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	)	
	)	
Defendant,	)	
	)	
ELI PUBLISHING, L.C.	)	
	)	
F8, LLC	)	
	)	
STEVEN J. LUND	)	
	)	
Intervenor-Defendants	)	
_____	)	

INTERVENOR-DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' opposition begins with an erroneous statement. In the first lines of its response, Plaintiffs assure the Court that "no party . . . disagrees that violations of law likely occurred." Pls.' Reply Mem. in Supp. of Their Mot. for Summ. J. and Mem. in Opp. To Def.'s Cross-Mots. for Summ. J. at 1 ("Pls.' Opp."). To the contrary, Intervenor-Defendants have maintained at every stage of proceedings that there is an insufficient basis to conclude that the Federal Election Campaign Act ("FECA") was violated in this case. Intervenor-Defendants stated so in their responses to the administrative complaints, *see* AR0028-0030; AR0222-0224, and specifically denied that the alleged conduct violated FECA in their answers to the instant complaint, *see* Answer of Intervenor-Defendant F8, LLC, ¶2, Docket No. 11-2; Answer of Intervenor-Defendants Eli Publishing L.C. and Steven J. Lund, ¶2, Docket No. 12-2.

Plaintiffs' opposition is littered with similar assertions, as Plaintiffs attempt to portray the decision before the Court as whether or not to allow what they think may be a violation to go unpunished. But that is not the question before the Court. The only question that is presented is whether a controlling group of Commissioners ("Controlling Commissioners") of the Federal Election Commission ("FEC" or "Commission") articulated a reasonable or rational basis for their decision to invoke the Commission's prosecutorial discretion, such that the FEC's dismissal of Plaintiffs' administrative complaints was not contrary to law. That question is an easy one, in light of the Controlling Commissioners' extensive and well-reasoned explanation for their decision, which is entitled to significant deference. The uncertain legal landscape following *Citizens United v. FEC*, 558 U.S. 310 (2010), which even Plaintiffs admitted "worked a sea change" in federal campaign finance law, warrants the cautious approach taken by the Controlling Commissioners in this critical area of key First Amendment rights. Plaintiffs fail to demonstrate that the Controlling Commissioners' implementation decision, based on a careful

and cogent analysis of Commission guidance and relevant court precedent, was contrary to law, that is, its dismissals were unreasonable, an abuse of discretion, arbitrary, or capricious.

ARGUMENT

I. Whether the Standard Announced by the Controlling Commissioners is Contrary to Law is Not Before this Court and any Challenge is not Ripe

As Plaintiffs note multiple times in their Opposition, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Shays v. FEC*, 508 F. Supp. 2d 10, 47 (D.D.C. 2007) *aff'd in part, rev'd in part by Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983)). The Controlling Commissioners' dismissal was not based on the prospective standard that they announced. The Controlling Commissioners explicitly did not apply that standard to the administrative complaints at issue. AR0087. Should the Controlling Commissioners apply that standard to a different case in the future, and on that basis dismiss an administrative complaint, Plaintiffs will then have an opportunity to challenge whether that standard is contrary to law.

Because there is no actual controversy over the propriety of the standard, the matter is not ripe for adjudication. The purpose of the ripeness doctrine is to prevent courts from being entangled "in abstract disagreements, and, where, as here, other branches of government are involved, to protect the other branches from judicial interference until their decisions are formalized and their 'effects felt in a concrete way by the challenging parties.'" *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). "Determining whether administrative action is ripe for judicial review requires [a court] to evaluate (1) the fitness of the issues for judicial decision and

(2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Assoc. v. Dep't of the Interior*, 538 U.S. 803, 808 (2003).

Plaintiffs assert only one hardship: that the "purpose-based" standard "will likely lead to non-disclosure of further information." Pls.' Opp. at 35. Any hardship Plaintiffs stand to suffer is therefore entirely speculative, and hardly the "imminent and certain" harm that Plaintiffs admit the ripeness doctrine requires. *See Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n. on Election Integrity*, No. 17-1354 (CKK), 2017 WL 3028832, at *6 (D.D.C. July 18, 2017). In addition, because it is not at all clear how the Controlling Commissioners' standard would be applied in practice, this is the quintessential case where "factual development would 'significantly advance [a court's] ability to deal with the legal issues presented.'" *Nat'l Park Hosp. Assoc.*, 538 U.S. at 812 (quoting *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 82 (1978)). Every case, even the MURs grouped together here, is different, and given that the administration of FECA requires the careful balancing of First Amendment rights, it would be premature for the Court to address the merits of the Controlling Commissioners' announced standard. That standard has not been applied to any party and the Court need not opine on whether it is contrary to law to resolve this case.

