NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5072

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPRESENTATIVE TED LIEU, *et al.*,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

Case No. 1:16-cv-02201-EGS

APPELLANTS' REPLY IN SUPPORT OF REQUEST TO HOLD FEDERAL ELECTION COMMISSION'S MOTION IN ABEYANCE

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INTRODUCTION

Representative Ted Lieu, Senator Jeff Merkley, and the other appellants have petitioned for initial en banc hearing in this challenge to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), which invalidated the Federal Election Campaign Act's limits on contributions to "super PACs" (independent expenditure-only political committees).[1] The Federal Election Commission urges the motions panel to bypass the Circuit's process for considering petitions for hearing en banc by deciding a motion for summary affirmance before the Court has decided appellants' petition.

The panel should allow the en banc process to play out. There is no need for speed, and the FEC's claim that the panel's action would conserve judicial resources is unfounded.

The FEC has used its reply to advance a new argument it did not present in its motion for summary affirmance: that appellants should have filed an entirely

[1] *See* Pet. for Init. Hearing En Banc, Doc. No. 1793993 (June 21, 2019).

different lawsuit (or possibly three) to raise the issues presented here.[2] The Court should reject the FEC's invitation to consider distracting collateral questions.[3]

ARGUMENT

I. The FEC's belated argument for hypothetical alternative litigation distracts from the issues in this case.

The FEC now argues that appellants should challenge *SpeechNow* in a different lawsuit that would provide a more "appropriate vehicle" for their constitutional claims.[4] The Court should reject—or ignore—this argument.

First, this invitation to consider alternative litigation was not raised in the FEC's motion for summary affirmance. This Court does not permit a movant "by way of reply, to expand its arguments." *Gen. Carbon Co. v. Occupational Safety & Health Review Comm'n,* 854 F.2d 1329, 1330 (D.C. Cir. 1988).

Second, the FEC overstates the availability of alternative procedures. Indeed, its position—that, even if *SpeechNow* was incorrectly decided and even if this

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[2] *See* FEC's Reply in Support of its Mot. for Summary Aff. and Opp. to Appellants' Request to Hold the FEC's Mot. in Abeyance (June 17, 2019) ("FEC Response"), Doc. No. 1793228, at 9-11.

[3] The FEC was permitted, but not required, to combine its reply in support of its motion for summary affirmance with its opposition to appellants' cross-motion to hold the FEC's request in abeyance. *See* Circuit Rule 27(d). It may have done so because the arguments raised by its reply and its opposition are deeply intertwined. Appellants address points raised in the FEC's reply only to the extent that they bear on points raised in the FEC's opposition to appellants' cross-motion.

[4] *Id.* at 10-11; *see also id.* at 13-14 (arguing that this action is not suited to present the constitutional issue for review en banc).

Court would recognize the error, the FEC's dismissal of appellants' complaint is not contrary to law because the FEC acted reasonably in relying on the erroneous decision—could immunize *SpeechNow* from reconsideration. As just one example, the FEC declares that appellants could challenge the FEC's 2010 advisory opinion acquiescing in *SpeechNow*.[5] But a final agency action must be challenged within six years. 28 U.S.C. § 2401(a); *Impro Prods., Inc. v. Block*, 722 F.2d 845, 849-50 & n.8 (D.C. Cir. 1983). The FEC has not explained how a challenger could overcome the hurdle posed by the statute of limitations.[6] The point is not that no alternative form of litigation is available, but rather that addressing that question involves distracting issues about non-existent collateral litigation.

Third, the FEC's belated proposals for alternative litigation are irrelevant. This is not a case under the Administrative Procedure Act requiring appellants to demonstrate that "there is no other adequate remedy in a court." 5 U.S.C. § 704. The hypothetical possibility of alternative litigation has no bearing on whether the Court may decide that the FEC's dismissal of *this* action "is contrary to law." 52 U.S.C. § 30109(a)(8)(C).

[5] FEC Response at 10.

[6] Similarly, if appellants had sought a declaratory judgment to construe the constitutionality of FECA, the FEC probably would have argued, as it hints in its response, that they lacked standing. *See* FEC Response at 10.

Fourth, the FEC misstates that standard of review when it suggests that even if "*SpeechNow* was wrongly decided or at odds with Supreme Court precedent," that "simply [would] not support a finding that the FEC acted contrary to law in dismissing Lieu's administrative complaint."[7] As the district court held, the "contrary to law" standard requires de novo review in this context. *See Lieu v. FEC,* 370 F. Supp. 3d 175, 183 (D.D.C. 2019). That means that the question is not whether the FEC acted reasonably, but whether its decision is correct. Of course, as appellants have acknowledged at every stage, *SpeechNow* remains the law of this Circuit. But the "contrary to law" standard does not freeze the law forever by requiring an appellate court to ask only whether an administrative agency or lower court adhered to precedent as it stood when a case was filed.

