UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-2201 (EGS)
v.	)	**(Oral Hearing Requested)**
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 3

I. SpeechNow and its Aftermath 3

II. Proceedings to Date 5

ARGUMENT 6

I. Rule 15's Liberal Policy Favors Amendment and Supplementation Even When There Are Questions of Jurisdiction 6

A. Standard of Review 7

C. This Court Allows Amending Complaints to Cure Potential Mootness. 8

II. The Court Should Not Deny the Motion on Futility Grounds. 12

A. The Court Should Not Resolve the Merits of the FEC's Objections to the Amended Complaint Until the Amended Complaint Has Been Filed. 12

B. An FEC Ruling Based on an Erroneous Understanding of the Law is "Contrary to Law." 13

C. Plaintiffs' Challenge to *SpeechNow* is Meritorious. 17

1. *SpeechNow* rests on a flawed syllogism. 18

2. *SpeechNow* is inconsistent with *Buckley v. Valeo*. 20

D. The FEC's Advisory Opinion Neither Precludes Declaratory Relief Nor Renders Illegal Contributions Lawful Under FECA. 22

1. "Sanction" means penalty or other detriment imposed for violation of a legal requirement, not a declaration that conduct is unlawful and may be penalized or sanctioned if it recurs. 23

2. FECA's legislative history demonstrates that the bar on "sanctions" was intended to excuse good-faith reliance on an advisory opinion, not to deem conduct lawful when this conduct was in fact unlawful. 24

III. Conclusion 25

INTRODUCTION

The goal of this litigation is to present the U.S. Supreme Court with an opportunity to overturn a decision of the Court of Appeals for the D.C. Circuit, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), that the Supreme Court has not had an opportunity to review. The case comes to this Court in an uncommon posture, with plaintiffs—a U.S. Senator, two Members of the U.S. House of Representatives, and House candidates of both major political parties—arguing that a provision of the Federal Election Campaign Act (FECA) *is* constitutional and the Federal Election Commission (FEC) arguing that it is *not*. Relying on *SpeechNow*, the FEC ceased its enforcement of a provision that, if enforced, would limit the amounts that contributors may give to super PACs.

Plaintiffs, who suffer "injury in fact" because the FEC no longer enforces limits on contributions to super PACs opposing their candidacies, complained to the FEC about its failure to enforce the law. When the FEC failed for more than 120 days to rule on their complaint, plaintiffs filed a complaint in this Court alleging that the agency's delay was unlawful. When, nearly seven months later, the agency rejected plaintiffs' administrative complaint and reiterated its unwillingness to enforce the law, the plaintiffs sought leave to amend and supplement their complaint in this Court to challenge the FEC's ruling.[1]

The FEC has decided to make a stand on the plaintiffs' routine Rule 15 motion. Plaintiffs could have filed a *new* case challenging the FEC's dismissal of the administrative complaint that has been the focus of this litigation all along. The reason for the FEC's resistance to their motion to amend appears to turn on the date that the Court may use to determine their standing.

[1] For brevity, this brief hereafter uses terms such as amend, amendment, and amended complaint to encompass both amendment under Fed. R. Civ. P. 15(a) and supplementation under Fed. R. Civ. P. 15(d).

Although the plaintiffs are prepared to show that they are threatened with injury-in-fact in the coming election cycle because of the FEC's ruling, the threatened injury was, for some plaintiffs, especially clear at the time of their initial district court complaint. At that time, four days before the election of 2016, super PACs were actively opposing their candidacies.
A plaintiff's standing is ordinarily judged at the time a complaint is filed. *See Hardaway v. D.C. Housing Auth.*, 843 F.3d 973, 978 (D.C. Cir. 2016).

By forcing the plaintiffs to re-file their complaint rather than amend it, the FEC may hope to move the date for assessing their standing from shortly *before* the 2016 election to eight or nine months *after* that election. The requested amendment would have little effect apart from its possible effect on the date for determining standing. Although the FEC suggests briefly that amendment would prejudice it by reducing the time allowed for filing a response from 60 days to 14, plaintiffs would not oppose a motion to extend this time. *See Cloud Found., Inc. v. Salazar,* 738 F. Supp. 2d 35, 38 (D.D.C. 2010) (rejecting similar argument against amendment and finding that "Plaintiffs' willingness to consent to an extension of time for the government to answer the . . . amended complaint stops the government's concern of prejudice").

Allowing plaintiffs to amend and supplement their complaint to include recent developments would enable the plaintiffs to present the case as they always intended and as they would have presented it in the absence of the FEC's delays. Refusing to permit amendment would reward and encourage FEC delay. Whenever a complainant sought prospective relief, the agency might delay its resolution of his case until after Election Day in an effort to weaken the complainant's ability to establish standing.

As explained in detail in plaintiffs' opposition to the FEC's motion to dismiss, this case continues to present a live controversy between plaintiffs and the FEC, and even if that were not

so, the Rules would permit amendment. Moreover, the Court should not deny the motion to amend as "futile" based on limited briefing with the parties in a reversed posture.[2] Instead, the Court should allow plaintiffs' motion to amend and should address the merits of the FEC's challenges only after the amended complaint is filed. This brief describes why the complaint is meritorious in sufficient detail to demonstrate that amendment would not be futile, but this is not the appropriate time for the Court to render judgment on the merits.

BACKGROUND

I. *SpeechNow* and its Aftermath

In 2010, two months after the Supreme Court decided *Citizens United v. FEC*, 558 U.S. 310 (2010), the D.C. Circuit held limits on contributions to super PACs unconstitutional. Its decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), created a regime in which federal law bars a contributor from giving more than $5,400 to a candidate for federal election, but in which this contributor can circumvent the limit by giving millions of dollars to an "independent expenditure committee" supporting the same candidate.

