**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| HERRON FOR CONGRESS, | ) | Civil Action No. 11-1466 (RC) |
| Plaintiff, | ) | |
| v. | ) | **REPLY** |
| FEDERAL ELECTION COMMISSION, | ) | |
| Defendant. | ) | |

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

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# TABLE OF CONTENTS

***Page***

I. HERRON FOR CONGRESS LACKS STANDING ..... 1

A. HFC's Alleged Injury Was Not Caused by an Alleged FECA Violation ..... 2

B. HFC Fails to Meet Its Burden of Showing a Concrete Threat of Future Injury ..... 7

II. THE COMMISSION REASONABLY DISMISSED HFC'S ADMINISTRATIVE COMPLAINT ..... 10

A. The Commission Should Receive the Full Deference Generally Afforded Enforcement Agencies ..... 10

B. The Commission Reasonably Dismissed the Administrative Complaint When It Could Not Agree on an Appropriate Civil Penalty ..... 13

C. The Commission Reasonably Declined to Find Reason to Believe that the Fincher Committee Received an Illegal Corporate Contribution ..... 19

III. CONCLUSION ..... 22

# TABLE OF AUTHORITIES

***Page***

***Cases***

*Advanced Mgmt. Tech., Inc. v. F.A.A.*, 211 F.3d 633 (D.C. Cir. 2000) ...................... 4, 5

*Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39 (D.D.C. 2004) ............................ 6

*Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988) ....................................... 16

*Branstool v. FEC*, No. 92-0284 (D.D.C. Apr. 4, 1995) ............................................... 20

*Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000) ................................................. 11

*Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182
(D.C. Cir. 1985) ........................................................................................................ 13

*Common Cause v. FEC,* Civ. No. 94-02104 (D.D.C. 1996) ........................................ 15

*Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) ...................................... *passim*

*CREW v. FEC,* 475 F.3d 337 (D.C. Cir. 2007) ............................................................ 19

*FEC v. Akins*, 524 U.S. 11 (1998) ................................................................................. 6

*FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) ........... 11, 13, 18

*FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 ....................................... 18

*Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003) ........................................... 4

*Gottlieb v. FEC*, 143 F.3d 618 (D.C. Cir. 1998) .......................................................... 10

*GSA v. FLRA*, 86 F.3d 1185 (D.C. Cir. 1996) ............................................................ 16

*Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) .................................................. 12

*Heckler v. Chaney*, 470 U.S. 821 (1985) ..................................................................... 16

*International Union (UAW) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972) ................. 21, 22

*Judicial Watch v. FEC*, 180 F.3d 277 (D.C. Cir. 1999) .................................................. 5

*LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011) ........................................................8

*Los Angeles v. Lyons*, 461 U.S. 95 (1983) ........................................................................7

*Louisiana Publ. Servs. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) ..................14

*Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583
(D.C. Cir. 1996) ..............................................................................................16

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) .............................................1, 2

*Meese v. Keene*, 481 U.S. 465 (1987)...............................................................................4

*Natural Res. Def. Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998) .........................7, 8

*Niagara Mohawk Power Corp. v. Federal Power Comm.*, 379 F.2d 153
(D.C. Cir. 1967) ..............................................................................................13

*Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)..........................................18, 19, 20

*O'Shea v. Littleton*, 414 U.S. 488 (1974) ...........................................................................7

*Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ..............................................................1, 6

*Stark v. FEC*, 683 F. Supp. 836 (D.D.C. 1988) ..........................................................19

*United States v. Rosen*, 365 F. Supp. 2d 1126 (C.D. Cal. 2005) .................................22

*Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001)......................................................5

*Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980)................................................10

*Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) ..................................19

***Statutes and Regulations***

Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. § 431-57...................1, 2

2 U.S.C. § 437g(a) ...............................................................................................4

2 U.S.C. § 437g(a)(2).................................................................................14, 15, 20

2 U.S.C. § 437g(a)(4)(A)(i) ........................................................................................17

2 U.S.C. § 437g(a)(8)...................................................................................2, 11, 12

2 U.S.C. § 437g(a)(8)(A) ....................................................................................4

18 U.S.C. § 1001 ..........................................................................................22

11 C.F.R. § 100.82 ........................................................................................21

*Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007)........11

***Miscellaneous***

*Guidebook for Complainant and Respondents on the FEC Enforcement Process*, *available at* http://www.fec.gov/em/respondent_guide.pdf ..............11

U.S. Const. art. III ...................................................................................*passim*

In its opposition to the Federal Election Commission's ("FEC" or "Commission") motion for summary judgment, plaintiff fails to rebut the Commission's showing that Herron for Congress ("HFC") lacks standing and that the Commission's dismissal of HFC's administrative complaint was well within the agency's prosecutorial discretion. As explained below, HFC's primary argument in support of standing is that Mr. Herron's decision-making regarding his political future might benefit if his credibility were boosted by the Commission finding "reason to believe" that his past political opponent, Stephen Fincher, had violated the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. § 431-57, in 2010. But that indirect interest in the proper enforcement of the law does not satisfy Article III's requirement of injury-in-fact. On the merits, HFC cannot show that the Commission abused its discretion when it dismissed HFC's complaint regarding Fincher's alleged reporting violation after reaching an impasse about an appropriate remedy, nor when it found that there was insufficient evidence that a bank loan received by the Fincher Committee was an unlawful corporate contribution as HFC contends. The Court should grant the Commission's motion for summary judgment.

