UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 16-2201 (EGS) REPLY IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Jacob S. Siler (D.C. Bar No. 1003383)
Attorney
jsiler@fec.gov

Sana Chaudhry
Attorney
schaudhry@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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INTRODUCTION

Plaintiffs' judicial complaint presents a single legal question: whether it was contrary to law for the Federal Election Commission ("Commission" or "FEC") to dismiss plaintiffs' administrative complaint in light of the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*) and the similar decisions by six other Circuit courts. Plaintiffs admit that *SpeechNow* declared the statutory provisions that their administrative complaint relied upon unenforceable as a constitutional matter; that the Commission faithfully applied the D.C. Circuit's holding; and that this Court is bound by that holding. Those concessions are sufficient for the Court to grant the Commission's motion to dismiss.

Plaintiffs' opposition makes "three main points" (Pls.' Opp'n to FEC's Mot. to Dismiss First Am. Compl. ("Pls.' Opp'n") at 3), but none of those arguments would justify reversing the Commission's dismissal. First, as to the proper standard of review, the Commission's adherence to *SpeechNow* was correct, and therefore it could not have been contrary to law so long as that ruling remains valid, regardless of the standard applicable to review of this FEC enforcement decision. Second, the Commission did not claim that its prior advisory opinion impairs plaintiffs' ability to maintain this judicial review action, only that the advisory opinion limited the *Commission*'s enforcement options. Third, regardless of whether plaintiffs can make a compelling case to reconsider *SpeechNow*, this Court may not grant plaintiffs that relief. And, in any event, none of plaintiffs' arguments for overturning that decision shows that a different Commission approach to this enforcement matter was legally compelled.

Plaintiffs have briefed these issues in submissions to the Commission and twice to this Court, but they have still not identified a single case that would permit this Court to rule in their favor. Therefore, the Court should not accept plaintiffs' invitation to engage in hypothetical constitutional analysis. Instead, the Court should grant the Commission's motion to dismiss.

ARGUMENT

I. *SPEECHNOW* CONTROLS THE OUTCOME OF THIS CASE

Regardless of how the Court construes the contrary to law standard, the Commission's motion should be granted. As the Commission demonstrated in its opening memorandum, the Commission's dismissal in this case was a routine application of the D.C. Circuit's *SpeechNow* decision. (*See* Mem. in Supp. of FEC's Mot. to Dismiss Pls.' First Am. Compl. ("FEC Mem.") at 12-15.) In response, plaintiffs concede that the Commission correctly applied *SpeechNow*, but they argue that that case should be overruled. (Pls.' Opp'n at 15.) That concession ends the analysis. Even if this Court were to conclude that the D.C. Circuit — as well as every other court of appeals to consider the issue after *Citizens United v. FEC*, 558 U.S. 310 (2010) — misapplied the First Amendment or Supreme Court precedent, the Court would still be bound to follow the law of the circuit until that law was overturned by the *en banc* court. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997); Pls.' Opp'n at 15 (conceding that "overruling *SpeechNow* [is] something this Court cannot do").

This Court need not — and should not — decide more to affirm the Commission's dismissal. Despite the clear applicability of *SpeechNow*, plaintiffs seem to invite this Court to engage in a hypothetical analysis of their constitutional claims, including some that are factual in nature. (Pls.' Opp'n at 15-31.) This Court should reject that invitation as inconsistent with the general rule against engaging in unnecessary constitutional analysis. *Cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (discussing the "prudential concern that constitutional issues not be needlessly confronted"). This case can be resolved purely on the basis of controlling precedent; it is not necessary to resolve the arguments plaintiffs present that a higher court should overturn that precedent. *PDK Labs. Inc.*

v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[I]f it is not necessary to decide more, it is necessary not to decide more.").

