UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, F8, LLC, *et al.*, Intervenor-Defendants.	Civ. No. 16-cv-752 (TNM) REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

In its opening brief, the Federal Election Commission ("Commission" or "FEC") demonstrated that, after careful consideration of plaintiffs' administrative complaints alleging straw donor and other violations, the FEC Commissioners voting to dismiss chose a course that balanced disclosure interests with due process and First Amendment concerns. These Commissioners agreed with their colleagues that corporate limited liability companies ("LLCs") and closely-held corporations may be straw donors capable of violating 52 U.S.C. § 30122, but that this interpretation of the Federal Election Campaign Act ("FECA" or "Act") should be applied only prospectively. All current Commissioners thus agreed that, when an individual is the true source of a contribution from a corporate LLC or closely-held corporation, FECA requires disclosure of the identity of the individual, rather than the corporate entity, as the contributor. Concerned that regulated persons and entities did not have sufficient notice to justify retroactive application of a newly announced interpretation, and sensitive to the First Amendment rights at stake, however, the controlling Commissioners invoked the agency's well-established prosecutorial discretion and dismissed the matters. While plaintiffs would have weighed these competing concerns differently, "federal judges . . . have a duty to respect legitimate policy choices made by" the agency. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

In attempting to overturn this exercise of the Commission's prosecutorial discretion, plaintiffs seek to cast this case as something it is not. The FEC has not, and does not, argue that FECA gives it "unqualified and unreviewable discretion." (Pls.' Reply Mem. in Supp. of Their Mot. for Summ. J. and Mem. in Opp'n to Defs.' Cross-Mot. for Summ. J. at 4 (Docket No. 36) ("Pls. Reply").) Rather, under the well-established deferential standard of review that applies under 52 U.S.C. § 30109(a)(8), the controlling dismissal decision finding that respondents did not have adequate notice regarding the potential unlawfulness of their

conduct is not contrary to law or arbitrary or capricious. The Court should reject plaintiffs' arguments for reduced deference and superficial analysis, and it should decline to review their unripe and meritless challenge to the controlling Commissioners' interpretation of section 30122. The controlling Commissioners' approach, sensitive to the First Amendment area in which the FEC operates, should be sustained. *Cf. Buckley v. Valeo*, 424 U.S. 1, 40-43 (1976) (per curiam) (explaining that stricter standards of notice apply to regulation of speech). The Court should award summary judgment to the FEC.

I. IT IS WELL-ESTABLISHED THAT THE COMMISSION'S DISMISSAL DECISION RECEIVES FULL DEFERENCE

As the FEC explained in its opening brief (FEC's Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 17-22 (Docket No. 34) ("FEC Mem.")), controlling law establishes that judicial review of FEC dismissal decisions under section 30109(a)(8) is "limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). The Supreme Court has explained that the FEC's decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). Rather, FECA's contrary-to-law standard is "extremely deferential" and "*requires affirmance* if a rational basis for the agency's decision is shown." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (emphasis added and internal quotation marks omitted); *see also* FEC Mem. at 18-19.

Plaintiffs ask the Court to disregard this longstanding, controlling authority in favor of "*de novo*" review. (Pls.' Reply at 6, 10.) They argue that: (1) the Commission did not actually exercise prosecutorial discretion; (2) dismissals resulting from a 3-3 vote by the Commission do not get deference; (3) the Commissioners were interpreting judicial precedent and the Constitution; and (4) plaintiffs have "parallel enforcement authority." (*Id.* at 3-10.) These arguments are without merit.

A. The Controlling Commissioners' Dismissal Decision Was a Quintessential Exercise of Prosecutorial Discretion

The controlling Commissioners expressly and repeatedly invoked prosecutorial discretion in dismissing here. (AR 76-77; AR 88.)[1] Plaintiffs nonetheless argue that the Commissioners did not actually exercise prosecutorial discretion in declining to pursue the matters further because, in plaintiffs' view, their controlling statement did not discuss in sufficient detail "whether agency resources are better spent elsewhere, whether [Commission] action would result in success, and whether there are sufficient resources to undertake the action at all." (Pls.' Reply at 4 (quoting *La Botz v. FEC*, 61 F. Supp. 3d 21, 33-34 (D.D.C. 2014)); *see also id.* at 4-7.) But an FEC dismissal decision may be upheld even if — unlike here — the decision is "of 'less than ideal clarity.'" *Nader v. FEC*, 823 F. Supp. 2d 53, 58 (D.D.C. 2011) (quoting *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990)), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013)). And plaintiffs are in any event incorrect for two primary reasons.

First and foremost, declining to pursue an enforcement action so as "[t]o ameliorate" what a prosecutor believes would be "a harsh and unjust outcome" is itself an "exercise in administrative discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (internal quotation marks omitted). And this is the exact circumstance the controlling Commissioners reasonably perceived here: "[P]ursuing enforcement against the [r]espondents in these matters would be manifestly unfair because Commission precedent does not provide adequate notice regarding the application of section 30122." (AR 82; *see also* AR 86-88 (section of controlling statement explaining in part why "[a]pplying [s]ection 30122 [a]gainst [r]espondents [w]ould [b]e [u]nfair").)

[1] This exercise of prosecutorial discretion belies plaintiffs' suggestion that the dismissals may also have been based upon a lack of sufficiency of the allegations. (Pls.' Reply at 19.)

Plaintiffs argue that "'principles of due process, fair notice, and First Amendment clarity'" are not "legitimately grounds for the exercise of prosecutorial discretion" (Pls.' Reply at 4 (quoting AR 77)), but those concerns are within the heartland of that discretion. The fundamental fairness of commencing enforcement proceedings is a proper consideration for any entity charged with law enforcement.[2] And, as the controlling Commissioners recognized, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict." (AR 87 n.69 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).)