## I. HERRON FOR CONGRESS LACKS STANDING

Herron for Congress's argument that it has suffered harm from an alleged diminution in Mr. Herron's credibility as an indirect result of the Commission's dismissal of HFC's administrative complaint cannot satisfy Article III's injury-in-fact requirement. As discussed below, dispositive precedent holds firmly to the contrary. Moreover, as HFC correctly notes (Plaintiff's Combined Memorandum (Doc. 20) ("HFC Opp.") at 2), at summary judgment it cannot rest on "mere allegations, but must set forth by affidavit or other evidence specific facts demonstrating standing." *Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005) (citing *Lujan v.*

*Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (quotation marks omitted). HFC has failed to meet this burden.

**A. HFC's Alleged Injury Was Not Caused by an Alleged FECA Violation**

The D.C. Circuit has held that a plaintiff cannot satisfy Article III's standing requirement in a case brought under 2 U.S.C. § 437g(a)(8) by relying on an injury stemming merely from the Commission's failure to properly resolve an administrative complaint. Instead, HFC must demonstrate an injury *from the underlying substantive violation* of the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-57.

> As in *Lujan*, absent the ability to demonstrate a "discrete injury" *flowing from the alleged violation of FECA,*" Common Cause cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law. To hold otherwise would be to recognize a justiciable interest in having the Executive Branch act in a lawful manner. This, the Supreme Court held in *Lujan,* is not a legally cognizable interest for purposes of standing. *Lujan,* 504 U.S. at 573.

*Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (emphasis added).

In its opposition, however, HFC repeatedly relies on an alleged injury that is *two steps removed* from the alleged violation of FECA: namely, that the Commission's allegedly improper dismissal of HFC's administrative complaint has in turn led to an (unproven) reduction in Mr. Herron's present reputation and credibility. But this alleged harm is even more attenuated than the kind of secondary harm *rejected* in *Common Cause* as a basis for standing, and is thus even weaker than an injury-in-fact based on a general interest in having the law properly enforced. In other words, HFC is arguing that because the Commission rejected its view of the law and dismissed its complaint, its candidate now looks bad. But this kind of bootstrapping would nullify *Common Cause* because every complainant who is displeased with the Commission's dismissal of his or her complaint could allege that the dismissal itself led to such tertiary consequences. *Common Cause* recognizes an injury-in-fact under section 437g(a)(8) only if it

flows from the primary wrong: *a violation of FECA* that harms a plaintiff.[1]

HFC's opposition is replete with arguments trying to leverage an unsubstantiated reputational injury to Mr. Herron as a substitute for the requirement of *Common Cause.* HFC argues (Opp. at 13) that "[w]hen the Commission improperly dismissed the administrative complaint, [Herron's] credibility and judgment suffered reputational harm and chances for election." *See also id.* at 16 ("Herron's reputation for credibility was harmed by the Commission's errant decision"); at 17 (same); at 21 ("harm the Commission has done to Mr. Herron's reputation"). Similarly, HFC effectively concedes (*id.* at 4) that its real interest is in using the Commission's enforcement process to achieve political gain, not in remedying a harm to it caused by a violation of FECA: HFC quotes its political consultant to suggest that if the Commission had ruled against the Fincher Committee, that would have been a "powerful political tool to wield against" Fincher.

Nothing in *Common Cause* remotely suggests that any alleged indirect effects of the Commission's enforcement process can give rise to a cognizable injury-in-fact, let alone that plaintiffs can manufacture concrete injuries by attempting to use the outcome of that process for political gain. To the contrary, the D.C. Circuit explained:

> According to Common Cause, these provisions embody "a statutory promise to the complainant that the FEC [will] act on a complaint in a reasonable period of time and [will] do so in a manner not 'contrary to law.'" When the FEC violates the complainant's right to a prompt and lawful resolution of the complaint, the Commission "deprives the complainant of a statutorily promised benefit that is personal to the complainant."
>
> Appellant's asserted injury parallels the "'procedural injury'" the Supreme Court held insufficient in *Lujan*. . . . The Supreme Court held that this provision could

[1] HFC also argues (Opp. at 12) that one reason Herron decided not to run for office in 2012 was "because the Commission failed to enforce the law." *Common Cause*, however, flatly rejected standing premised on a "justiciable interest in having the Executive Branch act in a lawful manner." 108 F.3d at 419.

> not satisfy the Article III injury in fact requirement in those cases where an individual was otherwise unable "to allege *any discrete injury flowing from" the violation of the Act*.
>
> In this case, Common Cause argues that § 437g(a) of FECA — a provision similar to the "citizen-suit" provision in *Lujan* — confers on "any person" who believes that FECA has been violated, a right to seek judicial review in federal court. *Section 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing.*

*Common Cause*, 108 F.3d at 418-19 (citations omitted and emphases added).

