IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 1:16-cv-00752-JDB
FEDERAL ELECTION COMMISSION	)	**ORAL ARGUMENT REQUESTED**
Defendant,	)	MOTION FOR SUMMARY JUDGMENT
ELI PUBLISHING, L.C.	)	
F8, LLC	)	
STEVEN J. LUND	)	
Intervenor-Defendants.	)	

INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendants Eli Publishing, L.C., F8, LLC, and Steven J. Lund cross-move this Court for an order (1) granting its motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the Plaintiffs' complaint with prejudice, and (2) denying the Plaintiffs' Motion for Summary Judgment, ECF No. 30.

In support of this motion, Intervenor-Defendants file (1) a Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, and (2) a Proposed Order.

Intervenor-Defendants request oral argument on this motion.

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INTERVENOR-DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Election Commission ("FEC" or "Commission") confronted a difficult and novel legal issue when weighing the administrative complaints in this matter. Following seismic changes in the law that, for the first time, permitted corporations to exercise their core First Amendment rights to political speech by making contributions to independent expenditure-only political committees, the Commission had to determine how the Federal Election Campaign Act's ("FECA") prohibition in 52 U.S.C. § 30122 against making contributions in the name of another (which had never been applied to a corporate "conduit") applied to closely-held and single-member limited-liability corporations. Given this new and uncharted area of the law, the FEC opted to advance incrementally, announcing a standard but declining to apply that standard retroactively against respondents. In short, the FEC exercised its prosecutorial discretion.

In contrast, the question before this Court is not difficult. The Court is called upon to determine only whether the FEC's decision to proceed in this fashion was reasonable. An agency's exercise of its prosecutorial discretion is entitled to substantial deference, especially when the agency in question is tasked by Congress with enforcing an act which has, as its sole purpose, the regulation of constitutionally protected political activity. Courts have consistently afforded the FEC great deference with regard to its decision to expend its resources investigating alleged violations, and this case is no different. So long as the Commission had a rational basis for invoking its prosecutorial discretion, its decision should be affirmed.

Plaintiffs urge this Court to conduct what amounts to a *de novo* review of the FEC's decision not to proceed, asking it to substitute Plaintiffs' policy preferences for that of the agency that Congress specifically designated to enforce FECA. The Court should reject Plaintiffs' invitation to, in essence, sit as four FEC Commissioners and direct the agency to execute Plaintiffs' view of its enforcement responsibilities under FECA. Accordingly, Mr. Lund, Eli

Publishing, and F8 respectfully request that this Court affirm the FEC's dismissal of the administrative complaints against them and enter summary judgment in favor of the FEC.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 11, 2011, Campaign Legal Center and Democracy 21 (Plaintiffs in the present action) filed complaints against F8, LLC, Steven J. Lund, and Eli Publishing, LLC. AR0001-0009; AR0201-0209. As a result of these complaints, the FEC opened MURs 6487 and 6488. AR0010; AR0210. Plaintiffs' allegations arose from an August 4, 2011 news report by a Salt Lake City, Utah television station that two Utah corporations donated $1 million each to Restore Our Future ("ROF"), an independent expenditure-only committee (also known as a "SuperPAC"). AR0002; AR0202. Plaintiffs alleged in their administrative complaints that there was reason to believe these contributions violated 2 U.S.C. § 441f (now 52 U.S.C. § 30122), the prohibition against making a contribution in the name of another, because "the persons(s) who created, operated and/or contributed" to the corporations were the true source of the contributions. AR0001, 0004; AR0201, 0204. Plaintiffs also alleged that there was reason to believe that F8 and Eli Publishing failed to register as political committees. AR0006-0007; AR0206-0207.

Upon notification of the administrative complaints against them, Mr. Lund, Eli Publishing, and F8 responded on October 6, 2011, noting (among other things) that both F8 and Eli Publishing had been formed years before the contributions in questions and that the administrative complaints alleged only that the corporations made contributions to a SuperPAC, "a lawful transaction on its face." AR0028-0030; AR0222-0224. Mr. Lund, Eli Publishing, and F8 asked that the administrative complaints be dismissed. *Id.*

The Office of the General Counsel of the FEC ("OGC") prepared its First Report on Plaintiffs' administrative complaints on June 6, 2012. AR0031-0057. OGC recommended in its

Report that the Commission find reason to believe that Mr. Lund, Eli Publishing, and F8 violated the prohibition against contributing in the name of another, but recommended against finding reason to believe that F8 and Eli Publishing failed to register as political committees. AR0033. OGC noted that Eli Publishing was an active, limited liability corporation that was formed in 1997 and had in fact published a book. AR0034. F8, also a limited liability corporation, was formed in 2008. *Id.* After reviewing what it deemed to be the applicable law, OGC stated, with minimal analysis, that FECA could be violated if the corporations were mere "intermediaries" for the "true source" of the contributions. AR0038.

Based on Mr. Lund's reported statements with respect to Eli Publishing's contribution, and the fact that Eli Publishing's sales could not have generated sufficient revenue to fund the $1 million contribution it made to ROF, OGC asserted there was reason to believe that respondents violated FECA's prohibition on making a contribution in the name of another. AR0041. OGC recommended finding there was reason to believe that F8 violated the same provision of FECA because of various ties between Mr. Lund, Eli Publishing, and F8. AR0041-0042.

The Commission did not view the matters involving Mr. Lund, Eli Publishing, and F8 in a vacuum. They were among the first that presented the question of the application of 52 U.S.C. § 30122 (and its predecessor) in the wake of the seminal decisions *Citizens United v. FEC*, 558 U.S. 310 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), but they were not alone. The matters involving Mr. Lund, Eli Publishing, and F8 were grouped with MUR 6930, SPM Holdings LLC (among others).[1] *See* AR0075. In that similar matter, the OGC recommended *against* finding reason to believe that the respondent violated 52 U.S.C. § 30122.

[1] As Plaintiffs assert, Pls.' Mot. for Summ. J. at 9 n.6, ECF No. 30 ("Pls.' Mot."), although the Court dismissed the counts of the complaint that pertained to MUR 6930, the Commission considered it together with those dismissals that are still being challenged, and thus the Court is free to consider the materials that were part of that MUR.

