EN BANC ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

No. 22-5277

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

NEW REPUBLICAN PAC,
Intervenor-Appellee.

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

APPELLANT'S EN BANC BRIEF

Adav Noti
Megan P. McAllen
Kevin P. Hancock
Alexandra Copper*
CAMPAIGN LEGAL CENTER ACTION
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
khancock@campaignlegalcenter.org

Counsel for Appellant

** Not a member of the D.C. Bar; practicing before the federal courts pursuant to D.C. App. Rule 49(c)(3)*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant End Citizens United PAC ("End Citizens United") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. End Citizens United is the plaintiff in the district court and Appellant in this Court. The Federal Election Commission ("FEC") is the defendant in the district court but defaulted and did not appear in the district court or in this Court until March 8, 2024, when it responded to End Citizens United's petition for rehearing en banc. New Republican PAC ("New Republican") was granted leave by the district court to intervene in the action as a defendant and is an Appellee in this Court. No parties participated as amici curiae in the district court. Citizens for Responsibility and Ethics in Washington ("CREW") is participating as an amicus for Appellant in this Court. The National Republican Senatorial Committee and National Republican Congressional Committee are participating as amici for Appellee in this Court.

(B) Rulings Under Review. End Citizens United appeals the September 16, 2022 memorandum opinion (Doc. 36) and order (Doc. 37) of the U.S. District Court for the District of Columbia (Leon, J.) granting New Republican's Cross-Motion for Summary Judgment and denying End Citizens United's Motion for Default Judgment, or, in the Alternative, for Summary Judgment. The September 16, 2022

opinion is not published in the federal reporter but is available at 2022 WL 4289654 and can be found in the Joint Appendix at JA097-113.

On January 19, 2024, a divided panel of this Court affirmed the District Court's September 16, 2022 judgment in an opinion that was published in the federal reporter at 90 F.4th 1172. On October 15, 2024, this Court issued a per curiam order vacating the panel's January 19, 2024 judgment and granting End Citizens United's petition for rehearing en banc.

(C) Related Cases. The case on review was not previously before this Court or any other court. A related case is pending before this Court. *See* No. 22-5339, *Campaign Legal Center v. FEC*. On October 15, 2024, the Court held No. 22-5339 in abeyance pending the en banc Court's disposition of this case. There are no additional related cases pending before this Court or any other court of which counsel is aware.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellant End Citizens United certifies that it has no parent companies and no publicly held company with a 10% or greater ownership interest. End Citizens United is a political action committee whose mission is to get big money out of politics and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
PAC	Political Committee

INTRODUCTION

This case involves two recent divided panel rulings that "call out for correction" because they "flout binding precedent" and "effectively scuttle [the] enforcement mechanism" of the Federal Election Campaign Act ("FECA" or "the Act"), 52 U.S.C. § 30101, *et seq*. *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1184-85, 1188 (D.C. Cir. 2024) (Pillard, J., concurring in part and dissenting in part).

FECA's campaign-finance laws are critical to our democracy. They limit the risk and appearance of quid pro quo corruption and inform the public of who is spending to influence their votes. To ensure effective implementation of the Act, Congress granted civil enforcement power to the independent, partisan-balanced Federal Election Commission ("FEC"), but devised a complaint mechanism allowing private citizens to participate in the process as well. Any person may file a complaint with the FEC alleging a FECA violation; if four of the six commissioners agree there is reason to believe a violation occurred, the FEC must investigate.

As "the countermeasure to otherwise predictable deadlock" created by the FEC's structure, Congress included a unique provision in FECA that makes the FEC's "refusals to act—no matter the reason—reviewable in court." *Id.* at 1184, 1188 (Pillard, J., concurring in part and dissenting in part). If a court declares the FEC's dismissal of a complaint "contrary to law," the FEC gets a chance to fix the

error on remand. If it fails or refuses, then FECA allows the private complainant to file a citizen suit to pursue remedies for the injuries it suffered from the violation.

For decades, the Supreme Court and this Circuit have recognized that FECA's express judicial-review provision rebuts the presumption of nonreviewability established in *Heckler v. Chaney*, 470 U.S. 821 (1985). But starting in 2018, two divided panel rulings by this Court took a "wrong turn" by "enabl[ing] a non-majority bloc of commissioners to shield nonenforcement decisions from judicial review . . . just by invoking the words 'prosecutorial discretion.'" *End Citizens United PAC*, 90 F.4th at 1184 (Pillard, J., concurring in part and dissenting in part).

Those divided panel rulings—*CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission on Hope I*") and *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models I*") (collectively, "the *CREW* cases")[1]—prompted the district court's dismissal below. In 2018, End Citizens United filed an FEC complaint alleging that U.S. Senator Rick Scott, his campaign, and Intervenor-Appellee New Republican violated FECA during Scott's 2018 Senate campaign. The FEC's nonpartisan General Counsel agreed, but the FEC deadlocked and dismissed the matter. To justify their decision, the three commissioners who voted against the General

[1] To differentiate between cases brought by Citizens for Responsibility and Ethics in Washington ("CREW") against the FEC, this brief refers to each case by the name of the respondent in the underlying administrative matter.

Counsel's reason-to-believe recommendations issued a statement with more than five pages of legal analysis, including erroneous statutory interpretation. But the district court, relying on the *CREW* cases, found the dismissal unreviewable because the commissioner statement also invoked prosecutorial discretion.

The *CREW* cases should be overruled. First, the decisions conflict with FECA's text, structure, and purpose. By its plain terms, FECA subjects FEC enforcement dismissals to judicial scrutiny under a contrary-to-law standard to prevent partisan reluctance to enforce the law from nullifying FECA. The *CREW* cases transgress this congressional choice by making the availability of judicial review hinge upon a partisan bloc's stated reasons for dismissing. In so doing, the *CREW* panels ignored decades of precedent recognizing that FECA rebuts the general presumption that agency decisions not to enforce the law are unreviewable.

Second, the *CREW* cases also vitiate the Act's enforcement framework and the important interests it serves. By arming the FEC with a judicial-review kill switch, the *CREW* cases void FECA's primary check on FEC ineffectiveness. Worse still, the *CREW* cases hand that judicial-review kill switch not just to the agency as a body, but to a partisan-aligned non-majority bloc of commissioners, thereby upending the Commission's delicate bipartisan balance. Not only may such partisan blocs now defeat judicial review at will, but the *CREW* cases also allow them to announce new legal interpretations guiding regulated actors—free from any judicial,

political, or bipartisan check—no matter how contrary to FECA those interpretations may be.

In addition to overruling the *CREW* decisions, this Court should also reaffirm its holding in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), that an FEC dismissal can be contrary to law under FECA if it is arbitrary or capricious or an abuse of discretion. Reviewing FEC dismissals for arbitrariness and abuse of discretion is consistent with FECA, precedent, and basic principles of administrative law, and that standard stood for decades as a critical bulwark against unreasoned FEC decisionmaking—until undermined by the *CREW* cases.

The Court should correct the *CREW* decisions and restore the effective operation of FECA's enforcement scheme, including the safeguards Congress devised to prevent FEC intransigence from rendering the federal campaign-finance laws a dead letter.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from a final order of the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). Despite the district court's conclusion otherwise, the district court had subject-matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8)(A). End Citizens United timely filed this appeal on October

17, 2022, within 60 days of the district court's opinion and order entered September 16, 2022, which disposed of all of End Citizens United's claims in this action.

STATEMENT OF THE ISSUES

This Court ordered the parties to address the following issues:

1. Decades of controlling precedent has recognized that FECA rebuts *Heckler v. Chaney*'s presumption of nonreviewability by directing courts to review whether the FEC's enforcement dismissals are "contrary to law." In the *CREW* cases, two divided panels held that any partisan non-majority commissioner bloc that voted against enforcement can shield the resulting dismissal from judicial review—including any supporting FECA interpretation—by invoking prosecutorial discretion in its statement of reasons. Should the *CREW* cases be overruled?

2. As FECA's text reflects, Congress intended for courts to set aside FEC dismissals that are "contrary to law" for any reason, including for being arbitrary, contrary to the record, or otherwise reflective of unreasoned decisionmaking. Consistent with this understanding and general principles of administrative law, *Orloski* interpreted FECA's contrary-to-law standard to include arbitrary-or-capricious and abuse-of-discretion review, and courts have successfully applied that standard to FEC dismissals for decades. Should *Orloski* be reaffirmed?

At the panel stage, the following additional issues were before the Court:

3. This Court has repeatedly held that whether agency action is judicially

reviewable under *Heckler v. Chaney* is not jurisdictional. Following the *CREW* cases, the district court held that the FEC's dismissal in this case is unreviewable. Assuming the *CREW* cases are not overruled, did the district court err by dismissing for lack of subject-matter jurisdiction rather than failure to state a claim upon which relief can be granted?

4. Under the *CREW* cases, the FEC's dismissal of a discrete FECA claim contained in an administrative complaint is unreviewable only if the no-voting commissioners specifically invoked prosecutorial discretion as to that claim. The no-voting commissioners in this case invoked prosecutorial discretion as to End Citizens United's Filing Claims, but not as to its Soft-Money Claims. Assuming the *CREW* cases are not overruled, did the district court err by concluding that the Soft-Money claims are unreviewable?

