ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5072

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

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE AND OPPOSITION TO APPELLANTS' REQUEST TO HOLD THE FEC'S MOTION IN ABEYANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes

Rules

Miscellaneous

ARGUMENT

This case centers on whether a federal agency's administrative enforcement decision was permissible, *not* whether a 2010 decision of this Court was correct. Representative Ted Lieu and the other appellants (collectively, "Lieu") brought this action under a provision of the Federal Election Campaign Act ("FECA") to challenge the Federal Election Commission's ("FEC" or "Commission") decision not to pursue enforcement proceedings against ten political committees named in Lieu's administrative complaint. The standard of review for such an action is whether the Commission acted contrary to law when it dismissed the administrative complaint. *See* 52 U.S.C. § 30109(a)(8)(A). Using this standard, the district court correctly held that the Commission had permissibly followed the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*), when it dismissed the administrative complaint. The sole question presented here is whether the Commission acted contrary to law in declining to pursue enforcement of the matter. On this question, the merits are so clear that further briefing will provide no benefit and summary affirmance is plainly warranted.

Rather than refuting the Commission's arguments, Lieu instead contends that summary affirmance is not appropriate because Lieu wishes to engage in full briefing on the correctness of the *SpeechNow* decision. To this end, Lieu also

requests that this Court hold the Commission's summary affirmance motion in abeyance pending consideration of Lieu's planned petition for initial hearing *en banc*, a judicial mechanism that is rarely permitted. But reevaluating the merits of the unanimous *en banc SpeechNow* opinion is not necessary to resolve the appeal in this Court, and Lieu's petition does not warrant withholding summary disposition where the standard for that relief is so clearly met. Lieu claims that judicial resources would be conserved by his proposed briefing structure, but to the contrary, there is no basis to burden all active judges of the court with a petition for initial *en banc* hearing of an appeal that so clearly lacks merit.

Accordingly, this Court should grant summary affirmance to the Commission and deny Lieu's affirmative request to hold the motion for summary affirmance in abeyance.

I. THE DISTRICT COURT DECISION SHOULD BE SUMMARILY AFFIRMED BECAUSE THE COMMISSION DID NOT ACT CONTRARY TO LAW UNDER 52 U.S.C. § 30109(a)(8)

A. The Commission Meets the Standard for Summary Affirmance

This Court should summarily affirm the district court's decision because the merits are so clear that "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (per curiam). The sole question presented in this challenge is whether it was contrary to law for the Commission to dismiss Lieu's

administrative complaint in light of the D.C. Circuit's decision in *SpeechNow* and similar decisions by six other circuit courts. (*See* FEC's Mot. for Summary Affirmance ("FEC Mem.") at 15-19 (Doc. #1787446).) With regard to this question, the law and the facts that warrant summary affirmance are not in dispute.

Lieu concedes that the *SpeechNow* decision compelled the Commission to dismiss his administrative complaint, and that he did not "expect[] the FEC . . . to overrule [*SpeechNow*]." (Appellants' Resp. in Opp'n to FEC's Mot. for Summ. Affirmance and Affirmative Req. to Hold FEC's Mot. in Abeyance ("Opp'n") at 4 (Doc. #1790270).) *SpeechNow* is a clear and binding judicial holding that directly applies to the conduct at issue in Lieu's administrative complaint. In fact, Lieu states that he "acknowledged at every stage — before the [FEC] and again before the district court — that *SpeechNow* remains the law of this Circuit." (*Id*. at 3.) Lieu also does not dispute that "obeying judicial decisions is usually what courts expect agencies to do." *Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 703 (D.C. Cir. 2017). In light of Lieu's failure to counter these critical elements of the Commission's motion, this Court should summarily affirm the district court's decision. *See Po Kee Wong v. U.S. Solicitor Gen.*, No. 12-5102, 2012 WL 3791302, at *1 (D.C. Cir. Aug. 8, 2012) (finding waiver of arguments and concession of a motion for summary affirmance where a response did not "address

any of the arguments raised by appellee in its motion for summary affirmance or any argument pertaining to the district court's dismissal of his complaint").

In fact, the *only* ground on which Lieu opposes summary affirmance is that "plenary briefing would elucidate and preserve issues for further appeal." (Opp'n at 25.) However, the briefing that Lieu requests relates to the admitted "goal of this litigation" — to convince the Court *en banc* to "modify or reverse" *SpeechNow* — *not* whether the FEC acted contrary to law under section 30109(a)(8). (Opp'n at 1, 13.) The requested briefing thus does not concern the actual, central "issues presented [in this case]," *Taxpayers Watchdog, Inc.*, 819 F.2d at 298, and provides no basis to deny summary affirmance regarding the agency's obviously correct enforcement determination.