Plaintiffs' incorrect suggestion that the FEC lacks enforcement discretion to dismiss their administrative complaints due to fairness concerns (Pls.' Reply 4) is directly contrary to how Congress designed the agency to work. By requiring four members of the Commission to vote to proceed in any matter, Congress was specifically guarding *against* the use of the Commission's enforcement power in unfair and unjust ways. FEC Mem. at 21-22 (citing authorities); *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) ("The four-affirmative-vote, non-delegation, and [Commissioner membership] requirements reduce the risk that the Commission will abuse its powers."). Affirming the dismissals at issue here furthers Congress's intent of "preclud[ing] coercive Commission action . . . where the Commission . . . is evenly split." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000).

Second, the controlling Commissioners *did* undertake the analysis plaintiffs urge, including "whether agency resources are better spent on this violation or another [and] whether the particular enforcement action requested best fits the agency's overall policies."

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[2] *See, e.g.*, Robert H. Jackson, *The Federal Prosecutor* (Apr. 1, 1940), https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ (advice from then-Attorney General, later Supreme Court Justice Robert Jackson that "[y]our positions [as prosecutors] are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just").

(AR 87 n.69 (quoting *Heckler*, 470 U.S. at 831).) The controlling Commissioners found that "the prudent and preferred course" here was to avoid "provok[ing] legal and constitutional controversies" identified in their analysis and to exercise their "discretion to take the safer course." (*Id.*) While plaintiffs would not have chosen this "safer course" (AR 87 n.69), "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," but belong to the agency, *Chevron*, 467 U.S. at 866. Here, the controlling Commissioners explained their enforcement priorities and policy goals as including focusing their enforcement efforts on potential violations that do not raise legal and constitutional concerns. The Court thus may "reasonably discern the agency's analytical path." *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016) ("*Van Hollen II")*.

Furthermore, and contrary to plaintiffs' claim of "*post hoc* litigation explanation" (Pls.' Reply at 7), those same statements show that the Commission also considered the likelihood of its success in pursuing enforcement against respondents. *See Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1233 n.11 (D.C. Cir. 1994) (rejecting argument that position taken by agency in litigation was a *post hoc* rationalization even if, contrary to the circumstances here, an agency "could have placed a finer point" on the issue in its explanation). The controlling Commissioners expressly stated that enforcement here could entail "numerous legal and constitutional concerns" and quoted *Heckler*, including the admonition that agencies must assess "'not only whether a violation has occurred,'" but also "'whether the agency is likely to succeed if it acts.'" (AR 87 n.69 (quoting *Heckler*, 470 U.S. at 831). Success so defined thus may involve not just obtaining a technical declaration of a violation by a court, but also remedies sufficiently vindicating the agency's interests and expenditure of resources. The cited "legal and constitutional concerns" of due process, notice, and lack of clarity in a First Amendment setting are factors that courts consider when

assessing remedies. And they can even prevent a finding of a violation as *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), on which the Commissioners repeatedly relied, demonstrates. *Id.* at 256-58 (overturning agency decisions for lack of fair notice); AR 76-77 n.3; AR 87-88 & nn. 71-72. The controlling Commissioners thus considered notice issues as risks affecting the FEC's likelihood of succeeding if pursuing these matters.

Accordingly, because the controlling Commissioners exercised the agency's broad prosecutorial discretion when deciding to dismiss these matters, the Court should afford great deference to that decision. (FEC Mem. at 18-19.)

B. The Same Level of Deference Applies to Unanimous and Divided FEC Enforcement Decisions

As the Commission explained in its opening brief, plaintiffs' arguments in favor of reduced deference because the dismissals resulted from fewer than four votes is contrary to controlling precedent. (FEC Mem. at 20-21.) The D.C. Circuit has squarely held that courts owe deference to an FEC's decision not to proceed on an enforcement matter, even if it only "prevails on a 3-3 deadlock." *Sealed Case*, 223 F.3d at 779; *see also FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

Plaintiffs, however, argue that these binding cases should be ignored in light of *United States v. Mead Corporation*, 533 U.S. 218 (2001), and *Fogo de Chao (Holdings), Inc. v. U.S. Department of Homeland Security*, 769 F.3d 1127 (D.C. Cir. 2014). (Pls.' Reply at 9-10.) As the Commission explained in its opening brief (FEC Mem. at 21), however, plaintiffs' argument was rejected in *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) ("*CREW II*"), and fares no better here. Regardless of whether a split decision would be legally binding in future cases, "the prospective, binding nature of an agency's interpretation is not the sole consideration regarding the applicability of [deference]." *Id.* at 85 n.5. Rather, in *Mead*, the Supreme Court explained that the type of delegated authority that warrants deference "may be shown in a variety of ways, as by an

agency's power to engage in adjudication . . . or by some other indication of comparable congressional intent." 533 U.S. at 227. The D.C. Circuit has found more than sufficient indications of such Congressional intent, noting that "even an FEC enforcement decision produced by a split vote is "part of a detailed statutory framework for civil enforcement . . . analogous to a formal adjudication" that "assumes a form expressly provided for by Congress." *Sealed Case*, 223 F.3d at 780 (internal quotation marks omitted). The court in *CREW II* thus concluded that there is "nothing in *Mead* that directly contradicts *Sealed Case*," and so the latter case remains controlling law. 209 F. Supp. 3d at 85 n.5. Moreover, the D.C. Circuit itself viewed the analysis in *Sealed Case* as consistent with *Mead*. *FEC v. Nat'l Rifle Assoc. of Am.*, 254 F.3d 173, 184-86 (D.C. Cir. 2001).