STATEMENT OF THE CASE

I. Legal Background

A. FECA and the FEC

In the wake of Watergate, Congress amended FECA in 1974 to limit political contributions and require disclosure of political spending "to limit the actuality and appearance of corruption" of the political process. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam). As amended, FECA restricts the sources and amounts of contributions to federal candidates and requires candidates to file periodic financial

disclosure reports. Courts have repeatedly recognized that the Act's contribution limits address the "concern that large contributions could be given 'to secure a political *quid pro quo*,'" *Citizens United v. FEC*, 558 U.S. 310, 345 (2010) (quoting *Buckley*, 424 U.S. at 25), and its disclosure requirements also limit the risk of corruption while "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages," *id.* at 371.

The post-Watergate Congress believed that the "most significant reform that could emerge from the Watergate scandal [was] the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections." Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93–981, 93d Cong., 2d Sess., 564 (1974). Congress thus created the FEC, an independent agency with jurisdiction over FECA's administration, interpretation, and civil enforcement. *See* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress "designed the Commission to ensure that every important action it takes is bipartisan." *Combat Veterans for Cong. PAC v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). The FEC accordingly consists of six commissioners, no more than three of whom "may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). Any "decision[ ] of the Commission" to "exercise [ ] its duties and powers" must, at minimum, "be made by a majority vote of" Commissioners. *Id.* § 30106(c).

B. The Commission's Enforcement Process

Any person may file an administrative complaint with the Commission alleging, under penalty of perjury, a violation of FECA. *Id.* § 30109(a)(1). After receiving a complaint, the FEC votes on whether there is "reason to believe that a person has committed, or is about to commit" a FECA violation. *Id.* § 30109(a)(2). If four or more Commissioners vote to find that there is reason to believe, the "Commission shall make an investigation of such alleged violation." *Id.* After an investigation, if at least four Commissioners vote to find there is "probable cause" to believe FECA has been violated, the Commission must first attempt to resolve the matter through conciliation. *Id.* § 30109(a)(3), (a)(4)(A)(i). If conciliation fails, "the Commission may, upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in federal district court. *Id.* § 30109(a)(6)(A).

Instead of starting an investigation, "the Commission at any time can dismiss a complaint" by the vote of four or more Commissioners. *Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024) (citing 52 U.S.C. § 30109(a)(1), (a)(8)). When the Commission is "deadlocked—that is, when no bloc of four Commissioners votes to find either reason to believe or *no* reason to believe"—that deadlock "give[s] rise to a dismissal only if a majority of

Commissioners separately votes to dismiss the complaint." *Id.*[2] Only once the FEC dismisses the complaint may the agency publicly disclose the existence of the matter and documents integral to its decisionmaking process. *See* FEC, Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016).

C. Judicial Review of FEC Dismissals and FECA Citizen Suits

Recognizing that the FEC's bipartisan structure "creates a risk that partisan deadlock will prevent enforcement of campaign finance laws," Congress "accounted for that possibility with a judicial review provision." *CREW v. FEC*, 55 F.4th 918, 923 (D.C. Cir. 2022) ("*New Models II*") (Millet, J., dissenting from denial of rehr'g en banc). That provision allows any administrative complainant "aggrieved by an order of the Commission dismissing a complaint . . . or by a failure of the Commission to act on such complaint" to seek review in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A); *see also id.* § 30109(a)(8)(B). The district court hearing the suit "may declare that the dismissal of the complaint or the failure to act is contrary to law" and "direct the Commission to conform with

[2] This Court has explained that although it has previously used the "convenient shorthand" phrase "deadlock dismissal" to refer to an FEC dismissal resulting from a deadlock on the merits, *see, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 448-49 (D.C. Cir. 1988); *New Models I*, 993 F.3d at 894, that phrase "should not be misunderstood to mean a deadlocked vote constitutes or automatically occasions a dismissal," *45Committee*, 118 F.4th at 382.

such declaration within 30 days." *Id.* § 30109(a)(8)(C). A dismissal is "contrary to law" if: "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA] . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.[3]

To "allow meaningful judicial review" of a dismissal resulting from a deadlock, the commissioners who voted against the General Counsel's recommendation to move forward must issue statements of reasons explaining their votes. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). Even though such statements are "not law" given their lack of majority support, *id.* at 449 & n.32, this Court has historically given these statements "great deference" under *Chevron* and similar doctrines, *In re Sealed Case*, 223 F.3d 775, 781 (D.C. Cir. 2000). *But see Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (reversing *Chevron*).

After review, if the district court declares that a dismissal or failure to act is contrary to law, it "may direct the Commission to conform with [that] declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform, the

[3] Courts analyze whether an FEC failure to act is contrary to law under a set of factors described in *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), and *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*").

complainant may file a citizen suit, *i.e.*, "a civil action to remedy the violation involved in the original complaint." *Id.*

D. The *CREW* Cases

As the Supreme Court recognized in *Akins*, the "traditional[]" presumption that nonenforcement decisions are "committed to agency discretion" is squarely rebutted by FECA. *FEC v. Akins*, 524 U.S. 11, 26 (1998). Accordingly, since the FEC's creation in 1974, courts had reviewed whether Commission dismissals were contrary to law, even if those dismissals implicated the agency's enforcement discretion. *See, e.g.*, *Akins v. FEC*, 66 F.3d 348, 355 (D.C. Cir. 1995) (rejecting plaintiff's claim that "the Commission failed to investigate adequately the administrative complaint" under abuse of discretion standard), *rev'd on other grounds*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998); *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) ("The Court finds that the FEC's decision to dismiss . . . was not contrary to law, and represents a reasonable exercise of the agency's considerable prosecutorial discretion."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) (reviewing "the Commission's discretion to determine where and when to commit its investigative resources . . . for abuse of that discretion").

But six years ago, a divided panel of this Court—adopting a position that no party had argued and with which the FEC disagreed—held that *Heckler* allows a non-majority partisan bloc of commissioners to insulate FEC dismissals from judicial review by invoking the words "prosecutorial discretion" in their statement of reasons. *Commission on Hope I*, 892 F.3d at 440-42. Three years later, another divided panel applied *Commission on Hope I* to conclude that it could not review a 32-page statement of reasons, including its voluminous legal interpretation, because in a footnote, the no-voting commissioners included a token, seven-word reference to prosecutorial discretion. *New Models I*, 993 F.3d at 882.

II. Procedural Background

A. End Citizens United's Administrative Complaint

In April 2018, End Citizens United filed an administrative complaint alleging that Senator Rick Scott, his campaign, and New Republican PAC violated FECA. JA027-61. As that complaint details, starting in 2017, Senator Scott's nascent Senate campaign engaged in a scheme to circumvent FECA's contribution limits and disclosure requirements: Senator Scott illegally delayed declaring his candidacy with the FEC to avoid triggering FECA's requirements, while co-opting New Republican, a super PAC, to raise millions outside of the Act's limits that would later be spent supporting his campaign. *See id.* The complaint thus alleges that Senator Scott failed to timely file a Statement of Candidacy with the FEC, *see* 52

U.S.C. § 30102(e)(1), and the Scott Campaign failed to timely file a Statement of Organization, *see id.* § 30103(a), and financial disclosure reports, *see id.* § 30104 (collectively, the "Filing Claims"). The complaint also alleges that Senator Scott and New Republican impermissibly raised and spent money outside of FECA's source and amount limits. *See id.* § 30125(e) (collectively, the "Soft-Money Claims"). The FEC designated the matter initiated by this complaint as Matter Under Review ("MUR") 7370. JA118.[4]

B. The FEC Deadlocked and Dismissed the Complaint

After evaluating End Citizens United's complaint, the FEC's nonpartisan Office of General Counsel recommended that the agency find reason to believe with respect to End Citizens United's Filing Claims and Soft-Money Claim against New Republican. JA208-34. The General Counsel recommended that the Commission "take no action at this time" on the Soft-Money Claim against Scott. *Id.*

On May 20, 2021, the FEC deadlocked 3-3 on a motion to approve the General Counsel's recommendations. JA270-71. On June 10, 2021, the Commission again deadlocked on whether to (1) dismiss the Filing Claims as an exercise of

[4] In April 2018, End Citizens United filed a second administrative complaint against Scott, the Scott Campaign, and New Republican alleging coordination violations under FECA, which the FEC designated as MUR 7496. JA175-82. The district court reviewed the FEC's dismissal of MUR 7496 and found it was not contrary to law. JA110-113. End Citizens United no longer challenges that aspect of the district court's decision in this appeal.

prosecutorial discretion, (2) find no reason to believe regarding the Soft-Money Claim against New Republican, and (3) dismiss the remainder of the allegations. JA272-73. Given these deadlocks, the FEC then voted 5-1 to "[c]lose the file" on End Citizens United's administrative complaint, thereby dismissing it. JA273.

On July 21, 2021, the three Commissioners who voted to reject the General Counsel's recommendations issued a Statement of Reasons containing five pages of "Legal Analysis." JA281-91. First, the no-voting commissioners claimed that "we . . . exercised our prosecutorial discretion regarding" the Filing Claims. JA290. Despite acknowledging the "significant evidence of Scott's potential earlier candidacy," the no-voting commissioners concluded that proceeding would require the FEC to "probe [Scott's] subjective intent" in a "lengthy and cumbersome investigation" to determine when he became a candidate. *Id.* Second, the no-voting commissioners "voted to find no reason to believe" that New Republican violated the soft-money ban. JA290. Third and finally, the no-voting commissioners dismissed the Soft-Money Claim against Scott, "for lack of evidence." JA291.