At the time of the *SpeechNow* decision, hardly anyone recognized the extent to which it would transform American politics. David Keating, the president of SpeechNow.org and the principal architect of the *SpeechNow* litigation, acknowledged in 2015 that using an independent expenditure group to promote a particular candidate "just never entered my mind." Alex Altman, *Meet the Man Who Invented the Super PAC*, Time, May 13, 2015, http://ti.me/2wFgp1t. Then-Attorney General Eric Holder explained that the Justice Department did not seek certiorari in *SpeechNow* because this decision would "affect only a small subset of federally regulated

[2] On a motion to dismiss, the FEC is functionally the movant and the plaintiffs the opponents. Yet the posture of this Rule 15 motion reverses this: the FEC is in the position of the opponent, and the plaintiffs are in the position of the movants, working under a page limit suitable for a reply rather than a memorandum in opposition.

contributions." Letter from Atty. Gen. Eric Holder to Sen. Harry Reid, June 16, 2010, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf.

Holder's statement belongs on a historic list of wrong predictions. In 2016, 2,389 super PACs campaigning in federal elections raised $1.8 billion. *See* Ctr. for Responsive Politics, *2016 Outside Spending, by Super PAC*, https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S (visited Aug. 15, 2017). Sixty percent of this amount came from just 100 donors. *See* Ctr. for Responsive Politics, *2016 Super PACs: How Many Donors Give?*, https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=B (visited Aug. 15, 2017). Before *SpeechNow*, FECA had allowed donors to give no more than $5000 per year to the groups now known as super PACs. *See* 52 U.S.C. § 30116(a)(1)(C).

When the FEC acquiesced in the *SpeechNow* decision, its enforcement of FECA's limit on super PAC contributions ceased. *See* FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). For a time, several states and one municipality enforced their own contribution limits, but federal courts of appeals sustained challenges to their efforts. *See* FEC Opp. to Pls.' Mot. to Amend, ECF No. 25 (July 17, 2017) ("FEC Opp."), at 13 n.3. None of the states sought Supreme Court review, and the petition for certiorari filed by the municipality, which only cited five cases, did not cite *SpeechNow*. *See* Pet. for Cert., *City of Long Beach v. Long Beach Area Chamber of Commerce*, 562 U.S. 896 (2010) (No. 10-155), 2010 WL 3000933.

In subsequent years, the appearance of corruption created by unlimited political contributions has become unmistakable. While campaigning in 2016, President Trump made statements like, "These Super PACs are a disaster by the way, folks, very corrupt. . . . There is total control of the candidates." *Transcript of Republican Debate in Florida*, N.Y. Times, Mar.

11, 2016, http://nyti.ms/2wiNYGw. His Democratic opponent, Secretary Hillary Clinton, promised to "fight hard to end the stranglehold that the wealthy and special interests have on much of our government." Hillary for America, *Issues: Campaign Finance Reform*, https://www.hillaryclinton.com/issues/campaign-finance-reform (visited Aug. 11, 2017). Senator Bernie Sanders, who won 43% of the Democratic primary vote after declining super PAC support, declared, "We now have a political situation where billionaires are literally able to buy elections and candidates." Paul Kane & Philip Rucker, *An Unlikely Contender, Sanders Takes On "Billionaire Class" in 2016 Bid*, Wash. Post, Apr. 30, 2015, http://wapo.st/2wiDc2X. Opinion polls show perceptions of government corruption at historic high points. *See*, *e.g.*, *75% in U.S. See Widespread Government Corruption*, Gallup, Sept. 19, 2015, http://www.gallup.com/poll/185759/widespread-government-corruption.aspx. As *SpeechNow* intensified concerns over corruption, academic commentary sharply criticized the reasoning of this decision. *See* Albert Alschuler, Laurence Tribe, Norman Eisen, & Richard Painter, *Why Limits on Contributions to Super PACs Should Survive* Citizens United, U. of Chicago Pub. L. Working Paper No. 626, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015462 (Aug. 8, 2017).

The plaintiffs here—members of Congress and candidates for Congress in the 2016 election—believe that *SpeechNow* and its creation of super PACs have harmed our democracy. They filed this action in order to bring to the Supreme Court the question of whether the Constitution guarantees the right to give unlimited amounts of money to a super PAC.

II. Proceedings to Date

On July 7, 2016, with the general election campaigns of 2016 barely underway, the plaintiffs filed an administrative complaint with the FEC, listing as respondents ten super PACs that had accepted contributions above the limit and that had spent or posed an imminent risk of spending money against them in their upcoming campaigns. Compl. ¶ 6, ECF No. 1 (Nov. 4,

2016). The FEC could have dismissed this complaint promptly, citing its earlier acquiescence in *SpeechNow*. The complainants then could have sought review in this court.

The statutory period of 120 days ended, however, without an FEC ruling. On November 4, 2016, four days before Election Day and still facing an imminent threat of major contributions to and spending by super PACs, the plaintiffs filed this action alleging that the FEC's failure to act was contrary to law. Seven months later, and almost eleven months after receiving the plaintiffs' administrative complaint, the FEC rejected this complaint, citing its earlier acquiescence in *SpeechNow*. FEC Opp. at 8. The plaintiffs promptly moved to amend their judicial complaint to allege that the FEC's ruling is contrary to law. *See* Scheduling Order, ECF No. 16 (Mar. 22, 2017), at 2 ("If the Commission issues an adverse final decision on plaintiffs' pending administrative complaint while this action is pending, plaintiffs may, within 21 days of the adverse final decision, file a motion to amend or supplement their complaint to seek substantive review of that decision."); *see also* 52 U.S.C. § 30109(a)(8)(B) (challenges to dismissals of complaints must be filed within 60 days).

