoted that language from the FEC's brief when summarizing its argument, as opposed to adopting that position. *Stop This Insanity*, 761 F.3d at 16. The FEC cited to *Citizens United*, 558 U.S. at 369-71, for this proposition, *Stop This Insanity*, 761 F.3d at 16, but the Supreme Court made no such holding in that case. Rather, the Court held that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Citizens United*, 558 U.S. at 371. That is, the government had a sufficient interest in ensuring that voters had access to information regarding "who is speaking about a candidate shortly before an election" to overcome the First Amendment interest in political speech, which is necessarily chilled by disclosure. *Id.* at 369-71. This is not the same as a First Amendment interest. It is Congress, not the Constitution, that mandates disclosure of information about political donors.

C. *CREW* does not Conflict with this Court's or the Supreme Court's Decisions Regarding Review of FEC Dismissals

The *CREW* decision is not in tension, much less in conflict, with prior decisions by the Supreme Court and this Court that have defined the scope of judicial review of FEC dismissals. The assertion that *CREW* conflicts with these decisions rests on the conflation of two different questions: whether a dismissal is subject to any review at all and, if so, whether the particular grounds for the FEC decision are amenable to judicial review.

CREW is not in conflict with the Supreme Court's leading decision regarding judicial review of FEC dismissals, *FEC v. Akins*. In that case, the FEC unsuccessfully challenged a complainant's standing to bring a § 30109(a)(8) action, asserting that a mere informational injury was not a sufficient injury-in-fact to enable review. *Akins*, 524 U.S. at 18-19. The parties did not raise the question of what law to apply to the review of a dismissal, only whether the complainant had standing. *See* Br. for Petitioner, *FEC v. Akins*, No. 96-1590, 1997 WL 523890, at 18-21 (Aug. 21, 1997). At the end of the standing discussion, the Court addressed the FEC's argument "that we should deny respondents standing because this case involves an agency's decision not to undertake an enforcement action—an area generally not subject to judicial review." *Akins*, 524 U.S. at 26. The Court held that, unlike the statute at issue in *Heckler*, FECA "explicitly indicate[d]" that "an agency's decision not to undertake an enforcement action" was subject to judicial review. *Id.* at 26.

Similarly, this Court held in *Chamber of Commerce v. FEC* that FECA was "unusual in that it permits a private party to challenge the FEC's decision *not* to enforce." 69 F.3d 600, 603 (D.C. Cir. 1995). FECA is unusual, but not in this respect unique: This Court has recognized that the existence of a review provision is consistent with the conclusion that a non-enforcement decision is not reviewable. *See Sierra Club*, 648 F.3d at 852; *Twentymile Coal Co.*, 456 F.3d at 160.

The FEC argued in *Akins* that the complainant did not have standing based on informational injury because if complainants prevailed, and the court declared that the FEC improperly applied the law, that declaration would not necessarily provide them the information they sought because the FEC could exercise its prosecutorial discretion to resolve the case in a way that did not result in disclosure. *See* Br. for Petitioner, *FEC v. Akins*, at 29-31. The Supreme Court's holding should therefore be understood in the context of the FEC's standing argument. The FEC's discretion did not strip the complainant of standing because the complainant could potentially challenge the subsequent dismissal under § 30109(a)(8). The Supreme Court did not confront the question at issue in *CREW*, which was instead what, if any, standard to apply once the complainant lodged that challenge after the FEC dismissed the complaint as an exercise of its prosecutorial discretion.

This Court also recognized that these questions were distinct in *DCCC* when it noted that that there are "two analytically discrete issues" in play when reviewing

the dismissal of an FEC complaint: "(1) the threshold question whether a complaint is reviewable at all; [and] (2) the respect that the reviewing court must accord to the Commission's disposition." 831 F.2d at 1134. *DCCC* dealt only with the first question, holding that, when the FEC dismisses an administrative complaint after it deadlocks 3-3, the complainant may challenge that dismissal in a § 30109(a)(8) action. *See id.* at 1133. In reaching that conclusion, this Court rejected the FEC's argument, pursuant to *Heckler*, that "deadlocks . . . are immunized from judicial review because they are simply exercises of prosecutorial discretion." *Id.* In so holding, this Court did not state that *Heckler* was inapplicable to FEC dismissals, only that, as a threshold matter, § 30109(a)(8) applies to all FEC dismissals. *See id.* at 1134. And, because all dismissals are subject to § 30109(a)(8), the FEC must always provide a written explanation for its decision, so that the Court can "intelligently determine whether the Commission is acting 'contrary to law.'" *Id.* at 1132. This Court reiterated that principle in a subsequent case, holding that "[a] statement of reasons . . . is necessary to allow meaningful judicial review of the Commission's decision not to proceed." *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