C. End Citizens United's Lawsuit

On August 9, 2021, End Citizens United sued the FEC, challenging its dismissal as contrary to law. JA006-25. The FEC failed to appear and defend the action, and New Republican intervened. JA097. On September 16, 2022, the district court granted summary judgment for New Republican. *See* JA097-115. The district

court explained that, under *New Models I*, "the FEC's reliance on prosecutorial discretion to dismiss a complaint, even in part, divests a reviewing court of jurisdiction to second-guess the FEC's decision." JA107. The court then found that "the FEC did just that in this case," which was "dispositive of [End Citizens United]'s claims." *Id.*

A divided panel of this Court affirmed. *See End Citizens United PAC*, 90 F.4th at 1172. The panel majority concluded that "the analysis in the Statement of Reasons, which discussed legal reasons as well as prosecutorial discretion, cannot be distinguished from the statement we found unreviewable in *New Models* [*I*]," and "so we cannot review the dismissal." *Id.* at 1179-80. The divided panel also rejected the argument that the *CREW* cases are not binding because they conflict with earlier D.C. Circuit and Supreme Court rulings. *Id.* at 1180. Judge Pillard dissented, explaining that "[t]he majority repeats the mistakes from *Commission on Hope* [*I*] and *New Models* [*I*], which continue to call out for correction." *Id.* at 1188 (Pillard, J., concurring in part and dissenting in part).

On October 15, 2024, this Court vacated the divided panel's judgment and granted End Citizens United's petition for rehearing en banc.

SUMMARY OF ARGUMENT

The Court should overrule the *CREW* cases, reverse the district court's ruling, and remand for review of whether the FEC's dismissal of End Citizens United's complaint was contrary to law under 52 U.S.C. § 30109(a)(8).

First, the *CREW* decisions contravene FECA and controlling precedent. The Act explicitly subjects FEC enforcement dismissals to judicial scrutiny under a "contrary to law" standard. FECA's language is unambiguous and evinces Congress's clear intent to make dismissal decisions reviewable for legal error—regardless of any purported reliance on prosecutorial discretion. Yet the *CREW* cases erroneously allow FEC commissioners to override Congress's choice by invoking prosecutorial discretion in their stated reasons for dismissal. This rule of automatic and absolute immunity cannot be squared with the Act, and effectively nullifies the private right of action Congress prescribed to ensure proper enforcement.

The *CREW* cases also run counter to long-established and controlling precedent. In *Akins*, the Supreme Court held that FEC "decision[s] not to undertake an enforcement action" are reviewable, notwithstanding *Heckler*'s general presumption to the contrary—because FECA "explicitly indicates" as much. 524 U.S. at 26. Until *Commission on Hope I* in 2018, this Court's decisions had uniformly recognized the same. *See Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); *Democratic Congressional Campaign Committee v. FEC*, 831

F.2d 1131 (D.C. Cir. 1987) ("*DCCC*"); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986).

Second, the *CREW* cases eviscerate FECA's enforcement scheme and the vital interests it serves. FECA's anti-corruption and transparency laws are critical to the health of our democracy. To ensure effective enforcement and prevent "partisan gamesmanship," *Commission on Hope II*, 923 F.3d at 1142 (Griffith, J., concurring in denial of rehr'g en banc), Congress entrusted civil FECA enforcement power to the independent, bipartisan FEC—but provided for judicial review and a private right of action as a countermeasure lest the Commission's structural conflict prevent it from pursuing viable claims.

The *CREW* decisions dismantle these safeguards. They arm the FEC—and even a partisan minority of FEC commissioners—with a judicial-review kill switch, negating FECA's primary check on FEC deadlock and upending the careful bipartisan structure crafted by Congress. Compounding their harms, the *CREW* cases nullify FECA's private right of action and the ability of private parties to pursue remedies for concrete and particularized injuries caused by FECA violations. Finally, the decisions allow any partisan bloc to entrench unreviewable interpretations of FECA that guide the conduct of regulated actors, free from any accountability no matter how unlawful those interpretations may be.

In addition to overruling this misguided line of decisions, the Court should reaffirm its decision in *Orloski*, 795 F.2d at 156 (D.C. Cir. 1986), which correctly held that an FEC dismissal can be contrary to law under FECA if it is arbitrary or capricious or an abuse of discretion. Reviewing FEC dismissals for arbitrariness and abuse of discretion is consistent with FECA, longstanding precedent, and basic principles of administrative review, and successfully provided a critical backstop against unreasoned FEC decisionmaking for decades until undermined by the *CREW* cases.

STANDING

End Citizens United has standing on two independent bases: informational standing and competitive standing.

I. End Citizens United Has Informational Standing.

As the district court concluded, End Citizens United has standing based on informational injuries. JA105-06. That conclusion went unchallenged on appeal.

As this Court has explained, "[t]he law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr. v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) ("*Democracy 21*") (citation omitted); *see also* JA105 (citing *FEC v. Akins*, 524 U.S. 11, 20-21 (1998)) (same). Here, FECA requires

disclosure of a campaign's donors and finances starting when a person becomes a candidate. *See* JA012 (Compl. ¶¶ 21-22 (citing 52 U.S.C. § 30104(a); 11 C.F.R. § 104.1(a))). Before the district court, it was "not dispute[d] that the Scott Campaign did not disclose information on the Campaign's fundraising and expenditures prior to January 1, 2018." JA105. End Citizens United's complaint, however, "supports an inference that Scott became a candidate at some point in 2017." JA105 (citing Compl. ¶¶ 34-42). "If true, Scott's failure to file disclosures," the district court correctly concluded, "deprived [End Citizens United] of information to which it was entitled by law and that would be relevant to its work." JA105; *see also End Citizens United PAC v. FEC*, No. 1:21-cv-2128-RJL (D.D.C.), ECF No. 24-1 (Muller Decl. ¶¶ 17-22). Where, as here, the FEC acts contrary to law in declining to pursue an enforcement action, injuries caused by such non-enforcement are traceable to the agency's decision and are judicially redressable. *See Akins*, 524 U.S. at 25.

II. End Citizens United Has Competitor Standing.

The FEC's dismissal also injures End Citizens United as a political competitor of the administrative respondents, forcing End Citizens United to compete on an illegally structured political playing field by allowing its political competitors to fundraise outside FECA's limits. *See Shays v. FEC*, 414 F.3d 76, 84-91 (D.C. Cir. 2005). When the FEC acts contrary to law in failing to enforce campaign-finance laws, FEC-regulated competitors of the entities that benefit from that non-

enforcement suffer an injury in fact. *See id.*; *see also Nader v. FEC*, 725 F.3d 226, 228-29 (D.C. Cir. 2013) (recognizing that an FEC dismissal could cause competitive injury when plaintiff will compete against involved entities in future).

Here, End Citizens United's FEC complaint documented actual, concrete FECA violations by its political competitors, the Scott Campaign and New Republican. JA027-70. End Citizens United, as a PAC, competes politically with the Scott Campaign and New Republican both to raise funds and to elect candidates. *See* Muller Decl. ¶¶ 2, 4-16. The FEC's unlawful action thus forces End Citizens United to compete on an uneven, illegally structured political playing field, which is a redressable injury-in-fact.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Democracy 21*, 952 F.3d at 356. Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

The *CREW* cases, which controlled the outcome of this case, were wrongly decided and should be overruled. First, the decisions contravene FECA and controlling precedent, which mandate that FEC enforcement dismissals are subject to judicial review regardless of the reason for the dismissal. Second, the *CREW* cases

are damaging to FECA and the interests it serves because they allow a partisan non-majority bloc to kill judicial review at will, nullify FECA's private right of action, and issue unaccountable interpretations of FECA.

This Court should also reaffirm its recognition in *Orloski* that an FEC dismissal—including one purportedly based on enforcement discretion—can be contrary to law if the dismissal was arbitrary or capricious or an abuse of discretion.

I. Immunizing the Commission's Legal Errors from Review Contravenes FECA and Controlling Precedent.

As affirmed by the Supreme Court in *Akins* and in the long-established law of this Circuit, FEC enforcement dismissals, unlike the nonenforcement decisions of most other agencies, are subject to judicial oversight—because Congress expressly provided for review in the FEC's governing statute. By its plain terms, FECA provides for judicial review of Commission enforcement dismissals under a "contrary to law" standard. *See* 52 U.S.C. § 30109(a)(8)(A), (C). In nevertheless treating FEC dismissals that purport to invoke the agency's prosecutorial discretion as unreviewable under *Heckler v. Chaney*, the divided panel ruling, and the *CREW* decisions it followed, flout FECA's text and decades of Supreme Court and Circuit precedent interpreting it. Worse still, the capacious rule of nonreviewability applied in these decisions empowers the FEC to cut off congressionally directed judicial review—and scuttle a key component of the statutory enforcement scheme—at will. *See infra* Part II.A. The Court should now reaffirm that FEC enforcement dismissals,

even those purportedly based in whole or in part on prosecutorial discretion, do not escape statutorily mandated review for legal error.

A. FECA expressly authorizes judicial review of FEC enforcement dismissals.

There is "a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). "[T]o honor" that presumption, exceptions to review are to be read "quite narrowly," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018), and judicial review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). The statute here, by its plain terms, confirms that Congress had no intention of cutting off or circumscribing judicial review of FEC enforcement dismissals. Instead, "to avoid nullification of FECA" by FEC commissioners "refusing to act on apparent violations of campaign-finance laws, Congress made such refusals to act—no matter the reason—reviewable in court." *End Citizens United PAC*, 90 F.4th at 1184 (Pillard, J., concurring in part and dissenting in part).