As to *Fogo De Chao*, the Court of Appeals found that the subject agency's decision was "the product of *informal* adjudication within the [agency], rather than a *formal* adjudication." 769 F.3d at 1136 (emphases added). The Supreme Court held in *Mead* that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230. In contrast to the agency action in *Fogo De Chao*, the dismissals here deserve deference because they are "analogous to a formal adjudication." *Sealed Case*, 223 F.3d at 780. In any event, the dismissals have legal force, despite the 3-3 split vote, because they resolved the underlying matters and precludes further enforcement proceedings.[3] Plaintiffs' force-of-law argument thus is incorrect. "Th[e] same standard of review applies to all FEC

[3] Contrary to plaintiffs' suggestion (Pls.' Reply at 10), the adjudications here were not rendered less formal because they did not provide an opportunity for notice and comment, as such requirements do not apply to adjudicative determinations. *Conference Grp., LLC v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013). And, as is well-established, agencies may announce new principles through adjudication. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 119 (D.D.C. 2015).

decisions, whether they be unanimous or determined by tie vote." *CREW II*, 209 F. Supp. 3d at 85.

C. The Commission's Decision Was Based on General Discretionary Considerations, Not the Meaning of Specific Cases or the Constitution

Plaintiffs also argue that "agencies are due no deference for their views of judicial decisions or the Constitution." (Pls.' Reply at 6.) This argument is misconceived because, as explained *supra* pp. 3-6 and in the FEC's opening brief (FEC Mem. at 22-31), the controlling Commissioners' dismissal decision was based on prosecutorial discretion, not on an analysis of judicial precedent or the U.S. Constitution. Though of course broadly informed by case law, abstract concerns about notice, due process, and clarity of administration are general agency considerations, not actual interpretations of judicial decisions or the Constitution.

Moreover, even if the general considerations at issue here could be conceived of as directly related to judicial precedent or the Constitution, a distinction can be drawn between (a) agency decisions that are about *what* specific cases or provisions of the Constitution mean, and (b) those about *how* such precedent or constitutional principle should be implemented. *CREW II*, 209 F. Supp. 3d at 86-88. The cases on which plaintiffs rely demonstrate this. (*See* Pls.' Reply at 6.) *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), and *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009), fall into the former category. In *University of Great Falls*, the court examined what a Supreme Court case required. 278 F.3d at 1341 ("The application of [*NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)], to the facts of this case is thus an interpretation of precedent, rather than a statute[.]"). And in *J.J. Cassone Bakery*, the court had to determine — on the merits — whether the appellant's due process rights were violated, *i.e.*, what process the Constitution required the agency to provide. 554 F.3d at 1044.

The latter category of FEC decisions, however, involve "implementation choices, which call on the FEC's special regulatory expertise," and are "the types of judgments that

Congress committed to the sound discretion of the agency." *CREW II*, 209 F. Supp. at 87. The dismissal decision under review involve such expertise and judgment, and thus should be accorded full deference. *Id.* As plaintiffs concede, Congress vested the FEC with the discretion to determine whether to pursue a particular enforcement matter. Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 20 (Docket No. 30) ("Pls.' Mem."); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("No one contends that the Commission must bring actions in court on every administrative complaint. The Supreme Court in [*FEC v. Akins*, 524 U.S. 11, 25 (1998),] recognized that the Commission, like other Executive agencies, retains prosecutorial discretion."). Here, no party disputes that *Citizens United v. FEC*, 558 U.S. 310 (2010), resulted in corporations being able to make formal contributions in connection with federal elections for the first time and thus "worked a sea change in the legal landscape." (Pls.' Reply at 12.) And as *Van Hollen II* demonstrates, that the controlling Commissioners applied discretion in a manner that was sensitive to constitutional concerns does not render deference to that decision any less warranted. 811 F.3d at 499 (deferring to the FEC and approving of the "tailoring" of its approach "to satisfy constitutional interests"). This is particularly true here, where the controlling Commissioners' analysis was driven by their interpretation of the agency's organic statute, own regulations, and own precedent — areas where judicial deference to the agency's decision or indecision is at its "zenith." *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987).

Unlike in *J.J. Cassone Bakery*, the question for this Court is not whether plaintiffs' preferred application of the straw donor provision would satisfy the due process clause's fair notice requirement. Rather, it is whether the controlling Commissioners acted reasonably when taking due process and other constitutional and legal concerns into account when deciding to exercise prosecutorial discretion. On this question, the Commissioners' decision

need not be one that "the [C]ourt would have reached." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 39. Rather, because it is "sufficiently reasonable to be accepted," it must be affirmed. *Id.* (internal quotation marks omitted).

D. Congress Vested the Commission, Not Private Parties, with the Right to Enforce FECA

Plaintiffs further argue that the level of "deference to the Commission's prosecutorial decisions . . . is not nearly as extreme as the FEC claims" because "FECA expressly sets forth a role for private complainants to enforce the law." (Pls.' Reply at 7.) Far from making extreme claims, however, the FEC merely recited the well-recognized standards for judicial review of dismissal decisions under section 30109(a)(8). (FEC Mem. at 17-22.) As the D.C. Circuit has held, the FEC's decision must be upheld unless it fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted).

In arguing against the controlling authority, plaintiffs greatly overstate their role under FECA. Had Congress intended to provide for citizen suits upon the mere election of the FEC not to proceed as a matter of prosecutorial discretion, it could easily have done so. Many other federal statutes permit citizen suits upon the mere declination of the relevant federal agency to pursue enforcement. *E.g.*, 42 U.S.C. § 2000e-5(f)(1) (Equal Employment Opportunity Commission); 33 U.S.C. § 1365 (Environmental Protection Agency); 31 U.S.C. § 3730 (False Claims Act).