II. THE DEFERENTIAL "CONTRARY TO LAW" STANDARD OF REVIEW SUPPORTS THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINT

The parties in this case agree that the standard for review of a Commission dismissal of an administrative complaint like the one at issue here is whether the dismissal is "contrary to law" under FECA. 52 U.S.C. § 30109(a)(8)(C); *see* FEC Mem. at 10; Pls.' Opp'n at 6.[1] Both sides similarly agree that courts need not give binding deference to an administrative agency's interpretation of judicial precedent or the Constitution. (FEC Mem. at 10; Pls.' Opp'n at 6.) The parties differ, however, over whether the contrary to law standard is otherwise deferential to the Commission's enforcement decisions in a particular case.

Two recent decisions involving judicial review of Commission dismissal decisions do much to explain the proper scope of review. In *Campaign Legal Center v. FEC*, a court in this district reviewed the Commission's decision to dismiss administrative complaints based on concerns about "due process and First Amendment principles" that "counseled against investigation." 1:16-cv-752, 2018 WL 2739920, at *5 (D.D.C. June 7, 2018). Even though that court declined to give binding deference "to the Commission's interpretation of case law or the Constitution," it also observed that the "'contrary to law' standard is itself deferential." *Id.* As that court recognized, there is nothing inconsistent between judicial primacy in interpreting constitutional requirements and recognizing that the contrary to law standard is deferential to the Commission's enforcement decisions in a particular matter. *See id.*

[1] Plaintiffs have now abandoned their Administrative Procedure Act claim. (Pls.' Opp'n at 5 n.2.)

The D.C. Circuit's decision in *Citizens for Responsibility & Ethics in Washington v. FEC* further limits the scope of judicial review under section 30109. No. 17-5049, 2018 WL 2993249 (D.C. Cir. June 15, 2018) ("*CREW*"). In that case, the court of appeals held that the Administrative Procedure Act and the Supreme Court's decision in *Heckler v. Chaney* bar judicial review of "'certain categories of administrative decisions,'" including any FEC decision not to institute enforcement proceedings as a matter of prosecutorial discretion. *CREW*, 2018 WL 2993249, at *3 (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)); *see also* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). As the D.C. Circuit explained, the "upshot is that agency enforcement decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion." *CREW*, 2018 WL 2993249, at *5 (footnote omitted). The court recognized that FECA expressly authorizes judicial review if "the agency's action was based entirely on its interpretation of" law. *Id.* at *5 n.11 (citing *FEC v. Akins*, 524 U.S. 11, 26 (1998)). To the extent that the Commission's dismissal relied on discretionary factors, however, those conclusions are not eligible for judicial review.[2]

Plaintiffs argue that *Campaign Legal Center* is inapplicable because it involved a "discretionary enforcement decision," whereas the Commission's "legal ruling here . . . reflected its interpretation of constitutional law." (Pls.' Opp'n at 8 & n.4.) But the discussion of the contrary to law standard in *Campaign Legal Center* was not predicated solely on the Commission's prosecutorial discretion. *See* 2018 WL 2739920, at *4-5. Additionally, as explained in more detail below (*see infra* at pp. 15-16), at least some of the Commission's reasoning in the matter being reviewed here was based on an assessment of how likely any

[2] Plaintiffs' opposition was filed two days before the D.C. Circuit's decision in *CREW*.

enforcement action would be to succeed, given the current state of the law and similar factors that were discussed in the *CREW* opinion. *CREW*, 2018 WL 2993249, at *3 n.7 (citing factors such as "whether the agency is likely to succeed if it acts" and "the strength of the case").

Fundamentally, plaintiffs seem to suggest that the Commission must prove that *SpeechNow* was correctly decided in order to prevail. (*See* Pls.' Opp'n at 6-10 (arguing that a Commission dismissal is contrary to law if the judicial ruling on which it was based is contrary to law).) But even the standards on which plaintiffs rely do not establish such a requirement. For example, plaintiffs cite the Black's Law Dictionary entry for "contrary to law," which defines the standard as "conflicting with *established* law." (*Id.* at 6 (citing Black's Law Dictionary (10th ed. 2014)) (emphasis added).) *SpeechNow*'s central holding has been adopted by six other courts of appeals and has been cited favorably in a controlling Supreme Court opinion. (FEC Mem. at 14-15.) No court of appeals has disagreed. Whatever the outer bounds of "established law" might be, *SpeechNow* clearly falls within its scope. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d. Cir. 2013) ("Few contested legal questions are answered so consistently by so many courts and judges.").