II. The Contrary to Law Standard Affords Substantial Deference to the FEC's Decision to Invoke Its Prosecutorial Discretion

The standard of review for the FEC's decision to dismiss an administrative complaint through an exercise of its prosecutorial discretion is well-settled. FECA provides that a court may overturn such a dismissal only if it was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). There is no other avenue available to a private litigant to challenge the FEC's dismissal of an administrative complaint. *CREW v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) (holding that § 30109(a)(8) "is the exclusive means to enforce" FECA). Under the contrary to law standard,

"[t]he 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 v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010)).

Plaintiffs argue that the Court should substitute this highly deferential standard for *de novo* review, Pls.'s Opp. at 6, and then go even further and substitute Plaintiffs' preferred policy agenda for the FEC's enforcement priorities. However, as the D.C. Circuit has cautioned, "[i]t is not for the judiciary to . . . sit as a board of superintendance directing where limited agency resources will be devoted." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986). Deference to the FEC's determination as to how best to administer and enforce FECA is particularly warranted, given that "Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the Act.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 109-110 (1976)) (citation omitted). The FEC's enforcement decisions are necessarily "charged with the dynamics of party politics, often under the pressure of an impending election." *Id.* Thus, deference should be afforded to the FEC's enforcement decisions to ensure that the FEC, and not private actors with their own agenda, remains the primary enforcer of FECA, as Congress intended. *See Akins v. FEC*, 736 F. Supp. 2d 9, 22 (D.D.C. 2010) ("it is not this Court's place to direct the Commission how to expend its resources, and it is certainly not the plaintiffs'.").

Plaintiffs attempt to avoid this clear and consistent line of precedent by arguing that *de novo* review is compelled because (1) the Controlling Commissioners relied on an improper ground for their prosecutorial discretion; (2) the Controlling Commissioners' decision was based, in part, on consideration of judicial precedents and Constitutional principles; and (3) the

deference afforded by the contrary to law standard is incompatible with the private right of action afforded to private litigants by FECA. Pls.' Opp. at 4-8. None of these arguments provide a compelling ground to depart from clear D.C. Circuit precedent.

A. The Commission properly invoked its prosecutorial discretion

Plaintiffs assert that the FEC's exercise of its prosecutorial discretion is only entitled to deference when it is based on "agency resources or predictions of litigation success." *Id.* at 5. In support of this assertion, Plaintiffs cite to *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014), where another court in this district observed that "[a]n agency decision not to pursue a potential violation 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." *Id.* at 33-34 (emphasis added). Plaintiffs imply by their citation, which omits a critical portion of the holding, that there are limited bases upon which the FEC may invoke its discretion. However, nothing in *La Botz* suggests that a court should refuse to afford deference to the FEC's prosecutorial discretion if it was invoked on grounds other than those listed. *La Botz* framed its list of examples as non-exclusive ("including"), and treating *La Botz* as announcing a restriction on when the FEC may invoke its prosecutorial discretion would conflict not only with the clear line of precedent affording the FEC wide latitude to determine the cases it pursues but the *La Botz* decision itself. The court in *La Botz* observed that "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)). It would be incongruous for the *La Botz* court to restrict the FEC's discretion while at the same time declaring it to be "generally absolute."

Even if *La Botz* could be read to require that the FEC may only invoke its prosecutorial discretion if it deems an enforcement action is not worth agency resources or unlikely to succeed, the record demonstrates that these concerns stood behind the Controlling Commissioners' decision. The Controlling Commissioners stated they were invoking their prosecutorial discretion "given the numerous legal and constitutional concerns" that would be raised by an enforcement action. AR0087 n.69. In laying out their concerns regarding the due process and First Amendment impact of an enforcement action, the Controlling Commissioners expressed their uncertainty regarding the Commission's chances of success. The Controlling Commissioners cited to *Heckler v. Chaney*, the same case relied on by the court in *La Botz*, and quoted an extensive excerpt from that case discussing the agency's balancing of both the allocation of agency resources and likelihood of success. *Id.* The Controlling Commissioners were entitled to conclude that a series of matters that presented significant constitutional concerns did not warrant the further use of limited agency resources, and it is apparent from the plain language in their statement of reasons that they did so.

