



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

**STATEMENT OF VICE CHAIR ELLEN L. WEINTRAUB AND
COMMISSIONER SHANA M. BROUSSARD
ON THE PETITIONS FOR REHEARING EN BANC
IN CAMPAIGN LEGAL CENTER V. FEC AND END CITIZENS UNITED PAC V. FEC**

The Office of General Counsel has submitted responses to two petitions for rehearing *en banc*¹ on behalf of the Commission. Those responses² do not represent our views.

The Federal Election Campaign Act of 1971, as amended (the “Act”), expressly provides for judicial review of the Commission’s enforcement actions.³ Specifically, when the Commission dismisses an enforcement matter, the Act permits a party to petition the U.S. District Court of the District of Columbia to determine whether the Commission acted contrary to law in dismissing the enforcement matter.⁴ In two cases before the D.C. Circuit, the Court has held that Commission action based on prosecutorial discretion was not subject to judicial review.⁵ Congress specifically required a four-vote requirement to take enforcement action⁶ — as Judge Pillard has clarified, “to avoid nullification of [the Act] by a non-majority bloc of commissioners refusing to act on apparent violations of campaign-finance laws, Congress made such refusals to act — no matter the reason — reviewable in court.”⁷ But these cases allow the Commission to take judicially unreviewable action with only three votes. Therefore, these cases contradict two of Congress’s fundamental aspects of the Act — the majority voting requirement and judicial review.

¹ Campaign Legal Center v. FEC, No. 22-5339, Pet. for Rehearing En Banc (Feb. 20, 2024), <https://www.fec.gov/resources/cms-content/documents/clc-pl-apnts-pet-for-reh-en-banc-02-20-2024.pdf>; End Citizens United PAC v. FEC, No. 22-5277, Pet. for Rehearing En Banc (Feb. 20, 2024), <https://www.fec.gov/resources/cms-content/documents/clca-pl-apnt-pet-for-reh-en-banc-02-20-2024.pdf>.

² Campaign Legal Center v. FEC, No. 22-5339, Resp. to Pet. for Rehearing En Banc (Mar. 8, 2024), <https://www.fec.gov/resources/cms-content/documents/fec-resp-to-pet-for-rhr-g-en-banc-03-08-2024.pdf>; End Citizens United PAC v. FEC, No. 22-5277, Resp. to Pet. for Rehearing En Banc (Mar. 8, 2024), <https://www.fec.gov/resources/cms-content/documents/fec-resp-to-pet-for-rhr-g-en-banc-22-5277-03-08-2024.pdf>.

³ See 52 U.S.C. § 30109(a).

⁴ *Id.* § 30109(a)(8)(C).

⁵ Citizens for Responsibility and Ethics in Washington v. FEC, 892 F.3d 434 (D.C. Cir. 2018) (“CHGO”); Citizens for Responsibility and Ethics in Washington v. FEC, 993 F.3d 880 (D.C. Cir. 2021) (“New Models”).

⁶ See 52 U.S.C. § 30109(a)(2).

⁷ End Citizens United PAC v. FEC et al., 90 F.4th 1172, 1184 (D.C. Cir. 2024) (Pillard J., dissenting).

Now that the D.C. Circuit is currently considering petitions to rehear *en banc* two cases on this issue, this is an opportune time for the Court to reconsider the troubling precedent on the judicial review of Commission enforcement actions.⁸ As Judge Millett has explained, “What is at stake here [] is a much further-reaching and consequential question: Can a federal agency openly consider, address, and issue comprehensive determinations of laws in its final agency action, and then avoid all accountability for and judicial review of its decision just by tacking onto the end ‘and in exercise of our prosecutorial discretion.’”⁹

Further, the Court should rehear these cases to put a stop to the reliance on prosecutorial discretion as, Judge Millett called it, a “get out of judicial review free card.”¹⁰ Reliance on prosecutorial discretion can be easily abused. *CHGO* and *New Models* are perfect examples of that abuse. In *CHGO*, the Commission’s lack of enforcement was not subject to judicial review because the statement of reasons signed by three Commissioners first included “discretion” as the third to last word of the five-page statement and only mentioned “prosecutorial discretion” in the 17th and final footnote of the statement.¹¹ And, in *New Models*, “seven magic words” in the final sentence of a three-commissioner statement of reasons — “and in exercise of our prosecutorial discretion” — made a 31-page legal analysis unreviewable.¹² As Judge Millett said, a final agency decision cannot become unreviewable “with just a rhetorical wink at prosecutorial discretion.”¹³ Judge Cooper has also cautioned that it would “gut the statutory scheme that Congress created in [the Act] — to foreclose judicial review whenever the FEC bases its dismissal on legal interpretations couched as ‘prosecutorial discretion’ or, worse yet, simply sprinkles the term throughout a Statement of Reasons in order to circumvent judicial review.”¹⁴

⁸ *Campaign Legal Center v. FEC*, No. 22-5339 and *End Citizens United PAC v. FEC*, No. 22-5277.

⁹ *Citizens for Responsibility and Ethics in Washington v. FEC*, 993 F.3d 880, 906 (D.C. Cir. 2021) (Millett, J., dissenting).

¹⁰ *Id.* at 895.

¹¹ *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).


¹² *Citizens for Responsibility and Ethics in Washington v. FEC*, 993 F.3d 880, 896 (D.C. Cir. 2021) (Millett, J., dissenting).

¹³ *Id.* at 896.

¹⁴ *Citizens for Responsibility and Ethics in Washington v. American Action Network*, 590 F.Supp.3d 164, 169 (D.D.C. Mar. 2, 2022).

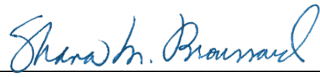
Permitting three commissioners to take judicially unreviewable action also disincentivizes bipartisan cooperation amongst the Commission to achieve a majority vote on enforcement matters. We urge the Court to rehear these cases and reconsider its precedent given this issue involves a question of exceptional importance to the enforcement of federal campaign finance laws.¹⁵

March 14, 2024
Date



Ellen L. Weintraub
Vice Chair

March 14, 2024
Date



Shana M. Broussard
Commissioner

¹⁵ Fed. R. App. P. 35(a)(2).