ARGUMENT

I. Rule 15's Liberal Policy Favors Amendment and Supplementation Even When There Are Questions of Jurisdiction.

As explained in plaintiffs' opposition to the FEC's motion to dismiss, the FEC's issuance of a final decision during the pendency of this lawsuit does not moot the lawsuit. But even if it did, the FEC's argument that its decision strips the Court of subject matter jurisdiction and prevents amending the complaint is inconsistent with Supreme Court precedent and the law of this Circuit. *See* FEC Opp. at 6-10.

A. Standard of Review

Leave to file an amended or supplemented complaint "should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)(2)); *Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006) (same for Rule 15(d)). The purpose of the liberal amendment and supplementation rules is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." Wright & Miller, 6 *Fed. Prac. & Proc. Civ.* § 1471 (3d ed. Apr. 2017 update). The district courts' discretion to grant motions to supplement pleadings "has been liberally applied in favor of granting leave." *Id.* § 1510. A district court's decision to grant leave to amend is rarely reversed absent severe prejudice to the opposing party. *See, e.g., Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2d Cir. 1968) (reversing grant of leave to amend an answer to assert a statute of limitations defense because the amendment would severely prejudice a plaintiff who, if statute had been timely pleaded, could have brought an action in a non-time-barred jurisdiction).

B. The Motion is Consistent With the Scheduling Order in This Case.

The Scheduling Order in this case contemplated this motion to amend. In the parties' Joint Scheduling Report, the parties submitted opposing statements on the appropriateness of amended pleadings. *See* Joint Scheduling Report, ECF No. 14 (Feb. 28, 2017), at 2. Plaintiffs contended that "if the Commission issues an adverse final decision on plaintiffs' pending administrative complaint while this action is pending, plaintiffs should be permitted to amend or supplement their complaint to seek substantive review of that decision." *Id.* The FEC, by contrast, stated: "The Commission's position is that if the agency takes final action on plaintiffs' administrative complaint before a judicial decision in this case, the case will be moot. If plaintiffs wish to seek judicial review of a dismissal of their administrative complaint, they must file a new court complaint." *Id.* In accordance with its position, the FEC's proposed scheduling

order provided: "No amendments to the pleadings shall be made." FEC's Proposed Scheduling Order, ECF No. 14-2 (Feb. 28, 2017), at 2.

The Scheduling Order issued by the Court, however, stated: "If the Commission issues an adverse final decision on plaintiffs' pending administrative complaint while this action is pending, plaintiffs may, within 21 days of the adverse final decision, file a motion to amend or supplement their complaint to seek substantive review of that decision." Scheduling Order, ECF No. 16 (Mar. 22, 2017), at 2.

The FEC's argument that the unamended complaint is moot, and therefore amendment is not possible, is what the FEC argued in its statement in the Joint Scheduling Report. But plaintiffs relied on the Scheduling Order, and its actual or apparent rejection of the FEC's position on this point. Based on this reliance, plaintiffs timely moved to amend and supplement their complaint, rather than file a new action, to seek substantive review of the FEC's adverse decision. Given this reliance, and the subsequent expiration of the statutory 60-day period for filing a new complaint, it would be inequitable and unjust to deny plaintiffs' motion on the very basis that the FEC argued and lost in the scheduling phase of this case.[3]

C. This Court Allows Amending Complaints to Cure Potential Mootness.

The weight of authority from the Supreme Court, the D.C. Circuit, and elsewhere recognizes that claims evolve while cases are pending when new facts emerge or interactions between the parties continue, and supports liberal amendment even when the court would no longer have jurisdiction to resolve the complaint as originally filed.

[3] *Cf. Bullock v. Cabasa*, No. CIV.-10-1412 RBK/AMD, 2013 WL 6253432 (D.N.J. Dec. 4, 2013) (granting leave to amend complaint with new, otherwise time-barred claims against existing defendants, because plaintiff relied on scheduling order allowing such amendment, but denying leave to add claims against new defendants).

Both the Supreme Court and the D.C. Circuit have permitted or invited plaintiffs to amend their complaints to allege new facts or modified claims after their cases became moot on appeal. *See Diffenderfer v. Cent. Baptist Church of Miami,* 404 U.S. 412, 415 (1972) (per curiam) (noting that case had become moot on appeal by replacement of challenged statute, but "remand[ing] the case to the District Court with leave to the appellants to amend their pleadings . . . to attack the newly enacted legislation"); *Bryan v. Austin*, 354 U.S. 933, 933 (1957) (per curiam) (same); *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1015 (D.C. Cir. 1997) (where government action appeared to moot plaintiffs' claims on appeal, noting that "[a]lthough we are normally hesitant to allow a plaintiff resisting a mootness claim later to assert broader claims of injury, here it is the government's own actions . . . that made Dynalantic's claims . . . arguably moot," and allowing plaintiff to amend pleadings to cure mootness).[4]

Similarly, judges of this court have permitted plaintiffs to amend their complaints after an initial challenge to agency procedures became moot because of belated agency action. *See Sierra Club v. Watkins*, 808 F. Supp. 852, 864–65 (D.D.C. 1991) (after plaintiff challenged environmental assessment, government produced second assessment, thus mooting initial claims, but plaintiff was then permitted to file supplemental complaint addressing new assessment); *cf. Schmidt v. United States*, 749 F.3d 1064, 1065-70 (D.C. Cir. 2014) (where plaintiff's initial challenge to administrative agency procedures became moot after agency decision on merits and plaintiff filed amended complaint challenging merits, affirming district court's dismissal solely because plaintiff did not satisfy Rule 15(a)(2) by seeking leave of court).