HFC does not cite a single case recognizing alleged reputational harm from the Commission's dismissal of an administrative complaint — or from any other law enforcement decision declining to prosecute — as satisfying Article III's standing requirement. And even if such reputational harm were cognizable, HFC does not present any *evidence* of any actual reduction in Herron's present or future credibility resulting from the Commission's handling of HFC's administrative complaint.[2] *See Advanced Mgmt. Tech., Inc. v. F.A.A.*, 211 F.3d 633, 636-37 (D.C. Cir. 2000) (rejecting standing based on allegations that agency labeled plaintiff a "fraud" and "liar" without evidence of the present or future consequences of such labeling). HFC instead cites cases (Opp. at 12) where *direct* government regulation of a party gave rise to concrete allegations of reputational injury. *Meese v. Keene*, 481 U.S. 465, 472-73 (1987) (plaintiff wishing to exhibit certain foreign films had standing to challenge a statute that required him to characterize those films as "political propaganda"); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (plaintiff had standing to challenge a statute "embodying a congressional determination that he is a child abuser and a danger to his own daughter"). Here, however, the Commission has not regulated HFC at all, nor has it cast any aspersions on HFC or

[2] Moreover, HFC is the plaintiff here, not Mr. Herron. Even if Herron's alleged reputational harm were cognizable as an injury to him, it is unclear whether such harm would suffice to demonstrate an injury-in-fact to his campaign committee.

Mr. Herron. Regardless, under *Common Cause*, HFC's burden is to demonstrate harm *from a violation of FECA*, not from tertiary effects of how Mr. Herron might be viewed by others in light of the Commission's resolution of allegations concerning Steve Fincher.

The gist of HFC's argument (*see* Opp. at 4-5) is that if the Commission had vindicated Herron by determining that his opponent's actions were unlawful in 2010, then Herron might have run for office in 2012 and might decide to run for office in 2014. Not only did the D.C. Circuit in *Common Cause* reject the lack of such vindication as an injury-in-fact, but in subsequent decisions the court has also specifically denied standing based on a request that the Commission make a "legal determination that certain transactions constitute" unlawful behavior. *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). "[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." *Id.* at 1074 (citing *Common Cause*, 108 F.3d at 417). "If an organization has simply been deprived of the knowledge as to whether a violation of the law has occurred, that 'injury' is no more than a generalized interest in enforcement of the law, and does not support standing." *Judicial Watch, Inc. v. FEC*, 180 F.3d 277, 278 (D.C. Cir. 1999) (citation and quotation marks omitted). And it is irrelevant whether HFC characterizes the Commission's alleged failure to label Fincher's conduct as unlawful as the basis of an "informational" or "reputational" injury, or one that allegedly harms Herron's campaign strategy. (*See* HFC Opp. at 11-14.)[3]

[3] Moreover, HFC's belated attempt to argue for an alleged "informational" injury goes beyond its judicial complaint, which includes no allegations of informational injury. In any event, HFC concedes that it had all the information to which it was entitled when it filed its judicial complaint, and as it also concedes (Opp. at 1), standing is based on the facts as they existed when HFC filed suit. *See Advanced Mgmt. Tech.*, 211 F.3d at 636. HFC couches its concession about its lack of informational injury as a flawed argument about mootness when it states (Opp. at 13) that the Fincher Committee "made the first informational injury moot by

In an effort to avoid the force of *Common Cause* and *Wertheimer*, HFC relies (Opp. at 8-10) on *Shays v. FEC*. 414 F.3d 76 (D.C. Cir. 2005), to argue that Herron has suffered a competitive injury. But *Shays* concerned *regulations* that were arguably too permissive — *e.g.*, rules that allegedly allowed unlimited "soft money" to influence federal elections — not individual prosecutorial decisions about whether a particular person had violated the Act. As HFC correctly notes (Opp. at 8), *Shays* focused on the "procedures" established by "campaign finance rules," 414 F.3d at 91, and held that a congressman could challenge rules that allegedly involved "illegal structuring of a competitive environment," *id.* at 85. Here, however, HFC's purported interest in having the Commission label Herron's former opponent an unlawful actor does not concern any general rule that *directly* regulates candidates and that may affect their campaign strategy.[4] *Shays* is thus irrelevant to what HFC calls its alleged competitive injury, which, as explained above, is nothing more than purported damage to Herron's credibility indirectly related to how the Commission enforced the law.

Finally, HFC's alleged injury does not satisfy the requirements for prudential standing. "[P]rudential standing is satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests to be protected or regulated by the statute." *FEC v. Akins*, 524 U.S. 11, 20

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filing an amendment to its Commission report." But mootness is irrelevant here; what matters for purposes of informational injury is that the Fincher Committee's amendment was filed with the Commission *before* HFC filed this lawsuit, so any potential informational deficit was cured before this action commenced. HFC thus lacks standing based on informational injury. *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) ("Alliance has failed to allege an Article III injury because plaintiffs already possess the information they claim to lack.").

[4] HFC confuses matters further when it suggests (Opp. at 10-11) that the Commission's alleged policy of reviewing publicly available information when considering the merits of administrative complaints is akin to the kind of rules governing campaigns at issue in *Shays*. As discussed *infra* pp. 11-12, the Commission's statement about how it may rely on publicly available material is neither a binding regulation nor any sort of rule governing *candidates'* spending or fundraising, but simply a statement of how the *Commission* will assess administrative complaints.

(1998) (citations and quotation marks omitted). However, to the extent that HFC's alleged injury-in-fact derives from its claim that Herron suffers a competitive disadvantage because Fincher, not Herron, was vindicated by the Commission's enforcement decision, that alleged harm is not within FECA's zone of interests. The Act helps protect the integrity of federal elections and provides useful information to voters. As *Shays* explained, while the Act also creates certain spending and fundraising rules that provide a competitive campaign environment with protections against corruption, nothing in that decision or FECA suggests that the statute's enforcement mechanism is designed as a tool to be gamed for electoral advantage.