FECA, in contrast, expressly provides that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of [the Act]." 52 U.S.C. § 30106(b)(1); *see also id.* § 30107(e) (similar). Private parties, thus, cannot seek relief for an alleged FECA violation directly in court, but rather are required to file an administrative complaint with the Commission, upon which the Commission determines whether to proceed. *Perot v. FEC*, 97

F.3d 553, 557-59 (D.C. Cir. 1996) (per curiam). While administrative complainants can seek judicial review of a Commission's dismissal of their complaint, the sole remedy the Court may grant is a declaration "that the dismissal of the complaint or the failure to act is contrary to law" and an order "direct[ing] the [FEC] to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If — and only if — the court finds the dismissal decision to be contrary to law *and* the Commission fails to conform within the 30 days, does Congress then grant the administrative complainant a private right of action against respondents. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985). These procedural steps, which set a very high bar in contrast to more permissible federal citizen-suit provisions, indicate that Congress intended private FECA suits to be rare.

Plaintiffs would permit a private right of action even when the Commission acted reasonably in exercising its discretion to dismiss. In contrast, deferring to the Commission's well-established prosecutorial discretion here would instead accord with FECA's statutory scheme. (FEC Mem. at 21-22.)

II. THE DISMISSAL DECISION WAS NOT CONTRARY TO LAW

The Commission's opening brief explained why the controlling Commissioners' dismissal decision was not contrary to law. (FEC Mem. at 22-31.) Plaintiffs have fallen far short of their burden to show that the decision was contrary to law or arbitrary or capricious. Presented with a statutory interpretation issue of first impression in an area where the law not only was unclear but also had recently underwent a sea change in light of *Citizens United*, the controlling Commissioners found that respondents did not have adequate notice regarding the potential unlawfulness of their conduct and thus that it would be unfair to pursue enforcement against them. These Commissioners instead "used the present matters to announce a governing interpretation to put the public on notice of the conduct that constitutes a violation of the Act, while dismissing these cases of first impression." (AR 98.)

Plaintiffs argue that the dismissal decision suffers from "four fatal defects": (1) "the governing statute is clear"; (2) *Citizens United* did not alter section 30122's application to corporations; (3) the Commissioners' failure to "explain why corporate respondents, but no other 'individual, partnership, committee, association, . . . [or] other group' regulated by section 30122, should be excused from the straw donor prohibition for lack of understanding of the law"; and (4) the "notice-based justification" was not "grounded in the administrative record." (Pls.' Reply at 1-3; *id.* at 11-13, 19-25, 27-31.) Plaintiffs are wrong on all counts.

A. Recent D.C. Circuit Case Law Supports the Controlling Commissioners' Determination that Section 30122's Application to Closely-Held Corporations and LLCs Was Unclear

Plaintiffs primarily argue that, because section 30122 prohibits any "person" from making a straw donor contribution, and section 30101(11) in turn defines "person" to include corporations, the straw donor provision clearly and unambiguously applied to closely-held corporations and corporate LLCs even though corporations were banned from making contributions when the straw donor prohibition was enacted. (*E.g.*, Pls.' Reply at 11-13.) The FEC has already explained that this argument, the centerpiece of plaintiffs' case, is fatally overstated because it is in tension with the evidence that was before it demonstrating actual uncertainty about the state of the law, Commission regulations, and prior Commission precedent analyzing whether the owner or the corporate entity is the "source" of funds from a closely-held corporation under 52 U.S.C. § 30118. (FEC Mem. at 26-30.)[4]

Labeling the controlling Commissioners' reliance on *Citizens United* a "diversion," plaintiffs contend that the landmark Supreme Court decision did not have any effect that

[4] Plaintiffs' brief contains a number of overstatements about the absence of dispute among the parties. Among these is the idea that "all" parties, including the FEC, have conceded that the straw donor provision "is clear and unambiguous." (Pls.' Reply at 2.) The controlling statement under review makes the opposite point. The controlling Commissioners' finding that the language and purpose of FECA's straw donor provision make it applicable to closely-held corporations and LLCs (AR 82; AR 91) is not a concession that the law was previously clear and unambiguous.

"directly bears on this case" because FECA's straw donor provision and the referenced definition of persons already included corporations. (Pls.' Reply at 12.) The D.C. Circuit, however, recently rejected a strikingly similar argument. *Ctr. For Indiv. Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam) ("*Van Hollen I*"). At issue in that case was an FEC regulation implementing a statutory requirement that every "person" who funds "electioneering communications" must disclose "all contributors," and banned one class of "persons," corporations, from funding electioneering communications. 52 U.S.C. § 30104(f); *id.* § 30118. In *FEC v. Wisconsin Right to Life, Inc.*, the Supreme Court held that Congress could not prohibit corporations from making certain electioneering communications. 551 U.S. 449, 465 (2007).[5] The FEC thus was "left to decide how [the statute's] disclosure requirements should apply to a class of speakers Congress never expected would have anything to disclose." *Van Hollen II*, 811 F.3d at 490-91. The FEC construed the disclosure provision to apply to corporations in a manner different from other "persons" and enacted a regulation requiring corporations to disclose contributions "made for the purpose of furthering electioneering communications." Electioneering Commc'ns, 72 Fed. Reg. 72899, 72901, 72913 (Dec. 26, 2007); 11 C.F.R. § 104.20(c)(9).