[4] *Accord ACLU of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1347 (5th Cir. Unit A 1981) (holding that where complaint became moot on appeal, "interests of justice" required that plaintiffs be permitted to file supplemental complaint "within a reasonable time" to maintain claim for prospective relief).

The FEC fails to cite this authority, instead relying largely on unpublished cases from the Southern District of New York that involved different procedural scenarios—most do not even involve mootness—and which, in any case, do not reflect D.D.C. practice. *See* FEC Opp. at 7-10.

Three of the FEC's cases involved irrelevant situations where plaintiffs lacked standing at the *start* of the case and tried to remedy that later by adding plaintiffs.[5] Two others involved other irrelevant scenarios involving a lack of jurisdiction at the time of filing and, in any event, would have been resolved differently in this district: (1) whether a plaintiff may cure a lack of diversity jurisdiction by alleging federal claims,[6] and (2) whether a plaintiff may cure a failure to exhaust remedies before filing by alleging post-filing exhaustion.[7]

The lone case cited by the FEC from this district that involves mootness is easily distinguished. In *American Wild Horse Preservation Campaign v. Salazar*, 800 F. Supp. 2d 270,

[5] *See Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assur. Co.*, 700 F.2d 889, 893 (2d Cir. 1983) (affirming denial of leave to amend where court lacked subject matter jurisdiction because wrong plaintiffs sued, but then sought to amend complaint to substitute proper plaintiffs); *Caruso v. Zugibe*, No. 14 CV 9185 VB, 2015 WL 5472643, at *2 (S.D.N.Y. July 21, 2015) (denying leave to amend where plaintiff lacked standing from the outset to seek prospective relief but sought to amend complaint to allege she was suing on behalf of a class); *Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112, 115 (D.D.C. 1999), *aff'd sub nom. Lans v. Digital Equip. Corp.*, 252 F.3d 1320 (Fed. Cir. 2001) (same).

[6] *Compare Broad v. DKP Corp.*, No. 97 CIV. 2029 (LAP), 1998 WL 516113, at *1 (S.D.N.Y. Aug. 19, 1998) (denying leave to amend complaint), *aff'd,* 182 F.3d 898 (2d Cir. 1999), *with Ulico Cas. Co. v. E.W. Blanc Co., Inc.*, 200 F.R.D. 3, 4 (D.D.C. 2001) (allowing amendment in same circumstance); *accord Shows v. Harber*, 575 F.2d 1253, 1254-55 (8th Cir. 1978) (per curiam) (reversing denial of leave to amend where original complaint wrongly asserted admiralty and Jones Act jurisdiction but amended complaint could have established diversity jurisdiction).

[7] *Compare H.B. v. Byram Hills Cent. Sch. Dist.*, No. 14-CV-6796-VB, 2015 WL 5460023, at *4 (S.D.N.Y. July 20, 2015) (denying leave to amend complaint), *aff'd,* 648 F. App'x 122 (2d Cir. 2016), *with Judicial Watch, Inc. v. U.S. Dep't of Energy*, 191 F. Supp. 2d 138, 139 (D.D.C. 2002) (permitting supplementation to cure jurisdictional defect by alleging post-complaint administrative exhaustion); *accord Purtill v. Harris*, 658 F.2d 134, 138-39 (3d Cir. 1981) (where administrative remedies were not exhausted at time of filing but were exhausted during pendency of case, remanding to district court with invitation to plaintiff to amend complaint to allege exhaustion); *see also Aftergood v. CIA*, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) (where original claims were filed outside jurisdictional statute of limitations, permitting filing of supplemental complaint raising new claims based on actions taken after original complaint filed).

273 (D.D.C. 2011), a government agency *rescinded* a wild-horse gelding plan for Wyoming that plaintiffs had challenged in the district court. Plaintiffs asked the Court to "permit the plaintiffs to expand the case to include other [unrelated] pending and future gelding plans" in Oregon and elsewhere. *See id.* The court refused, stressing that the "lawsuit was not an all-purpose objection to wild horse management efforts in general." *Id.* at 272. In other words, the plaintiffs challenged one agency decision, the agency withdrew that decision, and plaintiffs then sought to amend their complaint to include other, unrelated or barely related agency decisions.

But this is not a case where the government withdrew the decision under challenge or where plaintiffs have sought to add unrelated administrative decisions. Here, the FEC has issued a final decision during the pendency of this suit concerning the same administrative complaint that has been the subject of this lawsuit all along. Plaintiffs' proposed amended complaint reflects a natural evolution of the underlying litigation as the FEC shifted its posture from inaction to dismissal. This case concerns now, and has always concerned, the same "transaction": the FEC's handling of plaintiffs' administrative complaint.

This district's cases recognize the inefficiency of forcing plaintiffs to file entirely new suits due to procedural technicalities. *See Judicial Watch*, 191 F. Supp. at 130 ("[I]t would be putting form over substance to dismiss the complaint and require plaintiff to start all over again by filing a new complaint."); *Ulico Cas. Co.*, 200 F.R.D. at 4 (noting inefficiency of forcing plaintiffs to "re-file the amended complaint as a new action to put everyone in the same position they would be in" had the amended complaint been allowed). Plaintiffs' challenge to the FEC's final decision regarding their complaint is now ripe for review, and the Court should retain the jurisdiction that it has already assumed over the FEC's handling of this complaint.