B. The FEC's implementation choices are entitled to deference

The better way to understand *La Botz* is through the portion Plaintiffs omitted from their brief. That is, *La Botz* stated that deference should be afforded to the FEC because it was exercising its discretion based on "factors which are appropriately within its expertise." *La Botz*, 61 F. Supp. 3d at 33. The legal error that lies at the heart of Plaintiffs' claim for relief is that the Controlling Commissioners' decision was based on "a pure interpretation of law" or their interpretation of "judicial decisions and constitutional rights." Pls.' Opp. at 6. As Plaintiffs must admit, there is a difference between "interpretation" and a decision applying and implementing FECA in the context of judicial decisions or constitutional rights. *See* Pls. Opp. at 6 n.1. This concession is compelled by the weight of precedent, which holds that "implementation choices,

which call on the FEC's special regulatory expertise, [are] the types of judgments Congress committed to the sound discretion of the agency." *CREW v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016). While the Court need not defer to a statement from the FEC purporting to set out the meaning of a rule of law announced in a judicial opinion, that is not what the Controlling Commissioners did. The Controlling Commissioners exercised their prosecutorial discretion, a decision about how to implement the law. Plaintiffs do not point to a rule of law that the Controlling Commissioners incorrectly found and applied. Instead, Plaintiffs complain that the Controlling Commissioners have implemented FECA in a way with which they disagree.

As the D.C. Circuit has recognized, the FEC is different from other agencies. "Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). The FEC has a mandate, when it takes action, "to safeguard the First Amendment when implementing its congressional directives." *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016). It cannot be the case, as Plaintiffs effectively contend, that Congress assigned the FEC this difficult task, gave it the primary role in enforcing FECA, proscribed a narrow standard of review for the FEC's decision not to proceed in a matter, but also intended that the FEC would not be afforded deference when it performed the task Congress gave it by taking into account the constitutional impact of its enforcement decisions.

C. That FECA contains a private right of action is inapposite

Plaintiffs' only justification for their anomalous interpretation of FECA is to assert that deference to the FEC would derogate the role private complainants have in enforcing FECA, including through a private right of action. Pls.' Opp. at 7-8. Plaintiffs overstate their role. While Plaintiffs may bring an administrative complaint, it is the FEC that adjudicates and enforces FECA. Section 30109(a)(8) grants Plaintiffs the right to seek judicial review of a

dismissal of their administrative complaints, but it also provides that such review shall be under the highly deferential contrary to law standard. Indeed, all of the cases cited above setting out the highly deferential standard to be applied to the FEC's decision to dismiss an administrative complaint as an exercise of its prosecutorial discretion were decided in the context of § 30109(a)(8). As for Plaintiffs' private right of action, it is triggered only if this Court finds that the FEC's dismissals were contrary to law *and* the FEC takes no action in response to that order. *See* 52 U.S.C. § 30109(a)(8)(C). This is the exclusive private right of action provided by FECA. *See Perot v. FEC*, 97 F.3d 553, 558 n.2 (D.C. Cir. 1996). Thus, Plaintiffs' private right of action is triggered only where the FEC completely abandons the field. Even if this Court gave Plaintiffs all the relief that they seek, the FEC would still not be required to find that a violation of FECA occurred, as it could dismiss the complaints again on another ground.[1] *See id.* at 559.

Accordingly, the Court should only reverse the FEC's dismissal if it is convinced that the Controlling Commissioners' reasoning was not reasonable.