Neither *DCCC* nor *Common Cause* contradict the conclusion that a court may have no "law" to apply to a Commission dismissal pursuant to its prosecutorial discretion. Those cases dealt only with the threshold question, whether

§ 30109(a)(8) authorized review, not what law to apply to the FEC's decision. This Court has recognized that "[t]he distinction between a claim that is not justiciable because relief cannot be granted upon it and a claim over which the court lacks subject matter jurisdiction is important." *Sierra Club*, 648 F.3d at 853. The decision in *CREW* addressed the second prong identified in *DCCC*: the standard of review and the law to apply to a particular dismissal. *CREW* did not hold that any decision not to enforce was beyond the scope of review. To the contrary, the Court held that "if the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's decision is subject to judicial review to determine whether it is 'contrary to law.'" *CREW*, 892 F.3d at 441 n.11. *CREW* does not purport to overturn the procedure mandated by *DCCC* and *Common Cause* requiring the FEC to provide an explanation for its decisions so that a court can review it. *CREW* held only that there was no "law" to apply when the explanation for the decision was an exercise of prosecutorial discretion.

This Court's opinion in *CREW* is therefore not in conflict with any prior decision of this Court or of the Supreme Court. As such, it remains binding in this case.

II. The FEC's Decision to Dismiss the Administrative Complaints Against Intervenors-Appellees as an Exercise of its Prosecutorial Discretion is not Reviewable

The rationale for the FEC's decision to dismiss the administrative complaints against Intervenors-Appellees was squarely within the scope of its prosecutorial discretion, and therefore unreviewable under *CREW*. The essence of the Controlling Commissioners' decision was the recognition that the Supreme Court's decision in *Citizens United* worked a sea change in campaign finance law, and that fundamental concerns of "due process, fair notice, and First Amendment clarity" warranted a cautious approach when the Commission confronted the novel question of how to apply § 30122 to contributions by corporate LLCs and similar closely held corporations to SuperPACs. JA 147-48. The Commissioners explicitly exercised their prosecutorial discretion in the dismissal of the administrative complaints against Intervenors-Appellants and cited to *Heckler*. JA 148-49, 159-160. This case is therefore not like a recent case, where the Commission's statement of reasons comprised "a one-paragraph discussion of prosecutorial discretion [and] thirty pages of seemingly reviewable legal analysis." *CREW v. FEC*, 380 F. Supp. 3d 30, 41 (D.D.C. 2019). The Commission's decision here was wholly an exercise of its prosecutorial discretion.

When a federal agency surveys the landscape after a major Supreme Court decision and decides to proceed incrementally in adjusting its enforcement program

in light of that decision, it acts with the discretion bestowed upon it by Congress. *Cf. Invest. Co. Inst. v. CFTC*, 720 F.3d 370, 378 (D.C. Cir. 2013) (noting, in the rulemaking context, "the Supreme Court has emphasized, '[n]othing prohibits federal agencies from moving in an incremental manner'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009)). That discretion is especially appropriate with respect to the FEC, which is "authorized" by Congress "to 'formulate general policy with respect to the administration of this Act,' . . . and has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *Democratic Senatorial Campaign Committee*, 454 U.S. at 37 (quoting *Buckley v. Valeo*, 424 U.S. 1, 110, 112 n.153 (1976)). Here, the Controlling Commissioners examined the Commission's precedent, relevant legal decisions, and the facts of the cases before it, and concluded that it would not be fair to proceed against Intervenors-Appellees but that the proper enforcement approach was to announce a rule that the Controlling Commissioners would adhere to in cases going forward. JA 152-60.