Plaintiffs also compare FECA's standard to one in the Federal Magistrate Act (Pls.' Opp'n at 7 n.3), but that standard is equally supportive of the Commission's position here. When a party objects to a magistrate judge's order regarding a non-dispositive pretrial matter, the district court reviews the order to determine whether it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Review is *de novo* with respect to legal conclusions, but the sources of law the district court consults include not just "the relevant statutes," but also applicable "*case law*." *United States v. All Assets Held at Bank Julius, Baer & Co.*, 233 F. Supp. 3d 143, 148 (D.D.C. 2017) (emphasis added). The district court is, of course, bound by circuit

law when conducting its review. When the magistrate judge's decision is compelled by clear circuit precedent, the district court must follow it regardless of whether there is reason to doubt the correctness of the circuit's ruling. *See, e.g.*, *Adams v. Suozzi*, 393 F. Supp. 2d 175, 178 (E.D.N.Y. 2005) (holding that it was not contrary to law for magistrate judge to refuse to stay discovery pending appeal "[g]iven the clear precedent from the Second Circuit directly on point on this issue," notwithstanding contrary authority from other circuits). Like Commission dismissal decisions, magistrate judges' decisions are "entitled to great deference." *All Assets*, 233 F. Supp. 3d at 147 (internal quotation marks omitted).

What is more, plaintiffs fail to reconcile their arguments regarding the standard of review with their concession that the Commission properly applied *SpeechNow*. On the one hand, plaintiffs argue that this Court owes no binding deference to the Commission's interpretation of the Constitution, a point that the Commission does not contest. (Pls.' Opp'n at 6; FEC Mem. at 11.) But on the other hand, plaintiffs simultaneously argue that it was contrary to law for the Commission to adhere to the unanimous decisions of the judiciary tasked with that very interpretive role. Pls.' Opp'n at 9-10; *see Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (noting that interpreting "Supreme Court precedent" based "on constitutional concerns" is "an area of presumed judicial, rather than administrative, competence").

"[O]beying judicial decisions is usually what courts expect agencies to do," *Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 703 (D.C. Cir. 2017), a precept which has added force where that precedent "is based on constitutional concerns," *Univ. of Great Falls*, 278 F.3d at 1341. Of course, the Commission could have sought enforcement in a circuit that had not yet ruled on the legal issues decided by *SpeechNow*, as the agency itself recognized. (*See* AR 293.) But no legal principle required the Commission to take that course. As the Commission reasonably

concluded, the weight of unanimous case law made success unlikely even in these other circuits. (*See* AR 293.) In addition, it was plainly reasonable for the Commission to give special consideration to D.C. Circuit law, given that the Commission is located here. (*See* FEC Mem. at 18-19.) FECA's venue provision requires that any judicial review of the agency's dismissal decision would occur in this district, where the contribution limits at issue in plaintiffs' administrative complaint had been declared unconstitutional. 52 U.S.C. § 30109(a)(8)(A); *see Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 22-23 (D.C. Cir. 2016) (noting that a "statute's multi-venue provision" may excuse an administrative agency's nonacquiesence with adverse circuit law). Yet plaintiffs' approach would fault the Commission for complying with a clear constitutional holding of the D.C. Circuit that has been adopted by six other circuits. *But see Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (admonishing that an agency's refusal to follow the unanimous rulings of three circuits "would show contempt for the rule of law"). Indeed, plaintiffs' approach would have the Commission routinely defy the judiciary's rulings in an area at the core of the judicial function.[3]

