IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,	)	
	)	
Plaintiffs,	)	**Civil Action No. 14-148 (RJL)**
	)	
v.	)	**BRIEF OF *AMICUS CURIAE***
	)	**CENTER FOR COMPETITIVE**
FEDERAL ELECTION COMMISSION,	)	**POLITICS IN SUPPORT OF**
	)	**DEFENDANT**
Defendant.	)	
_____	)	

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF DEFENDANT

Amicus Curiae the Center for Competitive Politics (CCP) submits this brief to address the limited issue of the scope of review of a Federal Election Commission (Commission or FEC) decision to dismiss a complaint where the Commission lacked 4 votes to find reason to believe a violation had occurred and consequently lacked the statutorily required majority to initiate a formal investigation.

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, *Amicus Curiae* CCP is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and state and federal litigation. CCP has participated in many of the notable cases concern-

ing campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

BACKGROUND

As relevant to this brief, when the Commission receives a complaint alleging violation of the election laws, it may only proceed with a formal investigation of that complaint "[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 is about to commit, a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954." 52 U.S.C. § 30109(a)(2) [2 U.S.C. § 437g(a)(2)].

In this case, the vote on whether there was reason to believe a violation had occurred, thus warranting a formal investigation, was divided 3-3. The Commission thus failed to obtain the required 4 votes and the investigation was not permitted under the Act. Unable to proceed with an investigation, the Commission then voted unanimously to dismiss the complaint. Federal Election Commission's Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [Doc. 33] (FEC Mem.) at 11.

An "order of the Commission dismissing a complaint" is reviewable in this Court upon petition by the party or parties having filed the complaint. 52 U.S.C.

§ 30109(a)(8) [2 U.S.C. § 437g(a)(8)]. This Court then reviews the dismissal of the complaint to determine whether it "is contrary to law." *Id*.

Plaintiffs argue that this Court should review the split vote of the Commission that failed to authorize an investigation and that it should accord no deference to the determination of the 3 Commissioners finding no reason to believe that a violation had occurred. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment [Doc. 23] (Plaintiffs' Mem.) at 14-18. They then proceed to dispute the legal analysis of those 3 Commissioners and raise various arguments as to why the decision was supposedly arbitrary and capricious. Plaintiffs' Mem. at 24-40.

Defendant FEC, in turn, correctly points to extensive precedent that the decision of the 3 Commissioners voting not to proceed is entitled to full *Chevron* deference because those Commissioners constitute the controlling group preventing an investigation from proceeding. FEC Mem. at 4-5, 18-26. The determination of the 3 Commissioners finding no violation thus *is* the action of the Commission in that a decision not to proceed only requires 3 votes under the Act.

Amicus agrees with the Commission that, if analyzed under a traditional administrative law rubric, both reason and precedent support full deference to the views of the controlling group that no violation occurred and that the decision of the controlling group readily satisfies such review. That traditional administrative

law rubric, however, ignores certain aspects of the Act that in fact support an even more deferential approach to Commission decisions (including evenly split decisions) to refrain from exercising its powers. This brief will make two brief points arguing that Plaintiffs' suggested non-deferential review of the reasoning of the controlling group in this case is overly intrusive, goes beyond what is authorized by the statute, and makes little sense.

ARGUMENT

I. Review Is Limited to Whether the Legal Interpretations of the Controlling Group Are Foreclosed by the Act, Not Whether This Court Agrees with Those Legal Interpretations.

In reviewing a Commission determination to dismiss a complaint because it lacked the requisite 4 votes to initiate a formal investigation, this Court should not decide how *it* would interpret the Act, but only whether the Act necessarily forecloses the result reached by the controlling group, *i.e.*, whether their decision is "contrary to law." Where 3 Commissioners have determined that there is no reason to believe a violation has occurred, the Commission obviously has not satisfied the statutory requirement of 4 votes favoring a formal investigation before the Commission may exercise governmental power against constitutionally protected election speakers. In deciding whether the reasoning of the controlling group – those believing the Complaint does not reveal a violation and does not justify imposing additional burdens on election speakers – is contrary to law, the Court need

only determine whether the statute *permits* the interpretation given it by that group. If the statute admits of more than one possible construction, it does not matter whether the controlling group has the best or worst plausible construction, only whether the construction is not squarely precluded by the statute. Indeed, an evenly divided vote itself may reflect ambiguity in the statute, making it unlikely that the controlling group's views could be *contrary* to law.[1]

While the views of the 3 Commissioners finding no reason to believe a violation had occurred certainly controls the vote in question, the divided outcome as a whole is better viewed as a *failure* to satisfy the requirements for going forward. There is good reason to have both an evenly divided bi-partisan Commission and a requirement that ties go to the accused rather than the accuser. Campaign finance regulation poses a heightened danger that complaints will be used for partisan advantage to silence or hamper political opponent. Allowing either party to bring the weight of the Commission down on a speaker without bi-partisan support is an invitation for abuse. The requirement of 4 votes to initiate an investigation is an important safeguard against such abuse.