The district court correctly concluded that the Commission's dismissal rested on an exercise of its prosecutorial discretion. JA 416. Appellants' attempts to recast the Controlling Commissioners' decision as one based on "faulty propositions of law," Br. 20, instead of a well-reasoned exercise of its prosecutorial discretion, expands the exception announced in *CREW* such that it swallows the rule. This

Court held that "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion," *CREW*, 892 F.3d 441 n.11, not that the FEC may not consider "propositions of law" when deciding whether to exercise its prosecutorial discretion in a given case. Appellants' arguments urging review are not persuasive because they refuse to see the Controlling Commissioners' statement as a whole. Appellants fault the Controlling Commissioners for expressing that their exercise of discretion was "compelled" by their review of the legal landscape in light of their obligation to safeguard fundamental First Amendment rights and to conduct enforcement proceedings in a manner consistent with due process. Br. 22-23. In essence, Appellants contend that the Commission has no discretion at all whenever it takes into account any consideration outside of its available resources, and must rigidly follow the enforcement program favored by Appellants and to be dictated by the courts. This view of discretion is inconsistent both with FECA and this Court's opinions, *see supra* 15-16, recognizing that the FEC is due deference in its decisions, and with the view of prosecutorial discretion espoused in *Heckler*.

To be sure, the Controlling Commissioners' decision was not based on a legal interpretation or legal grounds, it was an exercise of prosecutorial discretion. Even assuming that Appellants are correct that the Controlling Commissioners made legal judgments, applying the rule urged by Appellants would eviscerate the deference owed to an agency's exercise of its prosecutorial discretion under *Heckler*. When

describing the "factors which are peculiarly within" the agency's expertise, the Supreme Court listed assessing (1) "whether a violation has occurred"; (2) "whether the agency is likely to succeed if it acts"; and (3) "whether the particular enforcement action requested best fits the agency's overall policies." *Heckler*, 470 U.S. 831. All of these factors involve reliance upon propositions of law, which *Heckler* nevertheless stated are not reviewable. First, determining whether a violation has occurred necessarily requires the agency to apply the law to the facts of a particular matter. Likewise, an assessment of the agency's chances if it proceeds with enforcement will involve consideration of the scope of its enabling statute and the application of that statute to the facts, including how the statute might apply to novel circumstances or a change in the legal landscape. Lastly, an agency cannot judge whether an enforcement action fits within its overall policies without undertaking a legal analysis of the purpose of the statute. Similarly, the factors underlying the exercise of prosecutorial discretion that this Court held to be unreviewable in *CREW* also involve reliance on propositions of law. The Commission in that case exercised its prosecutorial discretion out of a concern "that the statute of limitations had expired or was about to," and that proceeding against the respondent would raise "novel legal issues." *CREW*, 892 F.3d at 438. Whether the statute of limitations had expired is a legal conclusion, as is whether an enforcement proceeding would raise novel legal issues, the very same issue in this matter. It cannot be true,

therefore, that engaging in any legal analysis renders an exercise of prosecutorial discretion reviewable. Moreover, *Heckler* and *CREW* recognize that determinations regarding an agency's enforcement approach and whether novel legal issues are before it are quintessential grounds supporting prosecutorial discretion, both of which underlie the dismissals in this case.[5]

Even if the decision of the Controlling Commissioners involved legal analysis, it did not purport to resolve the question of whether Intervenors-Appellees' contributions violated FECA. Instead, the Controlling Commissioners took note of a change in the law caused by *Citizens United*, assessed their prior enforcement actions in light of the new legal landscape, weighed the constitutional concerns that could arise *if* the Commission proceeded with enforcement, and ultimately decided to proceed incrementally. JA 152-160. This analysis is the essence of prosecutorial discretion, and thus is not reviewable under *CREW*, which rejected the proposition that "legal rulings" could be carved out "from the middle of non-reviewable actions." 892 F.3d at 442 (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)); *see ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S.

[5] Appellants are incorrect that the Commissioners never mentioned the *Heckler* factors. Br. 25. The Controlling Commissioners stated at the beginning and the end of their statement of reasons that they were exercising their prosecutorial discretion and cited to *Heckler*, while also setting out all of the *Heckler* factors. AR 149, 159-60.

270, 283 (1987) (rejecting proposition that an "action becomes reviewable" where "the agency gives a 'reviewable' reason for otherwise unreviewable action").

III. The District Court did not Err when it Held that the FEC's Dismissal of the Administrative Complaints Against Intervenors-Appellees was not Contrary to Law

In addition to not being reviewable, the Commission's dismissal was not contrary to law. The district court, applying the pre-*CREW* standard of review, held that a Commission dismissal was contrary to law only if the FEC "failed to show a rational basis for dismissing these complaints." JA 417.