To achieve these objectives, Congress devised an "unusual" judicial review provision that explicitly "permits a private party to challenge the FEC's decision *not* to enforce." *Chamber of Commerce*, 69 F.3d at 603 (citation omitted). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the

legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). FECA's review provision permits "[a]ny person" who believes the Act has been violated to file a complaint with the FEC, 52 U.S.C. § 30109(a)(1), and authorizes "[a]ny party aggrieved by an order of the Commission dismissing" its complaint, "or by a failure of the Commission to act on such complaint" within 120 days, to seek review of the FEC's dismissal or failure to act in the United States District Court for the District of Columbia, *id.* § 30109(a)(8)(A).

FECA's statutory language is clear and undeniably evinces Congress's intent to make dismissal decisions reviewable—notwithstanding any supposed reliance on agency enforcement discretion. In particular, FECA broadly authorizes "[a]ny party aggrieved" by the FEC's dismissal of a complaint to seek judicial review for legal error, and it provides no exceptions to or limitations on the scope of that review. 52 U.S.C. § 30109(a)(8)(A). As in the *CREW* decisions, the district court and panel majority here gave short shrift to this unambiguously expressed directive of Congress. FECA affords no basis to immunize FEC enforcement dismissals from all scrutiny whenever the commissioners, in their statement of reasons, purport to base their action on prosecutorial discretion.

By nevertheless allowing the availability of judicial review to turn on the contents of a statement of reasons, the *CREW* cases also violate fundamental principles of administrative law. It is up to "Congress," not FEC commissioners,

whether "judicial review of a final agency action" is available. *Abbott Labs*, 387 U.S. at 140. Because Congress decides reviewability, it is an agency's "formal action, rather than its discussion," that is "dispositive." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987); *cf. New Models I*, 993 F.3d at 887 ("[W]e have never held that the availability of judicial review turns on an agency's prose composition."). In violation of this principle, the *CREW* cases allow commissioner discussion to override Congress's choice to make the formal action of "dismissing a complaint" reviewable. 52 U.S.C. § 30109(a)(8)(A).

Further underscoring that the FEC's enforcement discretion is not absolute, FECA provides multiple avenues for private litigants to participate in the Act's enforcement.

First, FECA enables administrative complainants to obtain review of not only the dismissal of an administrative complaint, but also the agency's failure to act on a complaint within 120 days. In the context of a failure to act or "delay" suit, 52 U.S.C. § 30109(a)(8)(A), judicial intervention necessarily intrudes on the Commission's discretionary prerogatives, given that the underlying administrative matter remains unresolved and, without a final agency action for the court to evaluate, the pertinent questions on review turn almost entirely on considerations of agency resources and priorities. Indeed, this Court has directed courts to review FEC failures to act under a set of factors (often called the *Common Cause* and *TRAC*

factors) that collectively entail review of "the Commission's exercise of its discretion" in conducting its enforcement proceedings for "evidence of an abuse of discretion." *FEC v. Rose*, 806 F.2d 1081, 1084 & n.6, 1091 & n. 17 (D.C. Cir. 1986) (citing *TRAC*, 750 F.2d at 80; *Common Cause*, 489 F. Supp. at 744); *see also Common Cause*, 489 F. Supp. at 744 (explaining that in a challenge to FEC delay, "[f]actors the Court may consider in making its determination include . . . the resources available to the agency"). Yet Congress unequivocally provided for review of delay suits under the same contrary-to-law standard that applies to the review of FEC dismissals. *See* 52 U.S.C. § 30109(a)(8)(C).

Second, FECA also provides complainants a private right of action "to remedy the violation involved in the original complaint," which is available only if, following judicial review and a contrary-to-law ruling, the FEC fails to correct unlawful decisionmaking. *Id.* Allowing the FEC to cut off both judicial review *and* any future citizen suit by citing its own discretion not to enforce the law renders FECA's provision for citizen suits a functional nullity, and simply cannot be squared with the statute's text or purpose. *See infra* Part II.C.

FECA's plain language and salient structural features thus confirm that Congress did not intend to leave enforcement of campaign-finance laws to the FEC alone. Congress specifically provided for judicial oversight of FEC enforcement dismissals to ensure that the agency was not "turning a blind eye to illegal uses of

money in politics, and burying information the public has a right to know." *Commission on Hope I*, 892 F.3d at 442 (Pillard, J., dissenting). Rather than give effect to Congress's unambiguously expressed intent, however, the district court and panel majority relied on the *CREW* decisions to apply a rule of nonreviewability that flouts the Act and grossly compromises its purposes.

B. Until the *CREW* cases, Supreme Court and Circuit precedent correctly recognized that FECA rebuts the general presumption that agency nonenforcement decisions are unreviewable.

The divided panel ruling, like the *CREW* cases, relied on the premise that FEC nonenforcement decisions are "control[led]" by *Heckler* and its "presumption" that "an agency's decision not to undertake enforcement" is unreviewable. *Commission on Hope I*, 892 F.3d at 439; *see also End Citizens United PAC*, 90 F.4th at 1179-80. But that premise was flatly rejected by the Supreme Court in *Akins* and is contrary to the long-established law of this Circuit. Instead, and "[a]s the Supreme Court has specifically held, 'reason-to-believe' assessments under [FECA] are expressly excepted from the general presumption that decisions not to enforce the law are unreviewable." *New Models II*, 55 F.4th at 927 (Millett, J., dissenting from denial of rehr'g en banc).

In *Akins*, the Supreme Court held that the FECA "explicitly indicates" that FEC "decision[s] not to undertake an enforcement action" are subject to judicial review, notwithstanding *Heckler*. 524 U.S. at 26. As the Supreme Court recognized,

under FECA, complainants could seek review of even a "discretionary agency decision" to correct any "improper legal ground" given to support dismissal. *Id.* at 25.

Consistent with *Akins*, decades of Circuit precedent reviewing FEC dismissals under section 30109(a)(8) confirm this understanding. In *DCCC*, this Court expressly declined to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits," 831 F.2d at 1134-35 & n.5, rejecting the FEC's argument "that deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion," *id.* at 1133-34 (citing Br. for the FEC at 17-20).

Likewise, in *Chamber of Commerce*, the Court affirmed the reviewability of the FEC's "unwillingness to enforce" the law, noting that FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce," such that "even without a Commission enforcement decision, [administrative respondents] are subject to litigation." 69 F.3d at 603. The FEC itself conceded to the Court in *Chamber of Commerce* that its "exercise of such discretion is not unreviewable, as it is for many other agencies." *See* Br. for FEC, *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995) (No. 94-5339), 1995 WL 17204295, at *22.

Finally, in *Orloski*, the Court affirmed that FEC nonenforcement decisions are reviewable. Under the standard *Orloski* articulated, an FEC dismissal is contrary to

law if it was either based on an impermissible interpretation of the statute *or*, "under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." 795 F.2d at 161; *see also, e.g.*, *Akins*, 101 F.3d at 734 (distinguishing *Heckler* and noting that 52 U.S.C. § 30109(a)(8) is "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings").

Given this clear authority, even the FEC itself—at least before *Commission on Hope I*—had recognized "that when FEC Commissioners purport to invoke prosecutorial discretion in dismissing a complaint, the matter in dispute is subject to judicial review." *Democracy 21*, 952 F.3d at 361 (Edwards, J., concurring) (citing Br. for the FEC, *Commission on Hope I*, 892 F.3d 434 (D.C. Cir. 2018) (No. 17-5049), 2017 WL 3206534, at *27-28 (arguing that the FEC's "prosecutorial discretion does not invalidate [FECA] . . . because Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review")). But the agency has since retreated from that position on reviewability, arguing instead, as it has in this case, for an automatic and all-encompassing immunity under *Heckler* that it had previously and correctly "eschewed." *Id.* at 362 (admonishing the FEC for "ignor[ing] *Akins* and abandon[ing] (without explanation) the position that it presented to the court in [*Commission on Hope I*]").

The panel majority's disregard for long-standing Supreme Court and Circuit precedent is not excused by the *New Models I* majority's failed attempt to distinguish *Akins*. While *New Models I* suggested that *Akins* can be limited to its facts, doing so requires ignoring the Supreme Court's clear holding that the presumption of nonreviewability is inapplicable in the FECA context. *Akins*, 524 U.S. at 26. The *New Models I* majority suggested it could disregard this part of *Akins* because it was dictum. *See* 993 F.3d at 893 (asserting that the FEC in *Akins* "did not invoke enforcement discretion as a basis for dismissal"). But that characterization is incorrect: in its briefing to the Court in *Akins*, the FEC specifically relied on *Heckler*, invoked its "authority to exercise prosecutorial discretion" as the reason plaintiffs lacked a redressable injury, and described the underlying administrative decision as "a discretionary judgment." Br. for Petitioner, *FEC v. Akins*, 524 U.S. 11 (1998) (No. 96-1590), 1997 WL 523890, at *23, *29; Reply Br. for Petitioner, *FEC v. Akins*, 524 U.S. 11 (1998) (No. 96-1590), 1997 WL 675443, at *9 n.8. Of course, even if *Akins*'s discussion of *Heckler were* dictum, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006).

II. The *CREW* Cases Eviscerate FECA's Enforcement Scheme and the Vital Interests it Serves.

Not only do the *CREW* cases contravene FECA's explicit terms and precedent, but they also damage FECA and the critical interests it serves. In short, the *CREW* cases vitiate civil enforcement under the Act by allowing a partisan-aligned, non-majority commissioner bloc to ignore at will FECA's safeguards against partisan reluctance to enforce the law.