Defending a challenge in district court, "the FEC argue[d] that Congress could not have specifically intended the broad disclosure rules to apply to corporations . . . as written if it carved them out of the [statute] entirely at the same time." *Van Hollen v. FEC*, 851 F. Supp. 2d 69, 81 (D.D.C. 2012). The D.C. Circuit shared this view, holding that Congress did not have "an intention on the precise question at issue" because "it is doubtful that, in enacting [the statute], Congress even anticipated the circumstances that the FEC faced when it promulgated [the regulation]." *Van Hollen I*, 694 F.3d at 111 (internal quotation marks

[5] In *Citizens United*, the Supreme Court extended this holding to encompass "express advocacy." 558 U.S. at 365.

omitted). In other words, the D.C. Circuit held that the same statutory definition of "person" to include corporations that plaintiffs rely on here was not dispositive with respect to how newly-permitted corporate conduct would fit within the existing regulatory regime. *Id.* at 112; *see also Van Hollen II*, 811 F.3d at 491-92.

The instant case likewise involves a provision regulating certain conduct by a "person" enacted at a time when a corporation was forbidden from doing that conduct, but which later became permissible as a result of a Supreme Court ruling. Here, plaintiffs are similarly asking the Court to conclude that the straw donor provision's applicability to corporate entities was clear and unambiguous by ignoring that corporate contributions to federal candidates had been banned for nearly 70 years when the straw donor prohibition was enacted and nearly 100 years when it was last amended.[6] But when determining whether Congress has specifically addressed an issue in a statute, courts are not so myopic. *See Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014) ("[A] court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context."). Rather, it would not be unreasonable to conclude that, regardless of the general statutory definition of "person," Congress may not have "an intention on the precise question at issue," *Van Hollen I*, 694 F.3d at 111, because it is doubtful that, when enacting the straw donor provision, Congress anticipated corporations lawfully making contributions. By reasoning in analogous fashion, the controlling

[6] Plaintiffs' simplification of the soft money abuses at issue in *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310, fails to rebut the point that the contributions at issue here were made to groups undisputedly involved in express federal candidate advocacy, not issue-focused communications or advocacy arguably attributable in part to state and local elections, as well as the Commission's regulatory treatment of soft money before Congress amended the statute. (FEC Mem. at 25-26.) Indeed, one court expressly held during that earlier era that "the statutory prohibition of making contributions in the name of another . . . applies only to hard money contributions." *United States v. Trie*, 23 F. Supp. 2d 55, 59 (D.D.C. 1998).

Commissioners were acting consistent with the approval of agency action by the D.C. Circuit in *Van Hollen I*.

Plaintiffs' errors are highlighted through considering an extant FECA prohibition. Corporations remain prohibited from making contributions to candidates, 52 U.S.C. § 30118, and yet "persons" generally are permitted to make contributions to candidates and their committees up to a specified amount, *id.* § 30116(a)(1)(A). If the corporate contribution ban were ever overturned, it would be permissible for the agency to consider regulatory or adjudicative implementation when considering application of the limit to an additional class of persons, just as the Commission has with respect to other "persons." *See, e.g.*, 11 C.F.R. § 110.1(e) (partnerships); *id.* § 110.1(g) (limited liability companies); *id.* § 110.1(i) (spouses of individuals); FEC Advisory Op. 2008-05 (Holland & Knight LLP), https://www.fec.gov/files/legal/aos/73905.pdf (limited liability partnerships).

Failing to connect their argument to their burden, plaintiffs confuse whether it was possible for the Commission to find that the straw donor provision was clear with whether the agency was required to do so. *Van Hollen I* makes clear that it was not so required. Furthermore, other factors also supported the controlling Commissioners' conclusion, including that the Commission has refused to attribute funds from closely-held corporations to their owners in a number of similar contexts, that FEC regulations mandate that contributions from corporate LLCs are not attributed to their members, and that prior FEC enforcement matters were largely limited to unlawful contributions, unlike the lawful contributions at issue here. (FEC Mem. at 24-30.) Because of the intervening change in law resulting from *Citizens United* (AR 75-77), the controlling Commissioners' dismissals were not contrary to law on plaintiffs' claimed basis that the application of the straw donor provision was clear and unambiguous.

B. *Citizens United* Affected FECA's Straw Donor Provision

Plaintiffs relatedly assert that, because *Citizens United* did not address the straw donor provision in section 30122, "much less alter its application to corporations," "[g]rounding a theory of insufficient notice on a ruling that in no way impacted the operative statute is not only unreasonable, but irrational." (Pls.' Reply at 2.) This argument is unfounded.

The straw donor provision reads in relevant part: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution[.]" 52 U.S.C. § 30122. Because it was against the law for a corporation to make a "contribution," *i.e.*, provide a thing of value for the purpose of influencing a federal election, *id.* § 30101(8), a corporation could not "*make a contribution* in the name of another" or knowingly permit its "name to be used to effect *such a contribution*." *Id.* (emphases added). Thus, as the controlling Commissioners explained, prior to *Citizens United*, "the inquiry generally looked at whether a corporation (or some other person) paid or reimbursed individuals for making contributions in their names." (AR 75.) It was only after the Supreme Court permitted certain corporate funding that corporate contributions were permissible and thus potentially used as straw donations. (AR 75-76.) *Citizens United* plainly altered section 30122's applicability to corporations, and plaintiffs' claim that "*Citizens United* did not impact section 30122" (Pls.' Reply at 24) thus rings hollow.