### B. HFC Fails to Meet Its Burden of Showing a Concrete Threat of Future Injury

HFC does not contest our showing (FEC Mem. at 16-17) that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. . . ." *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1022 (D.C. Cir. 1998) (citation and quotation marks omitted). Instead, HFC improperly attempts (Opp. at 2) to shift the burden of proof by arguing that the Commission's standing argument is "actually a mootness argument because it applies prospectively." *See also* HFC Opp. at 20 (improperly attempting to invoke the "capable of repetition, yet evading review" exception to mootness). In fact, *Natural Resource Defense Council* and other relevant precedent all focus on whether the plaintiff has satisfied its burden of demonstrating the requisite *injury* — one of the touchstones of standing — at the time of the filing of the suit. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("Abstract injury is not enough. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'") (citation omitted); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("The most that could be said for plaintiffs' standing . . ."). Because HFC asks the Court to declare that the Commission acted contrary to law when it dismissed HFC's administrative complaint and to

remand the matter to the agency, the nature of the relief sought is inherently prospective and, in accordance with precedent, HFC thus bears the burden of demonstrating a "real and immediate . . . threat of future injury." *Natural Res. Def. Council*, 147 F.3d at 1022.

HFC's declarations and arguments provide no evidence of such a future threat. Obviously, nothing that happened in the 2010 election cycle can be changed by the relief HFC requests here, and Herron's decision not to run for federal office in 2012 is now in the past as well. *See* Herron Decl. ¶ 5 ("I recently announced that I would not run for the Senate again in 2012 . . ."). Regarding the future, Herron admits that he has not yet decided whether he will run for office in 2014; he states that in 2013, "[n]ext year — probably in the summer or fall — *I will make a decision* whether to run for federal office in the 2014 election." *Id. ¶* 30 (emphasis added). As previously explained (FEC Mem. at 17-18), this kind of allegation is less concrete and immediate than the kind of "some day intentions" found insufficient in *Lujan.*

Although HFC relies on *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011), that case actually supports the Commission's position. Two plaintiffs in that case held a press conference on the same day that they filed their court complaint and announced that they intended to run for office in the election to be held 19 months later. *Id.* at 783, 788. The court relied specifically on these facts when it held that the "allegation that [plaintiff] intended to run in the November 2011 election and his public announcement at the press conference sufficiently establish the 'substantial probability' of imminent injury required for Article III standing." *Id*. at 788; *see also id.* at 789 ("concrete plan to run in the November 2011 election suffices to establish the imminence of his alleged injuries"). Here, in contrast, Herron's statement that he intends merely to "*make a decision whether* to run for federal office in the 2014 election" more than a year from

now (Herron Decl. ¶ 30 (emphasis added)), does not come close to establishing the requisite imminence and concreteness found in *LaRoque.*

Herron states that his decision not to run for office in 2012 was based in part on the "claimed vindication" by Fincher's representatives and by Herron's own "tainted" "reputation and credibility" (Herron Decl. ¶ 13) — none of which constitutes a cognizable injury-in-fact under Article III. Likewise, HFC concedes that a significant factor in his future decision-making may be the same kind of non-cognizable injury: "I cannot stress enough how the Commission's decision has affected my credibility and affects my decision whether to run for office next year and in the future." Herron Decl. ¶ 31; *see also id.* at ¶ 15. As explained *supra* pp. 2-5, however, these unsubstantiated allegations of diminished credibility do not satisfy the standing requirement of Article III because they are not a direct harm caused by any alleged FECA violation but instead flow indirectly from HFC's interest in the proper enforcement of the law. Thus, the speculative nature of whether Herron will run for office again is exacerbated, for Article III purposes, by his purported decision-making that may turn on a factor far too removed from any alleged violation of FECA.

Moreover, the declarations upon which HFC relies make no allegations that Fincher, HFC's opponent, will run for office again or that Fincher is likely to repeat the actions that formed the basis of HFC's administrative complaint. In response to the Commission's argument (FEC Mem. at 18) that it is too speculative to suggest that the Commission's failure to adequately punish Fincher will diminish Herron's future electoral prospects, HFC again relies on language from *Shays* (HFC Opp. at 18). But as previously discussed (*see supra* pp. 6-7), *Shays* is inapposite as it involved a challenge to rules of broad application that, among other things, set the competitive structure for candidates' campaigns. That case did not involve alleged harm

created by a single act, such as the loan Fincher received. Thus, even if the harms HFC allege were cognizable under Article III, their speculative effect on Herron's future candidacy is more akin to the facts found too conjectural in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), than to the regulations of general application at issue in *Shays*. (*See* FEC Mem. at 18.)

Similarly, in *Gottlieb v. FEC*, 143 F.3d 618, 621-22 (D.C. Cir. 1998), the D.C. Circuit held that the effects of a single act of alleged misconduct were too speculative to create a cognizable injury-in-fact. In particular, the court demanded evidence that additional funds improperly made available to a presidential campaign would have been used to influence voters. Without such evidence, the court would not assume that the extra funds would have been used, as plaintiffs contended, to counter the plaintiffs' "attempts to influence the electorate," rather than, as an example, for "better hotel accommodations" or "more comfortable transportation." *Id.* For these and other reasons, the court found that the plaintiffs in *Gottlieb* had failed to prove a cognizable injury-in-fact and therefore lacked standing. The same conclusion applies to HFC here.