To the extent that the dismissals are reviewable, the district court applied the correct standard of review. The Supreme Court and this Court have repeatedly emphasized that courts owe the Commission discretion in its enforcement decisions. *See Democratic Senatorial Campaign Comm.*, 454 U.S. at 37; *Common Cause*, 842 F.2d 436. Thus, as this Court held, "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). Accordingly, a dismissal is contrary to law only if it was the "result of an impermissible interpretation of the Act" of the FEC's decision "was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. Because the Controlling Commissioners did not apply an interpretation of FECA, this Court should affirm the district court because the

dismissals were reasonable and therefore not arbitrary, capricious, or an abuse of discretion.[6]

A. The Commission's Decision was not Arbitrary, Capricious, or an Abuse of Discretion, and thus was not Contrary to Law

Appellants have failed to demonstrate that any of the reasons explaining the Controlling Commissioners' decision were erroneous. The Commission's decision to dismiss rested on essentially two points: (1) that in light of *Citizens United*, the application of 52 U.S.C. § 30122 to the contributions at issue was a matter of first impression; and (2) the Commission's guidance regarding how § 30122 was to be applied to the contributions was unclear. The district court properly concluded that the Controlling Commissioners' statement rationally supported both of these conclusions, and therefore the dismissals were not contrary to law. JA 417-425.

There can be no doubt that *Citizens United* worked a sea change in campaign finance law. Indeed, this Court observed that it was "the most expansive, speech-protective campaign finance decision in American history." *Van Hollen*, 811 F.3d at 496. Prior to *Citizens United*, FECA prohibited all corporate contributions to political committees. *See* 52 U.S.C. § 30118(a). *Citizens United* and this Court's

[6] Appellants assert in conclusory fashion that the Controlling Commissioners' conclusions are owed no deference, yet also assert that the *Orloski* arbitrary, capricious, or an abuse of discretion standard applies. Br. 38. This Circuit's case law is clear that FEC decisions are owed deference, especially when weighing enforcement strategy.

elaboration on it in *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) allowed corporate contributions to certain political committees, something that even Appellants must accept had never been allowed in FECA's decades-long history. *See* Marc E. Elias Advisory Opinion, AO 2010-11, 2010 WL 3184269 (FEC July 22, 2010); Carol A. Laham Advisory Opinion, AO 2010-09, 2010 WL 3184267 (FEC July 22, 2010); Br. 42. As the Supreme Court noted, "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." *Citizens United*, 558 U.S. at 370.

The application of § 30122 to a corporate contribution was uncertain following *Citizens United* because the provision's operation with respect to corporations is not clear. Section 30122 prohibits "mak[ing] a contribution in the name of another person." The statute thus asks who is the person making the contribution, the "true source," and who is the conduit. This Court has never defined who is the "true source" of a contribution under this provision. Those courts to have considered the question have not offered clear answers. The Ninth Circuit held that it must look "to the substance of the transaction" to determine who "makes" a contribution for purposes of § 30122 and suggested in dicta that it would look to the person who exercised "direction or control." *United States v. O'Donnell*, 608 F.3d 546, 550 & n.2 (9th Cir. 2010). The Seventh Circuit adopted the Ninth Circuit's

approach. *See United States v. Boender*, 649 F.3d 650, 661 (7th Cir. 2011). Neither case dealt with a corporate conduit.

In the typical straw donor or conduit contribution case, a natural person (who could legally make the contribution for a corporation or foreigner, or a person who had reached their contribution limit) is used as the conduit, and thus the question whether the intermediary exerted "direction or control" is a meaningful one. When a person is the sole shareholder or owner who controls a corporation, which *Citizens United* recognized has a First Amendment right to make a contribution in its own name, the question of "direction or control" is not useful: a corporation always acts at the direction or control of a natural person. It is therefore not sufficient to observe, as Appellants contend, that § 30122 applies to corporations because corporations are "persons" within the meaning of FECA. *See* 52 U.S.C. § 30101(11). Even if § 30122 applied, it was not clear when a closely-held or corporate LLC would be liable post-*Citizens United*, because as the OGC recognized, "[b]y definition, a corporate LLC acts only at the will of that member." First General Counsel's Report, MUR 6930 (SPM Holdings, LLC) at 10 (Nov. 19, 2015). Deciding that § 30122 applies and deciding who is the "true source" are separate questions, the latter of which had never been confronted in this context.

The district court correctly observed that the Controlling Commissioners never questioned that § 30122 *applied* to corporations. JA 417. Instead, the question

the FEC confronted was the "application of the true source analysis to determine whether a corporation may be considered a straw donor for an individual's contribution." JA 147-48. The Controlling Commissioners believed that under *Citizens United* the FEC "may not merely presume that contributions from closely held corporations or corporate LLCs are actually contributions in the name of another." JA 158. The Controlling Commissioners were on firm ground with this conclusion, given the Supreme Court's holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United*, 558 U.S. at 365. The FEC thus had to enforce FECA in a way that gave effect to a corporation's right to contribute, which would be compromised if corporate contributions (necessarily made at the direction and control of another) were in effect presumed to be conduit contributions.