It is also important to note that the Commission was itself the party in *SpeechNow* arguing that FECA's restrictions on contributions to political committees were constitutional as applied to groups that make only independent expenditures. *See* 599 F.3d at 686. Even after *SpeechNow*, the Commission argued in this district that certain related restrictions were constitutional. *See Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012). The Commission did not succeed in those cases. Having lost the argument presented by plaintiffs' administrative

[3] Of course, the Commission's assessment of enforcement litigation options was discretionary, and such judgments are judicially unreviewable, as explained below. (*See infra* pp. 15-16.)

complaint here, it was not contrary to law for the Commission to accept that result and proceed accordingly.

None of this is meant to suggest that the Commission lacks authority to argue against precedent or attempt to change the law, if it does so openly in an appropriate case. *See Heartland*, 838 F.3d at 21-22; *Grant Med. Ctr.*, 875 F.3d at 707. The Commission's decision here acknowledged as much. (AR 293.) But plaintiffs' argument that the Commission acts contrary to law when it does not defy the constitutional holdings of the judiciary is in deep tension with the proper standard of review.

III. AFFIRMING THE COMMISSION'S DISMISSAL DECISION WOULD NOT PRECLUDE FURTHER APPELLATE REVIEW OF *SPEECHNOW* AND ITS PROGENY

Plaintiffs suggest that the Commission's arguments on the standard of review would be inconsistent with "our country's civil rights precedents" and would "[i]mmunize" *SpeechNow* from reconsideration. (Pls.' Opp'n at 9-12.) Neither point is correct.

A. Plaintiffs' Reliance on *Brown v. Board of Education* Is Misplaced

Plaintiffs repeatedly cite *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954), but the procedural posture of this case bears little relationship to *Brown*. On the most basic level, *Brown* did not involve review of an administrative enforcement decision. *Id.* Accordingly, that case did not involve the application of a statutorily defined standard of review, such as the contrary to law standard applicable here. *Id.* It is unsurprising, then, that the district court in the case did not consider whether any administrative agency had properly followed the law or otherwise made reasonable enforcement decisions. (*See* Pls.' Opp'n at 9-10.)

Plaintiffs also observe that the *Brown* district court engaged in a discussion of the merits of the plaintiffs' constitutional claims, even though the court was bound by precedent to rule

against them. (*Id.* at 9 (quoting *Brown*, 98 F. Supp. at 800).) However, the *Brown* plaintiffs had argued both that Kansas's segregated school system was unequal as a factual matter under *Plessy v. Ferguson*, 163 U.S. 537 (1896), as well as that segregated schools were inherently unequal under the Fourteenth Amendment. *Brown*, 98 F. Supp. at 797-98. Consideration of that first argument required the district court to make findings of fact regarding the relative quality and availability of educational facilities and services offered among the various segregated schools in the relevant school districts. *Id.* at 798. The second argument required the district court to consider whether more recent cases in which the Supreme Court had decided that particular school segregation schemes were unconstitutional had overruled *Plessy*. *Id.* at 799-800 ("It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court . . . show a trend away from the Plessy and Lum cases.").

Here, in contrast, the plaintiffs' claim is that the Commission's dismissal was contrary to law. As this is an agency review action, there are no factual disputes for this Court to resolve. *See, e.g.*, *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221 (D.C. Cir. 1993); Pls.' Opp'n at 5 ("this case involves no factual disputes"). Because this case presents a pure matter of law, this Court need not wade into the proffered factual developments plaintiffs submit in their briefing. As to plaintiffs' legal arguments against *SpeechNow*, later cases from the Supreme Court and the other courts of appeals have either accepted or adopted it. (*See* FEC Mem. at 14-15.) Unlike the situation in *Brown*, therefore, there is no question that *SpeechNow* remains binding circuit law. And because any appeal will be reviewed *de novo*, there is no risk that plaintiffs will be prevented from making whatever properly preserved arguments they wish regardless of how this Court decides the case. *See Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 13 (D.C. Cir. 2014).