II. The Court Should Not Deny the Motion on Futility Grounds.

A. The Court Should Not Resolve the Merits of the FEC's Objections to the Amended Complaint Until the Amended Complaint Has Been Filed.

The district court has discretion to grant or deny leave to amend. *See James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996). This discretion includes the discretion to allow amendment and consider, after complete briefing on a motion to dismiss, whether the amended pleading is defective.

In this case, it would be better to allow amendment. As noted above, the FEC's futility claim embeds a miniature motion to dismiss in its opposition to a routine procedural motion. Its move places the parties in the opposite positions from those they would normally occupy. The plaintiffs, who would *oppose* a motion to dismiss, must address it from the standpoint (and page limits) of a reply brief that must simultaneously address other matters. Where, as here, amendment would cause no hardship to the defendant and where denying leave to amend would reward and encourage delay by the FEC and impede the plaintiffs' efforts to present a constitutional issue for appellate review, the better course is to allow amendment and *then* consider whether the complaint should be dismissed. *See, e.g., Adams v. FedEx Ground Package Sys., Inc.*, No. 11-CV-02333-LTB-CBS, 2013 WL 61448, at *1 (D. Colo. Jan. 4, 2013) (noting that arguments for dismissing amended complaint "are more efficiently raised in the context of [a] Rule 12 motion, rather than indirectly under Rule 15(a)"); *Deya v. Hiawatha Hosp. Ass'n, Inc.,* No. 10-CV-2263-JAR/GLR, 2011 WL 1698774, at *3 (D. Kan. May 4, 2011) (rejecting futility argument and allowing amendment while reserving legal questions for a later stage); *Matthew Bender & Co. v. W. Pub. Co.*, No. 94-CIV-0589 (JSM), 1995 WL 702389, at *4 (S.D.N.Y. Nov. 28, 1995) (rejecting futility argument and allowing supplementation while granting time to defendant to file new motion to dismiss).

In many cases, a claim that "would not survive a motion to dismiss" would truly be futile. Such a claim would have no chance of prevailing in any court. But that is not always the case. When, for example, the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), challenged school segregation in a federal district court, they expected that *Plessy v. Ferguson*, 163 U.S. 537 (1896), would preclude the court from granting the relief they sought. As subsequent events showed, however, their complaint was not futile. More recently, an organization called Citizens United challenged a campaign finance law that had been previously found constitutional by the Supreme Court. Although the district court dismissed its claim, this claim, too, turned out not to be futile. *See Citizens United v. FEC*, 558 U.S. 310, 329-30, 365 (2010) (overruling two Supreme Court decisions).

When the object of a lawsuit is to seek reconsideration of an appellate decision, the court should not, on a Rule 15 motion, prematurely reject the amended complaint as "futile" based on precedent that may bind the district court but would not bind courts, including the Supreme Court, that are free to reconsider that precedent.

Although the issues posed by the FEC's objections to the amended complaint would be better addressed on a Rule 12 motion following amendment of the complaint, plaintiffs offer the following preliminary replies.

B. An FEC Ruling Based on an Erroneous Understanding of the Law is "Contrary to Law."

FECA requires this court to set aside an FEC ruling that is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Contrary to the FEC's argument, this language does not establish a deferential standard of review for *all* situations, and it certainly does not here.

The vast majority of challenges to FEC dismissals under 52 U.S.C. § 30109 involve allegations either that the FEC has misconstrued a term in FECA or that it has misapplied FECA

to a particular set of facts. For cases presenting those circumstances, the D.C. Circuit has interpreted the words "contrary to law" to allow a court to set aside an FEC ruling only when "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act or (2) . . . the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). The first test applies the framework of *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984), to determine whether the statute can be construed using traditional tools of statutory interpretation, or, if not, whether the agency's construction was reasonable; the second test is akin to the "arbitrary, capricious, [or] abuse of discretion" standard from the Administrative Procedure Act (APA), 5 U.S.C. § 706(2).

But "contrary to law" means something different here. Plaintiffs do not allege that the FEC has misconstrued a provision in FECA; all parties agree that the $5,000 contribution limit to political committees in 52 U.S.C. § 30116(a)(1)(C) is unambiguous and, according to its plain meaning, applies to the undisputed facts and to the respondents named in plaintiffs' administrative complaint. Plaintiffs allege that the FEC's refusal to enforce limits on super PAC contributions is contrary to law because its refusal rests, not on an erroneous construction of the statute, but on the erroneous view that a portion of the statute is invalid. This question is not one on which the agency is entitled to *Chevron* deference, and the FEC does not suggest otherwise.[8] A court defers to an agency's ruling on a question of law only when Congress has delegated authority to the agency to resolve that legal question. *See*, *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-26 (2001) (an agency's interpretation of a statute is entitled to deference only

[8] The FEC argues that its construction of the word "sanction" in 52 U.S.C. § 30108(c)(2) is entitled to *Chevron* deference, FEC Opp. at 22, but that does not apply to its acquiescence in *SpeechNow*.

"when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Congress did not grant the FEC authority to resolve the issue posed by *SpeechNow*.

Nor do plaintiffs allege that the FEC started with the proper construction of the law but applied it arbitrarily or capriciously to plaintiffs' complaint—for example, by improperly considering non-statutory factors or by using improper procedure. The APA's "arbitrary, capricious, [or] abuse of discretion" standard, 5 U.S.C. § 706(2), is therefore inapposite here.

The central question here is a pure question of law: whether the First Amendment prohibits application of FECA's contribution limit to the contributions identified in the administrative complaint. In a challenge of this type, the "contrary to law" standard requires de novo review by the courts.