Recognizing that *Citizens United* created novel questions of the application of § 30122, the Controlling Commissioners rationally concluded that prior guidance from the Commission and the Courts could create confusion regarding who was the "true source" of a corporate contribution. Appellants do not dispute that, at the time of the contributions, the FEC's regulations provided that all contributions from a corporate LLC would be considered corporate contributions for purposes of FECA's source prohibitions. *See* 11 C.F.R. § 110.1(g)(3). Indeed, the FEC opposed, and a court rejected, the argument that closely-held corporations should be allowed to

make contributions like individuals, even where the corporation had only a single shareholder and therefore "the contribution is necessarily the shareholder's money." *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *4 (M.D. Fl. Nov. 30, 2007). Similarly, OGC opined that "[i]t has been the policy of the Commission that once a decision is made and carried out to conduct business using the corporate form, *any funds* taken from the corporation's accounts are to be deemed corporate in nature, whether or not they originated as . . . the personal funds of a shareholder." First General Counsel's Report at 34, MUR 4313 (Coalition for Good Government, Inc.) (June 13, 1996) (emphasis added). Indeed, Appellants acknowledge that guidance to this effect was "copious."[7] Br. 47. Even if that guidance did not come in § 30122 cases, it addressed issues a reasonable person would find relevant to who was the true source of a contribution. Appellants' contention that a reasonable person could not be misled by these precedents overlooks that OGC changed its view of the applicable standard over the course of these matters, from a "direction or control" test to a test that evaluated the purpose behind using the corporation to make a contribution, similar to what the Controlling Commissioners ultimately proposed. *See* JA 154. Thus, the Controlling Commissioners reasonably concluded that contributors were not on notice regarding

[7] The fact that this guidance was "copious" and bore directly on who was regarded as the "source" of a contribution distinguishes corporate contributions from contributions made by other entities such as political committees.

the operation of § 30122, because prior guidance stood for the proposition that a corporation is the source of contributions made with its monies.[8] JA 157.

This conclusion was not arbitrary, capricious, or an abuse of discretion given these novel circumstances and the Commission's unique mandate to administer FECA in a way that minimizes the impact on fundamental First Amendment rights. *See Van Hollen*, 811 F.3d at 500.[9] That Appellants might have come to a different conclusion were they FEC Commissioners does not render the Controlling Commissioners' decision unreasonable or irrational. *See CREW v. FEC*, 236 F. Supp. 3d 378, 396 (D.D.C. 2017) ("Although Plaintiffs may have chosen a different path were they in charge of the agency, neither they nor the Court are in a position to second-guess the FEC's exercise of discretion."). Ultimately, Plaintiffs are disappointed that the FEC did not adopt their preferred enforcement program. That

[8] The Commission's conclusion regarding notice is particularly salient for F8 and Eli Publishing. Both F8 and Eli Publishing were established long before the contributions at issue (and thus were not, as Appellants contend, created for the purpose of the contributions) and their contributions were made before this issue attracted any publicity.

[9] Appellants assert that *Van Hollen*'s holding is not applicable because it dealt with the legality of an FEC rule. Br. 57. Appellants do not explain why the FEC would have to balance First Amendment concerns in the rulemaking context but not the enforcement context. The Commission is not, in fact, required to enforce every unambiguous violation of FECA: the essence of prosecutorial discretion is to determine where agency resources are to be allocated, and Appellants never explain why the FEC's consideration of its First Amendment mandate is not entitled to deference.

difference of approach does not render the Controlling Commissioners' decision to proceed incrementally arbitrary, capricious, or an abuse of discretion.

B. The Controlling Commissioners' Proposed Standard is not Ripe for Review

The Controlling Commissioners determined to proceed with an incremental enforcement program, declining to enforce against Intervenors-Appellees while announcing a standard that the three Commissioners would apply in *future* cases. JA 158. The district court held that any challenge to this standard was not ripe. JA 425. "Determining whether administrative action is ripe for judicial review requires [a court] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Assoc. v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). The purpose of the ripeness doctrine is to prevent courts from being entangled "in abstract disagreements, and, where, as here, other branches of government are involved, to protect the other branches from judicial interference until their decisions are formalized and their 'effects felt in a concrete way by the challenging parties.'" *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). The district court did not err in concluding that the Controlling Commissioners' standard was not ripe for review; the standard was not formalized and nor had it been applied to any party.