B. Recognizing That This Case Arises in the Enforcement Context Would Not Immunize *SpeechNow* from Further Review in an Appropriate Case

As the Commission noted in its opening memorandum, plaintiffs seeking to relitigate the constitutionality of limits on contributions to super PACs have several procedures available to them. (FEC Mem. at 21.) In contrast to the method plaintiffs chose to pursue here, those alternatives would not require identified administrative respondents to defend themselves privately before the Commission or publicly before the courts for conduct undertaken in reliance on judicial and FEC guidance. (*Id.*) In their opposition, plaintiffs accuse the Commission of seeking "to bar the reconsideration or review of *SpeechNow*" and argue that the enforcement context "has no bearing on whether Plaintiffs' Complaint states a valid claim for relief" (Pls.' Opp'n at 10), but those claims are wrong.

Plaintiffs point to no principle of law that requires that circuit precedent must be easy to overrule. Indeed, it is reasonable to expect that as more courts accept a proposition of law, and no courts disagree, it will become increasingly hard to reverse that holding. *Cf.* Sup. Ct. R. 10 (stating that a "conflict" between the decisions of courts of appeals is a factor in whether to grant a writ of certiorari). Far from seeking to bar review, the Commission's defense of this case merely asks this Court to recognize that *SpeechNow* is binding precedent in this circuit and hold that the Commission's dismissal was consistent with that precedent. Whatever plaintiffs might argue in a case that properly presents the correctness of the *SpeechNow* holding, the Commission's decision in this case followed binding law and therefore should be affirmed.

Worse, plaintiffs get the potential alternatives wrong. Plaintiffs argue that FECA's special review provision, by which certain parties may seek immediate certification to the *en banc* court of appeals in an action "to construe the constitutionality of any provision" of FECA, 52 U.S.C. § 30110, is "largely unavailable to plaintiffs who challenge 'settled principles of

law.'" (Pls.' Opp'n at 10-11 (quoting *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 161 (D.D.C. 2013).) While it is true that the Supreme Court has held that the special review provision does not require district courts to certify "constitutional claims that are frivolous," *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981), plaintiffs ignore the most recent D.C. Circuit opinion construing that provision, *Holmes v. FEC*, 823 F.3d 69 (D.C. Cir. 2016). The district court in *Holmes* had concluded that certification of a First Amendment claim to the *en banc* court of appeals was unnecessary because it was inconsistent with "settled law" that had been decided by the Supreme Court. *Id.* at 70 (internal quotation marks omitted). On appeal, the D.C. Circuit reversed. *Id.* As to the standard for certification under section 30110, the appellate court wrote that it did not "think a district court may decline to certify a constitutional question simply because the plaintiff is arguing against Supreme Court precedent so long as the plaintiff mounts a non-frivolous argument in favor of overturning that precedent." *Id.* at 74. As to the specific First Amendment claim the *Holmes* plaintiffs asserted, however, the court of appeals concluded that the constitutional issue had not, in fact, been settled, and it therefore remanded the case for certification to the *en banc* court of appeals. *Id.* at 74-75.

Plaintiffs do not even cite *Holmes*, let alone reckon with the implications of the decision. (Pls.' Opp'n at 10-11.) Of course, to the extent that plaintiffs believe they have a non-frivolous basis to argue *SpeechNow* is incorrect, *Holmes* would support using FECA's special review procedure to have the court of appeals do so. While the Commission might argue in such an action that certification is unjustified, it is hard to see how plaintiffs would succeed in convincing the entire D.C. Circuit that *SpeechNow* should be overturned if they cannot clear that preliminary "'low bar.'" *Holmes*, 823 F.3d at 72 (quoting *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015)). And more importantly, even in the event of a dismissal by the district court at the early

certification stage, plaintiffs would be permitted to appeal such a decision and attempt to convince the court of appeals to revisit *SpeechNow* in a manner materially similar to what they seek here.[4]

