UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DAVID LEWICKI, VLADIMIR SHKLOVSKY, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 24-2505 (ABJ)

PLANTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

Plaintiffs Rev. David Lewicki and Vladimir Schklovsky, two Georgia voters (the "Plaintiffs"), seek judicial review of the Federal Election Commission's ("FEC," "Commission") dismissal of their administrative complaint alleging a scheme to launder approximately $5 million through a series of intermediaries to influence the 2020 federal Senate elections in Georgia without disclosing the true source(s) of the political contribution(s). In dismissing the complaint after a deadlock, the blocking commissioners, among other things, departed from the Federal Election Campaign Act ("FECA") and court precedent by applying a heightened standard of proof to even start enforcement proceedings, one far beyond the low statutory threshold: to establish a "reason to believe…a…violation may have occurred." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024) (interpreting 52 U.S.C. § 30109(a)(2)). Rather, the controlling commissioners imposed a standard that would be practically impossible for any complainant to meet—namely, that a complainant must disprove every potentially exonerating

possibility in order to avoid dismissal, even where those facts could only be known to the parties allegedly violating the FECA.

In response to Plaintiffs' complaint in this Court, the Commission filed a perplexing motion to dismiss only Plaintiffs' second claim, which asserts legal error on the part of the controlling commissioners' interpretation of the reason-to-believe standard in the FECA. *See* Compl. ¶¶ 58–62, ECF No. 1. The motion concedes that the complaint is well-pleaded and otherwise states a claim under section 30109(a)(8), such that the instant motion would have no effect on the relief sought. *See* FEC Mot. at 10 & n.3, ECF No. 5. The Commission also concedes that the commissioners' legal interpretations are subject to review and legal error will justify a reversal if such interpretations are contrary to law. *Id.* The Commission even concedes that the FECA's "reason to believe" language is a matter of law for this Court to expound upon and that the Court will likely do so when adjudicating Plaintiffs' fourth claim asserting error in the commissioners' analysis of the evidence, such that their motion will not alter the issues before the Court. *See* FEC Mot. at 10, ECF No. 5 (citing *Hagelin v. FEC*, 411 F.3d 237, 239 (2005)).

Yet, the Commission argues that no court may directly review the blocking commissioners' controlling interpretation of the "reason to believe" standard, even when its erroneous interpretation of the FECA led to the dismissal of an otherwise meritorious complaint. The Commission argues it is free to interpret at least that portion of the law "in a way that differs from the court." *See* FEC Mot. at 11, ECF No. 5. It is not.

When charged to do so by Congress, courts must examine the controlling legal interpretations underlying agency determination to decide "whether an erroneous rule of law was applied," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2259 (2024), including the FEC's

legal interpretations of the FECA underlying its dismissal of a complaint, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981). Courts review agency interpretations of a statute, whether the relevant provisions are substantive or procedural. *See, e.g.*, *Chem. Waste Mgmt. Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (reviewing EPA's procedure for informal hearings, upholding based on then-existing Chevron deference). The Commission's purported distinction between interpretations of "substantive law" vs. procedure is without support in law.

Here, the relevant statement that serves as the basis of judicial review of the Commission's dismissal applied an erroneous interpretation of the FECA's "reason to believe" standard, contrary to agency and court precedent, to justify the dismissal. That legal interpretation of the FECA—regardless of whether it is one of substantive law or a statutorily-mandated process—is reviewable by this court to determine whether it is erroneous, and thus whether the Commission's dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Accordingly, Plaintiffs respectfully request the Court deny the Commission's partial motion to dismiss Plaintiffs' second claim.