FECA promotes interests that are vital to our democracy. To ensure FECA would be robustly enforced, Congress created the FEC—an independent agency charged with civil FECA enforcement. This choice "was undoubtedly influenced by Congress's belief that the Justice Department, headed by a Presidential appointee, might choose to ignore infractions committed by members of the President's own political party." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 95-96 (1994). Indeed, Congress observed that the Department of Justice had "scrupulously ignored" violations of "past election statutes . . . for years." FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 72 (1977), https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf (Statement of Sen. Clark). By creating the FEC, Congress sought to restore "public confidence in the election process" with "an active watchdog in this area." *Id.* at 75 (Statement of Sen. Scott).

But the *CREW* cases have eviscerated FECA's enforcement structure in at least four critical ways. First, the *CREW* cases arm the FEC with a judicial-review kill switch, thereby voiding FECA's primary check on partisan reluctance to enforce the law. Second, the *CREW* cases upend the FEC's bipartisan balance by handing that judicial-review kill switch to a partisan-aligned non-majority bloc of the six-member FEC. Third, the *CREW* cases nullify FECA's private right of action and the ability of private parties to pursue remedies for concrete and particularized injuries caused by FECA violations. Fourth and finally, the *CREW* cases allow any partisan bloc to become a law unto itself by announcing new legal interpretations guiding regulated actors, free from any judicial, political, or bipartisan check, no matter how contrary to FECA those interpretations may be.

A. The *CREW* cases arm partisan non-majority blocs of the FEC with a judicial-review kill switch.

To prevent partisan enforcement of campaign-finance laws, Congress structured the FEC as a bipartisan six-member agency. *Combat Veterans*, 795 F.3d at 153. But in attempting to solve one problem, Congress created another: "a risk of partisan reluctance to apply the law." *Commission on Hope II*, 923 F.3d at 1143-44 (Pillard, J., dissenting from denial of rehr'g en banc). Congress "anticipated that partisan deadlocks were likely to result" from the FEC's bipartisan structure, and that such deadlocks risked nullifying FECA enforcement. *See CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019).

To address that risk, Congress relied on the courts. In the initial "reason to believe" stage of the FEC's enforcement process, the agency acts less like a prosecutor and more like a "first arbiter" that dismisses non-credible complaints, subject to judicial review which ensures "plausible claims" are pursued either by the FEC or by a private litigant. *Commission on Hope II*, 923 F.3d at 1143-44, 1149 (Pillard, J., dissenting from denial of rehr'g en banc).

Under this system, if the FEC dismisses a complaint, courts may review whether that dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A). If the FEC's dismissal was legal, the matter is over. If the dismissal was contrary to law, however, then the matter is remanded and the FEC has a choice: On the one hand, it can "conform" to the court's order either by proceeding with enforcement or issuing a lawful dismissal. *Id.* § 30109(a)(8)(C). On the other hand, if the agency is unable or unwilling to conform, it is not forced to do anything; in that scenario, however, the claimant may pursue the credible FECA claim by filing a private action against the alleged violator. *See id.* This structure grants the FEC a "right of first refusal on enforcement," while tasking courts with ensuring that the FEC's bipartisan structure does not nullify all FECA enforcement. *New Models II*, 55 F.4th at 929 (Millett, J, dissenting from denial of rehr'g en banc).

The *CREW* cases upend this structure by granting the FEC "a judicial-review kill switch." *Id.* at 922 (Millett, J., dissenting from denial of rehr'g en banc). Merely

by uttering the words "prosecutorial discretion," the *CREW* cases allow the FEC to decide whether Article III courts may review its dismissals. *See id.* at 927 (Millett, J., dissenting from denial of rehr'g en banc) ("The court's decision . . . hands the agency and its members a Get Out of Judicial Review Free card even though Congress expressly mandated judicial review of dismissal orders.").

The FEC's ability to abuse its newfound power is virtually limitless. Under the *CREW* cases, a partisan non-majority bloc could shield *all* dismissals from judicial review. Or, a partisan bloc could shield only dismissals in matters against their fellow party members. More strategically, a partisan bloc could deploy the magic words of prosecutorial discretion only for more serious violations in deadlocked matters brought by private watchdog groups that are likely to have standing and challenge the dismissal in court. *See, e.g.*, *End Citizens United PAC v. FEC*, 69 F.4th 916, 919 (D.C. Cir. 2023) (invalidating partisan bloc's attempt to issue statement of reasons invoking prosecutorial discretion *after* watchdog group had already filed suit).

These concerns are not just theoretical. Unsurprisingly, since *Commission on Hope I* was decided in June 2018, it has become "commonplace" for Commission dismissals to invoke prosecutorial discretion to block judicial review. *New Models II*, 55 F.4th at 929 (Millett, J., dissenting from denial of rehr'g en banc). In December 2022, a member of this Court observed that "approximately two thirds of

Commission cases dismissed contrary to the General Counsel's reason-to-believe recommendation have included a reference to prosecutorial discretion." *Id.* A more recent analysis has found that since June 2018, a non-majority bloc has invoked prosecutorial discretion in approximately 75 percent of matters where its analysis would otherwise be subject to de novo review. *See* Br. of CREW as Amicus Curiae Supporting Appellant's Pet. for Rehr'g En banc, at 9 & n.5 (Feb. 28, 2025).

Regardless of the extent to which partisan blocs deploy their newfound superpower to turn off judicial review "like a light switch," *New Models I*, 993 F.3d at 901 (Millett, J., dissenting), there is no dispute that the *CREW* cases have granted FEC non-majorities virtually limitless ability to sidestep FECA's judicial review provisions at their leisure. This amounts to a "rule of lawlessness, not law." *New Models II*, 55 F.4th at 927 (Millett, J., dissenting from denial of rehr'g en banc).

B. The CREW cases undermine the FEC's bipartisan balance.

The *CREW* cases not only give the FEC a judicial-review kill switch, but they give that kill switch to any non-majority partisan bloc of commissioners thereby "undermin[ing] the [FEC's] carefully balanced bipartisan structure." *Common Cause*, 842 F.2d at 449 n.32. In effect, the *CREW* cases nonsensically allow partisan reluctance to enforce the law—expressed in the language of prosecutorial discretion—to nullify FECA's primary safeguard against partisan reluctance to enforce the law.

A bipartisan majority is required for the FEC either to pursue enforcement or to dismiss a complaint. *45Committee*, 118 F.4th at 381-82. In cases, like this one, where the commissioners are deadlocked on whether to pursue enforcement, a bipartisan majority will "often" agree to dismiss the matter, thereby submitting the dispute on the merits to judicial review. *Id.* at 382-83. Typically, the commissioners who supported pursuing enforcement "held their noses" and joined their anti-enforcement colleagues in dismissing the case "on the theory that complainants had a shot at convincing a court that the Commission's dismissal action had been contrary to law, and the law could then be enforced." Statement of FEC Commissioner Ellen L. Weintraub, *On the Voting Decisions of FEC Commissioners* at 6 (Oct. 4, 2022), https://perma.cc/9LRY-3Z5E. The desire for judicial review of the anti-enforcement commissioners' reasons for not pursuing enforcement thus forms an essential part of the bipartisan agreement to dismiss a matter that is deadlocked on the merits.

Ignoring this, the *CREW* cases instead elevate and empower a partisan non-majority bloc's invocation of prosecutorial discretion to defeat judicial review. But as this Court has recognized, a three-member statement of reasons is not supported by a "majority vote," and thus is not an "*official* Commission decision," and is only intended to "allow meaningful judicial review." *Common Cause*, 842 F.2d at 449 & n.32; *see also FEC v. Nat'l Republican Sen. Comm.*, 966 F.2d 1471, 1476 (D.C. Cir.

1992) (explaining that no-voting commissioners' statements of reasons "make judicial review a meaningful exercise"). Perversely, the *CREW* cases allow a partisan-aligned bloc to use a document intended to facilitate judicial review to nullify review.

By granting partisan non-majority blocs of commissioners a "Get Out of Judicial Review Free card," *New Models II*, 55 at 922 (Millett, J., dissenting from denial of rehr'g en banc), the *CREW* cases have opened the door for partisan abuse. As amicus CREW has observed, since *Commission on Hope I*, the FEC has deadlocked in dozens of complaints filed against President-Elect Trump alone, despite the FEC's General Counsel's recommendation to move forward, in a manner that suggests partisanship was a factor. *See* Br. of CREW as Amicus Curiae Supporting Appellant's Pet. for Rehr'g En banc, at 6-9 (Feb. 28, 2024).

C. The *CREW* cases nullify FECA's private right of action.

Not only do the *CREW* cases undermine FEC enforcement, but they also block private citizens from pursuing remedies for injuries they suffer from campaign-finance violations. When crafting FECA's judicial-review provision, Congress recognized that campaign-finance violations cause not only public harms but also concrete and particularized injuries to voters and groups. *See supra* at 12-14 (describing End Citizens United's standing). To address those injuries and to ensure FEC refusal to pursue plausible FECA claims does not preclude all possible

enforcement of those claims, Congress included in the statute a private right of action, which is "a feature of many modern legislative programs." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990).

To trigger FECA's private cause of action, a complainant must exhaust its administrative remedies by satisfying two nonjurisdictional claim-processing rules: (1) a court must declare that the FEC's dismissal was contrary to law, and (2) on remand, the FEC must fail to conform with the court's declaration within 30 days. *45Committee*, 118 F.4th at 386-88. These citizen-suit preconditions give the FEC "the right of first refusal on enforcement," and "[i]f the agency is still opposed or unable to bring an enforcement action, no court will force it to do so; all that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J, dissenting from denial of rehr'g en banc).