[1] In this case, *amicus* agrees with the legal views of the Commissioners finding that no violation had occurred, and the matter may not even be ambiguous. But in a close case the question is not which side has the *better* view of the statute, but merely whether the view of the Commissioners finding no violation is necessarily *foreclosed* by the statute, regardless of potential competing interpretations.

The notion that one analyzes the views of the declining-to-proceed Commissioners with the same level of scrutiny applied to an affirmative exercise of power by the Commission (whether adjudicatory or regulatory) is mistaken. Review of a decision *not* to use government power against election speakers should in fact be even *more* lenient. Rather than applying some form of "arbitrary or capricious" review reminiscent of the APA, review should at best be limited to whether the result is unavoidably contrary to an express statutory command or prohibition. The Act itself provides support for this approach, limiting review of dismissals of complaints to the sole question whether they are "contrary to law." *See also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*") (because "the Commission is precisely the type of agency to which deference should presumptively be afforded[,] * * * has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred[,] * * * is inherently bipartisan[,] * * * [and] must decide issues charged with the dynamics of party politics, * * * Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'") (citations omitted); *Citizens for Responsibility & Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

Scrutiny under this standard is more akin to rational basis scrutiny under the Constitution than it is to the more searching scrutiny of the APA. *See Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (review of FEC dismissal of a complaint is subject to "'an extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown.'") (quoting district court). Indeed, the very fact that the Act's review provisions are limited to whether the dismissal is "contrary to law" contrasts rather starkly with the APA's more expansive review standard of whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence ." 5 U.S.C. § 706(2)(A) & (E). Expressly lacking such additional grounds for review of Commission dismissals of complaints, courts should be loath to imply them into the Act merely because they provide a comfortable and familiar framework. Congress obviously knew how to provide for such greater review, having done so nearly three decades earlier in the APA. But Congress having notably limited the review of FEC dismissals, courts must give that limitation meaning and not simply ignore it.

As with rational basis review, the scrutiny in this case should be limited to whether the Act necessarily precludes the result reached in the split vote and should not turn on the particular reasoning of individual Commissioners, or even the collective view of the three Commissioners voting against proceeding with an

investigation. Any further review of the rationality of the Commission's failed vote to investigate should be no more than the extremely light rational basis review that would apply in a substantive due process challenge.[2]

Amicus recognizes that D.C. Circuit precedent occasionally uses the language of "arbitrary or capricious" when reviewing FEC decisions not to proceed with an investigation. To the extent such language is not merely a linguistic variation but rather is a substantive expansion toward APA standards of review, *Amicus* notes that such judicially expanded review has no statutory basis and consequently should be approached with caution. While this Court obviously must work within the confines of precedent, it should carefully consider whether such precedent substantively requires more invasive review than permitted by the statute.[3] Indeed,

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[2] While the First Amendment implications of *affirmative* actions by the Commission might warrant heightened scrutiny to protect First Amendment interests, where the Commission declines to proceed it is in fact being *more* solicitous of First Amendment interests and thus can more easily satisfy rational basis review.

[3] Similarly, while courts have scrutinized the rationale of the controlling group in evenly divided votes on whether there was reason to believe a violation had occurred, the statute actually provides for review only of a successful vote to dismiss, not the underlying unsuccessful vote to open a formal investigation. According to the statute, it is the "order of the Commission dismissing a complaint" that is subject to a petition for review, 52 U.S.C. § 30109(a)(8) [2 U.S.C. § 437g(a)(8)]. That order was not the product of a split vote, but rather of a *unanimous* vote by the Commission. FEC Mem. at 11. While the prior divided vote certainly had a bearing on, and was the reason for, the subsequent unanimous vote to dismiss, that latter decision was self-evidently not "contrary to law." Given that the statute expressly precludes initiating a formal investigation without 4 or more votes to do so, 52 U.S.C. § 30109(a)(2) [2 U.S.C. § 437g(a)(2)], the vote to dismiss was effective-