Lieu provides no other serious argument in opposition to summary affirmance. While Lieu contends that the issue of whether FECA forecloses a declaratory judgment against a Commission advisory opinion is an issue of first impression and therefore unsuitable for summary disposition (Opp'n at 22, 26), the district court did not address that argument below. The FEC included a description of the advisory opinion as background but did not present the issue in its motion for summary affirmance. Therefore, this Court also need not make any determination as to that issue in order to grant summary affirmance.

B. Whether the Commission Acted Contrary to Law Under FECA Does Not Hinge on the Future Viability of *SpeechNow*, and Lieu's Claims Are Unpersuasive in Any Event

The standard of review for the Commission action at issue here is well-settled. Lieu brings this action under FECA's judicial review provision at 52 U.S.C. § 30109(a)(8) to challenge the Commission's decision not to pursue enforcement proceedings against the respondents in the administrative complaint that he filed with the agency. In challenges to agency action under section 30109(a)(8), a decision is "contrary to law" if "the FEC dismissed the complaint as a result of an impermissible interpretation of" FECA or "if 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 contrary-to-law standard "requires affirmance if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167 (citation omitted). Of course, courts are not obligated to give binding deference to an administrative agency's interpretation of judicial precedent or of the Constitution. *See, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

Under this standard, the district court correctly found that the Commission permissibly applied binding circuit precedent in dismissing Lieu's administrative complaint, and that ultimately "[i]t cannot be said that the FEC's determination, which was based on *SpeechNow*, was contrary to law." *Lieu v. FEC*, 370 F. Supp.

3d 175, 186 (D.D.C. 2019). Lieu agrees that the FEC appropriately considered *SpeechNow* in dismissing the administrative complaint, but then argues that this dismissal was contrary to law because, Lieu contends, "*SpeechNow* is contrary to law." (Opp'n at 4.) Yet Lieu does not dispute the FEC's contention that determinations under the section 30109(a)(8) contrary-to-law standard include taking into account binding judicial precedent, and therefore the FEC's point is effectively conceded. *See Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003) ("It is understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citing *FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C. Cir. 1997); *Stephenson v. Cox*, 223 F. Supp. 2d 119, 121 (D.D.C. 2002))).

Lieu also provides no authority to support his claim that the Commission's determinations could be "contrary to law" under section 30109(a)(8) when the agency simply decides to acquiesce to binding Circuit precedent or declines to proceed with enforcement that would be based on speculation that the court of appeals might later reverse that precedent. Even if *SpeechNow* were to be modified in some future case by the Court *en banc* or by the Supreme Court, the FEC did not act contrary to law under section 30109(a)(8) when it relied on judicial precedent that was binding at the time.

Lieu's claims that *SpeechNow* has lost its binding force are unavailing. Lieu contends that the Supreme Court has not yet addressed *SpeechNow*. (Opp'n at 8.) However, though the Supreme Court has not directly considered the central issue in *SpeechNow*, the Court did acknowledge *SpeechNow* in its controlling opinion in *McCutcheon v. FEC* in a way that supports the case's continuing validity, as explained in the Commission's opening brief. *See* 572 U.S. 185, 193 n.2 (2014) (plurality op.); FEC Mem. at 7. Lieu also relies on several other cases (Opp'n at 17-21), but they fail to support his arguments about the viability of *SpeechNow*. In *Republican Party of La. v. FEC* (Opp'n at 20-21), for instance, the Supreme Court affirmed the decision of a three-judge district court that had explicitly distinguished *SpeechNow* on the basis that the political parties in that litigation differed from the independent expenditure-only political committees involved in *SpeechNow*. 219 F. Supp. 3d 86, 98 (D.D.C. 2016) ("[E]ven if contributions to independent-expenditure organizations present no potential for *quid pro quo* corruption, contributions to political parties, for the reasons described in *McConnell*, have that potential."), *aff'd*, 137 S. Ct. 2178 (2017).

Further, many of the alleged flaws in *SpeechNow* that Lieu presents here (Opp'n at 16-18, 21-22), including potential later factual developments, were actually raised before the *SpeechNow* court, to no avail. In *SpeechNow*, the Commission argued 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. Lieu now argues that *SpeechNow*'s holding wrongly conflates the corruptive potential of contributions and expenditures. (Opp'n at 16-18.) But the Commission had argued in *SpeechNow* that Supreme Court cases striking down limits on expenditures were distinguishable because a more permissive standard of review applies to limits on contributions. *See* FEC Br. at 19-23 (Docket #1207856), *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009), http://www.fec.gov/law/litigation/speechnow_fec_brief_092309.pdf ("*SpeechNow* PI Brief"). The Court of Appeals expressly rejected that argument, writing that limits on contributions to super PACs were unconstitutional "[n]o matter which standard of review" applies. *SpeechNow*, 599 F.3d at 696.

