ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5239

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER & DEMOCRACY 21,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

F8, ELI PUBLISHING, AND STEVEN J. LUND,
Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:16-cv-00752-TNM
Before the Honorable Trevor McFadden

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
(202) 429-2008

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
(202) 682-0240

Paul M. Smith
Tara Malloy
Megan P. McAllen
Mark P. Gaber
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Counsel for *Plaintiffs-Appellants*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Authorities upon which appellants principally rely are marked with an asterisk*

Cases:

Federal Statutes:

Federal Regulations and Administrative Materials:

Miscellaneous Resources:

GLOSSARY OF ABBREVIATIONS

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	FEC Office of General Counsel
SOR	Statement of Reasons

INTRODUCTION

According to the Federal Election Commission ("FEC"), the recent divided panel decision in *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW*"), *pet. for reh'g en banc filed*, No. 17-5049 (July 27, 2018), means that the mere mention of the phrase "prosecutorial discretion" immunizes any FEC enforcement decision from judicial scrutiny. Because three FEC Commissioners invoked this phrase in explaining their votes to find no "reason to believe" a violation of the Federal Election Campaign Act ("FECA") occurred with respect to the three straw-donor complaints underlying this appeal, the Commission maintains that *CREW* not only renders the dismissals unreviewable, but also does this "so clear[ly] as to justify summary action." D.C. Circuit Handbook of Practice and Internal Procedures at 36 (2018) ("Handbook").

Even assuming that the FEC's maximalist interpretation of *CREW* is correct, and the decision does in fact endow three FEC Commissioners with a new "case-killing" "superpower"[1] in some enforcement matters, summary disposition is wholly unwarranted here.

[1] *See* Statement of Vice Chair Ellen L. Weintraub on the D.C. Circuit's Decision in *CREW v. FEC*, June 22, 2018, https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf ("Weintraub Statement").

Most importantly, *CREW*'s presumption of unreviewability does not govern this case. The *CREW* majority expressly recognized that when the Commission declines to bring an enforcement action based on interpretations of law, its decision remains "subject to judicial review." 892 F.3d at 441 n.11. And here, the controlling Commissioners' Statement of Reasons ("SOR") relied upon multiple interpretations of law—of FECA, of agency regulations, and of judicial precedent—as well as upon constitutional considerations of "due process, fair notice, and First Amendment clarity." Add. 2. None of these is a matter committed to unreviewable agency discretion and *CREW* does not hold otherwise.

Moreover, even if this Court finds that *CREW* has some application here, summary disposition remains inappropriate, given that *CREW* was decided four months ago and a petition for *en banc* rehearing is pending. No mandate has issued. This appeal should not be resolved—much less resolved summarily—based on a Circuit precedent that remains subject to possible change. And if this Court finds that *CREW* applies, appellants request that these proceedings be stayed until CREW's petition is decided by the full court

Even if rehearing in *CREW* is denied, summary disposition of the first case to follow it would not be appropriate. *CREW* announced a standard of absolute unreviewability whenever the Commission invokes "prosecutorial discretion" as grounds for dismissing a complaint—which is a standard at odds with Supreme

Court precedent. *Akins v. FEC*, 524 U.S. 11, 29 (1998). The scope of *CREW*'s holding is untested, and this Circuit discourages parties from requesting summary disposition of issues of first impression. *See* Handbook at 35-36. It certainly should disapprove of summary disposition based upon a new ruling that is itself still subject to rehearing. The Commission's motion must be denied.

LEGAL AND FACTUAL BACKGROUND

A. The Commission's Administrative Complaint and Enforcement Process

FECA sets forth a detailed, multi-stage process for the Commission's review and resolution of private administrative complaints.

Any person may file a complaint alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). The Commission, after reviewing the complaint and any responses, then votes on whether there is "reason to believe" a violation has occurred, in which case it "shall" investigate. *Id.* § 30109(a)(2). FECA requires an affirmative vote of four Commissioners to undertake most agency actions, *id.* § 30106(c), including a reason-to-believe finding necessary to initiate an investigation, *id.* § 30109(a)(2).