First General Counsel's Report, MUR 6930 (SPM Holdings, LLC) (Nov. 19, 2015) ("MUR 6930 OGC Report").

Over three years after its recommendation in MURs 6487 and 6488, where it concluded that the law was "clear," the OGC in MUR 6930 stated it "must engage in a close review of the particular facts presented in each case," owing to the fact that a limited liability corporation was "a distinct legal person entitled to contribute without restriction to independent-expenditure-only political committees." *Id.* at 10. The application of § 30122 was not, in OGC's view, straightforward, because "[b]y definition, a single-member LLC acts only by the will of that member," complicating the source analysis in light of an LLC's right to contribute to independent expenditure-only political committees. *Id.* Thus, in the absence of further guidance, the "mere involvement of such an entity in a contribution does not alone resolve the true-source inquiry under Section 30122." *Id.* The OGC recommended against finding reason to believe that the respondent violated § 30122, even though the owner of the LLC (who made considerable personal contributions) admitted that he exercised his control over it to make a contribution after "his personal accounts were depleted." *Id.* at 9.

Following OGC's recommendation in MUR 6930, the FEC voted on whether to proceed with an investigation into the allegations in all of the administrative complaints. The Commission divided equally on whether to find reason to believe that Mr. Lund, Eli Publishing, or F8 violated 52 U.S.C. §§ 30102, 30103, and 30104. AR0073. Accordingly, the Commission dismissed the complaints and closed the file on February 25, 2016. *Id.*

The three Commissioners who voted against finding reason to believe that a violation occurred ("Controlling Commissioners") issued their statement of reasons on April 1, 2016, AR0075-0089, after the statute of limitations for the FEC to file a civil action expired, *see* AR

0021. The Controlling Commissioners acknowledged that the collected MURs presented an issue of first impression regarding the "application of the true source analysis to determine whether a corporation may be considered a straw donor for an individual's contribution." AR0075-0076. The Controlling Commissioners further noted that because "past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm." AR0076. Thus, the Controlling Commissioners determined that the MURs should be dismissed as an exercise of the Commission's prosecutorial discretion. AR0077.

In explaining the exercise of that discretion, the Controlling Commissioners noted that, because corporations had been forbidden from making any contributions to political committees prior to *Citizens United*, the Commission had "never addressed the inverse of the conventional corporate straw-donor scheme—that is, whether, or under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor under section 30122." AR0081. The Controlling Commissioners found it significant that the OGC, as it gained experience with this issue, refined its analysis and concluded that a nuanced, case-by-case approach was required to determine the "true source" of a contribution. AR0082. The Controlling Commissioners determined that it "would be manifestly unfair" to pursue enforcement against the respondents "because Commission precedent does not provide adequate notice regarding the application of section 30122 to closely held corporations and corporate LLCs or the proper standards for its application." *Id.*

To explain that conclusion, the Controlling Commissioners first noted that the issue before them was one of first impression. AR0083. Indeed, at the time Congress enacted the

prohibition against making a contribution in the name of another, corporate contributions to political committees were forbidden. *Id.* Thus, the Commission's prior precedent addressing straw-donor schemes primarily dealt with individuals attempting to circumvent FECA's contribution limits or source prohibitions. *Id.* Neither restriction applied to an LLC's contribution to an independent expenditure-only committee: both the LLC and any "source" were free to contribute in unlimited amounts. *Id.*

Second, the Controlling Commissioners acknowledged the sea-change in campaign finance law wrought by *Citizens United*. They recognized that corporations exercising their rights following that decision could be confused by Commission precedent when determining who would be regarded as the "true source" of a contribution for purposes of § 30122. *Id.* The Controlling Commissioners highlighted precedent holding that, even with respect to closely-held corporations, "once funds are deposited in a corporate account, they become the corporation's funds and are no longer those of the corporation's owner." AR0085. Commission regulations, likewise, treated corporate LLCs, even single member LLCs, as distinct from their individual owners. *Id.* In light of this uniform precedent treating corporate funds as belonging to the corporation, regardless of form, the Controlling Commissioners concluded that "it would be reasonable for Respondents to conclude that contributions made by their closely-held corporations and corporate LLCs were lawful and not contributions in the name of another." *Id.*

As a result of these factors, the Controlling Commissioners determined that applying § 30122 against respondents would be fundamentally unfair. AR0086. The Controlling Commissioners allowed that there could be circumstances where a closely-held corporation could be considered a conduit or straw donor under § 30122. *Id.* However, in the view of the Controlling Commissioners, "profound First Amendment rights [were] at stake," because

"closely held corporations and corporate LLCs are constitutionally entitled to make contributions to SuperPACs." *Id.* Thus, consistent with the Commission's obligation to implement FECA to protect the right to political speech, the Commission could not presume that contributions from closely-held corporations violated § 30122; a more searching inquiry focusing "on whether funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements" was warranted. *Id.*

Because the respondents were not on notice of this standard, and "may have reasonably concluded" based on Commission precedent that they would not violate § 30122 by their contributions, due process concerns suggested that the Commission should exercise its prosecutorial discretion and dismiss the MURs. AR0087. The Controlling Commissioners specifically noted that "where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course." *Id.* at n.69. That is precisely the route that the Controlling Commissioners followed.[2] AR0088.

Plaintiffs filed an action in this Court challenging the dismissal of their administrative complaints, pursuant to 52 U.S.C. § 30109(a)(8). Compl., ¶¶ 1, 9 ECF No. 1. Plaintiffs asserted that the FEC's dismissal was arbitrary and capricious and contrary to law. *Id.* at ¶1. The Court granted Mr. Lund's, Eli Publishing's, and F8's motions to intervene in this action and docketed

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[2] The Commissioners who voted to find reason to believe a violation had occurred, ("Dissenting Commissioners"), issued their own statements. AR0090-0097. Neither of these statements contested the reasons underlying the Controlling Commissioners' decision to invoke the Commission's prosecutorial discretion. As the Controlling Commissioners noted, the Dissenting Commissioners merely disagreed with the Controlling Commissioners' proposed standard, and their disagreement with the Controlling Commissioners' "interpretation only reaffirms the prudence of insisting on clear notice." AR0100.

their answers to the complaint. Thereafter, the FEC filed a motion to dismiss Plaintiffs' complaint for lack of jurisdiction. Mot. to Dismiss, ECF No. 13. The Court granted that motion in part and denied it in part, so that Plaintiffs had standing only with respect to the dismissals of MURs 6487, 6488, and 6711. ECF No. 23. The FEC filed its answer to the complaint, ECF No. 25, and Plaintiffs moved for summary judgment. Pls.' Mot. for Summ. J., ECF No. 30.