BACKGROUND

A. Statutory and Regulatory Background

To ensure the public is "fully informed," *Buckley v. Valeo*, 424 U.S. 1, 76 (1976), about "who is speaking about a candidate" and might have officials "in [their] pocket," *Citizens United v. FEC*, 558 U.S. 310, 369, 370 (2010) (quoting *McConnell v. FEC*, 558 U.S. 310, 259 (2003)), the FECA imposes several disclosure obligations on people and entities spending money to influence federal elections. Relevant here, it requires certain entities called "political committee[s]" to disclose the true source of any contribution to them. 52 U.S.C. § 30103(a); *id.* § 30104(b), (d)(2); 11 C.F.R. §§ 102.1, 104.3, 104.4, 104.20(b); *United States v. Hsia*, 30 F. App'x 1, 1–2 (D.C. Cir. 2001). A political committee, such as an independent

expenditure-only committee (known as a "Super PAC"), must report the identity of the original source of funds it receives, even if those funds are passed through intermediaries, if that original source earmarked or otherwise directed the funds to that recipient committee. 11 C.F.R. § 110.6(a), (b)(1) (incorporated by reference in 11 C.F.R. § 110.4(b)(2)(i)). Attempting to evade these rules by making contributions in the name of another is prohibited. 52 U.S.C. § 30122; 11 C.F.R. §110.4(b)

The FECA defines a political committee as any group that accepts or expends over $1,000 in a calendar year to influence elections, 52 U.S.C. § 30101(4)(A), (8)(A), (9)(A); 11 C.F.R. § 100.5(a), and whose "major purpose" is to nominate or elect candidates, *Buckley*, 424 U.S. at 79. A group that spends "extensive[ly]" to influence elections has such a major purpose, *FEC v. Mass. Citizens for Life Inc.*, 479 U.S. 238, 262 (1986), which would include any group that devotes a majority of its annual expenditures to electioneering, Political Committee Status, 72 Fed. Reg. 5595, 5605 (Feb. 7, 2007) (groups spending 50–75% of funds on electioneering must register as political committees).

To enforce its provisions, the FECA lays out a detailed procedure by which the Commission acts as "first arbiter" to decide whether matters are sufficiently meritorious to proceed to enforcement by either the agency or a private complainant. *Citizens for Resp. & Ethics in Wash. v. FEC*, 923 F.3d 1141, 1149 (D.C. Cir. 2019) (Pillard, J., dissenting). Once a matter is brought to the FEC, either by means of a private complaint or through discovery by virtue of the FEC's own supervisory responsibility, the agency's Office of General Counsel ("OGC") prepares a report recommending whether the matter warrants opening enforcement proceedings. 52 U.S.C. § 30109(a)(2); 11 C.F.R. §§ 111.3, 111.7. The six-member Commission, comprising an evenly split slate of partisan-aligned commissioners, then adjudicates the matter

and votes on whether the allegations raise a "reason to believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2); 11 C.F.R. §111.9; *see also* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. at 19730. If four commissioners vote to find there is reason to believe a violation may have occurred, enforcement proceedings are opened and an investigation starts. 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.10.

Commensurate with the fact the initial reason-to-believe vote is only the threshold to open proceedings, it presents only a "very low evidentiary bar." *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 67 (D.D.C. 2022), *aff'd Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1194 (D.C. Cir. 2024) (reason to believe is absent only when there are "no grounds for investigation"). Additional successful votes are necessary before any enforcement, *see* 52 U.S.C. § 30109(a)(4) (four vote requirement to find probable cause based on the investigation); *id.* § 30109(a)(6)(A) (four vote requirement to institute a *de novo* civil action), or a private civil action can be brought after a successful judicial proceeding brought by the complainant to establish the agency's dismissal was "contrary to law," *id.* § 30109(a)(8).

Where a "reason-to-believe vote result[s] in a deadlock," the Commission may choose to dismiss "if a majority of Commissioners separately votes to dismiss the complaint." *Campaign Legal Ctr. v. 45Committee Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024). To permit a court to "intelligently determine whether the Commission is acting 'contrary to law'" by such dismissal, *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir 1987), the "declining-to-go-ahead Commissioners" must provide a contemporaneous explanation for their deadlock, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). The court reviews that justification and will find the dismissal contrary to law if it determines "(1) the FEC dismissed

the complaint as a result of an impermissible interpretation of the Act, … or (2) 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).

