ORAL ARGUMENT HELD APRIL 26, 2023

No. 22-5277

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

END CITIZENS UNITED PAC,

Appellant,

v.

FEDERAL ELECTION COMMISSION AND NEW REPULICAN PAC,

Appellees.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:21-cv-2128-RJL (The Honorable Richard J. Leon)

BRIEF OF THE NRSC AND THE NRCC AS *AMICI CURIAE* IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING EN BANC

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March 8, 2024

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The NRSC (the National Republican Senatorial Committee) and the NRCC (the National Republican Congressional Committee), by counsel, provide the following information in accordance with Circuit Rule 28(a)(1):

A. Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in Appellant's addendum to the Petition for Rehearing En Banc.

B. Rulings Under Review

An accurate reference to the ruling below appears in Appellant's addendum. The ruling under review in the Petition for Rehearing En Banc is the panel decision dated January 19, 2024. The panel decision is reported at 90 F.4th 1172.

C. Related Cases

The case on review was not previously before this Court or any other court. There are no related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the NRSC and the NRCC state as follows:

The NRSC has no parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in it.

The NRCC has no parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in it.

Dated: March 8, 2024

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
ECU	End Citizens United PAC
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTEREST OF *AMICI CURIAE*[1]

The **NRSC** (the National Republican Senatorial Committee) is the principal national political party committee focused on electing Republicans to the U.S. Senate. The NRSC's membership includes all Republican Members of the Senate, including a respondent in the agency proceeding below.

The **NRCC** (the National Republican Congressional Committee) is the principal national political party committee devoted to electing Republicans to the U.S. House of Representatives. The NRCC's membership includes all Republican Members of the House.

For the NRSC, the NRCC, and their members, affirmation of the panel decision is essential to ensure that, as Congress instructed, enforcement of the Federal Election Campaign Act requires four affirmative votes by a bipartisan majority of Commissioners on the Federal Election Commission and, just as important, that dismissal of an administrative complaint requires only three votes. Congress established the FEC in the shadow of Watergate and structured it so partisan political abuse would not chill "core constitutionally protected activity." *See Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (citation omitted).

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

By requiring bipartisan agreement, Congress blunted the risk that one political party could use agency enforcement to silence or damage another political party. But dismissals do not pose the same risk, and Congress did not require bipartisan agreement for the FEC to decline enforcement.

The Petition seeks to upend the careful congressional design, arguing federal district judges should be authorized to second-guess every Commission dismissal—especially when a deadlocked Commission votes 3-3 to invoke prosecutorial discretion. But the Petition cannot develop "meaningful standards for assessing the propriety of enforcement choices." *United States v. Texas*, 599 U.S. 670, 679 (2023); *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Nor can it justify its position that a three-commissioner statement speaks for the agency on the merits (and thus is reversible) but cannot invoke discretion.

At bottom, the Petition argues more enforcement is always better. But Congress, in the aftermath of the abuses of Watergate, made a different choice—as FECA's text, structure, history, and purpose all confirm. Because the panel decision is well reasoned and adheres to precedent, the Petition should be denied.

ARGUMENT

I. The FEC's Prosecutorial Discretion Is Unreviewable.

When the panel affirmed the FEC's dismissal of the first complaint against New Republican PAC and Senator Rick Scott was unreviewable, it relied on a well-

established principle of Circuit law: "a Commission dismissal is unreviewable if it turns in whole or in part on enforcement discretion." *ECU v. FEC*, 90 F.4th 1172, 1178 (D.C. Cir. 2024) (cleaned up); *see also CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), *en banc reh'g denied*, 55 F.4th 918 (D.C. Cir. 2022) ("*New Models II*"), and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"), *en banc reh'g denied*, 923 F.3d 1141 (D.C. Cir. 2019). Because the FEC expressly invoked discretion when it dismissed the complaint, the panel affirmed the district court's holding that the dismissal "was not reviewable." *ECU*, 90 F.4th at 1181.