## II. THE COMMISSION REASONABLY DISMISSED HFC'S ADMINISTRATIVE COMPLAINT

### A. The Commission Should Receive the Full Deference Generally Afforded Enforcement Agencies

As the Commission explained in its opening memorandum (FEC Mem. at 22-41), HFC has fallen short of its burden of showing that the Commission's dismissal of its administrative complaint was contrary to law. The Commission's decision to dismiss the complaint when it could not agree whether to seek a civil penalty on the alleged reporting violation was a reasonable exercise of prosecutorial discretion.

The "contrary to law" standard of review applicable under 2 U.S.C. § 437g(a)(8) is highly deferential, and such deference is particularly appropriate in this case because it involves the FEC's interpretations of its own regulations. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 70 (D.D.C. 2000). As the Supreme Court has observed, the Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*").

HFC attempts to challenge FEC's entitlement to deference on two grounds. First, HFC erroneously argues (Opp. at 23) that the Commission should receive no deference because the Commission purportedly did not follow its own "policy and practice" of reviewing publicly available information at the reason-to-believe stage. In support of this argument, HFC cites solely to the Commission's *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (HFC MSJ Att. A), as well as a recently updated *Guidebook for Complainant and Respondents on the FEC Enforcement Process*, *available at* http://www.fec.gov/em/respondent_guide.pdf, which tracks the language in the 2007 Policy Statement. But as previously explained (FEC Mem. at 38-39), that Policy Statement only states that the Commission *may* consider publicly available information at the reason-to-believe stage, not that it *must* scour public records for relevant information or explain why it did not do so for each record the complainant thinks relevant — let alone that the Commission must consult public records that HFC did not bring to the Commission's attention in either its administrative complaint or its supplement.

The Policy Statement is not binding. In the statement itself, the Commission explained that the policy "does not bind the Commission or any member of the general public" and "does not confer any rights on any person and does not in any way limit the right of the Commission to

evaluate every case individually on its own facts and circumstances." (HFC Att. A at 2.) Thus, neither the Policy Statement nor the Guidebook establishes a compulsory requirement of seeking out publicly available information in every enforcement matter.

Second, HFC repeats its argument (Opp. at 22-24) that the Commission merits no deference because this matter does not, according to HFC, involve the dynamics of party politics, but rather banking rules that are purportedly beyond the Commission's competence. As previously explained (FEC Mem. at 24), however, the D.C. Circuit has held that the Commission's bipartisan structure is "but one of *several* reasons the Supreme Court cited [in *DSCC*] in support of deferential review." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (emphasis added). HFC does not dispute that the Commission implements a statute about the *financing* of campaigns or that the Supreme Court has explained that there are many reasons to defer to agencies in general and to the Commission in particular.[5]

HFC suggests that the Commission must explain why it deserves deference in this particular matter. *See, e.g.*, HFC Opp. at 23 ("[T]he Commission did not provide any other reason [for deferring to it]"), at 24 (arguing that "Commission offered no evidence that, *in this matter*, it has expertise in banking law"). But HFC does not cite a single case holding that the deference afforded the Commission under 2 U.S.C. § 437g(a)(8) varies with the nature of the FECA violation at issue or the subject matter of its own implementing regulations, or that the Commission bears any burden in demonstrating why it merits deference on a case-by-case basis.

[5] In its Answer (¶ 42), the Commission stated that it was "without knowledge or information sufficient to form a belief as to the . . . usual practice of Tennessee banks beyond what is required by the Commission regulations." That is hardly an admission that the Commission is incapable of understanding issues concerning collateral and security interests. Regardless, HFC does not dispute our argument (FEC Mem. at 40-41), that it never presented its claims regarding Tennessee law to the Commission and thus cannot raise them for the first time before this Court.

Rather, the numerous cases we cited (FEC Mem. 22-25) speak generally about the great deference owed the Commission when reviewing its prosecutorial decisions, regardless of the nature of the underlying substantive violation. In *DSCC*, for example, the Supreme Court explained that "in determining whether the Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC,* 454 U.S. at 39 (citations omitted).

Thus, HFC's challenges to the deference properly afforded the FEC here must fail. The Commission's interpretations of the Act and its own regulations are presumptively valid, and HFC can prevail only if it shows that the Commission abused the discretion by failing to meet "its minimal burden of showing a 'coherent and reasonable explanation of its exercise of discretion.'" *Carter/Mondale Presidential Comm., Inc. v. FEC,* 775 F.2d 1182, 1185 (D.C. Cir. 1985). As the Commission explained in its opening brief, it has met that minimal burden. (FEC Mem. at 25-41.)

**B. The Commission Reasonably Dismissed the Administrative Complaint When It Could Not Agree on an Appropriate Civil Penalty**

The Commission is due especially great deference concerning whether to seek a civil penalty, and its dismissal of the administrative complaint when it could not reach consensus on the appropriate penalty for the reporting violation was entirely reasonable. (*See* FEC Mem. at 25-31.) As the Supreme Court observed in *Akins*, the Commission retains prosecutorial discretion that extends to its decisions not to pursue an enforcement action. Such discretion is at its "zenith" regarding "policies, remedies and sanctions." *Niagara Mohawk Power Corp. v. Federal Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967).