The other alternative procedures identified in the Commission's opening memorandum are equally available to litigants seeking to make a good faith argument to overturn *SpeechNow*. (FEC Mem. at 21.) Plaintiffs argue that "[s]tate and local limits on super PAC contributions have been unenforced since 2013" (Pls.' Opp'n at 10), but that is because those restrictions have been uniformly struck down as unconstitutional after *Citizens United* (*see* FEC Mem. at 14-15 n.4). And while any direct challenge to the Commission's *Commonsense Ten* advisory opinion might be time-barred, plaintiffs could have asked the Commission to take actions to supersede that opinion and then filed a lawsuit if the agency did not do so.

As these alternatives establish, the Commission's decision not to proceed with the administrative enforcement plaintiffs seek here does not prevent a litigant from seeking review of *SpeechNow* through less objectionable causes of action. But the enforcement action plaintiffs urge would impose real costs on the respondents identified in plaintiffs' administrative complaint, who had been relying on administrative and judicial guidance clearly indicating their conduct was constitutionally protected. Plaintiffs argue that the costs to those respondents would be the same if plaintiffs utilized any other procedure to revive limits on contributions to super PACs (Pls.' Opp'n at 11), but that is not the case. Plaintiffs' administrative complaint invoked FECA's detailed enforcement procedures. *See* 52 U.S.C. § 30109(a). If the Commission had

[4] For similar reasons, plaintiffs' argument that certain of their arguments may "have never been presented to any court" and "deserve a chance for review" presents a false choice. (*See* Pls.' Opp'n at 30-31.) To the extent that plaintiffs' premise is correct, they could make these arguments in other, less problematic actions to lower or higher courts.

found reason to believe statutory violations had occurred, as plaintiffs requested, FECA would have required the Commission to "make an investigation" into the respondents, and, if the agency found probable cause to believe violations occurred, to seek to conciliate with those groups. *Id.* § 30109(a)(2)-(4). In any conciliation efforts, the Commission would be asking the respondents to formally admit that they had engaged in unlawful conduct — an unlikely prospect given *SpeechNow*. If respondents did not conciliate, further enforcement would have required the Commission to litigate plaintiffs' factual allegations and legal theories in a public lawsuit in which the respondents were named as defendants. *Id.* at § 30109(a)(6)(A). The procedural mechanism plaintiffs chose, therefore, imposes burdens on identified respondents that could have been avoided in litigation between the Commission and plaintiffs alone.

IV. PLAINTIFFS HAVE NOT SHOWN THAT A CHANGE IN CIRCUMSTANCES COMPELS REVISITING *SPEECHNOW*

Plaintiffs continue to maintain that *SpeechNow* was incorrectly decided or has been undermined by recent developments (Pls.' Opp'n at 15-31), but nothing in their administrative complaint would have compelled the Commission to ignore *SpeechNow*. As explained above, this Court need not and should not wade into plaintiffs' arguments on the merits of the *SpeechNow* decision. Even if it did, as an initial matter, nearly all of the cases plaintiffs cite predate *SpeechNow* and *Citizens United*, and therefore they cannot be a basis to conclude that the D.C. Circuit's decision is no longer authoritative. (*Id.*) Only four are more recent. (*Id.* at 18-19, 21-22, 25-26.) Of those four, only the Supreme Court's decision in *McCutcheon v. FEC* is from a court with the authority to reverse *SpeechNow*. 134 S. Ct. 1434 (2014) (plurality op.).

The plurality opinion in *McCutcheon* does not abrogate *SpeechNow*. The Supreme Court plurality certainly considered its decision to be consistent with *SpeechNow*. As the Commission explained in its opening brief, that controlling opinion favorably cited *SpeechNow* in explaining

the structure of FECA's contribution limits. (FEC Mem. at 15 (quoting *McCutcheon*, 134 S. Ct. at 1442 n.2).) Plaintiffs nowhere respond to this point, despite their argument that *McCutcheon* undermines *SpeechNow*.