ARGUMENT

I. Standard of Review

52 U.S.C. § 30109(a)(8)(A) provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with" this Court to seek redress. *Id.* FECA empowers this Court to remand the matter to the FEC only if it declares that the dismissal of the complaints was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). A petitioner challenging the FEC's dismissal of an administrative complaint bears a heavy burden, because deference to the FEC's enforcement decisions "is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

Indeed, the Supreme Court has expressly held that "the Commission is precisely the type of agency to which deference should presumptively be afforded. Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the Act,' providing the agency with 'extensive rulemaking and adjudicative powers.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*") (quoting *Buckley v. Valeo*, 424 U.S. 1, 109-110 (1976)). The FEC "is authorized to 'formulate general policy with respect to the administration of [FECA],' and has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *Id.* (quoting 2 U.S.C. § 437d(a)(9) (1980) and *Buckley*, 424 U.S. at 111 n.153). "[T]he Commission is inherently

bipartisan in that no more than three of its six voting members may be of the same political party, and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election." *Id.* (citation omitted). For these reasons, Congress provided that "the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'" *Id.* (citation omitted). In short, as the D.C. Circuit observed, "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendence directing where limited agency resources will be devoted. We are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

The deference owed to the FEC's enforcement decisions is built into the contrary to law standard. The FEC's "decision not to investigate [a] complaint" is contrary to law only 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). "In determining whether the Commission's action was contrary to law, a reviewing court is 'not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court.'" *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010) ("*Akins III*") (alteration in original) (quoting *DSCC*, 454 U.S. at 39). When the Commission splits 3-3 on the question of whether to investigate an alleged violation, the decision of the Commissioners who voted not to proceed becomes the controlling decision of the Commission for purposes of this Court's review. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

In this case, the Controlling Commissioners exercised their prosecutorial discretion not to proceed on the administrative complaints. "An agency decision not to pursue a potential

complaint involves a complicated balancing of factors which are appropriately within its expertise, including whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources to undertake the action at all." *La Botz v. FEC*, 61 F. Supp. 3d 21, 33-34 (D.D.C. 2014). As such, "an agency's decision not to pursue a particular claim is 'a decision generally committed to an agency's absolute discretion.'" *Id.* at 34 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). While § 30109(a)(8)(A) explicitly provides for federal court review of the FEC's decision to dismiss an administrative complaint, *see CREW v. FEC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016), the "FEC has 'broad discretionary power in determining whether to investigate a claim,' and its decisions to dismiss complaints are entitled to great deference as well, as long as it supplies reasonable grounds," *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) (quoting *Akins III*, 736 F. Supp. 2d at 21) *vac'd and remanded on other grounds*, 725 F. 3d 226 (D.C. Cir. 2013).

Another court in this district recently opined on the appropriate standard of review to be applied when the FEC invokes its prosecutorial discretion to dismiss a complaint. In *CREW v. FEC*, the FEC determined not to proceed on an administrative complaint, concluding the case "did not warrant further use of Commission resources." No. 15-2038 (RC), __ F. Supp. 3d __, 2017 WL 706155, at *7 (D.D.C. 2017) (internal citation omitted).[3] As such, the court held that it would not "meddle with that decision unless the plaintiff shows that the FEC acted contrary to law by abusing its discretion." *Id.* at *8. In attempting to demonstrate that the FEC abused its discretion, petitioner argued that legal avenues existed to pursue the alleged "obvious" violations, the FEC erred when it considered the legal issues before it to be "novel," and

[3] An appeal of the district court's order is currently pending in the D.C. Circuit. *See CREW v. FEC*, No. 17-5049. The parties, including Plaintiff Campaign Legal Center as amicus, have raised many of the same arguments presented by Plaintiffs here regarding the appropriate standard of review when the FEC exercises its prosecutorial discretion.

remedies remained available should the FEC determine to proceed. *Id.* at *9. The court held that its only role was to determine "whether the FEC's conclusion had a rational basis." *Id.* at *10. Thus, even where the petitioner argued that "the law was so clear on the matter that the FEC abused its discretion by concluding that the issues were novel," the court instead upheld the FEC's decision where it had a "rational basis for concluding that 'novel legal issues' existed" in the case, because petitioners did "not cite to any authority that definitively resolve[d]" the issue. *Id.* at *11-*12. Therefore, "[r]egardless of whether the controlling commissioners were ultimately wrong . . . the litigation risk existed at the time they decided to dismiss." *Id.* at *12. "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 here." *Id.*

The standard of review proposed by the Plaintiffs ignores the FEC's explicit invocation of its prosecutorial discretion and the well-established standards that govern the FEC's exercise of that discretion. Instead, Plaintiffs propose what is essentially *de novo* review, based on the theory that the FEC committed an error of law when the FEC exercised its discretion in not pursuing an investigation based reasonably on fundamental concerns of due process and First Amendment political speech rights. Pls.' Mot. 21-25. In essence, Plaintiffs assert that the FEC is entitled to *no deference at all* when it determines that the exercise of its prosecutorial discretion is warranted based on constitutional concerns.[4] *See id.* at 25. As another court in this district observed, where the FEC is not deciding *what* a constitutional test requires but *how* that

[4] Plaintiffs' argument appears to be based on some confusion regarding the standard of review. Plaintiffs assert that the FEC's interpretation of judicial decisions and the Constitution is entitled to no deference under *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984), and they then import that observation into the "contrary to law" standard, ignoring that the contrary to law standard is different from *Chevron* deference and, according to the precedent cited in this section, is intended to be deferential to the agency's enforcement decisions. *See* Pls.' Mot. 25.

test should be implemented, its decision is one of the "implementation choices . . . that Congress committed to the sound discretion of the agency." *CREW*, 209 F. Supp.3d at 87.