In cases like this one, the *CREW* cases effectively write FECA's private action out of the statute. This is so precisely because the *CREW* cases allow a partisan non-majority to block the judicial review that could possibly result in a contrary-to-law declaration. But Congress intended for both judicial review and the possibility of citizen suits to ensure that the FEC's partisan reluctance to apply FECA doesn't preclude enforcement of the law. *Commission on Hope II*, 923 F.3d at 1143-44 (Pillard, J., dissenting from denial of rehr'g en banc). By undermining both of those

safeguards, the *CREW* cases make it impossible for a court to hold the FEC accountable and prod the agency into action, *and* they prevent private claimants like End Citizens United from ever pursuing remedies for private injuries resulting from campaign-finance violations.

The *CREW* cases overlooked the independent rights of private complainants by allowing the agency to block valid private claims when prudential factors weigh in favor of the agency not pursuing those claims itself. But the FEC's invocation of prosecutorial discretion not to pursue a valid claim provides *more* reason to activate the private right of action, not less. "At most, the Commission may employ prosecutorial discretion in settling its *own* claims." *Burlington Resources Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008). If the FEC determines that it cannot pursue a valid claim because of discretionary reasons—e.g., scarce resources, resource allocation priorities, perceived likelihood of success, etc.—then FECA "never requires the agency to bring an enforcement action that it does not want to bring," and instead, the Act "just opens the door to private enforcement by an aggrieved party." *New Models II*, 55 F.4th at 923 (Millett, J., dissenting from denial of rehr'g en banc). Where the FEC is unwilling or unable to proceed, allowing a *willing and able* aggrieved party to pursue a valid claim makes far more sense than requiring that claim to die on the vine.

D. The *CREW* cases allow any partisan bloc of the FEC to become a law unto itself.

Finally, the *CREW* cases also damage FECA by allowing partisan-aligned blocs of FEC Commissioners to effectively make law—even in open defiance of federal court orders—without any judicial, political, or bipartisan accountability.

It has been the law of this Circuit for decades that "[e]ven if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether," since otherwise, agencies would have "carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986). Yet the *CREW* cases have handed that very power to partisan blocs of FEC commissioners. As the panel majority in this case explained, the *CREW* cases demand that an FEC "dismissal is reviewable 'only if the decision rests *solely* on legal interpretation," and it is "unreviewable if it 'turn[s] in whole *or in part* on enforcement discretion.'" *End Citizens United PAC*, 90 F.4th at 1178 (quoting *New Models I*, 993 F.3d at 884, 894) (second emphasis added).

In this case, just as in the *CREW* cases, the partisan-aligned no-voting commissioners issued a statement of reasons that 'provided legal reasons . . . for declining enforcement' in addition to invoking prosecutorial discretion.'" *Id.* at 1180 (quoting *New Models I*, 993 F.3d at 885-86). Following the *CREW* cases, the panel

majority concluded that "we cannot review the dismissal"—including its legal reasoning—because the statement of reasons "cannot be distinguished from the statement we found unreviewable in *New Models* [*I*]." *Id.*

In addition to being legally incorrect, this feature of the *CREW* cases transforms the agency into "a law unto itself." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting from denial of rehr'g en banc). Functioning normally, the FEC is an independent agency where only a bipartisan majority—accountable to the courts yet not under the thumb of a partisan administration—may announce and enforce legal determinations. But under the *CREW* cases, even a mere non-majority partisan bloc of commissioners may interpret the law completely free of any judicial, political, or bipartisan correction.

First, insulating the no-voting commissioners' erroneous legal reasoning from judicial correction violates the most fundamental principle of our legal system: that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). Indeed, in overturning *Chevron* deference, the Supreme Court recently clarified that even merely *deferring* to an agency's legal determinations—much less shielding an agency's legal determinations from review altogether—is at odds with the "traditional understanding that questions of law were for courts to decide, exercising independent judgment." *Loper Bright*, 144 S. Ct. at 2257 ("The views of the

Executive Branch could inform the judgment of the Judiciary, but did not supersede it.").

Second, the judicial abdication that the *CREW* cases require is particularly problematic because the legal determinations of a partisan bloc of FEC commissioners are also not subject to any political correction. An election thus cannot change the direction of the agency since no President can appoint a commission majority. *See* 52 U.S.C. § 30106(a). Under normal circumstances, the FEC's independence serves the laudable purpose of ensuring that the FEC is not "under the thumb of those who are to be regulated." FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 72 (1977), https://perma.cc/G23G-SQ7T (Statement of Sen. Clark). But under the *CREW* cases, the judicial check that Congress included as a condition of the FEC's independence has now been nullified.

Third and finally, the *CREW* cases compound their own error by handing not just the agency, but a partisan bloc within it the ability to announce unaccountable legal interpretations. FECA protects against partisan abuse by requiring a bipartisan majority of at least four commissioners to make law. 52 U.S.C. § 30106(c) (citing *id.* § 30107(6)-(9)). By eliminating this protection, not only do the *CREW* cases open the door for partisan abuses, they also undermine the basis for FEC commissioners' exemption from "the President's unrestricted removal power." *Seila Law LLC v.*

CFPB, 591 U.S. 197, 215 (2020). As the Supreme Court recently explained, Congress may limit the removal power only in limited circumstances, including for an agency (like the FEC) that consists of a "multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions." *Id.* at 216 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935)); *see also CREW v. FEC*, 711 F.3d 180, 184 n.1 (D.C. Cir. 2013) (noting that "[t]he FEC is an independent agency" under *Humphrey's Executor*).

The non-majority's unaccountable legal pronouncements are problematic because their unreviewability elevates them to the status of *de facto* law. This Circuit required deadlocked no-voting FEC commissioners to issue statements of reasons only "to allow meaningful judicial review of the Commission's decision not to proceed," and specified that these statements are "not law." *Common Cause*, 842 F.2d at 449 & n.32. But remove the reviewability—as the *CREW* cases have—and they are now used "as legal precedent within the agency" and "directly influence the conduct of regulated parties, who regularly rely on and invoke them in subsequent proceedings before the Commission." *New Models II*, 55 F.4th at 931 (Millett, J., dissenting from denial of rehr'g en banc) (citing examples). This is true even when the legal reasoning contained therein "openly defies a federal court order holding that very same statutory interpretation unlawful." *Id.* at 922 (Millett, J., dissenting from denial of rehr'g en banc).

For example, take *New Models*. There, the administrative complainant alleged that a self-described "issues" group called New Models had failed to register with the FEC as a political committee and disclose its campaign spending despite devoting a substantial majority of its annual budget in 2012 to election spending. *See CREW v. FEC*, 380 F. Supp. 3d 30, 36 (D.D.C. 2019). The FEC deadlocked, and the partisan-aligned no-voting Commissioners issued a statement of reasons invoking discretion but also claiming there had not been a violation because, in their view, FECA requires the agency to look to an organization's proportion of electoral spending over its entire lifetime. *Id.* at 37-38. The invocation of discretion shielded the partisan bloc's legal reasoning from review—even though the exact same legal reasoning in another case had already been held contrary to law. *See CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) ("Looking only at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility . . . that an organization's major purpose can change.").

Free from judicial review, the same partisan bloc later continued to cite their *New Models I* decision as authority in other matters. *See, e.g.*, Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen at 8 n.47, MURs 6969, 7031, and 7034 (Children of Israel) (Sept. 13, 2018), https://perma.cc/9D4Z-T2KA. In doing so, that partisan bloc stressed their "consistent[] reject[ion]" of a "myopic focus on one year of spending" when applying the major-purpose test

across many matters, purporting to make it *de facto* law. *See, e.g.*, Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'r Caroline C. Hunter at 16 n.1, 16-18, MUR 6596 (Crossroads GPS) (May 13, 2019), https://perma.cc/AZA8-BMML.

A similar situation exists here. End Citizens United PAC has alleged, among other things, that Senator Scott failed to timely file his FEC statement of candidacy. *End Citizens United PAC*, 90 F.4th at 1175. The agency deadlocked and the no-voting commissioners invoked discretion, but also concluded that the law would require probing Scott's "subjective intent" to determine when he became a candidate. *Id.* at 1176-77. In fact, under FEC regulations and precedent (supported by majority votes), that inquiry "look[s] objectively to candidate activities, not to the stage of an individual's subjective decisionmaking process." FEC, Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton) (Nov. 13, 2003), https://perma.cc/VYJ2-F97R (citing 11 C.F.R. §§ 100.72(b), 100.131(b) (candidacy triggered by engaging in "activities indicating that an individual has decided to become a candidate")); *accord* FEC Advisory Op. 2015-09 at 5 (Senate Maj. PAC), https://perma.cc/7AMK-KAND. But the district court and divided panel rulings in this case, relying on the *CREW* cases, let that incorrect legal interpretation stand. Predictably, other partisan-aligned blocs of commissioners have since relied on the no-voting Commissioners' incorrect statement of law here about candidate subjective intent as

authority for not moving forward in other matters. *See* Statement of Reasons of Vice Chair Allen Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor, III at 8 n.41, MUR 7754 (Pacific Atlantic Action Coalition) (Dec. 1, 2021), https://perma.cc/QUU5-D5S3.