The FEC quotes language describing what "contrary to law" means when *Chevron* or APA-like review apply, and it uses this language to argue for a highly deferential standard of review in this case.[9] *See* FEC Opp. at 13-15 (framing question as whether FEC decision was "arbitrary or capricious or an abuse of discretion," whether it "reasonably followed judicial precedent," and whether it adhered to "the law as it stood at the time the decision was made," and arguing that court must be "highly deferential" to FEC's decision, which "must be affirmed so long as it is reasonable," because FEC was "not required to choose the 'best' solution, only a reasonable one"). But the FEC's argument tears this language from its context. When an agency's ruling on a general question of law is entitled to neither *Chevron* deference nor

[9] One decision cited by the FEC, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), preceded *Chevron*. Like the post-*Chevron* decisions cited by the FEC, however, this *Chevron* precursor considered only the deference owed the FEC in its construction of FECA.

Skidmore deference (which applies when a court is persuaded that an agency has relevant expertise the court itself lacks, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it is not entitled to deference at all.

For example, as a recent decision of this court emphasizes, a court applying the "contrary to law" standard affords no deference to an agency's interpretation of judicial precedent. *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 8 (D.D.C. 2016) (Cooper, J.), *appeal dismissed*, No. 16-5343 (D.C. Cir. Apr. 4, 2017) ("Finding that the controlling [FEC] Commissioners premised their conclusion on an erroneous interpretation of Supreme Court precedent and the First Amendment, the court agrees with CREW that the dismissals [of its administrative complaints] were contrary to law."); *id*. at 86-87 (describing the applicable standard and citing numerous precedents); *see Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle."), *vacated on other grounds*, 524 U.S. 11 (1998). And when an agency ruling on a question of law is not entitled to deference, it is subject to review on the same terms as a district court's ruling on a legal question.

When, for example, the Supreme Court reversed the decision of a three-judge district court in *Brown v Board of Education*, 347 U.S. 483 (1954), it concluded that the district court's ruling was contrary to law—contrary, in that case, to the Constitution of the United States. The district court, however, followed binding precedent. Although that court observed that it was "difficult to see" why racial segregation was not a denial of due process, it noted that *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Gong Lum v. Rice*, 275 U.S. 78 (1927), "have not been overruled and . . . still presently are authority for the maintenance of a segregated school system." *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951), *rev'd*, 347 U.S. 483

(1954). The Supreme Court recognized that, even if the district court in *Brown* was compelled by *Plessy* and *Gong Lum* to rule as it did, its ruling was contrary to law because these earlier decisions were contrary to law. A contrary view would have left school segregation in place indefinitely, just as the FEC now proposes to interpret the phrase "contrary to law" in a way that would immunize *SpeechNow* from reconsideration. Indeed, under the FEC's logic, if *Brown* had originated with an administrative proceeding against the school district under a hypothetical agency statute containing a "contrary to law" test, the agency's decision to follow *Plessy* and *Gong Lum* would have been unreviewable.

Congress knows how to write deferential standards of review. *See*, *e.g*., 28 U.S.C. § 2254(d)(1) (allowing habeas corpus relief only when a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"). But Congress did not direct courts to set aside FEC rulings only when these rulings are "clearly erroneous" or "contrary to clearly established law." It directed courts to set aside these rulings when they are in any respect "contrary to law." The FEC's argument improperly extends a judicial gloss developed for circumstances in which deference is appropriate to a case in which it is not.

C. Plaintiffs' Challenge to *SpeechNow* is Meritorious.

This section describes *SpeechNow*'s errors to demonstrate that amending the complaint would not be futile and to ensure that plaintiffs' contentions are preserved. A law review article written by four of the plaintiffs' lawyers provides a more thorough exposition of these arguments. *See* Albert Alschuler, Laurence Tribe, Norman Eisen, & Richard Painter, *Why Limits on Contributions to Super PACs Should Survive* Citizens United, U. of Chicago Pub. L. Working Paper No. 626, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015462 (Aug. 8, 2017).

1. <u>SpeechNow *rests on a flawed syllogism.*</u>

The *SpeechNow* opinion announced that a single sentence of the *Citizens United* opinion compelled its result. The Supreme Court wrote in *Citizens United*, "We now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, and the D.C. Circuit declared, "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." 599 F.3d at 694.[10]

This purported syllogism collapsed the distinction between political contributions and expenditures—a distinction that has been central to the Supreme Court's campaign finance jurisprudence since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). Since *Buckley*, the Court has subjected expenditure limits to strict scrutiny. The Court has reviewed contribution limits under a more tolerant standard, and it has nearly always upheld them.[11] *See Citizens United*, 558 U.S. at 359 ("[C]ontribution limits, . . . unlike limits on independent expenditures, have been an accepted means of preventing *quid pro quo* corruption."); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441-42 (2001) ("[W]e have routinely struck down limitations

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[10] Although the D.C. Circuit described the premise of its syllogism—the statement that "independent expenditures . . . do not give rise to corruption or the appearance of corruption"—as something the Supreme Court had held as a matter of law, this statement was dictum. The assertion that independent expenditures do not corrupt at all went far beyond any issue before the Court. *See* Alschuler *et al.*, *supra*, at 13-15. Moreover, the Supreme Court probably did not mean its dictum to be taken literally. *See id.* at 15-19.

[11] The Court's refusal to subject contribution limits to strict scrutiny rested on its conclusion that contributions have limited communicative value. *See FEC v. Beaumont*, 539 U.S. 146, 161 (2003) ("[R]estrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.").

on independent expenditures by candidates, other individuals and groups while repeatedly upholding contribution limits.”).