After the investigation, the Commission votes on whether there is "probable cause" to believe FECA was violated. *Id.* § 30109(a)(3). If it determines, by an affirmative vote of at least four Commissioners, that there is probable cause, it "shall" attempt to "correct or prevent such violation" by conciliating with the respondent. *Id.* § 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the

violation and enter a conciliation agreement, it "may," by the affirmative vote of at least four Commissioners, institute a civil action against the respondent. *Id.* § 30109(a)(6)(A).

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the majority or controlling group must issue a Statement of Reasons to permit subsequent judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 & n.5 (D.C. Cir. 1987).

FECA also provides a right of judicial review to the complainant: "Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in the district court seeking review of the Commission's action. 52 U.S.C. § 30109(a)(8)(A). If the court finds the dismissal "contrary to law," it may order the Commission to conform with such declaration within 30 days. *Id.* § 30109(a)(8)(C). If the Commission fails to conform, the complainant may bring a civil action directly against the respondents to remedy the violation. *Id.*

B. Appellants' Administrative Complaints

In 2011, the media began reporting on a new technique for large donors to evade laws requiring public disclosure of campaign contributions—namely, using LLCs and similar corporate entities as conduits, or "straw donors," to obscure the true source of funds contributed to various political committees.

Appellants filed five administrative complaints[2] between August 2011 and April 2015 alleging that various such schemes violated 52 U.S.C. § 30122, which prohibits any "person" from "mak[ing] a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution."

The first two administrative complaints, filed in August 2011, alleged that Eli Publishing, L.C. and F8 LLC were used as illegal straw donors to conceal the true sources of two $1 million contributions to Restore Our Future, Inc., an independent-expenditure-only political committee (or "super PAC"). The complaints asked the FEC to find reason to believe a violation had occurred and to authorize an investigation into whether (a) Eli Publishing, F8, and other respondents had violated 52 U.S.C. § 30122; and (b) Eli Publishing and F8 had violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and file reports as political committees.

The third administrative complaint, which was filed more than a year after the first two, *see* Add. 4 n.16; Add. 5 n.24, alleged that Specialty Investment Group Inc. ("Specialty Group") and its subsidiary, Kingston Pike Development LLC ("Kingston"), were used as conduits to hide the true source of almost $12 million contributed to another super PAC, FreedomWorks for America ("FreedomWorks").

[2] The district court found that appellants had standing to challenge the FEC's dismissals of three of the five complaints, designated Matters Under Review ("MURs") 6487 (F8 LLC), 6488 (Eli Publishing), and 6711 (Specialty Investment Group, Inc.). Appellants do not appeal that ruling, and only these complaints remain at issue.

Add. 39. Appellants alleged that Specialty Group and Kingston, as well as any other persons who made contributions in the names of Specialty Group and Kingston, had violated 52 U.S.C. § 30122, and that Specialty Group and Kingston violated 52 U.S.C. §§ 30102, 30103, and 30104, for failing to register as political committees.

On June 6, 2012, the FEC's Office of General Counsel ("OGC") reported its recommendations regarding the Eli Publishing/F8 MURs. It concluded that "there is ample 'reason to believe'" that Steven Lund was "the true source of the $1 million contribution made by Eli Publishing," and that "there is also 'reason to believe' that F8 was a conduit and not the true source of the $1 million contribution by F8." Add. 31. The OGC recommended the Commission find reason to believe that F8, Eli Publishing, and Lund violated the straw donor prohibition of section 30122, but not the political committee requirements at 52 U.S.C. §§ 30102, 30103, and 30104. It reasoned that if respondent LLCs were mere straw-donor conduits, then they could not simultaneously be political committees. "Because the resolution of this [political committee] allegation may depend on the disposition of the section [30122] allegation," it recommended that the Commission "take no action *at [that] time*" with respect to political committee status. Add. 36 (emphasis added).

On June 6, 2014, OGC recommended the Commission find reason to believe that the undisclosed individuals who contributed over $12 million to FreedomWorks in the names of Specialty Investments and Kingston had violated section 30122.

Add. 50-52. It again recommended against proceeding at that time on the political committee allegations until the section 30122 allegations were resolved. *Id*.