The Court should reject Plaintiffs' naked invitation to sit as "superintendent" over the FEC's charging decisions. *See Rose*, 806 F.2d at 1091. Not only does Plaintiffs' assertion ignore the standard of review articulated by *Orloski* and other D.C. Circuit and Supreme Court precedents, it ignores the significant role that Congress has assigned the FEC in making decisions that impact fundamental First Amendment rights. "Unique 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 to 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). In order to fulfill "its unique mandate," *id.*, the FEC is required to tailor its actions so as to "avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." *AFL-CIO*, 333 F.3d at 178. It would be anomalous for Congress to give the FEC its unique mandate to enforce and administer an act that, by its very nature, places limitations on constitutionally protected speech, and then intend that the FEC's decision *not* to take an action that would infringe upon the First Amendment should be reviewed at a higher standard than that enjoyed by other agencies.

Accordingly, this Court should affirm the FEC's dismissal of the administrative complaints in these matters so long as the FEC's exercise of its prosecutorial discretion was reasonable and supported by a rational basis.

II. The FEC's Exercise of its Prosecutorial Discretion was Not Contrary to Law

The Controlling Commissioners based their exercise of prosecutorial discretion on two factors. *First*, the Controlling Commissioners noted that the question of when a closely-held LLC could be considered the source of a contribution under 52 U.S.C. § 30122 was a matter of first impression in the wake of *Citizens United*, and thus there was no controlling law on the issue. *Second*, in light of precedent and Commission regulations emphasizing the separateness of corporations from their owners, the standard governing who was the "true source" of a contribution made by a closely-held corporation was unclear, and thus "principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm." AR0076. Applying the standards set forth in *Orloski*, the Controlling Commissioners' decision to dismiss the administrative complaints against Mr. Lund, Eli Publishing, and F8 was not based on an impermissible interpretation of FECA; indeed, it was not based on an interpretation of FECA at all. Thus, the FEC's exercise of its prosecutorial discretion should be overturned only if it was arbitrary, capricious, or an abuse of discretion. Following other cases to have considered the FEC's power to dismiss a complaint pursuant to its prosecutorial discretion, the Controlling Commissioners' decision should only be considered arbitrary, capricious, or an abuse of discretion if the grounds the Controlling Commissioners relied on had no rational basis.

A. It was reasonable for the Controlling Commissioners to conclude that *Citizens United* changed the legal landscape

In the words of the D.C. Circuit, *Citizens United* was "the most expansive, speech-protective campaign finance decision in American history." *Van Hollen*, 811 F.3d at 496. The Supreme Court in *Citizens United* gave full effect to the principle that "political speech does not lose First Amendment protection 'simply because its source is a corporation,'" and struck down

the Bipartisan Campaign Reform Act's ("BCRA") prohibition on independent expenditures made by corporations. 558 U.S. at 342, 365 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978)). In the wake of *Citizens United*, and explicitly in reliance on that decision, the D.C. Circuit held that FECA's contribution limits on individual contributions to independent expenditure-only political committees could not survive First Amendment scrutiny. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010). In a series of advisory opinions issued thereafter, the FEC recognized that the clear import of these decisions was that corporations, for the first time, must be permitted to create and contribute to, in unlimited amounts, independent expenditure-only political committees. *See* FEC Advisory Op., AO 2010-11, 2010 WL 3184269 (July 22, 2010); FEC Advisory Op., AO 2010-09, 2010 WL 3184267 (July 22, 2010). Eli Publishing's and F8's contributions came mere months later as the 2012 election cycle was ramping up. AR0035.

Prior to *Citizens United*, "the *modus operandi* of campaign finance law had always been that Congress could restrict corporate and union speech in the interest of deterring 'corruption' or 'the appearance of corruption.'" *Van Hollen*, 811 F.3d at 496 (quoting *Buckley*, 424 U.S. at 25). Indeed, "the source restriction on independent expenditures by corporations and unions in *Citizens United* had been part of federal law for more than sixty years." Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 26 (2012). The prohibition on corporate contributions to candidates was in place for over a century by the time *Citizens United* was decided. *See FEC v. Beaumont*, 539 U.S. 146, 152 (2003). Therefore, the Controlling Commissioners were correct when they observed that when Congress enacted § 30122 corporations could not make contributions at all, and thus Congress likely did not consider its application to the circumstances presented by the administrative complaints. AR0083. This

blanket prohibition also explains why the Commission had not previously confronted the issue that arose from the administrative complaints.

Accordingly, it was reasonable for the Controlling Commissioners to conclude that *Citizens United* had changed the legal landscape.

B. It was reasonable for the Controlling Commissioners to conclude the regulatory landscape was uncertain following *Citizens United*

The Controlling Commissioners held that Commission and court precedents, together with Commission regulations, could have led a reasonable individual to conclude that a closely-held LLC was the true contributor when the contribution came from its general treasury. AR0083-0085. If the Court concludes that this observation had a rational basis, then the Commission's dismissals should be affirmed. Moreover, where the Commission's determination turned on an interpretation of its own regulations and precedents, the court's review is "at its most deferential." *FEC v. NRA*, 254 F.3d 173, 183 (D.C. Cir. 2001); *see Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998).

At the time the contributions at issue were made, FEC regulations provided that an LLC that elected to be treated as a corporation for tax purposes would be considered a corporation for purposes of FEC regulations, meaning that its contributions would be prohibited. 11 C.F.R. § 110.1(g)(3). By contrast, if an LLC elected under federal tax law to be treated as a partnership, and had a single natural person as a member, its contributions "shall be attributed only to that single member." *Id.* at § 110.1(g)(4). Before enacting these regulations, the FEC considered and rejected a rule that would have treated all LLCs as partnerships. FEC Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37,397, 37,398 (July 12, 1999). Thus, at the time the contributions were made, the FEC had rejected a rule that would have attributed the contributions at issue to the LLCs' members or shareholders.

Likewise, in *FEC v. Kalogianis*, the court rejected the argument that FECA's prohibition on corporate contributions should not apply to a corporation with a single shareholder, even though "the contribution is necessarily the shareholder's money." No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *4 (M.D. Fla. Nov. 30, 2007).