HFC does not dispute that an agency's discretion is at its peak regarding sanctions, but instead engages in semantics (Opp. at 29) by arguing that because "no penalty was imposed at all," the Commission's debate fell outside its deference to choose an "appropriate penalty." In fact, the record is clear that the Commissioners' debate focused on whether a letter of caution was a more appropriate remedy than a monetary payment. AR0719-30. Regardless of whether a letter of caution is viewed as a type of penalty or as "no" penalty, the dispute among the Commissioners was indisputably about the nature of the appropriate remedy, not whether there had been a reporting violation. The fact that three Commissioners believed that no monetary penalty was warranted does not turn the Commission's internal debate into something other than a dispute about appropriate remedies or sanctions, as HFC torturously argues. In other words, an agency's "considerable discretion in fashioning remedies" necessarily applies to a decision not to sanction. *See*, *e.g.*, *Louisiana Publ. Serv. Comm'n v. FERC*, 174 F.3d 218, 228-30 (D.C. Cir. 1999).[6]

HFC also incorrectly and repeatedly argues (Opp. at 28-30, 32 n.5, 33) that the Commission's dismissal of the reporting violation was unreasonable because section 437g(a)(2) purportedly *requires* the Commission to find reason to believe in a single vote when all Commissioners individually agree that a violation has occurred. But section 437(g)(a)(2) requires no such thing. Rather, section 437(g)(a)(2) provides that "[i]f the Commission . . . determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or it about to commit, a violation of this Act . . . the Commission shall . . . notify

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[6] Contrary to HFC's suggestion (Opp. at 29-30), the Commission's dismissal and its determination to impose no sanction are inseparable. In both Statements of Reasons ("SORs"), the Commissioners explained that the administrative complaint was dismissed because the Commission could not agree on an appropriate sanction. (AR719-29.) HFC itself previously admitted this fact. (Pl.'s Mem. in Support of Its Mot. for Summ. Judg. at 16.)

the person of the alleged violation." Section 437(g)(a)(2) says nothing about how the Commission must structure its votes, nor does it affirmatively require the Commission to vote formally to find reason to believe when the Commission is divided about an appropriate remedy. HFC's baseless assertion (Opp. at 33) that "Congress has determined that HFC is entitled to an RTB finding" finds no support in the plain language of the applicable FECA provision, 2 U.S.C. § 437g(a)(2).

*Common Cause v. FEC,* Civ. No. 94-02104 (D.D.C. 1996), illustrates the deference due the Commission's dismissal of a complaint, even in circumstances where the Commissioners agree that the Act has been violated. (*See* FEC Mem. 27-28 & Mem. Exh. 3).[7] HFC argues (Opp. at 30) that *Common Cause* is distinguishable because there the Commissioners disagreed about the amount and nature of the *violation* rather than the penalty. But that is a distinction without a difference. The plaintiffs in *Common Cause*, like HFC, argued that the "Commission's dismissal of the complaint was arbitrary and capricious because the Commissioners agreed that there was a violation." FEC Mem. Exh. 3, slip op. at 8 n.3. However, because the Commissioners had reasonably supported their respective positions, the court deferred to the decision to dismiss. *Common Cause* rejected the argument, much like HFC's, that the Commission's failure to formally find "probable cause," when all Commissioners agreed that the law had been violated in some way, was arbitrary and capricious.

As the Commission explained in its opening memorandum (FEC Mem. at 28-29), its dismissal of the alleged reporting violation reasonably avoided the futile exercises of casting a

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[7] HFC erroneously disputes (Opp. at 30) the precedential value of *Common Cause* because it was dismissed on appeal based on the named appellant's lack of standing. *Common Cause* was brought by two plaintiffs in the district court, one of whom chose not to join in the appeal. *See Common Cause*, 108 F.3d at 416. The D.C. Circuit neither addressed the merits of the decision below, nor vacated it.

standalone vote to find reason to believe and authorizing the General Counsel to engage in pre-probable cause conciliation with the respondents, which would have simply deferred further impasse. The Commission thus avoided expending resources to arrive back at the same logjam — deciding the nature of a penalty — after attempting conciliation. As the Supreme Court has explained, an agency's determination not to proceed with an enforcement matter "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," including how to best expend agency resources, the likelihood of success, and whether a particularly enforcement action best fits the agency's overall policies. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). HFC cites nothing to support its suggestion (Opp. at 33) that an agency's determination to dismiss an administrative complaint must take into account the self-serving interests of the complainant.[8]

HFC also imagines hypothetical scenarios (Opp. at 32) in which a standalone vote to find reason to believe and to authorize the General Counsel to engage in pre-probable cause conciliation would not be futile. But HFC's argument rests on unrealistic and speculative premises: How could the Commission's lawyers reasonably present an opening offer in

[8] HFC erroneously accuses (Opp. at 29) the Commission of presenting post hoc arguments regarding Commission resources. It has not. The Commission's decision to dismiss when it could not agree on the proper civil penalty necessarily involved a determination not to unnecessarily expend Commission resources. A more detailed explanation in a brief of the reasoning underpinning an agency's decision is not impermissible post hoc rationalization. *See Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583, 592 n.12 (D.C. Cir. 1996) ("Although it is true that some of the explanations offered by the [agency] in its brief go into somewhat more detail than in its actual ruling, their essence can clearly be found in the [agency's] rationale"); *cf. GSA v. FLRA*, 86 F.3d 1185, 1188 (D.C. Cir. 1996) ("We have even deferred to 'agency counsel's litigative positions' where we were certain that they did not differ from the agency's") (citations omitted). Because the Commission's briefing does not present an "agency litigating position[] that [is] wholly unsupported by" the reasoning explained in the General Counsel's Report, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988), it is not post hoc argumentation.

conciliation when the Commission had not approved one and was divided on an appropriate penalty, and how could they negotiate in good faith — *e.g.*, by demanding a significant monetary penalty — knowing that half of its client believed that such a remedy was inappropriate?