III. *Orloski v. FEC* Correctly Delineated the Scope of Judicial Review Under FECA's "Contrary to Law" Standard.

The Court should not only overrule the *CREW* decisions, but should also reaffirm its ruling in *Orloski*, which correctly articulated the standard that courts apply when reviewing whether the FEC's dismissal of an enforcement complaint is "contrary to law" under FECA. According to the two-part test *Orloski* established, an FEC dismissal can be "contrary to law" if the dismissal was either based on an impermissible interpretation of the statute or, "under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." 795 F.2d at 161.

A footnote in the vacated panel majority opinion, however, suggested that *Orloski* may have erred by "import[ing]" the APA's arbitrary-and-capricious and abuse-of-discretion standards of review into FECA's "contrary to law" standard. *End Citizens United PAC*, 90 F.4th at 1178 n.3. It did not. The standard *Orloski* employed is well founded, consistent with FECA's text and purpose, and clearly correct. Indeed, if anything, it is *Orloski*'s *first* prong—which drew on the recently invalidated decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *see Orloski*, 795 F.2d at 161-64—that may need to be

reevaluated. *See U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 991 n.7 (D.C. Cir. 2024) (explaining that *Loper Bright* "requires courts to construe statutes *de novo*, without deference to the views of agencies entrusted to administer the statutes").

But certainly, there is no need to revisit *Orloski*'s second prong. Reviewing FEC dismissals for arbitrariness and abuse of discretion is consistent with FECA, precedent, and basic principles of administrative law—and until the *CREW* decisions upended this Circuit's approach to review under FECA, the *Orloski* standard had long served as a critical and uncontroversial defense against unreasoned FEC decisionmaking.

A. *Orloski*'s second prong comports with FECA, longstanding precedent, and basic principles of administrative review.

Virtually since the FEC's creation, FECA's contrary-to-law standard has been correctly understood to require evaluating FEC enforcement decisions under the standards generally applicable to judicial review of agency action, by testing whether the FEC's action was based on statutory misreading, arbitrary or capricious, or otherwise contrary to law. That approach makes sense. Whether an FEC decision dismissing an enforcement complaint is based on an erroneous construction of the Act or is arbitrary and capricious, it is "contrary to law" either way. Incorporating arbitrary-and-capricious and abuse-of-discretion review in FECA's standard thus effectuates the meaningful judicial oversight of Commission enforcement dismissals that Congress intended.

Indeed, *Orloski*'s framework only amplified the approach courts had already consistently been taking in FECA review cases. According to one early case, it was "clear" that, when reviewing an FEC enforcement dismissal, "the Court must test the Commission's decision according to the standard commonly applied to judicial review of administrative decisions . . . [which] requires the reversal of agency action which is either arbitrary or capricious." *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). A few years later, another district court—in a decision favorably cited by this Court in *DCCC*—observed that for purposes of section 30109(a)(8), "the term 'contrary to law' is interchangeable with the term 'arbitrary and capricious.'" *Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984); *see also DCCC*, 831 F.2d at 1135 ("The FEC correctly notes . . . that 'contrary to law' in this context includes action that is 'arbitrary and capricious.'") (citing *Orloski*, 795 F.2d at 161; *Antosh*, 599 F. Supp. at 853).[5]

[5] *See also, e.g.*, *In re Nat. Cong. Club*, No. 84-5701, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (per curiam) (unpublished) ("[I]n using the language "contrary to law," Congress appears to have intended that the unreasonableness of the Commission's delay . . . be tested under standards generally applicable to review of agency inaction."); *Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984) ("[T]he standard for determining whether the Commission has acted contrary to law is whether the Commission has abused its discretion and acted in an arbitrary and capricious manner."); *Common Cause*, 489 F. Supp. at 744 ("The contrary to law standard has been further defined in the case of final agency action on a complaint to mean action which is arbitrary and capricious.").

This longstanding approach is fully consonant with the Act.

For one thing, it comports with the statutory language and congressional intent. It is a bedrock principle of statutory construction that "the best evidence of Congress's intent is the statutory text," *NFIB v. Sebelius*, 567 U.S. 519, 544 (2012)—and FECA, on its face, unconditionally permits reviewing courts to set aside FEC dismissals that are "contrary to law," 52 U.S.C. § 30109(a)(8)(C).

Arbitrary or unreasoned agency decisionmaking is no less a form of legal error than is an agency's misconstruction of a statute. "[J]udicial labeling of an agency's action as 'arbitrary and capricious' sets forth a legal conclusion." *Rose*, 806 F.2d at 1087; *cf. Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2002) ("Claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.") (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002)). Likewise, when complainants seek review of an FEC dismissal, the reviewing court "sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001) (citing *Marshall Cnty. Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 (D.C. Cir. 1993)). In conducting such review, to be sure, the court's posture is generally deferential. But assessing FEC dismissals for legal error—and providing the judicial check that Congress intended—requires not only correcting

the FEC's statutory misreading, but also determining whether "reason or caprice determined the dismissal of [the] complaint." *DCCC*, 831 F.2d at 1135.

Incorporating arbitrary-or-capricious and abuse-of-discretion review in FECA's standard also serves the Act's purposes. As this Court has recognized, "a Commission decision treating like parties unalike *or* one based on statutorily impermissible factors should be reversible under the 'contrary to law' standard." *Common Cause*, 842 F.2d at 449 (emphasis added). Indeed, the whole point of judicial review for dismissals by the deadlock-prone FEC was to provide a check on arbitrariness: Congress sought to "assure judicious, expeditious enforcement of the law, [and] revers[e] the long history of nonenforcement," 120 Cong. Rec. 35,135 (1974) (Statement of Rep. Frenzel), while avoiding partisan abuse or bias in the Act's enforcement, *see* H.R. Rep. No. 94-917, at 3 (1976) (admonishing against "partisan misuse" or "administrative action which does not comport with the intent of the enabling statute"); *see also Common Cause*, 842 F.2d at 449 (recognizing that "meaningful" review avoids the "possibility that similarly situated parties may not be treated evenhandedly"). It would be perverse to cabin the scope of FECA review such that arbitrary or irrational FEC dismissals are now beyond all scrutiny.

Finally, the longstanding mode of FECA review encapsulated in *Orloski*'s second prong has survived numerous legislative revisions to the Act, indicating that Congress "at least acquiesces in, and apparently affirms, that interpretation."

Jackson v. Modly, 949 F.3d 763, 772-73 (D.C. Cir. 2020). Since the FEC's creation in 1974, Congress has amended the relevant section on nine occasions, including as part of its "overhaul of our Nation's existing campaign finance laws—culminating with the enactment of" the Bipartisan Campaign Reform Act in 2002—that "would consume the attention of three separate Congresses." *McConnell v. FEC*, 251 F. Supp. 2d 176, 202 (D.D.C. 2003) (three-judge court) (per curiam opinion).[6]

Ordinarily, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)). That presumption is particularly strong where "Congress has continually declined to disturb a longstanding interpretation of a statute" and there is evidence "of the Congress's awareness of and familiarity with such an interpretation." *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 182 (D.C. Cir. 2022) (quoting *Modly*, 949 U.S. at 772-73), *cert. denied*, 144 S. Ct. 78 (2023). Here,

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[6] *See* Pub. L. No. 94-283, Title I, §§ 105, 109, 90 Stat. 481, 483 (1976); Pub. L. No. 96-187, Title I, §§ 105(4), 108, 93 Stat. 1354, 1358 (1980); Pub. L. No. 98-620, Title IV, § 402(1)(A), 98 Stat. 3357 (1984); Pub. L. No. 99-514, § 2, 100 Stat. 2095 (1986); Pub. L. No. 106-58, Title VI, § 640(a), (b), 113 Stat. 476, 477 (1999); Pub. L. No. 107-155, Title III, §§ 312(a), 315(a), (b), 116 Stat. 106, 108 (2002); Pub. L. No. 110-433, § 1(a), 122 Stat. 4971 (2008); Pub. L. No. 113-72, §§ 1, 2, 127 Stat. 1210 (2013); Pub. L. No. 115-386, § 1(a), 132 Stat. 5161 (2018); Pub. L. No. 118-26, § 1, 137 Stat. 131 (2023).

there is every reason to assume Congress's familiarity with the statute that directly regulates their campaigns—and with an administrative complaint process in which candidates and officeholders routinely participate. *See, e.g.*, *Cruz Campaign Files FEC Complaint*, TedCruz.org (Oct. 24, 2024), https://perma.cc/WS24-YXJ8. As this history underscores, *Orloski*'s formulation was fully consistent with the review Congress prescribed in FECA, and with decades of case law applying review under an equivalent standard.

B. *Orloski*'s second prong ensures FEC enforcement dismissals reflect reasoned decisionmaking while affording due deference to the agency.

Orloski's second prong is not only legally correct, but courts had also successfully applied it to review FEC dismissals—including those based on discretionary factors—since the 1970s without controversy. *See, e.g.*, *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. at 1046-47. As that history shows, *Orloski*'s second prong sets essential guardrails to ensure that dismissals based on permissible interpretations of FECA still comply with fundamental standards of reasoned decisionmaking, while also affording appropriate deference to the FEC's evidentiary and discretionary decisions.