In urging review, Appellants attempt to demonstrate that the issue is ripe because they allegedly have been denied information in connection with the instant complaints because the Controlling Commissioners announced a prospective standard. Br. 32. The Controlling Commissioners' statement of reasons does not bear this reading; it provides that they would have declined to enforce regardless of the standard going forward. The Controlling Commissioners exercised their prosecutorial discretion based on the change in the law wrought by *Citizens United* and the confusion that could arise from the Commission's prior guidance. The conclusion that prior guidance was confusing, and therefore no enforcement should take place, is wholly independent from the conclusion of what the correct standard is.

In the event the Commission has occasion to apply the proposed standard on the merits and come to a view as to whether a respondent did or did not violate FECA, the standard will be subject to review. Appellants suffer no harm until that time, and thus the district court was correct when it held that the question was not ripe. Moreover, given that the Controlling Commissioners explicitly did not apply their prospective standard to the MURs at issue, this is the quintessential case where "factual development would 'significantly advance [the court's] ability to deal with

the legal issues presented.'" *Nat'l Park Hosp. Assoc.*, 538 U.S. at 812 (quoting *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 82 (1978)).[10]

C. The Controlling Commissioners did not Fail to Address Appellants' Contention that Intervenors-Appellees F8 and Eli Publishing were Required to Register as Political Committees

Contrary to Appellants' assertion, the Controlling Commissioners did not ignore their allegation that Intervenor-Appellees violated FECA's registration and disclosure provisions for political committees.[11] *See* Br. 52-54. In fact, the Controlling Commissioners adopted OGC's recommendation that the Commission not "find reason to believe with respect to" Appellants' alleged political committee registration violations and concluded that "the applicable statutory provision addressing these circumstances is section 30122." JA 152. The district court observed that Appellants raised this argument "only in passing" in their briefing below. JA 425.

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[10] Because the proposed standard is not ripe for review, it is not appropriate to argue whether it is correct, as the standard has not been applied. Appellants' challenges to the contrary are not availing. The Controlling Commissioners' proposed approach required a showing that the corporation was used "for the purpose of making a contribution that evades the Act's reporting requirements." JA 158. Appellants conflate this standard with the "knowing and willful" standard under FECA. Br. 55. If a person believed it was legal to use a corporation to evade the reporting requirements, they would not commit a knowing and willful violation, which requires "knowing, conscious, and deliberate flaunting" of FECA. *See AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980). The Controlling Commissioners' proposed standard was therefore not redundant as Appellants claim.

[11] *See* 52 U.S.C. §§ 30102, 30103, and 30104.

Moreover, the Controlling Commissioners were not required to provide any explanation for their decision not to investigation the political committee registration allegations, because OGC recommended not taking action on these allegations. When the FEC declines to enforce consistent with OGC's recommendation, then the OGC's report provides the statement of reasons subject to judicial review. *See Common Cause*, 842 F.2d at 448-48. Appellants contend that OGC's recommendation not to take action on the political committee registration allegations was contingent on the FEC proceeding to investigate the § 30122 violations. Br. 54. The contradiction that Appellants assert does not exist. The Controlling Commissioners agreed with OGC that the proper frame of analysis was whether the contributions at issue violated § 30122. JA 152. The Controlling Commissioners simply exercised their prosecutorial discretion not to proceed on that charge. The Commission's determination that these cases presented issues under § 30122 is implicitly a determination that this is not a political committee registration case but a conduit contribution case.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's decision granting summary judgment for Intervenors-Appellees.

Respectfully Submitted,

/s/ *George J. Terwilliger III*

George J. Terwilliger, III
Robert J. Bittman
Nathan R. Pittman
MCGUIREWOODS LLP
2001 K St., NW
Suite 400
Washington, D.C. 20006-1040
202-857-1700
202-857-1737(fax)
gterwilliger@mcguirewoods.com
rbittman@mcguirewoods.com
npittman@mcguirewoods.com

Counsel for Steven Lund, F8, LLC and Eli Publishing, L.C.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9,930 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ *George J. Terwilliger III*

Attorney for Steven Lund, F8, LLC and Eli Publishing, L.C.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record at their respective email addresses on this 14th day of August, 2019.

/s/ *George J. Terwilliger III*

Attorney for Steven Lund, F8, LLC and Eli Publishing