Even though it is possible that some Commissioners might have changed their minds during the conciliation process, it was hardly unreasonable for the Commission itself to assume that their own positions would not change during the brief period of 30 to 90 days the statute provides for conciliation. *See* 2 U.S.C. § 437g(a)(4)(A)(i). The twin SORs (AR719-30) reflect the basis and depth of the Commission's differing views on the necessity of a civil penalty — views that the Commission could more than reasonably expect to endure for 90 days. In any event, the decision not to authorize the General Counsel to engage in conciliation efforts is precisely the type of judgment regarding the management of the Commission's enforcement docket that falls within an agency's expertise and discretion.

Even if the Court were to find that the FEC should have taken a standalone reason-to-believe vote, such an omission was at worst harmless error, a showing the HFC fails to rebut (Opp. at 34). As discussed above, a remand requiring the Commission to take such a vote would be a superfluous formality that would not change the ultimate disposition of HFC's administrative complaint, and the views expressed in the SORs are unlikely to vary after remand. And as explained *supra* p. 5, HFC's purported harm in not having the Commission label the Fincher Committee's actions unlawful is not a cognizable injury. In sum, HFC has not cited any facts or law that suggests that a remand ordering the Commission to take a standalone reason-to-believe vote on the reporting violation would serve any cognizable purpose.

Finally, the Commission also did not act contrary to law when it declined to find reason to believe that the Fincher Committee acted knowingly and willingly when it violated the Act's

reporting requirements. In their SOR, Commissioners Hunter, Petersen, and McGahn described the Committee as having committed a "technical" violation of a "counterintuitive" regulation that "trips up many candidates. . . . ." and thus clearly lacked the requisite state of mind that would support a knowing and willful determination.[9] (*See* FEC Mem. at 30; AR0728-29.) For purposes of judicial review in this case, the Court may rely on both the reasoning outlined in this SOR and the reasoning set forth in the General Counsel's report to support the Commission's decision.[10] HFC has presented no evidence contradicting either the General Counsel's explanation that there was no information suggesting that the Fincher Committee acted intentionally when it delayed submitting amendments to its reports or the SOR's conclusion that the reporting violation was inadvertent.

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[9] HFC dismisses this conclusion as speculative (Opp. at 27), but it is precisely the type of subjective determination the Commission is entitled to make before committing to an investigation or attempting to conciliate with the respondents. *See Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986) ("[R]eason to believe standard also itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims.").

[10] The Court may rely on both the reasoning provided in the General Counsel's recommendation and the additional reasoning set forth in the SOR which addressed the knowing and willful state of mind. Generally, when the Commission follows the General Counsel's recommendation, dismisses an administrative complaint, and does not articulate separate reasoning, the General Counsel's report provides the basis for judicial review. *DSCC,* 454 U.S. at 38 & n.19. However, when the Commission deadlocks and dismisses a complaint, the reasoning of the three Commissioners who voted to dismiss the complaint, sometimes described as the "declining-to-go-ahead" commissioners or the "controlling group," provides the basis for judicial review. *Common Cause,* 108 F.3d at 415-16. Here, there were *two* sets of three Commissioners who voted to dismiss the administrative complaint, so *both* sets are "controlling groups" for purposes of judicial review. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."). One controlling group's SOR explained its view that the reporting violation was inadvertent; the other group's SOR did not address the knowing and willful allegation, so the General Counsel's reasoning on that issue is reviewed for the latter group.

### C. The Commission Reasonably Declined to Find Reason to Believe that the Fincher Committee Received an Illegal Corporate Contribution

As previously demonstrated (FEC Mem. at 32-42), the Commission was clearly within its prosecutorial discretion not to find reason to believe that the Fincher Committee received an illegal contribution. The Commission's assessment of the representations of Gates Bank and the Fincher Committee and the documentation provided by them was not contrary to law, but rather "preliminary investigative decisions" of the type the Commission is authorized to make in the opening phases of the enforcement process. *Orloski*, 795 F.2d at 168. As the D.C. Circuit has explained, at the reason-to-believe stage, the "FEC is entitled, and indeed required, to make subjective evaluation of claims." *Id.* HFC's challenges to the sufficiency of the Commission's research and deliberations, prior to its votes, fall squarely within the Commission's discretionary authority and are without merit.

In making investigative decisions, such as deciding which evidence to credit or disbelieve, rely on or pursue, "the Commission . . . retains prosecutorial discretion." *CREW v. FEC,* 475 F.3d 337, 340 (D.C. Cir. 2007); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) ("[P]rosecutor exercises considerable discretion in matters such as . . . what information will be sought as evidence . . . ."); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("It is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources.").