[1] The FEC on remand could, for instance, dismiss the complaints against Intervenor-Defendants because the statute of limitations has run with respect to the conduct alleged in the administrative complaints. Contrary to Plaintiffs' assertions, where the statute of limitations operates to bar legal remedies, it will bar equitable remedies as well. *See FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (holding "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both."); *FEC v. Nat'l Right to Work Comm.*, 916 F. Supp. 10, 14 (D.D.C. 1996) ("The FEC argues that even if § 2462 bars its civil penalty claims, it is nevertheless entitled to its declaratory judgment and an injunction. The Court disagrees."). Intervenor-Defendants acknowledge that there is a split of authority in the D.C. District Court on this question. However, even Plaintiffs all but recognize that the statute of limitations has run on the FEC's ability to collect a civil monetary penalty for the alleged violations. Thus, the Commission would be well within its rights to dismiss the administrative complaints again, on the basis that the legal uncertainty surrounding the application of the statute of limitations, and the plain unavailability of a monetary penalty, makes an enforcement action simply not worth Commission resources. *See CREW v. FEC*, 236 F. Supp. 3d 378, 392-93 (D.D.C. 2017) (acknowledging "split of authority" on whether FEC may bring an action for injunctive relief following expiration of the statute of limitations and upholding Commission's decision to dismiss complaint based on reasonable assessment that an enforcement action was not worth the litigation risk the split presented).

III. The Commission's Dismissal of Plaintiffs' Complaints was Not Contrary to Law

Before replying to the specific points in Plaintiffs' Opposition, it is necessary to correct Plaintiffs' mistaken view of the First Amendment rights at issue. Plaintiffs assert that FECA's disclosure requirements advance First Amendment interests and that providing the electorate with information is a "First Amendment interest" standing behind § 30122. Pls.' Opp. at 16-17. In essence, as Intervenor-Defendants previously asserted, Plaintiffs claim that "disclosure" is in effect a pseudo-constitutional right on par with First Amendment associational rights. This construction of the First Amendment would be news to the Supreme Court, which has uniformly held from *Buckley* to *McCutcheon* that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) ("[d]isclosure requirements burden speech"). As the D.C. Circuit put it, the values of "speech" and "disclosure" "exist in unmistakable tension. Disclosure chills speech." *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016). Providing information to the electorate is not a First Amendment value; it is one of three (indeed, the only one of three applicable in this case) governmental interests that may justify compelled disclosure *against* an individual's First Amendment rights.[2] *See Buckley*, 424 U.S. at 66-67. In the absence of FECA, no such disclosure right would exist. Despite Plaintiffs' attempts to argue otherwise, the FEC's enforcement decisions impact core constitutional rights, and its caution in proceeding with an enforcement action should be understood as the FEC fulfilling its unique mandate to administer an act that necessarily chills First Amendment activity. Indeed, even FEC investigations infringe

[2] There is no basis in *Buckley* or its progeny for Plaintiffs' contention that informing the electorate is the "paramount" disclosure interest. *See* Pls.' Opp. at 26. It is only recently, where the other two disclosure interests (detecting violations and anti-corruption) have been rendered inapplicable in certain areas, that this interest has come to the fore. Whereas in other areas all three interests are applicable, only one of the coequal interests is implicated here.

on First Amendment freedoms, *see FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388-90 (D.C. Cir. 1981), demonstrating that it was imperative for the Controlling Commissioners to take into account the First Amendment implications of their actions at any stage of the enforcement process.

A. The application of § 30122 after *Citizens United* is uncertain

Much of Plaintiffs' Opposition is devoted to attempting to show that the Controlling Commissioners' conclusion that, under certain circumstances, § 30122 could apply to the contributions at issue means that there can be no uncertainty with respect to how § 30122 could be applied. Pls.' Opp. at 11. However, it is one thing to say that a statute *could* apply, and another to determine *how* to apply it without chilling more speech than is necessary. Contrary to Plaintiffs' assertions, the application of § 30122 is not as simple as reading the statute.

The language of § 30122 is not as clear as Plaintiffs contend. The statute states only that it bars making "a contribution in the name of another person." 52 U.S.C. § 30122. On its face, the statute says nothing about conduit contributions and by its plain terms prohibits only a contributor listing another's name when making a contribution. Another provision of FECA, § 30116(a)(8), explicitly regulates conduit contributions, further demonstrating that Congress did not intend § 30122 to reach conduct already covered under another provision of the Act.[3]

It is only through judicial interpretation that § 30122 even potentially reaches the conduct here. Following the interpretation adopted in *United States v. O'Donnell*, the focus of § 30122 is to determine the "true contributor," 608 F.3d 546, 554 (9th Cir. 2010), or in the words of the Controlling Commissioners, the "true source" of a contribution, AR0075; *see United States v.*

[3] Intervenor-Defendants incorporate their arguments regarding the significant legal hurdles that the Commission would face if it brought an enforcement action, including the facial inapplicability of § 30122 to conduit contributions and the fact that Congress has not authorized the extension of § 30122 to the circumstances at issue here. Mem. in Supp. of Intervenor-Defendants' Mot. for Summ. J. at 16-18, Docket No. 32.