while some cases use the language of "arbitrary and capricious," other cases use the language of rational basis and hence it is not certain that precedent actually requires importation of the stricter APA standards that such phrase implies. Just as the courts have narrowed implied causes of action in the securities field, and declined to expand those causes of action beyond that required by precedent, so too should this Court limit its review to the minimum required by precedent. *See, e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 167 (2008) (noting the "narrow dimensions we must give to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law"). Recognizing that more stringent review lacks a statutory basis, even while following potentially questionable precedent, will help bring the issue into focus, resolve uncertainties in favor of the Commission's decision to dismiss, and allow for a more thoughtful reconsideration of judicially implied, but statutorily unsupported review procedures if and when this case goes up on appeal. At a minimum, acknowledging the questionable provenance of potentially more intrusive review supports the Commission's arguments for strong deference even within an APA-like framework.

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ly required by the statute. Had the Commission failed to consider the complaint at all, held an improper vote, or dismissed the Complaint without the required majority vote to do so, then it might reasonably be argued that it acted contrary to law. It did none of those things and hence the only order for which the statute expressly provides review was fully consistent with the plain language of the law.

II. The Act Asymmetrically Disfavors Investigations and Other Commission Actions, Resolves Uncertainty In Favor of Non-Action, and Hence Deference Should Be Asymmetrically Greater for Dismissals.

Even assuming this Court applies full APA-style review to the underlying split vote on whether there was reason to believe a violation occurred, *Amicus* agrees with the FEC that the views of the controlling group is entitled to, at a minimum, full *Chevron* deference. Contrary to Plaintiffs' assertion that a split vote does not constitute agency action entitled to deference because the agency can only act with 4 votes, the statute is actually asymmetrical if the failure to find reason to believe a violation occurred is deemed a vote not to investigate. While the statute indeed requires 4 votes for the Commission to act affirmatively against the object of a complaint, by intentional design it requires only 3 votes to foreclose further Commission action. If the underlying failure to investigate is indeed the "act" of the FEC subject to review, then 3 negative votes constitutes the decision *of the Commission* acting with sufficient votes for that result as expressly set forth in the statute. Having reached the no-go decision with the requisite number of votes under the statute, such decision is entitled to as much or more deference as any other decision by the Commission.

The asymmetry in the required votes for advancing versus terminating a Complaint is hardly surprising given the hazards of allowing a government agency to penalize election-related activity. Most obviously are the serious First Amend-

ment concerns, recognized by the Commission itself. FEC Mem. at 29 ("The controlling group's approach to the major-purpose test was based upon First Amendment concerns that have been expressed by various courts and commentators, including even lead plaintiff Public Citizen."); *see also Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("There are as well countervailing considerations for the FEC to ponder. It must allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory aims."). Such concerns rightly place a heavier burden on the Commission when it seeks to burden, punish, or restrict election speakers and conversely provide ample inherent support for Commission decisions declining to so impinge on free speech and association. The asymmetrical First Amendment impact of decisions to proceed or not proceed with investigations is entirely consistent with the asymmetrical voting requirements for proceeding (4 votes) or not proceeding (3 votes). And it likewise is consistent with and supportive of a more limited review of decisions not to proceed than of decisions to proceed against the object of a complaint.

Such asymmetrical treatment of action and inaction by government is also consistent with our overall structure of government. In numerous instances where collegial bodies wield government power there are typically significant hurdles to overcome before such power may be set loose upon the citizenry. Juries generally require unanimity where significant rights are at stake. Legislation requires a min-

imum of a majority vote, bicameral approval, and executive concurrence. Overriding a veto, ratifying a treaty, expelling members from Congress, determining whether a President is able to discharge the powers and duties of his office, or removing civil officers by impeachment all require a supermajority vote. Many House and Senate rules require a supermajority vote as do provisions in the Congressional Budget Act of 1974 and the Pay-As-You-Go Act of 2010. In each of these instances, failure to reach a majority or supermajority *precludes* the exercise of government power. And in none of those instances can the failure to act be reviewed to ascertain whether the voting members were arbitrary or capricious in their votes. While courts certainly review and check the affirmative exercise of government power, where government declines to act the courts generally have little or no say unless the law specifically creates an affirmative obligation to act.

In short, the history and structure of our limited government places a significant thumb on the scale favoring inaction over action. Even where, as here, Congress has expressly provided for limited review of a Commission decision to take no further action on a complaint, the historical thumb limiting government action supports keeping such review in this case narrowly confined and not implying greater powers of review that would effectively turn this Court into a tie-breaking vote.

Respectfully Submitted,

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