B. Factual Background

As provided by the FECA's process to begin proceedings, Plaintiffs filed an administrative complaint with the FEC on February 3, 2023, alleging that an unknown source or sources illegally funneled approximately $5 million through intermediaries to influence the 2020 federal Senate elections in Georgia. Compl. ¶ 37, ECF No. 1. The funds were eventually spent on electioneering by three Super PACs and an ostensible social welfare nonprofit. *Id.* ¶ 42. Had the unknown source or sources directly funded the Super PACs, their identity would have been disclosed. *Id.* Instead, the funds appear to have been passed through a series of structured transactions to evade disclosure.

For example, approximately $1.475 million of those funds were, over the course of only a few days, passed through two purported social welfare entities, each created within a short time of each other, before being deposited with a super PAC which used the funds to influence the 2020 federal Senate elections. *Id*. ¶ 39. These transactions bore strong indicia of conduit contributions—the conduit entities were founded shortly before the transfers at issue, and within weeks of each other; the entities at issue shared staff and addresses; the conduits had few activities other than the transfers at issue; the receipts were large, particularly for newly-created entities, and were quickly converted into distributions; the funds went to influence the same federal election; and the conduit entities shut down soon after the transfers were completed. *Id*., Ex. 1 ¶¶ 59-86 (detailing short timeline, overlapping personnel, among other indicia). Had the original source or sources donated the funds directly to the super PAC, federal law would have

required them to be disclosed. But by passing funds through intermediaries, the sources were able to make it appear as if the contributions were in the name of one of the nonprofits.

The remainder of the $5 million in funds were then transferred through structured transactions apparently designed to avoid public reporting which would have indicated the nonprofits were themselves political committees subject to disclosure. *Id*. ¶¶ 38, 40. The funds were divided up and passed through a third-ostensible nonprofit, which in turn made contributions to the same super PAC, as well as two others, and itself made unreported electioneering expenditures, all to influence the 2020 federal Senate elections in Georgia. *Id.* ¶¶ 38, 40, 41. By structuring these transactions, the entities could hide the fact that a majority of their spending went to influence federal elections: a fact that would have subjected them to reporting obligations and revealed the source or sources of the $5 million dollars.

Based on these allegations, Plaintiffs filed a complaint asserting that federal law required the disclosure of the original source or sources of these funds based on alternate theories: that the original source used these various entities in an unlawful conduit scheme and was required to be reported as the true source of the funds by their recipients; or that by properly accounting for the groups' various electioneering expenses, including any conduit contributions they made and contributions to entities that were de facto political committees, the entities themselves were required to register as political committees and disclose the source of the funds they received. *Id*. ¶ 43.

On review of Plaintiffs' amended administrative complaint, the FEC's expert non-partisan OGC staff found Plaintiffs' complaint had merit. *Id*. ¶ 44 (citing First General Counsel's Report at 19 & nn.80–82, MUR 8110 (Am. Coal. for Conservative Policies) (May 3, 2024), *available at* https://www.fec.gov/files/legal/murs/8110/8110_56.pdf)). OGC

recommended that the Commission find "reason to believe" unlawful conduit contributions of about $2.795 million were made to the three super PACs. *See id*. OGC recommended pausing further proceedings on Plaintiffs' political committee allegations contingent on the Commission approving an investigation into the Plaintiffs' conduit contributions. *See id.* at 37–38, 44–45.

In reaching its recommendation, OGC relied on binding case law and agency precedent to affirm that "[a] 'reason to believe' finding is a 'threshold determination' that an investigation may demonstrate liability," and is appropriate when a complaint "credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope." *See id.* at 19 & nn.80–82 (quoting *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 892 (D.C. Cir. 2021); Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. at 19730).

Notwithstanding this recommendation, on June 25, 2024, the Commission divided three-to-three on the OGC's various recommendations and dismissed by majority vote a week later. Compl. ¶ 45. About one month later, on July 29, 2024, the three commissioners who voted against the OGC's recommendation issued a delayed statement of reasons to explain the FEC's dismissal. *Id.* ¶ 46.