Hsia, 176 F.3d 517, 524 (D.C. Cir. 1999) (holding that FECA's reporting requirements refer to the "true source of the money"). Therefore, even if § 30122 were available, the FEC would still need a standard to determine which contributor is the "true" contributor, otherwise liability under § 30122 could not attach. *O'Donnell* did not articulate a test for determining the true source of a contribution, and it does not appear that any other court has done so. The only Commission regulations that touch on the subject, 11 C.F.R. § 110.6, pertain to § 30116(a)(8), which even Plaintiffs admit does not apply to contributions to SuperPACs. Pls. Opp. at 18 n.5. As the Controlling Commissioners observed, nearly all conduit contribution cases prior to *Citizens United* involved a scheme to evade the Act's contribution limits or source prohibitions. AR0083. Thus, determination of the "true source" was relatively simple even without a fully articulated standard: the contributor funneling prohibited contributions through others was the true source.

Citizens United, which even Plaintiffs admit "worked a sea change" in campaign finance law, opened an entirely new area to potential regulation under § 30122. For the first time in FECA's history, corporations could make direct contributions to a political committee.[4] As the Controlling Commissioners recognized, it was only after *Citizens United* that the question of who was the true source of a contribution, a corporation or its owner, could even arise under § 30122. AR0081-0083. The significance of the issue being a matter of first impression means that there were no extant rules regarding how to determine the true source of a corporate contribution, which Plaintiffs miss because they focus solely on whether § 30122 could be applied, and not the critical question of how § 30122 should be implemented in this new arena of

[4] Plaintiffs' assertion that the revolution in campaign finance wrought by *Citizens United* can be minimized because corporate giving occurred during the "soft money" era, Pls. Opp. at 13 n.3, ignores that "contribution" is a term of art within FECA that has a constitutional dimension. The "soft money" era is irrelevant. *See* Mem. in Supp. of Intervenor-Defendants' Mot. for Summ. J. at 25-26, Docket No. 32.

First Amendment expression. The resolution in the first instance of that question by Congress's chosen enforcement agency is at the very least owed a substantial degree of deference from this Court.

B. The state of the law regarding the true source analysis, and Commission guidance, demonstrate that the Controlling Commissioners' analysis was reasonable

The administrative record compiled in these matters demonstrates that the question of how to apply § 30122 is not as straightforward as Plaintiffs suggest in their Opposition. Throughout the enforcement proceedings, the Office of General Counsel ("OGC") and the various Commissioners together applied no less than *four* different standards to determine the "true source" of a corporation's contribution to a SuperPAC. A brief discussion of these standards demonstrates that, contrary to Plaintiffs' assertions, Pls.' Opp. at 18, the Commission benefitted from OGC's consideration of multiple fact patterns, which revealed the need for a prospective announcement from the Controlling Commissioners as to how they would implement § 30122 going forward.

The first known MUR involving contributions by closely-held or single-member LLCs to SuperPACs was MUR 6485, W Spann LLC. In that matter, OGC attempted to apply the straightforward, functional, "direction or control" analysis borrowed from regulations implementing § 30116(a)(8). First General Counsel's Report at 6 MUR 6485 (W Spann LLC) (Aug. 28, 2012) ("Spann OGC Report"). OGC stated that "[t]he determination of the true source of the contribution turns on consideration of who 'exercised direction or control' over the funds distributed to the recipient." *Id.* (alteration omitted). Applying that standard, OGC recommended finding reason to believe that respondents violated § 30122's predecessor. *Id.* at 19. When OGC confronted another matter, MUR 6930, it recognized that the regulations that provided the "direction and control" language were not applicable to contributions to

SuperPACs. First General Counsel's Report at 8 n.28 MUR 6930 (SPM Holdings, LLC) (Nov. 19, 2015). OGC surveyed the case law and crafted a new standard, stating "that a person who furnishes another with funds for the purpose of contributing to a candidate or committee 'makes' the resulting contribution." *Id.* at 7. OGC intended this standard to be different from the one it applied in MUR 6485; it issued a supplement to that MUR "clarify[ing]" that the "direction or control" analysis was not sufficient, and that the purposive standard announced in MUR 6930 was the correct standard. Spann OGC Report, supplement.