HFC does not appear to dispute that the Commission generally retains prosecutorial discretion, and its opposition brief does not mention *CREW*, *Young*, or *Stark*. Instead, HFC repeatedly argues (Opp. at 10, 23, 37-40) that the Commission's determination regarding the bank loan was contrary to law because the Commission "failed to follow its procedures and practices" to seek out publicly available facts — procedures and practices purportedly set forth in

a 2007 Policy Statement. But as explained *supra* pp. 11-12, that Policy Statement explicitly did not bind the Commission and only explains what the Commission *may* consider at the reason-to-believe stage on a case-by-case basis.

HFC's criticism (Opp. at 38-39) of the Commission's citation (FEC Mem. at 37-38) to *Branstool v. FEC*, No. 92-0284 (D.D.C. Apr. 4, 1995) (FEC Mem. Exh. 4) also falls wide of the mark. In *Branstool*, the Court held that the Commission's failure to depose a witness fell "safely within the ambit of those matters committed to the discretion of the Commission," *id.* at 7, exemplifying the prosecutorial discretion retained by the Commission to determine the scope of its investigations. Contrary to HFC's argument, it is of no moment that *Branstool* was decided before the Commission's 2007 policy was issued because the policy was not binding. HFC has thus cited no authority holding that the Commission was *required* to seek out publicly available information, nor that its practice of deciding whether to do so on a case-by-case basis is contrary to law.

Nonetheless, HFC suggests (Opp. at 39) that the Commission's failure to seek out publicly available information was contrary to law because the General Counsel noted the absence of certain pieces of information in its report. While the report acknowledged that it lacked a complete picture of the loan transaction, threshold investigative decisions at the reason-to-believe stage must necessarily be made on less than complete factual records, relying primarily on the information submitted by HFC and the responding parties. *See* 2 U.S.C. § 437g(a)(2) (providing that Commission shall not "make an investigation" until *after* finding reason to believe). In any event, the General Counsel's simple observation is beside the point since the Commission's decision not to find reason to believe was expressly and reasonably based on the information that was actually before it at the time. *See Orloski*, 795 F.2d at 168

("Congress determined that the FEC should make preliminary investigative decisions on the basis of all the information submitted to it by the charging and responding parties."). As previously explained (FEC Mem. at 8-9, 34-35; AR0693-96), the General Counsel considered each relevant regulatory requirement under 11 C.F.R. § 100.82 and noted that each was met and, where appropriate, supported by relevant documentation. The respondents represented that interest rate of the loan was 6.50%; the loan was memorialized by a written note which indicated a due date; the note provided that the loan was cross-collateralized with other bank debt and accounts held by Fincher; the deed of trust indicated that the Bank had a perfected security interest in Fincher's personal residence; and a UCC statement indicated that the Bank also had a lien on Fincher's 2010 crops.

HFC has also failed to cite any authority that supports its argument that the Commission abused its discretion by not invoking the adverse inference rule. As previously explained (FEC Mem. at 39), an agency has discretion whether to invoke the rule, and *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972), upon which HFC relies, is not to the contrary. In that case, the D.C. Circuit concluded that the National Labor Relations Board should have applied the adverse inference rule regarding the contents of vital records that were willfully withheld in the face of a Board subpoena. *Id.* at 1339-42. The defiance of a Board subpoena, even after the Board denied a motion to revoke the subpoena, was central to the court's determination that the Board should have drawn an adverse inference in that case. *Id.* at 1338-40. As the Court noted, in invoking the adverse inference rule, "[i]f a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression" and "the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party."

*Id.* at 1338. But here, the Commission never subpoenaed documents from the Fincher Committee or Gates Bank and they did not refuse to submit any requested information, so the factual premise underlying the holding in *International Union* is utterly missing.

Instead, as previously explained (FEC Mem. at 34-36), the Commission reasonably accepted the Bank's representation and supporting documentation that the loan was made in the ordinary course of business. HFC's assertion (Opp. at 42-43) that the representations of Gates Bank were merely arguments of counsel that the Commission could not reasonably credit has no basis in fact or law. To the contrary, the bank made numerous factual representations regarding the interest rate, maturity date, and collateral interests of the loan, all of which were evidenced by written documentation submitted to the Commission. Finally, HFC fails to muster any authority holding that an agency cannot treat representations of counsel as representations of the client, or that suggests that deeming counsel's representations of fact to be credible is an abuse of an agency's prosecutorial discretion.[11]

In sum, the Commission reasonably determined that there was insufficient evidence to warrant an investigation into HFC's allegations that the bank loan to the Fincher Committee constituted an illegal corporate contribution.

## III. CONCLUSION

For the foregoing reasons, Herron for Congress lacks standing and its substantive arguments lack merit. The Court should grant the Commission's motion for summary judgment and deny plaintiff's motion.

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[11] HFC's suggestion (Opp. at 42 & n.8) that 18 U.S.C. § 1001 may not apply to the representations of the Bank's counsel ignores that this criminal provision would apply to the Bank itself if it caused counsel to make a false statement on its behalf. *See United States v. Rosen*, 365 F. Supp. 2d 1126 (C.D. Cal. 2005) (denying motion to dismiss of defendant charged under section 1001 with causing other to make false statements to the FEC).

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