Circuit law required that result. "[T]he Commission, like other Executive agencies, retains prosecutorial discretion." *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007); *see FEC v. Akins*, 524 U.S. 11, 25 (1998). The general principle that flows from Article II and the Administrative Procedure Act is that an agency's enforcement discretion is unreviewable. *Texas*, 599 U.S. at 678-81; *Heckler*, 470 U.S. at 830-32. In *CHGO*, this Court held that "contrary to law" review under FECA cannot reach the FEC's express invocation of prosecutorial discretion, because "there is no 'law' to apply in judging how and when an agency should exercise its discretion." 892 F.3d at 440. *New Models* agreed. 993 F.3d at 887-89.

The Petition does not contend the majority misapplied these precedents. It instead urges the full Court to abandon them, asserting a "conflict" with the statute and other caselaw. Pet.2. New Republican PAC explains why there is no conflict,

and *amici* agree that *New Models* and *CHGO* are "consistent with the text and structure of FECA, as well as with the cases on which End Citizens United now relies." *ECU*, 90 F.4th at 1180; *accord Campaign Legal Ctr. v. FEC*, 89 F.4th 936, 942 (D.C. Cir. 2024) ("In *New Models*, the court addressed these same objections and explained why its holding was consistent with *Akins* and this court's FECA precedents." (citation omitted)).

II. The FEC May Invoke Prosecutorial Discretion In A Deadlock.

In addition to contesting the FEC's enforcement discretion, the Petition disputes its manner of invocation. Echoing the dissent, the Petition says the Commission may invoke prosecutorial discretion only when four commissioners agree. Pet.2, 15-17; *see ECU*, 90 F.4th at 1188-90 (Pillard, J., dissenting). But Congress made a different judgment and required four affirmative votes only to enforce an administrative complaint, not to dismiss.

A. FECA Requires Four Votes To Enforce Not To Dismiss.

FECA enumerates matters for which the votes of four FEC commissioners is required and does not include dismissals on that list. The statute requires "the affirmative vote of 4 members of the Commission" to initiate enforcement. 52 U.S.C. § 30106(c); *see also* §§ 30107(a)(6), 30107(a)(9), 30109(a)(1). "Yet no provision in FECA requires four votes to dismiss a complaint." *ECU*, 90 F.4th at 1180 n.6; *accord New Models*, 993 F.3d at 891 n.10 ("None of the referenced

paragraphs [in § 30106(c)] include dismissal"). Because *expressio unius est exclusio alterius*, Congress's decision to omit dismissal from the list of actions for which four affirmative votes is required shows four are not needed to dismiss.

FECA's structure confirms its text. Congress established the FEC as a six-member body while providing that "[n]o more than 3 members of the Commission … may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). By coupling FECA's four-vote requirement with a three-member party affiliation limit, Congress ensured that commissioners from a single political party could not easily hijack the FEC to chill political activity by individuals or organizations affiliated with a different political party.

Historical context shows why. Congress established the Commission in the shadow of Watergate. Among the "'deeply disturbing examples' of corruption 'surfacing after the 1972 election,'" *Wagner v. FEC*, 793 F.3d 1, 12-13 (D.C. Cir. 2015), were allegations that President Nixon had leveraged the law enforcement capabilities of the executive branch to investigate and prosecute his perceived "political 'enemies,'" Final Report of the Select Comm. on Presidential Campaign Activities, S. Rep. No. 93-981, at 108 (1974); *see also id.* at 130-50 (documenting "misuse of government agencies," especially law enforcement, for "political ends"). These abuses featured heavily in the congressional debates leading up to the enactment of FECA and its subsequent amendments, and the combination of the

party-affiliation limit with the four-vote requirement was seen by Members as the essential "safeguard" that would "keep politics, or the appearance of politics" out of FEC decisions to prosecute. 122 Cong. Rec. S3517 (daily ed. Mar. 16, 1976) (statement of Sen. Howard Cannon). But Congress expressed no similar concerns about the risk of allegedly partisan decisions to decline enforcement, which cannot have a similar chilling effect on protected activity. Contrary to the Petition, Congress was concerned about abuses that might result from Commission *overenforcement*, not underenforcement.