The Commission itself divided on how § 30122 should be applied, with neither group of Commissioners adopting either of OGC's standards. The Controlling Commissioners, noting how OGC's analysis changed and cognizant of their mandate to enforce FECA consistent with the values of First Amendment expression, announced a purposive standard: "the proper focus will be 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." AR0086. In contrast, the Dissenting Commissioners returned to a functional test, stating that "[w]here an individual is the source of the funds for a contribution and the LLC merely conveys the funds at the direction of that person," the individual is the "true source." AR0093. Even this test, however, did not return to the "direction or control" test applied in the W Spann LLC MUR (otherwise, the test would be circular). The standard for applying § 30122 had unmistakably evolved over the course of the FEC's consideration of these matters.

Plaintiffs cannot plausibly argue that the application of § 30122 was "crystal clear" when OGC and the Commission, the experts in campaign finance law, applied no less than four standards and could not agree on whether the "true source" analysis was purposive or functional. Contrary to Plaintiffs' assertions, § 30122's plain text provides no meaningful guidance, to the

public or the Commission, as to how to determine the "true source" of a contribution in a given context. Plainly, the gloss on the statutory text built up by the courts and the FEC was insufficient to the task in the new arena for corporate contributions opened up by *Citizens United*, as demonstrated by OGC's evolution on the standard and the fact that neither group of Commissioners adopted either standard OGC set forth. Given that situation, it was reasonable for the Controlling Commissioners to conclude that it would not be fair to hold the community to a standard that could not be known at the time the contributions in question were made.

The reasonableness of the Controlling Commissioners' conclusion is further supported by the guidance that was available to the community regarding contributions from corporate funds. The Controlling Commissioners recognized that Commission regulations, enforcement actions, and court decisions all would have led the regulated community to the same conclusion: when the funds for a contribution come from a corporation's treasury, the contribution comes from the corporation. AR0085. Plaintiffs attempt to downplay the message communicated by these authorities by asserting that they are merely "default attribution rules" or "presumptions" that have no bearing on the application of § 30122. Pls.' Opp. at 28-30.

Plaintiffs misunderstand the nature of the guidance cited by the Controlling Commissioners. As the D.C. Circuit held in *United States v. Hsia*, FECA's general reporting requirements mandate that the "true source" of a contribution be reported. 176 F.3d at 524. Likewise, the Commission cannot enforce the ban on corporate contributions to candidate committees pursuant to 52 U.S.C. § 30118 unless it can determine whether a given contribution's true source is a corporation. Indeed, § 30122 and § 30118 are often charged at the same time in cases involving corporations using conduits. *See, e.g.*, Conciliation Agreement MUR 6889 (National Air Transportation Association) (March 5, 2015); Conciliation Agreement MUR 6465

(Fiesta Bowl) (Oct. 24, 2013); Conciliation Agreement MUR 5849 (Bank of America) (Sept. 25, 2009). Thus, a standard setting forth when a contribution will be deemed to be corporate in nature is in effect a statement about the true source of the contribution, exactly the question that was at issue in these matters.

The language of the authorities relied on by the Controlling Commissioners reinforces that conclusion. As OGC stated in MUR 4313: "[i]t has been the policy of the Commission that once a decision is made and carried out to conduct business using the corporate form, *any funds* taken from the corporation's accounts are to be deemed corporate in nature, whether or not they originated as . . . the personal funds of a shareholder." First General Counsel's Report at 34, MUR 4313 (Coalition for Good Government, Inc.) (June 13, 1996) (emphasis added). Commission regulations later confirmed this interpretation. *See* 11 C.F.R. § 110.1(g)(3). In the inverse of the circumstances in the instant matters, a court rejected, citing six Supreme Court cases, the position that "a contribution of corporate money by the sole shareholder of a corporation" was the same as "a contribution by the shareholder of the shareholder's money," even though "the contribution is necessarily the shareholder's money." *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *4 (M.D. Fl. Nov. 30, 2007).