The OGC's analysis reinforced this conclusion. In MUR 4313 Coalition for Good Government, OGC stated 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.) (Oct. 18, 1996) (emphasis added). The message these regulations and precedent communicated to individuals was clear: the corporate form mattered. Contributions from the corporation's treasury, even when contributed by an individual, were corporate contributions, not contributions by a member or a shareholder.

At the same time, the federal courts that have considered challenges to § 30122's predecessor announced a functional rule for determining the "true" source of a contribution. In *United States v. O'Donnell*, the Ninth Circuit held that "[t]o identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role to the substance of the transaction." 608 F.3d 546, 550 (9th Cir. 2010). The *O'Donnell* court indicated in *dicta* that "direction or control" may be the dispositive factor in determining the source or sources of a contribution.[5] *Id.* at 550 n.2.

The functional approach that emerged from these cases was clearly designed for what was then practically the only conduit contribution scenario that could arise under FECA: when

[5] The Seventh Circuit adopted the Ninth Circuit's approach in *United States v. Boender*, 649 F.3d 650, 660-61 (7th Cir. 2011).

one person provided funds to a person or entity capable of making a contribution, which would be recorded in their own name. No court, or the FEC, had been called upon to decide how § 30122 should apply when the conduit was a corporation that was incapable of legally contributing and was under the control of the "source" of the funds. They did not have to: until *Citizens United* permitted corporate contributions to independent expenditure-only committees, there was no need to consider the question.

As the court recognized in *Kalogianis*, in a closely-held corporation or a single-member LLC, the corporation's funds essentially belong to the shareholder and they can do with those funds as they please. The OGC recognized the tension that *Citizens United* introduced into the operation of § 30122 when, in analyzing MUR 6930, it noted that the respondent "exercised sole authority over the disposition of [the LLC's] resources, including its decision to make the contributions at issue here. By definition, a single-member LLC acts only at the will of that member." MUR 6930 OGC Report at 10. The OGC recognized that, following *Citizens United*, an LLC was "a distinct legal person entitled to contribute without restriction to independent-expenditure-only political committees," meaning that "the mere involvement of such an entity in a contribution does not alone resolve the true-source inquiry under Section 30122." *Id.* A more searching inquiry was required; no bright-line rule could be fashioned. *Id.* The Controlling Commissioners specifically noted OGC's nuanced approach in MUR 6930 when they concluded that the above developments in the law created uncertainty in whether § 30122 applied. AR0081-0082.

The uncertainty created by these regulations and precedents led the Controlling Commissioners to exercise their prosecutorial discretion, consistent with the FEC's unique mandate to enforce FECA mindful of the fundamental right to political speech enshrined in the

First Amendment. The Controlling Commissioners did not, however, avoid the issue entirely. They announced that they would consider contributions from LLCs presumptively lawful, owing to the LLCs' constitutional entitlement to make contributions, unless evidence demonstrated "funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." AR0086. In other words, they concluded the functional approach was not sufficient, and a purposive analysis was necessary. Rather than confront the First Amendment and due process issues that would arise from applying this new standard against respondents, who were operating in the uncertain post-*Citizens United* legal landscape, the Controlling Commissioners determined that the more prudent course was to exercise their prosecutorial discretion and avoid the constitutional issues presented by the administrative complaints. AR0087 n.69. Given the uncertainty the Commission faced, this was a rational course of action.

The Court need not agree that, had the administrative complaints been before it, that it would have followed the same course. So long as the Controlling Commissioner's reasoning had a rational basis, the FEC's dismissal must be affirmed.

C. The Commission's decision to avoid the legal issues that would arise from an enforcement action was reasonable

The Controlling Commissioners' exercise of prosecutorial discretion rested on avoiding a course of action that raised "serious legal and constitutional doubt."[6] AR0087 n.69. The

[6] *See Shays v. FEC*, 508 F. Supp. 2d 10, 47 (D.D.C. 2007) ("'It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself,' and that 'courts may not accept . . . counsel's *post hoc* rationalizations for agency action.'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983)), *aff'd in part, rev'd in part by Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). However, the court need not remand a matter to the FEC where the remand would be futile. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) ("remand to an agency is an unnecessary formality where the outcome is clear"). In addition to the legal infirmities in the Plaintiffs' theory, Intervenor-Defendants note that on remand the Commission is free to dismiss the administrative complaints

Controlling Commissioners were correct to do so, because by its plain language 52 U.S.C. § 30122 does not apply in these circumstances. Section 30122 does not prohibit "indirect" or "conduit" contributions; it prohibits only making or accepting a contribution "made by one person in the name of another person."[7] That is, the use of a false name when making a contribution. FECA explicitly regulates conduit contributions in the context of contributions to or on behalf of candidates or their committees, 52 U.S.C. § 30116(a)(8), but, as the OGC observed in MUR 6930, FECA does not regulate such contributions with respect to independent expenditure-only political committees. *See* MUR 6930 OGC Report at 8 n.28. As such, Congress has not enacted any rules that would govern the conduct here.

While the Controlling Commissioners' response was rational in light of Congress's silence, significant legal issues would arise if the Commission proceeded against Intervenor-Defendants on the basis of its new standard. Congress has been silent on the issue of corporate "conduit" contributions to independent expenditure-only political committees. In the absence of a delegation of authority from Congress, the Commission lacks the authority to prohibit conduct that Congress left unregulated. "Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994). As such, an agency does not possess "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority

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again so long as that dismissal is consistent with this Court's remand order. *See FEC v. Akins*, 524 U.S. 11, 25 (1998). Moreover, the statute of limitations for a civil action expired on March 31, 2016, five years after the contributions at issue were made and before the Plaintiffs even initiated this action. *See* 28 U.S.C. § 2462; *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 18-19 (D.D.C. 1995); *FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10, 14 (D.D.C. 1996) (applying five-year statute of limitations to declaratory and injunctive relief). The statute of limitations would also presumably operate to cut off Plaintiffs' ability to proceed in place of the FEC under 52 U.S.C. § 30109(a)(8)(C).

[7] The Ninth Circuit, followed by the Seventh Circuit, disagreed with this interpretation. *See O'Donnell*, 608 F.3d at 553-54; *Boender*, 649 F.3d at 660. The D.C. Circuit has yet to opine.

to act in that area." *Id.* The fact that the FEC is empowered to enforce § 30122, which is silent as to a corporation's contributions to an independent expenditure-only committee, does not grant it the authority to extend the reach of that statute to conduct that Congress has not prohibited.