A decision may be contrary to law because the precedent itself is contrary to law. And a party challenging an appellate precedent often must initiate the challenge in a court or agency that is bound by that precedent. The challenge does not fail simply because the lower court or agency must adhere to the precedent. *See*, *e.g.*, *Janus v. AFSCME,* 138 S. Ct. 2448 (2018) (reversing after the district court dismissed a complaint in reliance on past precedent, and the court of appeals affirmed, because the Supreme Court overruled the precedent); *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951) (following Supreme Court precedent

[7] FEC Response at 14.

requiring it to uphold racial segregation in schools), *rev'd*, 347 U.S. 483 (1954) (setting aside district court's ruling, not because the court acted improperly in following precedent, but because the precedent itself was contrary to law).

Even in situations where the standard of review is more generous to the agency than the standard here, and in which deference could be appropriate, the FEC's argument—that following circuit precedent cannot be contrary to law—is inaccurate. In *Atchison, Topeka & Santa Fe Railway Co. v. Peña*, Judge Easterbrook explained that an agency is not entitled to special consideration or deference simply because it acquiesced in another circuit court's decision:

> A party aggrieved by [an] agency's decision to throw in the towel may protest and obtain an independent decision. Acquiescence and nonacquiescence are mirror images when each produces winners and losers in the private sector. If courts review nonacquiescence decisions without a thumb on the scale in favor of the agency's choice, they must review acquiescence decisions independently.

44 F.3d 437, 447 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring), *aff'd sub nom. Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996); *cf. Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 817-18 (D.C. Cir. 2002) (citing Judge Easterbrook's analysis favorably). If agencies are not entitled to deference for acquiescing in appellate precedent in situations in which deference could be appropriate, then the FEC's acquiescence to *SpeechNow* should not

prevent the Court from reaching the constitutional issue in this case, in which review of the FEC's decision is de novo.

II. Deferring resolution of the FEC's motion for summary affirmance would conserve judicial resources.

The FEC argues that deciding its motion for summary disposition while a petition for initial en banc hearing is pending would conserve resources.[8] But a more certain way to conserve judicial resources is for the motions panel to stay its hand. In due course, the judges in regular active service will resolve the appellants' petition for initial en banc hearing. In the meantime, no deadlines loom, and the appellants are not pressing for a briefing schedule. If the active judges vote to grant initial en banc hearing, resolution of the FEC's motion for summary affirmance will become unnecessary. The motions panel then could deny *both* the FEC's motion *and* appellants' cross-motion as moot (having expended no effort considering the merits of the parties' positions in the meantime). If the active judges do not approve initial hearing en banc, the motions panel will be able to resolve the FEC's motion on the basis of the already-completed motion briefing (having lost nothing by waiting).

The FEC maintains that it would be *more* efficient for the motions panel to rule on its motion for summary disposition while the en banc petition is pending.[9]

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[8] FEC Response at 13.
[9] *Id.* at 12.

But, as the FEC acknowledges, deciding its motion now could lead to a *second* petition for *rehearing* en banc before the appellants' petition for *initial* hearing en banc has been resolved.[10] The FEC also suggests that multiple separate amici (to whose participation the FEC has already consented) could move for leave to file amicus briefs on such a petition for rehearing—motions that are unnecessary in support of the initial petition.[11] That would not save anyone any time.

The FEC claims that, despite all this extra effort involved in deciding its motion now, it would still conserve resources because the en banc Court could have "the benefit of the panel's views."[12] But the argument that the Court would profit from the panel's views contradicts the FEC's claim that the case is "so clear" that the appellants should not be allowed even to file their own brief on the merits.[13] The most efficient use of judicial resources here is for the motions panel to do nothing until the en banc petition has been decided.

[10] FEC Response at 13.
[11] *Id*. at 13-14.
[12] *Id*. at 13.
[13] *Id*. at 2.

CONCLUSION

The motions panel should hold the FEC's motion for summary affirmance in abeyance until the en banc Court has voted on appellants' petition for initial hearing en banc, or the time for requesting such a vote has passed.

Respectfully submitted,

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Date: June 24, 2019

CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. R. 27(d)(2)(A) and Circuit Rule 27(c) because the brief contains 1,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Ronald A. Fein

Ronald A. Fein

Dated: June 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service to all persons required to be served will be accomplished by the CM/ECF system.

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/s/ Ronald A. Fein
Ronald A. Fein

Dated: June 24, 2019