The Commission also presented to the *SpeechNow* court the argument, echoed by Lieu here (Opp'n at 21-22), that a ruling striking down contribution limits for independent expenditure groups might "lead to the proliferation of independent expenditure political committees devoted to supporting or opposing a single federal candidate or officeholder and funded entirely by very large contributions." *SpeechNow* PI Brief at 45. And the Commission warned that such groups might then gain "undue influence over officeholders" even "without directly coordinating with them" on campaign-related spending. *Id*. at 36-38. The FEC further provided particular historical examples raising questions of quid pro

quo danger and polling regarding the appearance of corruption in the context of independent expenditures. FEC Br. at 21-25 (Docket #1220957), *Keating v. FEC*, No. 09-5342 (D.C. Cir. Dec. 15, 2009), https://transition.fec.gov/law/litigation/keating_ac_fec_brief.pdf. Lieu relies on court opinions issued after 2010 and recent research (Opp'n at 17-18, 21), but the FEC presented evidence of the type Lieu claims to have located and predicted many basic developments he describes in its arguments to the D.C. Circuit.[1] These arguments did not carry the day in *SpeechNow*. Lieu fails to establish any new factual evidence calling the decision into such question that the FEC was required to ignore it when making enforcement determinations.

II. SUMMARY AFFIRMANCE IS WARRANTED BECAUSE THIS ACTION IS NOT AN APPROPRIATE VEHICLE BY WHICH TO CHALLENGE THE VALIDITY OF *SPEECHNOW*

Rather than countering the Commission's showing that it did not act contrary to law in applying binding circuit precedent to dismiss Lieu's administrative complaint, Lieu's opposition brief focuses mainly on the alleged invalidity of *SpeechNow*. (Opp'n at 16-22.) Although it is true that, when "someone challenges an appellate precedent, they must initiate the challenge in an agency or lower court" (Opp'n at 3), an action under FECA's provision for judicial

[1] As Lieu acknowledges, of the two examples of purportedly relevant quid pro quos that he presents, one did not involve campaign spending and one was dismissed after trial for "factual insufficiency." (Opp'n at 17-18 & n.17.)

review of FEC enforcement decisions is not the appropriate vehicle by which to challenge the *SpeechNow* decision (FEC Mem. at 18-19). Review of Commission enforcement decisions cannot turn on speculation about potential future modifications of judicial decisions that were binding at the time of the agency action, and Lieu provides no authority suggesting otherwise. *See supra* pp. 5-6.

Recognizing that the Commission is not mandated to revisit court rulings through enforcement actions would not insulate the legal issues in *SpeechNow* from reexamination because there are other types of actions more appropriate for the challenge that Lieu seeks to make here. For example, assuming standing at the time a complaint would be filed, Lieu could have brought a declaratory judgment suit to construe the constitutionality of FECA, either in an ordinary district court lawsuit or under FECA's special review provision, 52 U.S.C. § 30110. In arguing that the continuing correctness of *SpeechNow* is an issue for the Court *en banc* (Opp'n at 23-24), Lieu recognizes that the *en banc* Court rules on challenges to the constitutionality of FECA provisions in the 52 U.S.C. § 30110 context, a key mechanism Congress created for such review. But Lieu did not elect that procedure, instead choosing to bring an action for judicial review of a Commission enforcement decision under section 30109(a)(8). Additionally, he could have brought a direct challenge to the Commonsense Ten advisory opinion, which announced the Commission's decision to acquiesce in *SpeechNow*. *See, e.g.*,

Unity08 v. FEC, 596 F.3d 861, 864-65 (D.C. Cir. 2010) (holding that Commission advisory opinions are final agency actions subject to judicial review). Options like these would have presented the constitutional issue Lieu seeks without involving the FEC's enforcement authority.