Accordingly, given the legal issues that would confront the Commission's decision to proceed, and the Controlling Commissioner's rational intention to avoid such complications, the dismissals of the administrative complaints should be affirmed.

III. Plaintiffs' Arguments that the FEC Acted Contrary to Law are Nothing More than Invitations for this Court to Assume the Role of FEC Commissioner

Plaintiffs, arguing under what is, in effect, a *de novo* standard of review, recite for the Court all of the reasons why the Plaintiffs, had they been FEC Commissioners, would have found reason to believe that respondents violated FECA. But whether Plaintiffs would have found reason to believe is not the question before the Court. Congress entrusted the FEC, not Plaintiffs, with the enforcement of FECA. Moreover, Plaintiffs' view of the post-*Citizens United* landscape fails to accord with the impact of that decision, their emphasis on disclosure above all else ignores the FEC's obligation to accommodate fundamental rights when making enforcement decisions, and its extra-record pleas for this Court to "fix" the Commission demonstrates the weakness of Plaintiffs' arguments and should be wholly rejected by this Court. Plaintiffs' arguments fail to demonstrate that the Controlling Commissioners abused their discretion in dismissing the administrative complaints. Thus, the Commission's dismissal of the administrative complaints should be affirmed.

A. Plaintiffs' arguments regarding the impact of *Citizens United* miss the mark

Plaintiffs first contend that the change in the law that permitted, for the first time, corporations to make contributions to political committees, is irrelevant because *Citizens United* and its progeny did not squarely address the application of § 30122, which applied to

corporations on its face. Pl.'s Mot. 28-30. Plaintiffs' argument misses the point. The Controlling Commissioners explicitly recognized that § 30122's prohibition applies to a "person," and that FECA's definition of "person" encompasses corporations. AR0086. However, this observation does not resolve the question. It is not sufficient to show that § 30122 may potentially apply to corporate conduits (though Plaintiffs do not cite to any case prior to *Citizens United* where the Commission charged a corporation as acting as a conduit under § 30122). The critical question is how to determine the *source* of a corporate contribution, which was an issue of first impression presented by the administrative complaints.

Plaintiffs make the same error when they argue that the Commission's prior precedents and regulations, which steadfastly regarded contributions from a corporation's general treasury as coming from the corporation and not its members or shareholders, should have been disregarded as irrelevant by the Controlling Commissioners. Pls.' Mot. 33-36. As noted above, the Commission's historical treatment of corporate contributions created an unmistakable tension with the functional approach to determining the source of a corporate contribution under § 30122. The FEC was called upon to determine what standard should apply, an issue that was uncertain enough that the OGC's approach to it evolved over time and that led to a split Commission. Thus, the Controlling Commissioners' decision not to retroactively apply a new sourcing standard to respondents was a rational response to the change in the law. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

Plaintiffs' attempts to demonstrate that the Controlling Commissioners were incorrect in their view that Congress did not contemplate that corporations could violate 52 U.S.C. § 30122 are no more persuasive. Plaintiffs assert that prior to the enactment of the BCRA corporations were permitted to make so-called "soft money" contributions to political parties, which in

Plaintiffs' view showed that Congress contemplated applying § 30122 to corporations. Pls.' Mot. 29-30. Plaintiffs have chosen a poor example, one which illustrates the uncertainty that confronted those exercising their right to make political contributions following *Citizens United*. As courts have observed, "the statutory prohibition on making contributions in the name of another under 2 U.S.C. § 441f [the predecessor of § 30122] applies only to hard money contributions," *United States v. Trie*, 23 F. Supp. 2d 55, 59 (D.D.C. 1998); *Mariani v. United States*, 212 F.3d 761, 767-68 (3d Cir. 2000), that is, "contributions subject to federal source, amount, and disclosure requirements," *Shays v. FEC*, 414 F.3d 76, 80 (D.C. Cir. 2005). Congress did not choose to apply the prohibition against contributing in the name of another to soft money contributions; it chose through the BCRA to ban soft money altogether. *See McConnell v. FEC*, 540 U.S. 93, 133-34 (2003). After *Citizens United*, corporate contributions to independent expenditure-only political committees were no longer subject to federal source or amount restrictions, and what disclosure requirements applied and when is precisely the question that confronted the Controlling Commissioners.[8]

Ultimately, Plaintiffs take a myopic view of the changes wrought by *Citizens United* and dismiss the Controlling Commissioner's conclusion that a reasonable individual could have believed that the conduct at issue here did not violate § 30122 as a "fiction." Pls.' Mot. 32. The Controlling Commissioners are not bound to follow the enforcement strategy urged by Plaintiffs or to take the same view of the law. So long as the Controlling Commissioners had a rational basis for their view, their decision should be affirmed.

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[8] Plaintiffs' arguments with respect to FECA's ban on foreign money expended by corporations are no more availing and in fact demonstrate the uncertainty surrounding how § 30122 would apply to corporations. *See* Pls.' Mot. 35 n.18. Plaintiffs cite to an FEC advisory opinion that explicitly contemplated how to determine whether a corporate expenditure is made with foreign funds. No such advice was available here, and again Plaintiffs provide an example of a rule that is designed to enforce source restrictions, not disclosure interests.

B. Plaintiffs' emphasis on the disclosure rationale underlying § 30122 fails to give proper weight to the constitutional rights at issue and the FEC's role in accommodating those rights

A repeated theme throughout Plaintiffs' memorandum is that the Controlling Commissioners have in some way disregarded an obligation to enforce FECA in favor of disclosure. To read Plaintiffs' motion, one would come away with the notion that there is some public "right" to disclosure of pseudo-constitutional dimension that exists alongside the constitutional right to engage in political speech, and that the Controlling Commissioners acted in derogation of that co-equal interest. Plaintiffs mistake precedent and law finding that Congress has the *power* to require disclosure with the question of whether it was reasonable to believe FECA required disclosure in a specific instance. However, just because Congress has the power to require disclosure in certain instances does not mean that it required disclosure in this instance.