Congress's concern makes perfect sense given the Commission's role. "Unique among federal administrative agencies, the [FEC] has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). Unlike "agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights" guaranteed by the First Amendment. *Van Hollen*, 811 F.3d at 499.

Because the Commission's enforcement decisions are all taken in this critical area of negative liberty, *see Laborers Loc. 236, AFL-CIO v. Walker*, 749 F.3d 628, 639 (7th Cir. 2014) ("the First Amendment … 'directs what government may not do to its citizens, rather than what it must do for them'"), Congress wisely required a

four-vote bipartisan majority before the agency can proceed. But when the FEC "elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty," *Texas*, 599 U.S. at 678, so there is no risk of "any 'chilling effect,'" *Buckley v. Valeo*, 519 F.2d 821, 844 n.50 (D.C. Cir. 1975) (subsequent history omitted). Unsurprisingly, Congress did *not* require bipartisan agreement for FEC decisions to decline enforcement. The First Amendment instructs Congress to "err on the side of protecting political speech," *see McCutcheon v. FEC*, 572 U.S. 185, 209 (2014) (plurality opinion), and that is exactly what Congress did when it required four votes to proceed with enforcement and not to dismiss.

What the Petition characterizes as a misreading of the statute is thus a critical feature—as decades of Circuit precedent confirm. When then-Judge Ruth Bader Ginsburg explained that the FEC often "deadlocks and for that reason dismisses a complaint," *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) ("*DCCC*"), she affirmed a basic tenet of the congressional design: FECA requires "four affirmative votes" to proceed with enforcement and not to "dismiss[,]" *id.* at 1133; *accord Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("a deadlock vote results in an order of dismissal").

B. The Statement Invoking Discretion Only Needs Three Votes.

Beginning with *DCCC*, this Court has held that when "the Commission deadlocks and dismisses," "the three Commissioners who voted to dismiss must

provide a statement of their reasons for so voting." *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Although a statement is not required by FECA, the Court found it necessary "to make judicial review a meaningful exercise." *Ibid.* (citing *DCCC*, 831 F.2d at 1133-34). "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." *Ibid.*

The Petition and dissent agree Commission deadlocks are dismissals and would review them by looking to the judicially required statement from the controlling group of commissioners. But they resist that approach when the statement invokes discretion, calling it "perverse" to "treat a non-majority's statement of reasons, elicited to facilitate judicial review, as instead its ticket to bypass judicial review altogether." Pet.7 (quoting *ECU*, 90 F.4th at 1189 (Pillard, J., dissenting)). Whatever the merits of that policy-based criticism, it does not land against the statute but against *DCCC*.

Prior to *DCCC*, all deadlock dismissals were deemed unreviewable exercises of prosecutorial discretion. So, if a Commission *majority* dismissed based on an interpretation of FECA, that was "reviewable in court solely to assure that the Commission's action is not based on an error of law." 125 Cong. Rec. 36754 (1979) (statement of Sen. Claiborne Pell). But "if the Commission consider[ed] a case and [was] evenly divided as to whether to proceed, that division which under the act

precludes Commission action on the merits [was] not subject to review any more than a similar prosecutorial decision by a U.S. attorney." *Ibid.*; *see ibid.* (explaining statutorily "limited" contrary-to-law review did not "work a transfer of prosecutorial discretion from the Commission to the courts"). Because the FEC's deadlocks were unreviewable, the agency often did not explain them. *See Common Cause*, 842 F.2d at 451 n.34.