And though plaintiffs argue that the straw donor provision has always been broad enough to reach corporate straw donors "both before and after [*Citizens United*]" (*id.*), it is undisputed that, as the controlling Commissioners explained, "until these matters, the Commission has considered alleged violations of section 30122 almost exclusively in contexts where individuals were the purported straw donors" (AR 83). Accordingly, "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period

of conspicuous inaction, the potential for unfair surprise is acute." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

C. Corporate LLCs and Closely-Held Corporations Are Different

Plaintiffs also assert that "there is nothing unique about corporations that would complicate the application of section 30122," so the controlling Commissioners failed to "explain why corporate respondents, but no other 'individual, partnership, committee, association, . . . [or] other organization or group' regulated by section 30122, should be excused from the straw donor prohibition for lack of understanding the law." (Pls.' Reply at 2; *id.* at 24, 29-31.) Plaintiffs again fatally oversimplify matters.

As the controlling Commissioners explained, corporate LLCs and closely-held corporations are materially different from other persons in at least two significant respects. First, the Commission had a long history of finding individuals to be straw donors, so these persons undisputedly had notice that they could be deemed unlawful straw donors. (AR 83 n.51.) In contrast, the controlling group located no instances of corporations being found to be straw donors, and concluded that prospect was an "issue of first impression." (AR 83; *see also* AR 87 ("Based on Commission precedent, the regulated community may have reasonably concluded that the answer to [the question of whether it is possible for individuals to violate section 30122 by contributing in the names of their closely held corporations and corporate LLCs] was 'no.'").)

Second, FEC regulations distinguish corporations and corporate LLCs from partnerships and non-corporate LLCs. For example, even prior to *Citizens United*, FEC regulations permitted partnerships and non-corporate LLCs to make contributions, which were attributed to both the partnership *and its individual partners* in accordance with 11 C.F.R. § 110.1(e) and (g). (AR 85 & n.64.) By contrast, the Commission rejected a proposal to attribute contributions from corporate LLCs to their individual owners. (AR 85 & n.63.)

Instead, the agency's regulations require corporate LLCs to be treated as corporations. 11 C.F.R. § 110.1(g)(3); *see also* FEC Mem. at 30.

While plaintiffs seek to write off this distinction as a mere "default" rule of attribution (Pls.' Reply at 2, 28), the different regulatory treatment is legally significant. The FEC has expressly *refused* to attribute a contribution or expenditure from a closely-held corporation to that corporation's individual owner *despite* the owner's attempts to argue that he was the true source of the donation. (AR 83-84 (collecting examples); *see also* FEC Mem. at 13, 26-27.) Thus, prior to these matters, FEC regulations governing the attribution of corporate entities were not the "default" rules. They were just "the rules."

The political committee matters plaintiffs rely upon are inapt. (Pls.' Reply at 30.) Those matters merely recognized that, when an individual is the true source of a committee's contribution, that contribution should be attributed to the individual rather than the committee. *Id.* In contrast, the significance of the line of Commission precedent pertaining to corporate attribution is not merely that a corporate contribution or expenditure is "typically" attributed to the corporation, but rather that it is attributed to the corporation *even when* an individual is its true source. That these rules of corporate attribution arose in a slightly different context is of no moment. *E.g., Trinity Broad. of Fla., Inc. v. F.C.C.*, 211 F.3d 618, 629 (D.C. Cir. 2000) (holding that it is reasonable for a regulated entity to rely on the agency's prior interpretation of an analogous provision). Additionally, as the Commission previously explained (FEC Mem. at 27), political committees have been legally permitted to make contributions for decades and can be formed for that very purpose.

Give these unique circumstances applicable only to corporate entities, the controlling Commissioners have provided the required "rational basis for the agency's decision," *Orloski*, 795 F.2d at 167, distinguishing the notice differences between the longstanding

applicability of section 30122 to individuals and other entities from the provision's potential applicability to closely-held corporations and corporate LLCs after *Citizens United*.

D. The Commissioners' Notice Concerns Were Grounded in the Record

Plaintiffs further argue that "the control group's notice-based justification" was not "grounded in the administrative record." (Pls.' Reply at 3, 20.) They are mistaken.

As plaintiffs recognize, when considering the matters presently before the Court, the Commissioners simultaneously considered other Matters Under Review ("MURs"), including MUR 6485 (W Spann LLC). (Pls.' Reply at 22 n.8 (stating that the Spann matter is "relevant to the Court's assessment of whether the FEC's actions were 'contrary to law'").) And as explained in the Commission's opening brief, even after weeks of research by a nationally-recognized law firm, it was not clear to respondents in that matter that it would be unlawful to make a contribution through a corporate LLC without disclosing the identity of the individual contributor. (FEC Mem. at 27.)[7] Thus, in addition to the foregoing reasons why

[7] Plaintiffs incorrectly assert that "the FEC [did] not accurately describe" this legal advice. (Pls.' Reply at 21.) Contrary to plaintiffs' selective quotation, the full declaration demonstrates that counsel: (a) found "FEC rules governing contributions to an independent expenditure committee *were not entirely clear*"; (b) indicated that, while "it was *possible*" that "the FEC *might* seek to look through the contributing entity to the underlying Contributor," they "were not aware of any rules to that effect"; and (c) did not advise their client that his contribution "would constitute, *or even risk constituting*," a violation of the straw donor provision. (Decl. of Kimberly E. Cohen, Esq. ¶ 8 (attached as Exhibit B to Response from Edward Conard and W Spann LLC, MUR 6485, https://www.fec.gov/files/legal/murs/current/100486643.pdf ("Conard Resp.") (emphases added).) The FEC notes that the link to this document has changed since the agency filed its opening brief (FEC Mem. at 26), and that this is the current link.