As noted, the FEC has a unique mandate among all federal agencies in that it is solely concerned with the regulation of fundamental rights. While Plaintiffs dismiss concerns that disclosure requirements burden free speech, *see* Pls.' Mot. 26-27, and thus argue the Controlling Commissioners acted contrary to law when considering the impact of their enforcement decision on respondents' free speech rights, the D.C. Circuit has taken a different view. In its view, speech and disclosure "exist in unmistakable tension. Disclosure chills speech. . . . [T]he Supreme Court's track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course." *Van Hollen*, 811 F.3d at 488. Indeed, "[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO*, 333 F.3d at 175.

The Court should not accept Plaintiffs' implicit invitation to view disclosure as a concern co-equal to free speech rights, or even to accept disclosure as the primary rationale behind § 30122. As the Supreme Court held in *Buckley*, one of the significant rationales for disclosure requirements was that they "are an essential means of gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 67-68. When an LLC contributes to an independent expenditure-only political committee, there is no violation to detect: the owner of the LLC and the LLC itself may each make unlimited contributions in their own name. Because there is no violation, any interest in disclosure is at its lowest ebb. The Supreme Court has recognized that "[d]isclosure requirements burden speech," and that the only legitimate justification for burdening political speech is the prevention of "'*quid pro quo*' corruption or its appearance." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441, 1459 (2014). In *Citizens United*, the Supreme Court held "that independent expenditures do not corrupt or create the appearance of corruption," meaning that contributions to independent expenditure-only committees also "cannot corrupt or create the appearance of corruption." *SpeechNow.org*, 599 F.3d at 694. Thus, whatever interest in disclosure remains (as acknowledged in *SpeechNow.org*) is minimal at best when the contribution indisputably comes from a permissible source.[9]

It is telling that Plaintiffs fail to identify *any* case arising under § 30122 or its predecessor that did not involve the use of a conduit to circumvent FECA's source or limitation requirements. Nor do they identify any § 30122 case where a corporation was used as a conduit. The two MURs that Plaintiffs identify to support the proposition that it would not be reasonable for

[9] The Supreme Court in *McCutcheon* contrasted disclosure requirements against aggregate contribution limits by noting that the latter imposes a "ceiling" while the former does not. *McCutcheon*, 134 S. Ct. at 1459. However, a disclosure requirement may deter a speaker from speaking at all, as opposed to a contribution limit that only sets the maximum "volume" for speech. Thus, a disclosure requirement may act as a much lower ceiling than any contribution limit Congress has set.

anyone to conclude that an LLC could contribute in its own name actually support the Controlling Commissioner's assertion that prior matters focused on conduits that were used to circumvent FECA's contribution limits. In both MURs cited by Plaintiffs, complainants alleged that individuals used other political committees as part of a scheme to make contributions in excess of the statutory limit. *See* Notification of Factual & Legal Analysis MUR 5968 at 4 (John Shadegg's Friends *et al.*) (Nov. 10, 2008);[10] Notification of Factual & Legal Analysis MUR 4568, 4633 & 4634 at 8-9 (John and Ruth Stauffer) (June 8, 1998). The contributions here would have been lawful if made by the LLC or any other individual.

Moreover, Plaintiffs' assertion that the disclosure regime enacted by Congress through the BCRA and upheld by the Supreme Court in *McConnell* supports the application of § 30122 here is unfounded. When Congress enacted BCRA, it did not choose to address concerns over "misleading" corporate names by extending § 30122 to those areas where corporations were participating in the political process. The Court in *McConnell* noted that Congress's concern with so-called "misleading" names came in connection with issue ads. *McConnell*, 540 U.S. at 127-29. Congress's response was to ban corporate funding of such ads, not to rewrite § 30122 to apply to issue ads or to enact a parallel provision for funding of electioneering communications. *See id.* at 203-04. When *Citizens United* overturned that ban, corporations fell under the BCRA's general disclosure provisions, *Citizens United*, 588 U.S. at 365-66, which are not analogous to § 30122. Thus, as the Supreme Court observed in *Citizens United*, "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." *Id.* at 370.

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[10] Notably, the Commission did not find reason to believe that a violation occurred, further indicating that the Controlling Commissioners acted reasonably in announcing a purposive test.

As noted, the primary flaw in the Plaintiffs' focus on the government's interest in disclosure is that just because the government has this interest does not inform whether disclosure was compelled in a particular circumstance. As demonstrated by the BCRA, Congress has chosen to address issues it perceives in campaign finance law by banning speech outright or requiring disclosure, and the disclosure required varies based on the type of speech and the speaker. Indeed, the concerns that Congress identified in enacting the ban on electioneering communications, that groups would disguise their involvement by creating new and misleading corporations, are not at issue here. Both Eli Publishing and F8 had existed for years prior to the 2012 election. They had as much of a right to speak in their own names as did any other individual. The Controlling Commissioners' decision to exercise their discretion and dismiss the administrative complaints based on the unclear application of § 30122 to LLCs following *Citizens United* cannot be rendered unreasonable by a general appeal to the non-constitutional value of disclosure.

C. Whether the Controlling Commissioners adopted an appropriate standard is not before this Court

Plaintiffs step beyond the scope of this Court's review and ask it to opine on the standard announced by the Controlling Commissioners. Pls.' Mot. 37-39. The question before the Court is whether the FEC's dismissal of the administrative complaints was contrary to law, not whether any standard the FEC formulated to evaluate § 30122 was contrary to law. Plaintiffs did not challenge this standard in their complaint and the Controlling Commissioners did not base their exercise of prosecutorial discretion on the exact standard they would apply going forward. Thus, even if the Court were to conclude that the standard the Controlling Commissioners announced was impermissible under FECA, such a finding would not invalidate the Controlling Commissioners' exercise of prosecutorial discretion.