The conclusion that “contributions to groups that make only independent expenditures . . . cannot corrupt or create the appearance of corruption” is insupportable. Contrary to this conclusion, super PAC *contributions* can corrupt even when super PAC *expenditures* do not. In 2015, for example, a federal court upheld an indictment for bribery that, according to the government, occurred partly through contributions to a super PAC. *See United States v. Menendez*, 132 F. Supp. 3d 635, 639-640 (D.N.J. 2015).[12] Although the indictment alleged that an elected official exchanged government favors for this contribution, the indictment contained no suggestion that the super PAC that received the contribution had acted improperly or that its *expenditures* corrupted the official. In fact, whether or how a super PAC spends a contribution does not bear at all on whether the contribution corrupts. Federal prosecutions for bribery (the most extreme form of quid pro quo corruption) often rest on payments to third parties (for example, a favored charity). *See* 18 U.S.C. § 201(b)(2) (defining bribery to include situations in which a candidate or official “directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally *or for any other person or entity*” in exchange for official action) (emphasis added); *United States v. Siegelman,* 640 F.3d 1159, 1165–66 (11th Cir. 2011) (upholding a governor’s bribery conviction where the bribe was a donation to an issue advocacy campaign supporting funding for public education).

Just this year the Supreme Court affirmed a decision relying on the principle that corruption can occur when funds are contributed without regard to if, when, or how they are spent. *See Republican Party of Louisiana v. FEC,* 219 F. Supp. 3d 86, 97 (D.D.C. 2016) (3-judge

[12] *See also* First Amended Compl. ¶¶ 50-51, ECF No. 21-2 (June 22, 2017) (identifying the contributions at issue in that case).

court) ("[T]he inducement occasioning the prospect of indebtedness on the part of a federal officeholder is not the *spending* of soft money by a political party. The inducement instead comes from the *contribution* of soft money to the party in the first place.") (emphasis in original), *aff'd*, 137 S. Ct. 2178 (2017) (mem.). A contribution to a super PAC can corrupt even when the super PAC never spends it—for example, because a bookkeeper pockets the money and absconds to Rio.

2. *SpeechNow is inconsistent with Buckley v. Valeo.*

The *SpeechNow* opinion did not address what should have been the central issue in the case—whether contributions to super PACs can reasonably be distinguished from the contributions to candidates whose limitation *Buckley v. Valeo* upheld.

Buckley's distinction between contributions and expenditures rested on five considerations: three reasons for concluding that contributions to candidates have less communicative value than expenditures and two reasons for concluding that contributions are more corrupting. All of *Buckley*'s reasons for treating contributions as low-value speech apply fully to contributions to super PACs:

1. "A contribution serves as a general expression of support for the candidate and his views, but does not convey the underlying basis for that support." 424 U.S. at 21. Equally, a contribution to a super PAC does not convey the underlying basis for the contributor's support.

2. "[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Id*. Transforming a contribution to a super PAC into political debate also "involves speech by someone other than the contributor."

3. Limiting the amount of an individual's contribution "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id*. Limiting a contribution to a super PAC similarly

allows the contribution to serve as an expression of support but does not limit a contributor's freedom to discuss candidates and issues.

Moreover, *Buckley*'s two reasons for viewing expenditures as less corrupting than contributions to candidates show why contributions to super PACs fall on the contribution side of the line, not the expenditure side:

1. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. Although non-coordination rules may inhibit corrupt transactions between candidates and super PAC managers and other independent spenders, they cannot inhibit corrupt transactions between candidates and super PAC *contributors*. These rules simply do not apply to super PAC contributors; they apply only to the managers who determine how super PAC funds are spent. The absence of prearrangement and coordination of *expenditures* does not distinguish contributions to super PACs from direct contributions to candidates.

2. Independent expenditures tend to be less valuable to candidates. The Court wrote: "[I]ndependent advocacy . . . does not presently appear to pose any dangers of real or apparent corruption comparable to those identified with large campaign contributions" and "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 46.

Candidates may value contributions to super PACs less than they do contributions to their own campaigns. But the fact that super PAC contributions are worth *less* does not mean that they are *worthless*. In *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), four members of the *Citizens United* majority joined a plurality opinion by Chief Justice Roberts. This opinion reiterated

Buckley's statement that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate" and then acknowledged, "But probably not by 95 percent." *Id.* at 1454.

Even assuming that a super PAC contribution is worth *99 percent* less than a contribution to a candidate, a $1 million super PAC contribution has nearly twice as much potential for corruption or appearance of corruption as a prohibited $5500 direct contribution. If Congress may prohibit the $5500 campaign contribution (as it may and has), it may prohibit the $1 million super PAC contribution as well (as it has).

In short, if *Buckley* still stands, *SpeechNow* was wrongly decided. FECA's contribution limit may be constitutionally applied to the six- and seven-figure contributions received by the super PACs identified in plaintiffs' administrative complaint.

D. The FEC's Advisory Opinion Neither Precludes Declaratory Relief Nor Renders Illegal Contributions Lawful Under FECA.

In an advisory opinion sought by a super PAC (FEC Advisory Op. 2010-11), the FEC authorized super PACs to accept contributions above the statutory limit from individuals and corporations.[13] FECA provides that someone who relies in good faith on an FEC advisory opinion "shall not . . . be subject to any sanction provided by this Act." 52 U.S.C. § 30108(c)(2). The plaintiffs accordingly have sought only prospective relief. The FEC contends, however, that even *declaratory* relief is a "sanction" and that it was required to reject the plaintiffs' complaint.