Moreover, contrary to Plaintiffs' assertions, corporations are different. In *Citizens United*, the Supreme Court unequivocally held that corporations have the right to engage in political speech. 558 U.S. at 342. At the same time, corporations are owned, operated, and controlled by individuals. While a corporation might hold funds, the corporation is itself held by an individual, or an association of individuals. Every corporation is ultimately under some individual's direction and control. Taking *Citizens United* seriously, however, requires that corporations be able to contribute without undue restriction. Thus, it was reasonable for

individuals to conclude that the free-speech guarantee in *Citizens United* was not stillborn because of § 30122. By the same logic, the Commission was required to interpret and apply § 30122 in a way that gave effect to the Supreme Court's clear and unmistakable directive.

The strong line of authority regarding the true source of a contribution from corporate funds demonstrates that the Controlling Commissioners' conclusion, that the single member or owner of an LLC could have reasonably determined that they would not be the true source of any contribution by the LLC, was reasonable. Surveying the landscape following *Citizens United*, the Controlling Commissioners confronted an unprecedented situation, which Congress could not have foreseen when it crafted § 30122. Up to that point, all extant guidance indicated that a contribution from a corporation's funds was made by the corporation. Already tasked with enforcing a vague statute, the Controlling Commissioners observed their general counsel struggle to divine a standard that would fit § 30122 to the unprecedented situation of corporate contributors. The Commission itself split on the appropriate standard. Given this confusion, it was reasonable for the Controlling Commissioners to exercise their prosecutorial discretion.

C. The Controlling Commissioners' exercise of their prosecutorial discretion was not arbitrary

The plain legal uncertainty surrounding the application of § 30122 to contributions by single-member and closely-held LLCs to SuperPACs provided a sufficient basis for the Controlling Commissioners' rational exercise of their prosecutorial discretion. Plaintiffs' contend, however, that the Controlling Commissioners' decision was arbitrary because they did not analyze whether respondents actually had notice that § 30122 prohibited their conduct.[5] Pls.'

[5] Plaintiffs' extended discussion of a counsel's letter in a MUR no longer at issue in this case is irrelevant. *See* Pls. Opp. at 21-22. The statement of counsel in that matter could not possibly have any impact on Intervenor-Defendants. The contributions at issue in matters concerning Intervenor-Defendants were made before the Spann contribution was made public and long before the record of OGC's investigation became known.

Opp. at 20-22. Plaintiffs' contention is circular and assumes the conclusion of its prior argument. If the Controlling Commissioners reasonably concluded that the application of § 30122 was so unclear that it could not be applied to any respondent, the potential that a given respondent had the contrary subjective belief that the law applied to their conduct would be irrelevant. The Controlling Commissioners' decision was based on the reasonable conclusion that the state of the law was uncertain. As such, there was no way that the law could provide sufficient notice to a respondent. Plaintiffs' argument assumes its view of the legal landscape. In short, Plaintiffs' notice argument only makes sense if the very questions at issue in this case are resolved definitively in their favor. It is not a separate ground for relief.

Plaintiffs' contention also relies on the assertion that respondents merely denied the facial sufficiency of the administrative complaints. *Id.* at 20. Intervenor-Defendants both asserted that there was no allegation in the administrative complaints that the contributions "are from any source other than . . . corporate funds, a lawful transaction on its face," rendering the administrative complaints *legally* as well as factually deficient. AR0029; AR0223. This assertion, that a contribution from corporate funds to a SuperPAC was lawful, was precisely the conclusion that the Controlling Commissioners observed was reasonable following *Citizens United* in light of Commission and judicial precedent. Thus, the Commission was faced with a real controversy between the arguments of respondents and the conclusions of its OGC. That dispute was sufficient to prompt Controlling Commissioners' thoughtful discussion of the state of the law and to support its reasonable decision to invoke its prosecutorial discretion.