The other post-*SpeechNow* cases plaintiffs cite are all self-distinguishing. Two of them are criminal cases involving "a *quid pro quo* bribery scheme, not [] exceeding limits set by a prophylactic campaign finance regulation" like the one struck down in *SpeechNow*. *United States v. Menendez*, 132 F. Supp. 3d 635, 638 (D.N.J. 2015); *see also United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011).[5] In the final case, *Republican Party of Louisiana v. FEC*, the three-judge panel itself distinguished *SpeechNow*, as plaintiffs admit. 219 F. Supp. 3d 86, 98 (D.D.C. 2016), *aff'd*, 137 S. Ct. 2178 (2017); Pls.' Opp'n at 22. To accept plaintiffs' argument that the decision is inconsistent with *SpeechNow* is to ignore the court's opinion.

For similar reasons, plaintiffs' pre-*SpeechNow* cases are insufficient to establish that it was unlawful for the Commission to follow the D.C. Circuit's ruling. In *Caperton v. A.T. Massey Coal Co.*, for example, the Supreme Court addressed campaign contributions in a state judicial campaign. 556 U.S. 868 (2009). As the Supreme Court has since clarified, however, a "State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666-67 (2015); *see also Caperton*, 556 U.S. at 889 (recognizing the "vital state interest" in protecting "public confidence in the fairness and integrity of the nation's elected judges" (internal quotation marks omitted)).

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[5] Plaintiffs summarize *Siegelman* as involving a campaign contribution that "did not benefit [the defendant] personally." (Pls.' Opp'n at 26.) As explained by the Eleventh Circuit, however, at least some of the relevant contributions were used to repay a loan that the defendant had "personally and unconditionally guaranteed." *Siegelman*, 640 F.3d at 1165.

In any event, plaintiffs cite these cases only for the implication that they are inconsistent with *SpeechNow*. The best evidence that *SpeechNow* remains authoritative, however, comes from the circuit level cases that have directly considered the constitutionality of restrictions on contributions to independent expenditure groups. As the Commission demonstrated in its opening brief, *every* court of appeals to consider that issue since *Citizens United* has likewise concluded that such restrictions are unconstitutional. (FEC Mem. at 14-15 n.4.) To this, plaintiffs have no response.

V. THERE IS NO OTHER REASON TO SET ASIDE THE COMMISSION'S DISMISSAL DECISION

A. The Commission's Decision Not to Engage in Nonacquiesence Was a Discretionary One That Is Beyond This Court's Review

The administrative complaint plaintiffs filed in this matter invited the Commission not to acquiesce in the *SpeechNow* decision. (AR 5.) During its internal consideration of the administrative complaint, the Commission chose "not to accept" plaintiffs' "invitation." (AR 293.) The Commission previously argued that its decision was not contrary to law because it was reasonable. (*See* FEC Mem. at 17-21.) After the recent D.C. Circuit decision in *CREW*, however, the Commission's decision is not subject to judicial review. 2018 WL 2993249, at *5.

Like a dismissal for prosecutorial discretion, a decision to challenge prevailing judicial precedent is a discretionary one "'ill-suited to judicial review.'" *CREW*, 2018 WL 2993249 at *3 n.7 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). The *CREW* court explained that prosecutorial discretion dismissals are not subject to judicial review because they involve a "'complicated balancing of a number of factors which are particularly within [the agency's] expertise,'" including "'whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts,'" and "'whether the particular enforcement action requested best fits the agency's overall policies.'" *Id.* (quoting *Heckler*, 470 U.S. at

831-32). The Commission's decision not to challenge the binding D.C. Circuit opinion in *SpeechNow* in the matter under review similarly involved an analysis of the agency's likelihood of success, its overall policies, and the possibility that doing so might expose it to legal fees. (AR 292-94 & n.45.) After *CREW*, such a decision is committed to the Commission's discretion and is "not subject to judicial review for abuse of discretion." *CREW*, 2018 WL 2993249, at *5.