The threshold step under *Chevron* is: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. Here, traditional tools of

[13] *SpeechNow* did not specifically address corporate contributions. Plaintiffs' administrative complaint identified several corporate super PAC contributions. First Amended Compl. ¶¶ 48, 49, 74, ECF No. 21-2 (June 22, 2017).

statutory construction, including dictionaries, legislative history, and case law, point to one conclusion: Declaratory relief is not a "sanction." There is no ambiguity for the FEC to resolve.

1. *"Sanction" means penalty or other detriment imposed for violation of a legal requirement, not a declaration that conduct is unlawful and may be penalized or sanctioned if it recurs.*

In general, a "sanction" is a penalty or coercive measure. The principal case cited by the FEC, *Alabama v. North Carolina*, 560 U.S. 330 (2010), supports this meaning precisely. There, the Supreme Court defined the "ordinary meaning" of the word "sanction" in two ways: "'[t]he detriment[al] loss of reward, or other coercive intervention, annexed to a violation of a law as a means of enforcing the law,'" and "'[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.'" *Id.* at 340 ((quoting Webster's New International Dictionary 2211 (2d ed. 1954) and Black's Law Dictionary 1458 (9th ed. 2009)).[14]

The D.C. Circuit has also equated sanctions with penalties. In *LaRouche v. FEC*, 28 F.3d 137 (D.C. Cir. 1994), a presidential candidate contested the FEC's determination that his campaign had to repay over $100,000 in excess federal matching funds received. The candidate challenged the repayment order based on a different good-faith reliance provision in FECA. *See* 52 U.S.C. § 30111(e) ("[A]ny person . . . who acts in good faith in accordance with [an FEC] rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act . . . ."). However, the D.C. Circuit rejected the candidate's argument, noting that "all the good faith in the world will not save petitioners because the request that they repay the . . . matching funds *was not a sanction*." *LaRouche*, 28 F.3d at 142 (emphasis added).

[14] *Alabama v. North Carolina* also noted that "the imposition of a nonmonetary obligation" can be a kind of sanction. 560 U.S. at 341; *see* FEC Opp. at 18 (citing this language). And so it can—but only when the nonmonetary obligation is imposed as a penalty or detriment for violating a legal requirement. Moreover, declaratory relief does not "impose" any obligation. It merely declares what the law is.

Declaratory judgments are an *alternative* to penalties or other coercive relief—and available even where such other forms of relief may be barred. *See* 28 U.S.C. § 2201(a) ("[A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*.") (emphasis added); *see also* Fed. R. Civ. P. 57, Advisory Cmte. notes (1937) (noting that even "when coercive relief only is sought but is deemed ungrantable or inappropriate," court may still issue declaratory judgment). Indeed, the FEC may seek *declaratory relief* for FECA violations even where *penalties* for those violations would be time-barred. *FEC v. Christian Coalition*, 965 F. Supp. 66, 69-72 (D.D.C. 1997); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995).

2. *FECA's legislative history demonstrates that the bar on "sanctions" was intended to excuse good-faith reliance on an advisory opinion, not to deem conduct lawful when this conduct was in fact unlawful.*

The legislative history of the advisory opinion provision further supports the common-sense interpretation of "sanction" as a penalty or detriment imposed for violation of a legal requirement. The original FECA of 1974 differed from the present statute in its treatment of compliance with FEC advisory opinions. It said, "Notwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered . . . who acts in good faith in accordance with the provisions and findings of such advisory opinion *shall be presumed to be in compliance* with the provision of this Act . . . with respect to which such advisory opinion is rendered." FECA Amendments of 1974, Pub. L. 93-443 § 208, sec. 313, 88 Stat. 1263, 1283-84 (Oct. 15, 1974) (emphasis added).

In 1976, Congress amended this provision. The 1976 revision, materially identical to the provision as it stands today, provided that a person relying in good faith on an advisory opinion "shall not, as a result of any such act, be subject to any sanction provided by this Act." FECA

Amendments of 1976, Pub. L. 94-283 § 108, sec. 312, 90 Stat. 475, 482 (May 11, 1976). A conference report explaining this provision used the word "penalty" as a synonym for the word "sanction": "Subsection (b)(1) provides that any person who relies on an advisory opinion and who acts in good faith in accordance with the advisory opinion may not be *penalized* under the Act . . . as the result of any such action." H.R. Conf. Rep. 94-1057 at 44, 1976 U.S.C.C.A.N. 946, 959 (Apr. 28, 1976); *see also* H.R. Rep. 94-917 at 62 (Mar. 17, 1976) (same).

The revised provision provides a "mistake of law" defense analogous to those found in criminal law under such names as "official authorization," *Keathley v. Holder*, 696 F.3d 644, 646-47 (7th Cir. 2012), "entrapment by estoppel," *United States v. Tallmadge*, 829 F.2d 767, 773-75 (9th Cir. 1987), "advice of counsel," *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997), and "mistake of law." *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987) ("[T]he government argued that mistake of law is never a defense. There is an exception to the mistake of law doctrine, however, in circumstances where the mistake results from the defendant's reasonable reliance upon an official—but mistaken or later overruled—statement of the law."). These defenses may *excuse* the defendant's conduct, but they do not amend the law. The conduct remains unlawful.

III. Conclusion

Amending the plaintiffs' complaint would not prejudice the FEC. Failing to amend the complaint, however, would reward and encourage the FEC's delay and prejudice the plaintiffs' ability to present their case. The Court should allow the amendment. It should address the FEC's challenges only after full briefing following a motion to dismiss the amended complaint.

Dated: August 16, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 16, 2017, the foregoing was caused to be served on counsel of record for Defendant by the Court's electronic filing system.

Dated: August 16, 2017

/s/ Stephen A. Weisbrod__
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