DCCC rejected the FEC's position that all "deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion." 831 F.2d at 1133-34. But, as *New Models* explained, *DCCC* was "focused on the facts of that case" and "did not 'answer ... for all cases' the question of whether a Commission dismissal due to deadlock is 'amenable to judicial review.'" 993 F.3d at 894 (quoting *DCCC*, 831 F.2d at 1132). After *New Models*, the statement of reasons *DCCC* required must be examined to determine whether the deadlock was based on unreviewable "enforcement discretion" or reviewable "legal arguments." 993 F.3d at 894.

Contrary to the dissent, there is nothing strange about examining a statement to determine whether it sets forth judicially reviewable statutory arguments or invokes unreviewable enforcement discretion. And the supposed anomaly of looking to a "non-majority" statement, *see ECU*, 90 F.4th at 1189 (Pillard, J., dissenting); Pet.1-2, 15-17, is simply the byproduct of *DCCC*'s project to make

reviewable some deadlocks when previously all were *per se* unreviewable. It has nothing at all to do with *CHGO* or *New Models*.

In any event, there is no support for the position advanced by the Petition and dissent that a three-commissioner statement speaks for the FEC when it provides legal reasons but not when it invokes prosecutorial discretion. If an explanation from the controlling commissioners is required, it speaks for the agency in either case. As the panel observed, "nothing in [the] caselaw suggests [the Court] must turn a blind eye to the invocation of prosecutorial discretion in a deadlock dismissal." *ECU*, 90 F.4th at 1180 n.6.

III. The FEC's Prosecutorial Discretion Has Not Stopped FECA Enforcement.

The Petition's final, policy-based plea is that unless *New Models* and *CHGO* are reversed, there will be "profoundly damaging effects on the operation of campaign finance law" as judges are unable "to 'prod a reluctant FEC to act' on plausible claims." Pet.1, 16.

The short answer is that what the Petition deems a problem is the careful, conscious congressional plan for the agency. "Under our system of government, the primary check against prosecutorial abuse is a political one." *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting). As explained, Congress imposed a bipartisan enforcement requirement, lest one political party seize control of the agency and use it to chill the protected speech and expression of another political

party. But that requirement does not apply to dismissal, as FECA's text, structure, history, and purpose all confirm.

Nor is the Petition correct that "partisan FEC minorities" "routinely" invoke discretion "to entrench impermissible statutory interpretations without recourse to the judicial check." Pet.16. For one thing, positions that fail to command a Commission majority do not bind the agency or the regulated community. For another, the Commission may *want* judicial review to confirm its legal interpretation.

As the record here illustrates, the FEC dismissed one complaint based on prosecutorial discretion and another on legal reasoning. Because only the second could be reviewed, only it afforded the agency an opportunity to claim judicial imprimatur for its view that on the facts here "a coordination violation was impossible as a matter of law." *ECU*, 90 F.4th at 1183.

This case is no outlier. Since *CHGO*, "the Commission has continued to dismiss matters based solely on judicially reviewable legal determinations." *New Models*, 993 F.3d at 891 (collecting cases). And since *New Models*, "the Commission has dismissed numerous complaints without invoking prosecutorial discretion, allowing those decisions to be reviewed." *New Models II*, 55 F.4th at 921 (Rao, J., concurral) (collecting cases). The alleged fear is unwarranted.

* * *

FECA allows "only a modest role for the courts in determining whether a dismissal or failure to act is 'contrary to law.'" *ECU*, 90 F.4th at 1180 (quoting 52 U.S.C. § 30109(a)(8)(C)). It does not allow courts to second-guess the FEC's enforcement discretion. And it "does not confer on the courts a general power to enforce the law, which instead belongs to the Commission in the exercise of its executive power." *Ibid.*

CONCLUSION

The Petition should be denied.

Dated: March 8, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, on March 8, 2024, that:

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/s/Jeremy J. Broggi
Jeremy J. Broggi

CERTIFICATE OF SERVICE

I certify that on March 8, 2024, a true and correct copy of this Brief was filed and served electronically upon counsel of record registered with the Court's CM/ECF system.

/s/Jeremy J. Broggi
Jeremy J. Broggi