C. The Controlling Commissioners' Statement of Reasons

Although OGC recommended investigation in all three matters, the Commission deadlocked, by a vote of 3-3, on whether to find reason to believe as to each complaint, and issued a single SOR addressing all of the complaints. Unable to proceed because of the deadlock, a majority of Commissioners voted to dismiss the cases.

In voting against a reason-to-believe finding, the three controlling Commissioners relied upon their interpretations of FECA and prior Commission guidance, as well as their understanding of judicial precedent and "First Amendment clarity." Add. 2.

First, interpreting FECA, they acknowledged that "section 30122 applies to closely held corporations and corporate LLCs," and that using an LLC as a straw donor violates this prohibition "in certain circumstances." Add. 12. They nevertheless voted against finding reason to believe, citing prosecutorial discretion, on the ground that the corporate respondents, newly freed to engage in campaign-related spending by *Citizens United v. FEC*, 558 U.S. 310 (2010), were not on notice that section 30122 potentially applied to them.

In reaching this determination, the control group also relied upon various other conclusions of law, finding:

- FECA had not been applied to corporate straw donors in the past and the allegations here "differ[ed] substantially" from prior FEC matters that addressed non-corporate straw-donor schemes, even those where analogous recipient entities, such as political committees, served as the conduit. Add. 9.
- Congressional intent was unclear because it had not "contemplate[d] that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions." *Id.*
- FEC regulations were unclear about "whether and under what circumstances a contribution made by a closely-held corporation or corporate LLC to a super PAC should be attributed to the entity's owner as the 'true contributor' rather than the entity itself." FEC Mot. at 9.
- As a matter of constitutional law, the rights recognized in *Citizens United* would be rendered "hollow" if closely held corporations and corporate LLCs were presumed to be straw donors when they made contributions. Add. 2.

Beyond making these determinations of law, the controlling Commissioners also announced an intent-based standard for applying section 30122 to corporate entities. But citing due process and First Amendment concerns, they said their new standard

for section 30122 would only be effective going forward and would not apply to the cases before them.

ARGUMENT

I. Standard of Review

"A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Before summarily affirming a district court's ruling, "this court must conclude that no benefit will be gained from further briefing and argument of the issues presented." *Id.* at 297-98. Because the appellant's right to proceed is "so clear," the merits of the case must be "given the fullest consideration necessary to a just determination." *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985).

Here, the Commission has plainly failed to meet its "heavy burden" of demonstrating that summary affirmance is "so clear" as to be warranted.

II. *CREW* Does Not Control this Case.

A. The dismissals of appellants' straw-donor complaints rested on reviewable interpretations of FECA, Commission precedent, and judicial decisions, so *CREW* is distinguishable.

Although the controlling Commissioners in this case acknowledged that the use of LLC straw donors violates FECA's prohibition on the making of a contribution in the name of another, they nevertheless voted against a reason-to-

believe finding in each of appellants' three administrative complaints. To explain those votes, they relied on a series of erroneous propositions of law. These flawed legal interpretations do not become shielded from all judicial review merely because they were later wrapped in the fig leaf of prosecutorial discretion, and *CREW* does not command otherwise. 892 F.3d at 441 n.11 ("The interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion.") (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

As outlined above, the dismissals here rested upon multiple legal interpretations of FECA and judicial precedent. The FEC does not dispute this, and indeed its motion (at 6-10) describes in detail the SOR and the various legal conclusions upon which the control group relied.

Section 30122 prohibits all contributions made "in the name of another person," and FECA defines a "person" as "an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11) (emphasis added). The controlling Commissioners did not dispute that these provisions would cover the corporate respondents. But they found that judicial decisions concerning unrelated FECA provisions—including *Citizens United*, 558 U.S. at 366 (invalidating a ban on corporate independent expenditures), and *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (allowing corporations to make contributions to political committees that make only

independent expenditures)—rendered section 30122 and existing regulatory guidance unclear with regard to LLCs, depriving the respondents of sufficient notice of the law's applicability.[3]

In *CREW*, the administrative dismissal rested on very different concerns, all rooted in paradigmatic prosecutorial choices touching agency resources. Although the FEC notes vaguely that the exercise of prosecutorial discretion in *CREW* was based on "a number of reasons," Mot. at 11, it does not elaborate—perhaps because those "reasons" are a far cry from the legal determinations that led to the dismissals here.