Relevant here, this untimely statement justified the commissioners' vote against finding reason to believe by, in part, interpreting the FECA to impose a significantly higher, and pragmatically impossible to meet, reason-to-believe standard. *Id.* Citing a prior non-majority statement of commissioners, the statement's rule required Plaintiffs to disprove every potentially exonerating possibility in order to avoid dismissal, even where those facts could only be known to the parties allegedly violating the FECA. *Id.*

ARGUMENT

I. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

When considering a motion to dismiss, the Court is bound to construe a complaint liberally in the plaintiff's favor, and it should grant the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)). Nevertheless, the court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the court accept plaintiff's legal conclusions. *Id.* at 1276; *see also Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

II. The Commission's Controlling Interpretations of the FECA Are Subject to Judicial Review

The FECA requires courts to adjudicate whether the Commission's dismissal of a plaintiff's complaint was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The controlling commissioners' statement, if timely, provides the basis for review. *See Democratic Congressional Campaign Comm.*, 831 F.2d 1131. Where the Commission fails to muster four votes in favor of adopting the OGC's recommendation to find reason to believe, the contemporaneous statement of the controlling commissioners—those who voted against bringing an enforcement action—"will be treated as if they were expressing the Commission's rationale

for dismissal" for the purpose of judicial review. *Citizens for Resp. & Ethics in Washington v. FEC*, 892 F.3d 434, 437–38 (D.C. Cir. 2018) (citing *Common Cause*, 842 F.2d at 449).

The Commission's determination of dismissal is contrary to law if the Commission dismisses the complaint either as a result of "'an impermissible interpretation of the Act,' or if the dismissal [is] otherwise 'arbitrary or capricious, or abuse of discretion.'" *See Campaign Legal Ctr. v. FEC*, 89 F.4th 936, 938 (D.C. Cir. 2024) (quoting *Orloski*, 795 F.2d at 161) ("If the Commission declines an enforcement action based entirely on its interpretation of the statute, the decision is reviewable pursuant to the 'contrary to law' provision." (internal quotation marks omitted) (quoting *Citizens for Resp. & Ethics in Wash.*, 993 F.3d at 884-85)); *Citizens for Resp. & Ethics in Wash.*, 993 F.3d at 894 ("*Orloski* recognizes first the established principle that courts may review an agency's statutory interpretation.").

The standard is notably disjunctive: a dismissal is contrary to law if it involves legal error "or" is otherwise arbitrary and capricious. *Campaign Legal Ctr.*, 89 F.4th at 940; *accord Orloski*, 795 F.2d at 161. Consequently, a dismissal will be contrary to law if the controlling rationale incorporates a legally erroneous interpretation of law, regardless of whether there is additional error—for example, in the analysis of the evidence—that would establish the commissioners' analysis as arbitrary, capricious, or otherwise contrary to law. *See, e.g.*, *Campaign Legal Ctr.*, 106 F.4th at 1190 (holding dismissal contrary to law on two distinct grounds: that it "rested in part on an impermissible interpretation of FECA and, to the extent it did not, was arbitrary and capricious"); *Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 92 (D.D.C. 2015) (holding dismissal contrary to law because commissioners' interpretation of law).

This approach conforms with courts' decades-old understanding of their role in assessing whether a Commission action is contrary to law, which includes analyzing whether the

Commission's construction of the FECA, "whether reached by adjudication or by rule-making, [is] inconsistent with the statutory mandate or . . . frustrate[s] the policy that Congress sought to implement." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32; *see also FEC v. Akins*, 524 U.S. 11, 25–28 (1998) (observing that "[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case" and opining on the Commission's interpretation of the statutory term "political committee"). As a general rule, courts, not agencies, are the ultimate determiners of the meaning of statutory language. *See Loper Bright Enters.*, 144 S. Ct. at 2257. When a litigant properly challenges a final agency determination, a court must interpret the statute at issue to determine "whether an erroneous rule of law was applied." *Id.* (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandies, J., concurring)).

