ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5239

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

ELI PUBLISHING, L.C., *et al.*,
Intervenor-Appellees.

On Appeal from the United States District Court
for the District of Columbia

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE

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ARGUMENT

As appellee Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief, this Court's recent decision in *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW*"), *petition for rehearing en banc filed*, No. 17-5049, Doc. #1742905 (July 27, 2018), establishes that the district court's judgment should be summarily affirmed. The administrative dismissals that appellants Campaign Legal Center and Democracy 21 (collectively, "Campaign Legal Center") challenge constitute exercises of prosecutorial discretion that are not subject to judicial review under *CREW*.

While conceding that the underlying dismissals were based on prosecutorial discretion, which the district court affirmed, Campaign Legal Center argues that *CREW* does not apply here because the dismissals were also purportedly based on interpretations of law. But the record refutes this argument, and *CREW* bars judicial review of the administrative dismissals even if that were the case. Campaign Legal Center's other attempts to avoid application of *CREW* similarly lack merit, and disregarding *CREW* is contrary to this Court's practice. Lastly, Campaign Legal Center provides no reason why summary disposition is not appropriate; the *CREW* judgment is fully applicable and binding here. The Court should summarily affirm the district court's judgment upholding the dismissals.

I. *CREW* FORECLOSES JUDICIAL REVIEW HERE BECAUSE THE UNDERLYING DISMISSALS WERE BASED ON PROSECUTORIAL DISCRETION

Campaign Legal Center concedes that "the controlling Commissioners [] exercised their prosecutorial discretion in dismissing the alleged violations of [52 U.S.C. §] 30122." (Pls.-Appellants' Response in Opposition to FEC's Mot. for Summ. Affirmance at 15 (Doc. #1754782) ("Opp'n")). And Campaign Legal Center does not dispute that, if *CREW* applies, *CREW* would ordinarily bar review of the underlying dismissals. This case should end there.

Campaign Legal Center nevertheless maintains that judicial review is available here, *CREW* notwithstanding, because the agency dismissals at issue were allegedly based on interpretations of the Federal Election Campaign Act ("FECA"), agency regulations, judicial case law, and constitutional considerations. (Opp'n at 2.) Campaign Legal Center is correct that "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion," but "there may be such review under FECA" only if "the agency's action was based *entirely* on its interpretation of the statute." *CREW*, 892 F.3d at 441 n.11 (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985); *FEC v. Akins*, 524 U.S. 11, 26 (1998)) (emphasis added); FEC Mot. for Summary Affirmance at 15 (Doc. #1752338) ("FEC Mot.") (noting this exception to unreviewability). The record refutes Campaign Legal Center's contention that the dismissals rested on

reviewable interpretations of FECA even in substantial part, and no serious argument is available that the controlling analysis was based entirely on FECA interpretations.

The agency dismissals in *CREW* and in this case were both squarely based on prosecutorial discretion. (FEC Mot. at 6-13, 14-16.) The below dismissals were not "founded on materially different grounds" from the one in *CREW*. (Opp'n at 20.) Contrary to Campaign Legal Center's repeated claim that the controlling Commissioners merely "mention[ed] . . . 'prosecutorial discretion'" (Opp'n at 1), the controlling statement of reasons here in fact applied such discretion, as in *CREW*, and explicitly concluded that the underlying administrative matters "should be dismissed in an exercise of the Commission's prosecutorial discretion." (FEC Mot. Add. 24-25, 36.) That the controlling Commissioners weighed issues of "procedural and evidentiary difficulties" at different periods in the enforcement process, as Campaign Legal Center acknowledges (Opp'n at 11 n.4), further indicates that these dismissals, as in *CREW*, were based on prosecutorial discretion because these are "'factors which are peculiarly within [the agency's] expertise.'" *CREW*, 892 F.3d at 439 & n.7 (quoting *Heckler*, 470 U.S. at 831-32).

Moreover, Campaign Legal Center's contention that the controlling dismissal decision rested on reviewable "interpretations of *law*" (*e.g.*, Opp'n at 13)

is not only in tension with the *CREW* panel's reference to "interpretation of *FECA*" being a potential basis for review, 892 F.3d at 441 n.11 (emphasis added), but an examination of the Commissioners' alleged "erroneous propositions of law" (Opp'n at 10) confirms that these were prosecutorial-discretion dismissals. As Campaign Legal Center repeatedly concedes (Opp'n at 7, 9, 10), the controlling Commissioners here recognized that FECA's straw donor provision at 52 U.S.C. § 30122 could be applicable to the non-natural persons that were the subjects of the administrative complaints (FEC Mot. Add. 30 (concluding that "closely held corporations and corporate LLCs may be considered straw donors" under FECA)). Thus, despite a degree to which these Commissioners might have *agreed* with Campaign Legal Center that the respondents could potentially have been found to have violated FECA, the controlling Commissioners determined that prudential factors weighed in favor of dismissing these matters — a classic application of prosecutorial discretion. (FEC Mot. at 6-10.) As the district court correctly explained, the controlling dismissal "decision was not a direct 'result' of the Commission's 'interpretation of the Act,' but an exercise of the Commission's 'considerable prosecutorial discretion.'" (FEC Mot. Add. 10 (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011)).)