Though plaintiffs argue that respondents would not have been aware of this confidential legal advice (Pls.' Reply at 22), the advice supports the controlling Commissioners' conclusion that notice was insufficient. And the same (extra record) political report plaintiffs assert provided respondents adequate notice includes a quote from the client's media statement (which was submitted to the Commission (*see* Conard Resp. Ex. A)), stating that the contribution was made "after consulting prominent legal counsel regarding the transaction, and based on my understanding that the contribution would comply with applicable laws." (Pls.' Mem. at 10 n.7 (citing Dan Eggen, *Mystery pro-Romney Donor Revealed as a Former Employee at Hedge Fund Firm*, WASH. POST (Aug. 6, 2011),

the controlling Commissioners found that the law and Commission precedent and regulations made section 30122's applicability unclear, *see supra* pp. 12-19, the Commissioners had in their possession in a contemporaneously pending matter an evidentiary basis on which they relied showing that, in fact, certain similarly situated regulated persons and entities were not on notice that section 30122 could apply to their conduct.

This evidence is pertinent even though it does not involve the subjective understanding of the respondents still at issue. The salient inquiry is whether it was contrary to law for the controlling Commissioners to exercise prosecutorial discretion on the basis that the straw donor provision, FEC regulations, and other agency guidance gave respondents inadequate notice. In *Gates & Fox Co. v. Occupational Safety & Health Review Commission*, for example, an agency argued that, "even if the language of the regulation was not adequate" to provide notice, "the company in fact had notice." 790 F.2d 154, 156 (D.C. Cir. 1986). The D.C. Circuit disagreed, finding that company was not adequately on notice absent an authoritative interpretation from the agency. *Id.* at 157; *see also Florida v. Long*, 487 U.S. 223, 236-37 (1988) (holding that whether regulated entities had sufficient notice of a statute's requirements cannot turn on "the subjective interpretations of discrete, affected persons and their legal advisers" and thus deeming irrelevant the entities' internal memoranda and discussions); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008) ("[T]he capacity of in-house counsel or others to read correctly legislative tea-leaves does not alleviate the government from its obligation to fashion coherent regulations that put citizens of 'ordinary intelligence' on notice as to what the law requires of them.").[8]

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https://www.washingtonpost.com/politics/mystery-pro-romneydonor-revealed-as-a-former-employee-at-hedge-fund-firm/2011/08/06/gIQArcMlyI_story.html.).)

[8] For this reason, plaintiffs' argument that the controlling Commissioners erred by not finding that a handful of news reports provided adequate notice (Pls.' Reply at 21) is irrelevant, in addition to being entirely speculative.

Here, the lack of clarity regarding the applicability of section 30122 following *Citizens United*, analogous to the situation in *Van Hollen I*, and potentially conflicting Commission precedent and regulations makes the controlling Commissioners' notice concerns rational and not contrary to law. The additional support in the record from the Spann matter confirms that their determination was, contrary to plaintiffs' claims, "ground[ed] in the actual record evidence." (*Contra* Pls.' Reply at 23.)

Nor are plaintiffs correct in arguing that the Court should find error due to the controlling Commissioners' supposed failure "to address whether the disclosure requirements for political committees applied to respondents." (Pls.' Reply at 14-16.) The FEC's Office of General Counsel ("OGC") explained that, in light of FEC precedent and the slim evidence regarding the major-purpose prong of the inquiry,[9] there was no basis "to conclude at this point that F8 or Eli Publishing is a political committee" (AR 33), and recommended not acting on those allegations. (AR 43-46.) As OGC explained, because a contribution is attributed to its "true source" and not the straw donor, a straw donor cannot constitute a political committee. (AR 44-45 (citing FEC Advisory Op. 1996-18 (Int'l Assoc. of Fire Fighters)).) OGC also identified an aspect of the political committee analysis that was not established with respect to Specialty Investment Group Inc. and Kingston Pike Development LLC, finding that the record did not make clear whether these entities even passed the statutory threshold for political committee status by "in fact accept[ing] or ma[king] more than $1,000 in contributions." (AR 403.) To any extent that the controlling group's handling of the political committee allegations may require further explanation, the OGC recommendation accepted by the Commissioners provides the agency's reasons for acting as it did. *See, e.g.*, *Common Cause*, 842 F.2d at 440-48.

[9] An entity that is not controlled by a candidate is not a political committee unless (a) it crosses the $1,000 threshold of contributions or expenditures, and (b) its "major purpose" is the nomination or election of federal candidates. (FEC Mem. at 6.)

In any event, plaintiffs' political committee argument is fundamentally misconceived because it is directly contrary to the gravamen of plaintiffs' case that the corporate entities were straw donors. As plaintiffs acknowledge, "*if* respondent corporations are *not* conduits, *then* they may indeed qualify as political committees." (Pls.' Reply at 15 (first and third emphases added).) But, as noted in the FEC's opening brief, "'an entity can be a conduit or a political committee, but not both.'" (FEC Mem. at 38 n.11 (quoting AR 44).) Thus, "[b]ecause [the FEC's Office of General Counsel] did not recommend that we find reason to believe with respect to [plaintiffs' political committee] allegations, and *because we conclude the applicable statutory provisions addressing these circumstances is section 30122*, we do not discuss those allegations here." (AR 80 n.36 (emphasis added).) Further addressing whether the corporate respondents were political committees was unnecessary because all of the Commissioners agreed with plaintiffs that the relevant analysis was under section 30122.

In sum, it was not contrary to law or arbitrary for the controlling Commissioners to conclude that respondents lacked sufficient notice following *Citizens United*.