That said, Plaintiffs' argument demonstrates that the Controlling Commissioners were correct to act cautiously with regard to these administrative complaints. Plaintiffs deny that they are seeking a rule that would amount to a *de facto* prohibition on LLC contributions. Pls.' Mot. 39. Instead, Plaintiffs would have the FEC adopt the Dissenting Commissioners' standard, which would require proof that (1) the individual is the source of the funds and (2) that the LLC conveys the funds at the direction of that individual. *Id.* However, Plaintiffs' complaint challenged the Controlling Commissioners' decision to exercise their prosecutorial discretion with respect to MUR 6930. Pls.' Compl. at 20, ECF No. 1. In that matter, it was undisputed that the individual did not provide funds to his LLC; the LLC contributed funds that were already in its treasury. MUR 6930 OGC Report at 8. More importantly, the Dissenting Commissioners also voted to find reason to believe that a violation occurred in MUR 6930, contrary to the OGC's recommendation, because they concluded that the LLC "was merely a holding place for [the individual's] personal funds and could only act at his direction." AR0090 n.2. The Dissenting Commissioners adopted their position even though one of the prongs of their test, that the individual was the source of the funds, was plainly not met. Thus, their vote was contrary to the standard they claimed they would have adopted, and Plaintiffs' assertion that the FEC acted contrary to law in dismissing the complaint in MUR 6930 cannot be reconciled with the standard they now assert the FEC should have adopted.

In light of the Dissenting Commissioners' incoherent position, the Controlling Commissioners reasonably concluded that the Dissenting Commissioners' true aim was to craft a rule that would, in practice, impermissibly chill LLCs from exercising the rights recognized in *Citizens United*. AR0076, AR0100-0101. After all, *every* LLC may only act at the direction of its members, and *every* LLC could be characterized as holding funds for those members. The

Controlling Commissioners were obligated to consider the First Amendment impact of any standard they chose to implement § 30122, and they chose a standard that looked to the purpose behind the LLC's contribution. AR0086. The D.C. Circuit has sanctioned purposive interpretations of FECA as a means for the FEC to fulfill "its unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Van Hollen*, 811 F.3d at 501. By tailoring its interpretation in light of First Amendment principles, the Controlling Commissioners engaged in "an able attempt to balance the competing values that lie at the heart of campaign finance law." *Id.* Moreover, because the Controlling Commissioners were engaged in interpreting § 30122 when deciding how to determine the true source of a contribution, that determination is entitled to *Chevron* deference. *See Orloski*, 795 F.2d at 161-62.

Again, the Court need not touch on whether the Controlling Commissioners' standard is contrary to law. To the extent the Court determines it is necessary to consider the standard the Controlling Commissioners announced, that decision is entitled to deference and reflects the reasonableness of the Controlling Commissioners' view that the post-*Citizens United* landscape generated uncertainty in the application of § 30122.

D. Plaintiffs' reliance on extra-record evidence indicates that their complaint is based on a disagreement with the FEC's enforcement decisions, not a contention that the FEC acted contrary to law

Ultimately, Plaintiffs' complaint is not based on the contention that the dismissal of their administrative complaints was contrary to law, but on a fundamental disagreement with the Controlling Commissioners' enforcement priorities. Plaintiffs air their grievances with the Controlling Commissioners, asserting the existence of what amounts to a "conspiracy" to thwart the enforcement of campaign finance law. Pls.' Mot. 40-42. Contrary to Plaintiffs' assertions, there is nothing in the Controlling Commissioners' reasoned decision to indicate that the agency did not consider the question before it. Plaintiffs' citations to other reports and news articles,

which had nothing to do with the Controlling Commissioners' decision, are inapposite. This Court's "review is limited to the administrative record, which 'includes all materials compiled by the agency that were before the agency at the time the decision was made.'" *Piersall v. Winter*, 507 F. Supp. 2d 23, 34 (D.D.C. 2007) (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)). Moreover, the Court may not "examine the internal deliberations of the Commission." *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996). Once again, Plaintiffs invite the Court to step outside of its role and enact Plaintiffs' enforcement preferences.

Congress created "the bipartisan Commission as [the FECA's] primary enforcer." *Common Cause*, 842 F.2d at 448. The fact of the Commission's bipartisanship is one safeguard on the Commission's exercise of its "potentially enormous power," by ensuring that "every important action it takes is bipartisan." *Combat Veterans for Congress PAC v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). As Congress explained on the enactment of the revised FECA, "[t]he four-vote requirement serves to ensure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976). What Plaintiffs view as dysfunction, that is, the failure of the FEC to pursue an enforcement plan of which Plaintiffs approve, is part and parcel of the Congressional design for an agency that, unique among federal agencies, wields enormous power to infringe upon fundamental First Amendment rights to engage in political speech.

IV. The Commission's Dismissal of the Administrative Complaints' Allegation that Eli Publishing and F8 Failed to Register as Political Committees was not Contrary to Law

The OGC recommended that the Commission should not find reason to believe that Eli Publishing or F8 violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register as political committees. AR0043-0045. The Controlling Commissioners accepted that recommendation, and the Dissenting Commissioners did not contest it. AR0080 n.36. As

relevant to this case, FECA defines a political committee as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). While Plaintiffs mention the political committee registration and disclosure requirements, they make no real effort to advance the argument that the Controlling Commissioners acted contrary to law by dismissing their administrative complaints with respect to this allegation. Thus, the Court should deem this contention waived. *See Interstate Fire and Cas. Co. v. Wash. Hosp. Ctr. Corp.*, 917 F. Supp. 2d 87, 92 (D.D.C. 2013).

Even if Plaintiffs have not waived this argument, it is unavailing. While corporations are capable of being political committees, in the context of an LLC's lawful contribution to an independent expenditure-only committee, the LLC stands in the same position as a natural-person contributor who may make unlimited contributions. It would contravene Supreme Court precedent to subject one type of speaker to additional disclosure requirements solely because that speaker is a corporation. *See Davis v. FEC*, 554 U.S. 724, 744 (2008) (rejecting "asymmetrical" disclosure requirements designed to implement regulatory scheme that treated speakers differently). As the OGC reasoned, if Plaintiffs are correct that Eli Publishing and F8 were intermediaries, they cannot be considered to have made the expenditures in question or received contributions and thus would not be required to register as political committees.

CONCLUSION

For the foregoing reasons, Mr. Lund, Eli Publishing, and F8, respectfully request that the Court enter the proposed order and affirm the FEC's dismissal of the administrative complaints against them.

_/s/ *George J. Terwilliger III*________

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August 21, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2011, I served a true and correct copy of Eli Publishing, L.C.'s, Steven J. Lund's, and F8 LLC's Motion for Summary Judgment, Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment, and Proposed Order, by means of electronic filing on:

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