The FEC effectively concedes as much, admitting that complainants may establish a dismissal is contrary to law "based upon the Commissioners' analysis of the FECA provisions at issue and the facts as applied to that law." FEC Mot. at 10, ECF No. 5. Yet, the FEC attempts to carve out from this rule a novel exception without legal basis—one that would limit reversible legal error to only the error in the commissioners' analysis of the "substantive law at issue." *Id.* at 12. In other words, the Commission asserts any legal error in its interpretation of the FECA's "reason to believe" standard would not serve to establish the dismissal was contrary to law, ostensibly because it is a procedural standard. But the Commission's substance vs. procedural distinction has no basis in the precedent and, in fact, runs headlong into precedent explicitly rejecting any substance-procedure distinction in reviewing agency actions.

The D.C. Circuit in 2020 declared that a "substance-procedure distinction finds no support" in the reviewability of an agency's interpretation and went on to review an action under

the Administrative Procedure Act. *Grace v. Barr*, 965 F.3d 883, 892 (D.C. Cir. 2020) (considering application of Immigration and Nationality Act review limitations, which expressly exclude certain actions from review). That decision accorded with precedent in which the D.C. Circuit evaluated an agency's interpretation of its organic statute's procedural provisions to establish procedural rules for informal adjudications. *See, e.g.*, *Chem. Waste Mgmt. Inc.*, 873 F.2d at 1479, 1483 (upholding agency's interpretation based on then-existing *Chevron* deference). In other words, an "agency's written recitation of its understanding of the substantive and procedural standards" is reviewable. *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 34 (D.D.C. 2020). Legal error in a procedural pronouncement is alone sufficient to establish reversible error because "[a] plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the [proper] procedure the substantive result would have been altered." *Id.* at 25 (alteration in original) (quoting *Sugar Cane Growers Co-Op. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). Thus, regardless of whether the interpretation at issue is one of "substantive law" or an "abstract legal standard" of procedure, FEC Mot. at 12, 11, ECF No. 5, an "impermissible interpretation of the Act" renders the Commission's dismissal contrary to law, *Campaign Legal Ctr.*, 89 F.4th at 938 (quoting *Orloski*, 795 F.2d at 161).

The Commission does not, and cannot, marshall contrary authority. Instead, the FEC offers an entirely inapposite hypothetical about speaking permits and purported error in a municipality's application of standards of scrutiny in issuing the permit. *See* FEC Mot. at 11, ECF No. 5 (citing *Green v. U.S. Dep't of Just.*, 54 F.4th 738, 745 (D.C. Cir. 2022) (evaluating constitutionality of Digital Millennium Copyright Act)). A municipality is not called upon, however, to apply standards of scrutiny in deciding whether to issue a permit. Standards of scrutiny are, after all, "standard[s] of review," *FEC v. Beaumont*, 539 U.S. 146, 162 (2003), and

thus inapplicable for officials who are not reviewing the actions of another. But if a statute calls upon officials to apply a standard in the process of carrying out their duties, the propriety of the officials' interpretation of that standard is itself subject to challenge. *See, e.g., Grace*, 965 F.3d at 892 (reviewing agency's interpretation of the "credible fear" standard in awarding asylum relief). And that is what the FECA does here: it mandates the Commission interpret a "reason to believe" standard and apply that in an adjudication of the matter before it. The controlling commissioners recognized as much, devoting a significant portion of their analysis to expounding on the standard. *See* Statement of Reasons of Chairman Sean J. Cooksey and Commissioners Allen J. Dickerson and James E. "Trey" Trainor, III at 1-4, 7, MUR 8110 (Am. Coal. for Conservative Policies) (July 29, 2024), *available at* https://www.fec.gov/files/legal/murs/8110/8110_65.pdf. Accordingly, their interpretation is subject to review and, if found impermissible by a court, renders the dismissal contrary to law.

The Commission's novel procedural exception to judicial review is without any support in law. Rather, the general rule is that controlling legal interpretations underlying final agency actions are subject to review. Accordingly, when adjudicating challenges to a dismissal under section 30109(a)(8), a dismissal based on an impermissible interpretation of the statute by the controlling commissioners' statement of reasons—whether of substance or procedure—renders the dismissal contrary to law. *See Campaign Legal Ctr.*, 89 F.4th at 940; *Orloski*, 795 F.2d at 161.

CONCLUSION

Plaintiffs respectfully request the Court deny the FEC's motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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