B. Plaintiffs' Arguments Do Not Undermine the Commission's Reliance on Its *Commonsense Ten* Advisory Opinion

Finally, plaintiffs make two arguments in support of their view that the *Commonsense Ten* advisory opinion does not support the Commission's handling of their administrative complaint, but these claims are incorrect. *See* FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). Plaintiffs first argue that the Commission's acceptance of *SpeechNow* in its *Commonsense Ten* advisory opinion "does not mean that" the administrative respondents' "contributions actually were lawful." (Pls.' Opp'n at 12.) But the Commission never argued that its advisory opinion somehow amended FECA. Rather, the Commission's argument was that it could not find reason to believe in this matter without contradicting its prior advisory opinion, which itself had been based on *SpeechNow*. (*See* FEC Mem. at 22.) Plaintiffs' argument that Commission advisory opinions cannot amend FECA is therefore inapposite.

Second, plaintiffs argue that the Commission's construction of FECA's advisory opinion safe harbor is ineligible for deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because plaintiffs "have sought only declaratory relief," which in their view is not a "sanction." (Pls.' Opp'n at 13-15.) As an initial matter, the Commission's reliance on its advisory opinion would come into play only if the *en banc* D.C. Circuit reversed *SpeechNow*, as the Commission's dismissal was plainly correct if that decision

stands. *See Combat Veterans for Congress PAC v. FEC*, 795 F.3d 151, 156-67 (D.C. Cir. 2015) (discussing harmless error).

More fundamentally, however, none of the authorities plaintiffs cite establishes that the term "sanction" is unambiguous in the context of FECA. (*See* Pls.' Opp'n at 13-14.) Instead, plaintiffs shift the analysis by arguing that declaratory judgments are not "coercive" or are not punishable by "contempt" (*id*.), when the statutory term is "sanction," 52 U.S.C. § 30108(c)(2).

Plaintiffs, moreover, continue to minimize the effect Commission proceedings and enforcement litigation would have on the particular administrative respondents they chose to identify. (*See* Pls.' Opp'n at 15.) They argue that a declaratory judgment cannot be a "sanction" because it "will merely clarify the law for everyone and affect everyone the same way." (*Id.*) But that ignores the fact that the Commission's enforcement procedures would necessarily target particular entities and individuals for investigation and potential litigation, as a result of conduct that was supported by a clear FEC advisory opinion. (*See supra* pp. 12-13.) The respondents, at a minimum, would experience adverse consequences for relying on *Commonsense Ten*.

Plaintiffs fail to respond to other points the Commission made to show that its construction of "sanction" is entitled to *Chevron* deference. (*See* FEC Mem. at 24-25.) Specifically, plaintiffs fail to respond to the Commission's argument that the D.C. Circuit's opinion in *LaRouche v. FEC*, 28 F.3d 137 (D.C. Cir. 1994), is consistent with according *Chevron* deference to the Commission's construction because the case did not conclude that the term "sanction" was unambiguous. (FEC Mem. at 24-25 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).) Nor do plaintiffs respond to the Commission's argument that its construction of the statute was reasonable at step two of the *Chevron* analysis, including the Commission's citation to the Administrative Procedure Act

definition of "sanction." (*Id.* at 25 (citing 5 U.S.C. § 551(10)).) Having failed to respond to these arguments, plaintiffs have waived any opposition to them. *See Maib v. FDIC*, 771 F. Supp. 2d 14, 20 (D.D.C. 2011).

CONCLUSION

For the foregoing reasons, this Court should grant the Commission's motion to dismiss plaintiffs' First Amended Complaint.

Respectfully submitted,

/s/Jacob S. Siler

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Jacob S. Siler (D.C. Bar No. 1003383)
Attorney
jsiler@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Sana Chaudhry
Attorney
schaudhry@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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