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE CONTROLLING COMMISSIONERS' ANNOUNCED PURPOSE-BASED ANALYSIS IS RIPE FOR ADJUDICATION OR CONTRARY TO LAW

A. Plaintiffs' Challenge to the Commissioners' Interpretation of Section 30122 Is Unripe

As the Commission demonstrated in its opening brief, plaintiffs' challenge to the controlling Commissioners' announced purpose-based standard that those Commissioners stated that they intend to apply in future straw donor cases — but that they concededly did not apply in this case and which plaintiffs do not assert will ever be applied to them — is not ripe for review. (FEC Mem. at 31-34.) None of the cases plaintiffs cite in their reply brief demonstrate otherwise. (Pls.' Reply at 35-36 & nn.16-17.)

Indeed, as one of those cases recognizes, "even purely legal issues may be unfit for review." *Atl. States Legal Found. v. E.P.A.*, 325 F.3d 281, 284 (D.C. Cir. 2003). This is

particularly true where, as here, plaintiffs have not demonstrated they will suffer any concrete, imminent harm from postponing review. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 811-12 (2003) (finding challenge not ripe where the plaintiff "failed to demonstrate that deferring judicial review will result in real hardship"). As another court in this District recently held in a case plaintiffs cite, "[a] plaintiff must 'demonstrate [] that it faces an imminent or certainly impending injury' to pass the 'ripeness test.'" *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1354 (CKK), --- F. Supp. 3d ---, 2017 WL 3028832, at *5 (D.D.C. July 18, 2017) (quoting *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013)). Plaintiffs plainly fail this test. Their only alleged injury is that "the FEC's restrictive 'purpose-based' standard will *likely* lead to non-disclosure of further information to which plaintiffs are legally entitled." (Pls.' Reply at 35 (emphasis added).) That their alleged injury is merely "likely" should alone mark the end of the Court's ripeness inquiry.

Even assuming the straw donor provision is viewed as itself containing a disclosure requirement (as opposed to complementing other disclosure requirements), plaintiffs' alleged harm is entirely hypothetical. They have not identified a single contribution about which they would be legally entitled to information but for the controlling Commissioners' newly announced purpose-based standard. "Although such injury is not inconceivable," it is certainly not "*imminent*." *Shell Oil Co. v. F.E.R.C.*, 47 F.3d 1186, 1202 (D.C. Cir. 1995); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that to be "concrete" an injury "must actually exist," *i.e.*, be "'real', and not 'abstract'"). Under the ripeness doctrine, "[c]ourts are obliged to . . . 'to protect the agencies from judicial interference until an administrative decision has been formalized *and* its effects felt in a concrete way by the challenging parties.'" *Util. Air Regulatory Grp. v. E.P.A.*, 320 F.3d 272, 278 (D.C. Cir. 2003) (emphasis added) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

In any event, the Court and the Commission would benefit from the application of the purpose-based approach before assessing its validity. (FEC Mem. at 32.) Indeed, plaintiffs themselves assert that, in its opening brief, the FEC misunderstood how the controlling Commissioners' purpose-based approach would apply in practice. (Pls.' Reply at 37-38.) This assertion demonstrates that "we have the classic institutional reason to postpone review: we need to wait for a rule to be applied [to determine] what its effect will be." *Atl. States Legal Found.*, 325 F.3d at 285 (internal quotation marks omitted). "In such circumstances, judicial review is likely to stand on a much surer footing in the context of specific application . . . than could be the case in the framework of [a] generalized challenge." *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) (internal quotation marks omitted). Accordingly, plaintiffs' challenge to the purpose-based approach is unripe.

B. The Commissioners' Interpretation of Section 30122 is Not Contrary to Law or Arbitrary or Capricious

Finally, even assuming that plaintiffs' challenge to the controlling Commissioners' interpretation of section 30122 were properly before the Court at this time, their purpose-based approach to analyzing potential straw donor contributions from closely-held corporations and corporate LLCs is not contrary to law and must be sustained. In arguing otherwise, plaintiffs again misunderstand the role of deference in this Court's review, arguing that *Chevron* deference does not apply to judicial review of the purpose-based approach because the controlling Commissioners "did not base the standard on an interpretation of FECA." (Pls.' Reply at 8.) This assertion is flatly incorrect. Not only were the controlling Commissioners interpreting section 30122, a FECA provision, but also plaintiffs' argument is contrary to *Van Hollen II*, where the D.C. Circuit applied *Chevron* deference to an FEC interpretation of a statutory provision which the agency found requires a similar purpose requirement. 811 F.3d at 492-95.

On the merits, plaintiffs argue that the omission of an express intent requirement in the statute is dispositive. (Pls.' Reply at 36-37.) This argument was also rejected in *Van Hollen II*. 811 F.3d at 492-95. More generally, a statute's silence is often not dispositive, as an agency may interpret statutes to "fill gaps." *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 328 (2002). Nor did the controlling Commissioners "inject[] a criminal intent element" into the straw donor provision. (Pls.' Reply at 37.) As the Commission previously explained, in light of the statute's legislative history, it was not unreasonable to construe even a non-"knowing and willful" violation of the straw donor provision as nonetheless requiring some level of scienter. (FEC Mem. at 34-35.) Plaintiffs are nowhere near the showing required to demonstrate that the controlling Commissioners' interpretation was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

Puzzlingly, plaintiffs contend that the controlling Commissioners did not explain their refusal to apply the purpose-based standard to respondents. (Pls.' Reply at 33-34.) But the Commissioners could not have been more plain in explaining that the dismissals in these matters were an exercise of prosecutorial discretion. Announcing a new legal principle as an exclusively prospective matter is a well-established practice in American common law. *See, e.g., Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) (Cardozo, J.) (discussing court discretion to choose between "forward operation" and "relation backward").

CONCLUSION

For the foregoing reasons, as well as those set forth in the Commission's opening brief, the Court should award summary judgment to the Commission.

Respectfully submitted,

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