In *CREW*, the controlling Commissioners explained their decision not to proceed against the respondent,[4] a fly-by-night political group that had dissolved and vanished while the complaint was pending, almost exclusively in terms of their concerns about scarce agency resources and the dim prospects for successful enforcement. The controlling Commissioners found, *inter alia*, that the "defunct"

---

[3] Even if the Commission maintains that questions about notice and due process are committed to agency discretion, these more "prudential" reasons for dismissal were grounded entirely in the controlling Commissioners' antecedent interpretation of FECA: their concern about notice arose precisely *because* they had interpreted section 30122 to apply to corporations, but nonetheless they found that, following *Citizens United*, the legal regime was unclear. Their concerns about "fair notice" thus cannot be disentangled from their interpretations of the statute.

[4] And importantly, the controlling Commissioners had been willing to proceed with enforcement earlier on, before the "procedural and evidentiary difficulties" became too significant. Add. 59.

association "no longer existed," "had filed termination papers with the IRS in 2011," and "had no money . . . [or] counsel . . . [or] agents who could legally bind it." *CREW*, 892 F.3d at 438. They also cited concerns about timing, noting that any agency action against the association would "raise[] novel legal issues that the Commission had no briefing or time to decide." Add. 62. They ultimately concluded that these practical obstacles would make further enforcement a "pyrrhic" exercise. Add. 59.

The three no-action Commissioners in this case explained their decision in markedly different terms. Their rationale here, unlike in *CREW*, did not hinge on traditional discretionary factors "peculiarly within [the FEC's] expertise," such as "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." 892 F.3d at 439 n.7 (citing *Heckler*, 470 U.S. at 831-32). The SOR does not even mention any of those considerations, much less rely on them.

Nor did their decision here address or rest on a finding that these multi-million-dollar straw-donor schemes were mere "technical violation[s]" of section 30122, *see id.*, or somehow de minimis. Permitting individuals to make political contributions in someone else's name violates the fundamental purposes of the

federal campaign finance laws in general, and of section 30122 in particular: providing the public with information about the true sources of funds given and spent to influence federal elections. *See, e.g.*, Add. 27-28.

And although the reasons given by the controlling Commissioners were recast *by the district court* as concerns about litigation risk, the SOR never invoked these concerns. "[C]ourts may not accept [] counsel's *post hoc* rationalizations"; "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Likewise, the district court may not provide a rationale unarticulated by the agency.

Instead, the decision not to proceed in this case rested on a series of faulty legal conclusions involving the proper interpretation of section 30122 given "recent" (albeit inapposite) judicial precedent, as well as principles of "due process and First Amendment clarity." Add. 2. Thus explained, the dismissals were not based on a "complicated balancing of factors which are appropriately within [the FEC's] expertise," *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014), but on legal interpretations falling squarely within *the Court's* expertise: interpreting statutes, judicial decisions, and constitutional rights. As the *CREW* majority expressly acknowledged, a nonenforcement decision based on interpretations of *law* remains subject to review. 892 F.3d at 441 n.11. And this Court is "not obliged to defer" *at*

all to "an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. at 29.

By requesting summary affirmance here based on *CREW* without any analysis of the sharply contrasting factual and legal grounds for the agency dismissals in each case, the FEC effectively asks this Court to sanction an extreme and unsustainable interpretation of *CREW*, under which *any* Commission decision making reference to "prosecutorial discretion" is entirely unreviewable.

The Court should not accept this invitation. And if it ultimately does take this course, it should at least not do so summarily.

B. This appeal raises legal issues to which *CREW* has no application.

In arguing that *CREW* supports summary disposition here, the Commission turns a blind eye to the multiple issues raised on appeal that do not involve the reviewability of agency exercises of prosecutorial discretion.

First, as discussed above, the controlling Commissioners justified their decision based on interpretations of law. For this reason alone, there is no presumption of unreviewability under *CREW*. But they went a step farther, announcing a "new" "governing interpretation" of section 30122, under which these Commissioners would only find reason to believe when presented with "direct evidence" that funds were "intentionally funneled through a closely held corporation

or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." Add. 12.