In making these allegations in an administrative complaint, on the other hand, Lieu asked the Commission to bring an enforcement action against a large number of political committees and contributors that relied on *SpeechNow*. Yet Lieu does not dispute that, if the Commission had pursued enforcement action against the numerous respondents named in his administrative complaint, those respondents would have had to defend their conduct in further administrative proceedings and potential enforcement litigation, despite the authority in the D.C. Circuit and other jurisdictions holding that such conduct cannot be limited consistent with the First Amendment. This, of course, would also put the Commission into an untenable position: Contrary-to-law determinations could result from the agency *following* binding judicial precedent, but *declining* to follow such precedent would also subject the agency to potential adverse legal rulings. Indeed, one court in this circuit ordered the Commission to pay legal fees after concluding that the agency had "fail[ed] to appreciate binding precedent,"

including *SpeechNow*. (FEC Mem. at 18 & n.5 (quoting *Carey v. FEC*, 864 F. Supp. 2d 61 (D.D.C. 2012)).)

The FECA violations alleged in Lieu's administrative complaint have already been declared beyond the Commission's constitutional enforcement authority by this Court *en banc*, a view unanimously adopted by many other circuits. (FEC Mem. at 16-18.) *SpeechNow* could be reconsidered in a different case, but the agency enforcement decision in this case was clearly not contrary to law, and the plenary briefing that Lieu requests would add nothing to the inquiry that is appropriate here.

III. THIS COURT SHOULD NOT HOLD THE FEC'S MOTION FOR SUMMARY AFFIRMANCE IN ABEYANCE

Lieu provides no basis to delay the summary disposition of this appeal. First, there has been no "effort to preempt en banc consideration of the merits" (Opp'n at 3) here. To begin with, as Lieu admits, summary affirmance *is* a decision on the merits. (*Id*. at 14.) The FEC's motion for summary affirmance only asks this Court to affirm the district court's decision that the FEC did not act contrary to law because *SpeechNow* is binding precedent in this circuit, and the Commission's dismissal was consistent with that precedent. Furthermore, this Court's Order, the Federal Rules of Appellate Procedure, and the D.C. Circuit Rules anticipate that motions for summary disposition will often be considered prior to a petition for initial hearing *en banc*, so that appeals can be dispensed with

summarily — and without unnecessary briefing and argument — when that is warranted. Order (Docket #1779390) (setting deadline for dispositive motions); Fed. R. App. P. 35(c) (establishing filing deadlines for petitions for hearing and rehearing *en banc*); D.C. Cir. Rule 27(g)(1) ("Any motion which, if granted, would dispose of the appeal or petition for review in its entirety . . . must be filed within 45 days of the docketing of the case in this court."). If a motions panel summarily disposes of this matter, the Court would likely conserve its resources. That is because rather than facing a petition for initial hearing *en banc* that would require all active judges to consider the entire matter in the first instance — an extraordinary procedure that is rarely permitted — the *en banc* Court would at most face a later petition for rehearing *en banc*, which could be considered in due course with the benefit of the panel's views, a benefit that an initial hearing *en banc* would fail to provide.

Lieu is wrong to argue that this action is "well suited" for review *en banc*, but even if that were debatable, it would not mean that summary affirmance is unwarranted here. (*See* Opp'n at 16.) The Commission's summary affirmance motion does not foreclose further review *en banc* or in the Supreme Court, though it is the "rare[]" case that is heard *en banc*. (D.C. Cir. Handbook of Practice and Internal Proc. at 58.) And summary affirmance does not limit the participation of amici, as Lieu suggests. (*See* Opp'n 15-16.) The Rules provide that amicus curiae

may file briefs with leave of the Court during the Court's consideration of whether to grant rehearing *en banc*. Fed. R. App. P. 29(b)(2). Lieu also claims that the FEC seeks "a provisional decision on the merits" (Opp'n at 16), but to the contrary, the summary affirmance the FEC requests would dispose of this appeal, a result that is clearly warranted and that would promote judicial efficiency.

Lieu's frequent contentions that *SpeechNow* was wrongly decided or at odds with Supreme Court precedent (Opp'n at 19-21) simply do not support a finding that the FEC acted contrary to law in dismissing Lieu's administrative complaint, which is the actual question on which this appeal turns. *SpeechNow* was binding at the time of that dismissal, and it remains binding. The FEC's choice not to initiate enforcement proceedings against the private parties identified in Lieu's administrative complaint in order to overturn that unanimous decision was so clearly permissible that summary affirmance is warranted.

CONCLUSION

This Court should summarily affirm the district court's decision in favor of the Commission and deny appellants' request to hold the motion in abeyance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 3,208 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also 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 the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2019, I electronically filed the Federal Election Commission's Reply in Support of Its Motion for Summary Affirmance and Opposition to Appellants' Affirmative Request to Hold the FEC's Motion in Abeyance with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Tanya Senanayake
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