Orloski's second prong "permits reversal only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks

omitted); *see also La Botz v. FEC*, 889 F. Supp. 2d 51, 60 (D.D.C. 2012) (explaining that under *Orloski*'s second prong, "the agency must articulate a 'satisfactory explanation for its action including a rational connection between the facts found and the choice made'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

The protection against unreasoned decisionmaking this standard provides—and which the *CREW* cases have undermined—is especially important in the realm of FEC dismissals purportedly based on discretionary factors. As the FEC itself explained to this Court in *Commission on Hope I*, "[i]f the Commission relied on an arbitrary or otherwise impermissible rationale for invoking its discretion, that dismissal would be declared contrary to law on judicial review." Br. for the FEC, *Commission on Hope I*, 892 F.3d 434 (D.C. Cir. 2018) (No. 17-5049), 2017 WL 3206534, at *28. For instance, before the *CREW* cases, this Court recognized that the "arbitrary and capricious and substantial evidence standards seem to us fully adequate to capture partisan or discriminatory FEC behavior." *Hagelin*, 411 F.3d at 243. At least one court has thus rejected the assertion that the FEC "could use its prosecutorial discretion" in a racially discriminatory manner, "because any criteria based on race" would "likely not survive an arbitrary and capricious challenge." *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 n.5. (D.D.C. 2014).

Orloski's second prong has also provided critical protection over the years against FEC dismissals based on irrational readings of the administrative record. For example, this Court recently affirmed that an FEC dismissal "was arbitrary and capricious and thus contrary to law" because the controlling commissioners, in dismissing allegations of coordination between Hillary Clinton's presidential campaign committee and a super PAC, had ignored compelling record evidence "wholesale," including the super PAC's "own public statements of coordination with the Clinton campaign on all its activities." *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1193-94 (D.C. Cir. 2024). Similarly, a district court recently held an FEC dismissal contrary to law in part because "the Controlling Commissioners did not explain why the record supported" their no-reason-to-believe votes, "and the weight of the evidence cut[] sharply in a different direction." *Common Cause Georgia v. FEC*, No. 22-cv-3067-DLF, 2023 WL 6388883, at *9 (D.D.C. Sept. 29, 2023) (citing *State Farm*, 463 U.S. at 56); *see also, e.g.*, *La Botz*, 889 F. Supp. 2d at 61-62 (finding that "the court cannot conclude that the FEC's decision was backed by substantial evidence" given the record and the FEC's "one-sentence analysis").

At the same time, *Orloski*'s second prong affords deference consistent with the recognition that "[t]he FEC is in a better position . . . to evaluate the strength of [a] complaint." *Nader*, 823 F. Supp. 2d at 65 (finding that the FEC's decision to dismiss . . . was not contrary to law" because it reflected "a reasonable exercise of

the agency's considerable prosecutorial discretion"). As the district court explained when holding the dismissal in *Common Cause Georgia* contrary to law, it was obliged to "afford[] the Commission due deference," 2023 WL 6388883, at *6, but agencies were still confined to a "zone of reasonableness," and the commissioners' disregard for the record evidence simply "fell outside that zone," *id.* at *8 (citing *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021)).

CONCLUSION

For the foregoing reasons, the Court should overrule the *CREW* cases, reverse the district court's judgment, and remand for review of whether the FEC's dismissal was contrary to law under 52 U.S.C. § 30109(a)(8).

Dated: November 18, 2024

Respectfully submitted,

/s/ *Kevin P. Hancock*

Adav Noti
Megan P. McAllen
Kevin P. Hancock
Alexandra Copper*
CAMPAIGN LEGAL CENTER ACTION
1101 14th Street, NW, St. 400
Washington, D.C. 20005
(202) 736-2000
khancock@campaignlegalcenter.org

Counsel for Appellant

** Not a member of the D.C. Bar; practicing before the federal courts pursuant to D.C. App. Rule 49(c)(3)*

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,518 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I certify that on November 18, 2024, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Kevin P. Hancock
Kevin P. Hancock

ADDENDUM

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28 U.S.C. § 1291
Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

52 U.S.C. § 30102(e)
Organization of Political Committees

(e) Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1).

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3)(A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that—

(i) the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of account with respect to its function as a principal campaign committee; and

(ii) candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of $2,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 30118(b) of this title shall include the name of its connected organization.

52 U.S.C. § 30103(a)
Registration of Political Committees

(a) Statements of organizations

Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 30102(e)(1) of this title. Each separate segregated fund established under the provisions of section 30118(b) of this title shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 30101(4) of this title.

52 U.S.C. § 30104(a)
Reporting requirements

(a) Receipts and disbursements by treasurers of political committees; filing requirements

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate--

(A) in any calendar year during which there is1 regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the treasurer shall file quarterly reports, which shall be filed not later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter, except that the report for the quarter ending December 31 shall be filed not later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President--

(A) in any calendar year during which a general election is held to fill such office--

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either--

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either--

(A)

(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

Notwithstanding the preceding sentence, a national committee of a political party shall file the reports required under subparagraph (B).

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) or subsection (g)(1)) is sent by registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, the United States postmark shall be considered the date of filing the designation, report or statement. If a designation, report or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii), or subsection (g)(1)) is sent by an overnight delivery service with an on-line tracking system, the date on the proof of delivery to the delivery service shall be considered the date of filing of the designation, report, or statement.

(6)(A) The principal campaign committee of a candidate shall notify the Secretary or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and

shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) Notification of expenditure from personal funds

(i) Definition of expenditure from personal funds

In this subparagraph, the term "expenditure from personal funds" means--

(I) an expenditure made by a candidate using personal funds; and

(II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(ii) Declaration of intent

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Senator, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula with--

(I) the Commission; and

(II) each candidate in the same election.

(iii) Initial notification

Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the threshold amount in connection with any election, the candidate shall file a notification with--

(I) the Commission; and

(II) each candidate in the same election.

(iv) Additional notification

After a candidate files an initial notification under clause (iii), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed2 $10,000 with--

(I) the Commission; and

(II) each candidate in the same election.

Such notification shall be filed not later than 24 hours after the expenditure is made.

(v) Contents

A notification under clause (iii) or (iv) shall include--

(I) the name of the candidate and the office sought by the candidate;

(II) the date and amount of each expenditure; and

(III) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(C) Notification of disposal of excess contributions

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under paragraph (1) of section 30116(i) of this title) and the manner in which the candidate or the candidate's authorized committee used such funds.

(D) Enforcement

For provisions providing for the enforcement of the reporting requirements under this paragraph, see section 30109 of this title.

(E) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for

each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(11)(A) The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act--

(i) is required to maintain and file a designation, statement, or report for any calendar year in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate contributions or expenditures in excess of a threshold amount determined by the Commission; and

(ii) may maintain and file a designation, statement, or report in electronic form or an alternative form if not required to do so under the regulation promulgated under clause (i).

(B) The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.

(C) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying designations, statements, and reports covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(D) As used in this paragraph, the term "report" means, with respect to the Commission, a report, designation, or statement required by this Act to be filed with the Commission.

(12) Software for filing of reports

(A) In general

The Commission shall--

(i) promulgate standards to be used by vendors to develop software that--

(I) permits candidates to easily record information concerning receipts and disbursements required to be reported under this Act at the time of the receipt or disbursement;

(II) allows the information recorded under subclause (I) to be transmitted immediately to the Commission; and

(III) allows the Commission to post the information on the Internet immediately upon receipt; and

(ii) make a copy of software that meets the standards promulgated under clause (i) available to each person required to file a designation, statement, or report in electronic form under this Act.

(B) Additional information

To the extent feasible, the Commission shall require vendors to include in the software developed under the standards under subparagraph (A) the ability for any person to file any designation, statement, or report required under this Act in electronic form.

(C) Required use

Notwithstanding any provision of this Act relating to times for filing reports, each candidate for Federal office (or that candidate's authorized committee) shall use software that meets the standards promulgated under this paragraph once such software is made available to such candidate.

(D) Required posting

The Commission shall, as soon as practicable, post on the Internet any information received under this paragraph.

52 U.S.C. § 30106(a)-(c)
Federal Election Commission

(a) Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2)(A) Members of the Commission shall serve for a single term of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;
(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and
(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman

and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title or with chapter 95 or chapter 96 of Title 26.

52 U.S.C. § 30107(a)
Powers of Commission

(a) Specific authorities

The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of Title 26, through its general counsel;

(7) to render advisory opinions under section 30108 of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

52 U.S.C. § 30109(a)
Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have

committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, 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 Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clauses[1] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement,

unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(C)(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

> **(I)** find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and
>
> **(II)** based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the

date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections[2] (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2023.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action

for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is

filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

52 U.S.C. § 30125(e)
Soft Money of Political Parties

(e) Federal candidates

(1) In general

A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds-

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 30116(a) of this title; and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) State law
Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) Fundraising events
Notwithstanding paragraph (1) or subsection (b)(2)(C), a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) Permitting certain solicitations

(A) General solicitations
Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 30101(20)(A) of this title) where such solicitation does not specify how the funds will or should be spent.

(B) Certain specific solicitations
In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 30101(20)(A) of this title, or for an entity whose principal purpose is to conduct such activities, if-

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

11 C.F.R. § 100.72(b)
Testing the waters

(b) Exemption not applicable to individuals who have decided to become candidates. This exemption does not apply to funds received for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(4) The individual conducts activities in close proximity to the election or over a protracted period of time.

(5) The individual has taken action to qualify for the ballot under State law.

11 C.F.R. § 100.131(b)
Testing the waters

(b) Exemption not applicable to individuals who have decided to become candidates. This exemption does not apply to payments made for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(4) The individual conducts activities in close proximity to the election or over a protracted period of time.

(5) The individual has taken action to qualify for the ballot under State law.