The FEC has not—and could not—characterize the announcement of a new standard for the application of section 30122 as a matter committed to the agency's unfettered discretion. Indeed, such a standard is the paradigmatic "interpretation of FECA" that the *CREW* majority confirmed "is not committed to the agency's unreviewable discretion." 892 F.3d at 441 n.11. Indeed, in subsequent matters involving identical straw-donor violations, the controlling Commissioners have explicitly characterized this "intent" standard as "the relevant legal interpretation" of section 30122.[5]

The Commission resists appellants' challenge to this new "legal interpretation" as premature. Appellants disagree, and likewise disagree that the FEC's citation (at 17 n.2) to the lone enforcement case against corporate straw donors (which involved conduct that occurred *before* the "governing norm" was announced) suffices to defeat any concerns about agency abdication. But regardless, these are not questions that *CREW* can answer.

Second, the controlling Commissioners only exercised their prosecutorial discretion in dismissing the alleged violations of section 30122; they wholly failed

[5] *E.g.*, Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen, MURs 6969, 7031, 7034 (MMWP12 LLC, *et al.*) (Sept. 13, 2018), http://eqs.fec.gov/eqsdocsMUR/6969_2.pdf.

to consider appellants' claims that the respondent corporations had violated 52 U.S.C. §§ 30102, 30103, and 30104 by not registering and filing reports as "political committees."[6] The controlling Commissioners did not address these claims, in terms of prosecutorial discretion or otherwise; they were simply silent, and that silence makes the SOR inadequate on its face. *Cf. State Farm*, 463 U.S. at 43 ("[W]e must consider whether the [agency's] decision was based on a consideration of the relevant factors . . . . [or] entirely failed to consider an important aspect of the problem."). *CREW* does not speak to the FEC's failure to "consider an important aspect" of an administrative complaint.[7]

---

[6] Appellants' complaints alleged with, and as an alternative to, their straw donor allegations, that there was reason to believe the corporate respondents had met the two-pronged test for "political committee" status, because they (1) had a "major purpose" of influencing the "nomination or election of a candidate," *see Buckley v. Valeo*, 424 U.S. 1 (1976), and (2) had received "contributions" or made "expenditures" of $1,000 or more. Add. 22; Add. 39.

[7] Below, the FEC attempted to justify this failure by citing OGC's conclusion that "an entity can be a conduit or a political committee, but not both," suggesting that the controlling Commissioners were only required to analyze the first question. FEC Summ. J. Mot. at 38 n.11 (Aug. 21, 2017) (Docket No. 34). But OGC recommended only that the Commission "take no action at [that] time" with respect to the political committee question, Add. 36; Add. 55-56, "because the resolution of this allegation may depend on the disposition of the section [30122] allegation," Add. 41. Precisely because the controlling Commissioners declined to find any section 30122 violations, it was necessary to analyze whether appellants' alternative theory merited investigation: if respondent corporations were *not* conduits, then they might indeed have been political committees. The SOR answers only half of this question, and is therefore fatally incomplete. *CREW* does not address such a defect.

C. Great caution in applying *CREW* here is appropriate given the stage of the administrative proceedings at which the dismissals occurred.

Summary disposition would be especially inappropriate given that the dismissals of the straw donor complaint occurred at the reason-to-believe stage, where FECA anticipates that the Commission will make a reviewable finding of law. 52 U.S.C. § 30109(a)(2); *see also CREW*, 892 F.3d at 445 (Pillard, J., dissenting) (noting that FECA "is clear that . . . the agency does not have wholly unfettered—or unreviewable—choice as to how it proceeds" at the reason-to-believe stage).