In addition, Plaintiffs assert that the Controlling Commissioners waited too long to announce their standard. Pls.' Opp. at 3. As in their initial motion, Plaintiffs make what amounts to a general attack on the Commission's enforcement priorities and in essence ask the

Court to substitute the Commission's reasoned judgment regarding its enforcement priorities for Plaintiffs' own. The development of OGC's analysis over the course of the MURs at issue in this case demonstrates that the Controlling Commissioners made a rational decision to observe how First Amendment speakers would react to the new legal landscape.

If there is any evidence of bad faith in the record below, it is on the part of the Dissenting Commissioners, who would have overturned an OGC recommendation to close MUR 6930 even where the conduct at issue plainly did not meet the standard the Dissenting Commissioners themselves announced. The Dissenting Commissioners stated that an element of their test was that "an individual is the source of the funds for a contribution." AR0093. Yet, it is undisputed, even by the Dissenting Commissioners, that the individual respondent in MUR 6930 "*never* personally possessed the funds held by" the LLC. AR0090 n.2 (emphasis added). The Dissenting Commissioners rationalized their contrary position by asserting that the LLC "was merely a holding place for [the individual's] personal funds and could only act at his direction." *Id.* If even an LLC whose funds were never in the hands of an individual could be under suspicion for violating § 30122, merely because it is under the control of that individual, then the Controlling Commissioners were correct to conclude that the Dissenting Commissioners' "true objective is not to regulate rationally and reasonably but rather to regulate so as to countermand the Supreme Court's ruling in *Citizens United*." AR 0100-0101. As noted, every single-member or closely-held LLC is under the control of an individual. The Dissenting Commissioners announced a standard that would make *every* contribution from such an LLC presumptively unlawful. This is the same standard that Plaintiffs urge the Court to impose on the FEC.

Plaintiffs' complaint with the Controlling Commissioners' decision rests on a disagreement with the FEC's enforcement priorities, not that the dismissals were contrary to law.

Accordingly, the Controlling Commissioners' reasonable decision to dismiss these matters should be affirmed.

IV. Plaintiffs Fail to Demonstrate that the Commission's Dismissal of the Administrative Complaints' Allegations that Eli Publishing and F8 Failed to Register as Political Committees was Contrary to Law

Contrary to Plaintiffs' assertions, the Controlling Commissioners considered and addressed Plaintiffs' allegation that Eli Publishing and F8 were required to register as political committees. The Controlling Commissioners specifically stated that they did not find reason to believe that a violation occurred with respect to these allegations because "the applicable statutory provisions [sic] addressing these circumstances is section 30122." AR0080 n.36. However, even were Plaintiffs correct that the Controlling Commissioners did not address these allegations, it would not mandate remand to the agency. Plaintiffs' assertion is based on general administrative law precedent, which ignores D.C. Circuit precedent requiring a statement of reasons from a controlling group of Commissioners only when the Commission acts contrary to OGC's recommendation. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987). In the event the Commission adopts OGC's recommendation not to find reason to believe that a violation occurred, the Court may look to the OGC report to determine whether the dismissal was contrary to law. *See Common Cause v. FEC*, 842 F.2d 436, 440-448 (D.C. Cir. 1988) (analyzing report where OGC recommended not to find reason to believe and Commission deadlocked). As OGC observed, the "present record would be inadequate to draw an inference that the major purpose of either Eli Publishing or F8 was federal campaign activity." AR0045.

The Controlling Commissioners' view, that the conduct here is best assessed under § 30122, is correct. Contrary to Plaintiffs' assertion, if F8 and Eli Publishing are not conduits, they are not political committees: they are contributors in their own right. FECA defines, in relevant part, a political committee as "any committee, club, association, or other group of

persons who 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). If the corporation is the true source of the funds, it cannot be said to receive a contribution from others. Nor can the donation of those funds to a SuperPAC be considered an expenditure, it must instead be a contribution. To hold otherwise would be to collapse the distinction between contributions and expenditures and upend FECA's entire framework. It cannot be the case following *Citizen United*'s recognition of a corporation's right to make contributions that FECA could be read to subject corporations to additional registration and disclosure requirements that would not apply against a similarly situated individual.

CONCLUSION

For the foregoing reasons, Mr. Lund, Eli Publishing, and F8, respectfully request that the Court grant summary judgment in their favor and affirm the FEC's dismissal of the administrative complaints against them.

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