Here, the operative votes leading to dismissal were the controlling Commissioners' votes against finding reason-to-believe, and although they claimed this was an act of discretion, the SOR explaining their decision relied on interpretations of law. But if the Commission indeed was not interested in making any legal findings, it could have directly considered—and taken substantive votes on—whether to dismiss for discretionary reasons. The Commission in this matter held no votes on whether the complaints should be dismissed under *Heckler*, even though the Commission can and *does* vote specifically on whether to dismiss cases

on that basis,[8] and appears to be doing so more frequently in deadlock decisions in the wake of the *CREW* decision.[9]

A vote to dismiss under *Heckler* based on an assertion of prosecutorial discretion might warrant different consideration. But in this case, the controlling Commissioners were not even asked that question; their dispositive votes were against finding *reason to believe* a violation of FECA occurred. The fact that the dismissals occurred at the reason-to-believe stage is all the more reason to doubt that the controlling Commissioners' decision actually rested on discretionary factors instead of on their interpretation of FECA and conclusions of law. And it is all the more reason to question any presumption that their SOR is entirely unreviewable. *CREW*, 892 F.3d at 449 (Pillard, J., dissenting) ("Where the FEC makes a determination about the law in finding no 'reason to believe,' we may review the dismissal.").

---

[8] *See, e.g.*, Certification, MUR 7114 (Casperson for Congress) (June 26, 2018), https://www.fec.gov/files/legal/murs/7114/17044430961.pdf (dismissing by a vote of 5-0 under *Heckler*).

[9] *See, e.g.*, Certification, MURs 7094, 7096, and 7098 (Donald J. Trump for President, *et al.*) (July 31, 2018), https://www.fec.gov/files/legal/murs/7094/18044451829.pdf (noting that Commission "[f]ailed by a vote of 2-2" to dismiss "pursuant to *Heckler v. Chaney* in an exercise of the Commission's prosecutorial discretion").

III. Summary Disposition Is Inappropriate Regardless of *CREW*'s Applicability.

A. *CREW* Cannot Provide a Basis for Summary Disposition While Its Mandate Has Not Issued Pending a Petition for Rehearing *En Banc*.

Summary disposition is particularly inappropriate when it is based on a new panel decision in a case still open on direct review. The mandate in *CREW* has not yet issued because there is a pending petition for rehearing *en banc*—a petition to which the Court directed the FEC to file a response. *See* Fed. R. App. P. 41(b) (noting that the mandate does not issue until seven days following denial of petition for rehearing *en banc*); *cf. Texas v. United States*, 798 F.3d 1108, 1118 (D.C. Cir. 2015) (noting that as a formal matter, decisions are not effective until mandate issues). Even if *CREW* bears on the resolution of this case, the FEC's suggestion that this Court should now summarily dispose of this appeal because three Commissioners use the phrase "prosecutorial discretion" is plainly wrong and inconsistent with this Court's considered review of its docket. The FEC points to no case in the history of this Circuit in which a panel decision subject to a pending petition for rehearing *en banc* has been deemed to foreclose plenary review in related subsequent cases.

B. The scope and contours of *CREW* require full consideration even if the pending petition is denied.

Even if *CREW* survives the petition for rehearing, it is hardly self-executing. Rather, it is a new decision that has never been applied to the facts of a subsequent

case. *See CREW*, 892 F.3d at 443 (Pillard, J., dissenting) ("The court's energetic defense of the FEC's enforcement discretion in rejecting [CREW's] particular theory of this case should not be taken to foreclose judicial review in similar cases in the future."). As discussed above, it is far from clear how and if *CREW* affects the outcome of this case, given that the underlying agency dismissals challenged in the two cases were founded on materially different grounds. Moreover, *CREW* represents both a change in the practice for determining when a decision is committed to the FEC's discretion, and a change in the standard governing judicial review of discretionary dismissals. *See, e.g.*, *id.* at 444 (noting that "the majority takes an unwarranted and incorrect further step, parting ways with the parties and the district court"); FEC Br. at 27, *CREW*, 892 F.3d 434 (July 27, 2017) (Docket No. 1686240) ("Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review."). How *CREW* will apply to future cases deserves this Court's full consideration, starting with this case.

C. FECA's inclusion of a private enforcement mechanism counsels against creating a categorical practice of summary disposition.

Summary disposition—which the FEC now believes is appropriate for any case challenging an agency decision invoking "prosecutorial discretion"—is inappropriate in light of FECA's express provision of a private enforcement process. Congress balanced its desire for partisan parity in the composition of the FEC with several mechanisms for private involvement to ensure that partisan deadlock did not

render FECA meaningless. *See, e.g.*, 52 U.S.C. § 30109(a)(1) (permitting filing of complaints with the FEC); *id.* § 30109(a)(8)(A) (permitting any person aggrieved by action of FEC to file civil action challenging FEC decision); *id.* § 30109(a)(8)(C) (authorizing complainant to bring civil action against violator if FEC fails to conform to judicial decision arising from (a)(8)(A) suit).

The reflexive treatment the FEC advocates in its motion—automatic summary disposition for any appeal concerning agency action invoking "prosecutorial discretion"—would fundamentally reshape the role of private complainants in the FECA enforcement process. Indeed, it is antithetical to the very notion of judicial review Congress designed. Any dismissal that purports to rely upon prosecutorial discretion—however untethered the invocation of that phrase is from any traditional conception of such discretion—would render the statutory right for private judicial enforcement meaningless. This contravenes the Supreme Court's interpretation of FECA. *See Akins*, 524 U.S. at 26 (rejecting argument that FEC's enforcement decisions committed to agency discretion without judicial review because FECA "explicitly indicates the contrary"). At the very least, if that is to be the result of the divided panel decision in *CREW*, this Court should not arrive at that decision through summary disposition of this case.

It is exceptionally important to preserve the proper function of the private complaint process Congress devised given the uniquely partisan environment in

which the FEC operates and the self-evident risk that its decision-making will be mired in 3-3 splits along partisan or ideological lines. Concerns that "prosecutorial discretion" will now regularly be invoked to avoid judicial review are not unfounded. *See, e.g.*, Weintraub Statement, *supra* note 1 ("If I have learned anything in my last ten years on the FEC, it is that those who ideologically oppose campaign-finance law enforcement will use every single legal and procedural advantage . . . . If my obstructionist colleagues are allowed to keep this case-killing power they have been handed, they will wield it."). Indeed, since the lower court in *CREW* issued its decision in February of this year, every Commission decision rejecting an OGC recommendation to find no reason to believe has invoked "prosecutorial discretion"—in seven of the seven such decisions since *CREW* was announced. *See* Add. 64.

III. If the Court Finds That *CREW* Bears Upon the Resolution of this Case, These Proceedings Should Be Stayed until CREW's Petition Is Decided.

For the reasons listed above, *CREW*'s presumption that discretionary FEC decisions are unreviewable does not govern the outcome of this appeal, and certainly does not support summary disposition. But, if this court finds otherwise, appellants request a stay of proceedings until CREW's pending petition for rehearing is decided.

Indeed, the very fact that the FEC now believes that *CREW* has created a "magic words" test for unreviewability—requiring summary disposition of all

appeals mentioning "prosecutorial discretion"—underscores the need for the full Court to grant CREW's petition. Congress could not have intended to create such a massive exception to the judicial review provisions it included in FECA—an exception that threatens to swallow the right of judicial review entirely. That the FEC sees summary disposition on the horizon for this case and every case seeking judicial review of its dismissal of complaints is the best evidence that the decision in *CREW* demands review by the full Court.

CONCLUSION

The FEC's motion should be denied. If this Court finds that *CREW* supports summary affirmance here, appellants request that their appeal be stayed until CREW's petition for rehearing is decided.

Dated: October 11, 2018

Respectfully submitted,

Paul M. Smith (DC Bar No. 358870)
/s/ Tara Malloy
Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
Megan P. McAllen (DC Bar No. 1020509)
Mark P. Gaber (DC Bar No. 988077)
CAMPAIGN LEGAL CENTER
1411 K Street N.W., Suite 1400
Washington, DC 20005
(202) 736-2200

Fred Wertheimer (DC Bar No. 154211)
DEMOCRACY 21
2000 Massachusetts Avenue N.W.
Washington, DC 20036
(202) 355-9600

Donald J. Simon (DC Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street N.W., Suite 600
Washington, DC 20005
(202) 682-0240

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. R. 27(d)(2) because it contains 5,162 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman 14-point font.

/s/ Tara Malloy
Tara Malloy

Dated: October 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed Appellants' Response opposing Appellee's Motion for Summary Affirmance with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all counsel of record.

I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk on October 11, 2018.

/s/ Tara Malloy
Tara Malloy