Even if it were true that the controlling Commissioners' reasoning also implicated some statutory or other legal interpretation, the *CREW* majority itself

concluded that review was unavailable where some FECA interpretation was involved in actions otherwise based on prosecutorial discretion. 892 F.3d at 441-42 (considering possibility of underlying FECA interpretation of "political committee"). Thus, under *CREW*, and other Circuit precedent that the decision relied upon, the presence of some statutory interpretation in a statement of reasons for a dismissal also based in part on prosecutorial discretion does not make the dismissal reviewable. *Id.* (noting that "even if some statutory interpretation could be teased out of the Commissioners' statement of reasons," the dismissal cannot be subject to judicial review because "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions'" (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)).

Because the underlying nonenforcement decisions at issue were not based "entirely" on interpretations of FECA, Campaign Legal Center is "not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at 441 & n.11. Under *CREW*, the merits of this appeal are so clear as to justify summary affirmance. (FEC Mot. at 13-14.)

II. CAMPAIGN LEGAL CENTER'S OTHER ARGUMENTS AGAINST SUMMARY AFFIRMANCE ALSO LACK MERIT

Campaign Legal Center's other arguments are equally unpersuasive. Campaign Legal Center's attempt to challenge a "new standard for the application of section 30122" described in the controlling Commissioners' statement of reasons (Opp'n at 14-15) does not render *CREW* inapplicable. The new standard purportedly challenged was an explanation only of the controlling Commissioners' views on how they intend to apply section 30122 in future cases and is not at issue here. Even if the Commissioners' articulation of their views provides some guidance to the regulated community, it is not "binding legal precedent or authority for future cases." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). Accordingly, as the district court found, "[t]his challenge is not even close to being ripe." (FEC Mot. Add. at 20.) The controlling analysis is not reviewable because it discusses potential future applications of FECA.

Nor does the controlling Commissioners' supposed "fail[ure] to consider" claims that the underlying respondents ran afoul of FECA's registration and reporting requirements for political committees provide a basis for review. (Opp'n at 15-16 & nn.6-7.) In considering these allegations, the Commissioners determined that the underlying administrative matters were appropriately addressed under FECA's straw donor prohibition, not regulations concerning political committees. (FEC Mot. Add. 19 n.9; *id.* 28 n.36.) Indeed, as Campaign

Legal Center correctly notes, during the administrative proceedings the Commission's Office of General Counsel concluded that "an entity can be a conduit or a political committee, but not both" (Opp'n at 16 n.7 (internal quotation marks omitted)), and no Commissioners expressed disagreement with that proposition. Moreover, the controlling Commissioners' resolution of the matters through prosecutorial discretion belies the notion that an alternative potential theory of liability required detailed consideration. Whether the underlying facts could have been shoehorned into theoretical political committee violations would not alter the dispositive application of prosecutorial discretion with respect to the potential section 30122 violations that all Commissioners viewed as the appropriate framework for the analyzed activity.

Campaign Legal Center's reliance on FECA procedures and the dissenting opinion in *CREW* are similarly misplaced. Campaign Legal Center claims that *CREW* should not be applied summarily here because "the dismissals of the straw donor complaint occurred at the reason-to-believe stage [of the FEC enforcement process], where FECA anticipates that the Commission will make a reviewable finding of law." (Opp'n at 17 (citing 52 U.S.C. § 30109(a)(2); *CREW*, 892 F.3d at 445 (Pillard, J., dissenting)).) Not so. FECA explicitly contemplates pre-reason-to-believe dismissals, 52 U.S.C. § 30109(a)(1) (explaining that "a vote to dismiss" is the only vote the Commission may make prior to receiving a response from a

respondent), and provides that, "[i]f the Commission, . . . determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act," the Commission shall notify that person of the alleged violation, *id.* § 30109(a)(2). FECA does not compel Commissioners to find reason to believe before dismissing. In the absence of four Commissioner votes to find reason-to-believe that a violation occurred, the administrative complaint may be dismissed for reasons of prosecutorial discretion, and arguments to the contrary were not accepted in *CREW*.

Campaign Legal Center further errs in contending that a Commission motion preceding the closing of a matter need reference *Heckler*, prosecutorial discretion, or even dismissal. (Opp'n at 18.) The context of this case is a *failed* vote to proceed to the next enforcement step. (FEC Mot. Add. 2 (explaining that the FEC's "'voting and membership requirements mean that, unlike other agencies — where deadlocks are rather atypical — [the Commission] will regularly deadlock as part of its *modus operandi*'" (quoting *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1171 (D.C. Cir. 2016)); *see also, e.g.*, MUR 6968 (Tread Standard, *et al.*), Certification, http://eqs.fec.gov/eqsdocsMUR/18044444051.pdf (failed 2-2 vote to find reason to believe in matter Campaign Legal Center identifies on its table of post-*CREW* invocations of prosecutorial discretion). In cases where controlling Commissioners provide a statement of their

reasons for declining to go forward, courts look to those statements to determine the reasons for the agency's action. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The terms of the vote preceding the Commission's closure of its file — *e.g.*, motions to find reason to believe, find no reason to believe, or to dismiss — are immaterial.

FECA's provision for "a private enforcement process" (Opp'n at 20) also does not alter *CREW*'s application here. FECA contemplates that process only after a court order finding that the Commission has acted contrary to law and a subsequent failure by the Commission to conform to that order. *See* 52 U.S.C. § 30109(a)(8)(C). These predicate procedural steps, which are virtually unique among federal citizen-suit provisions, indicate that Congress intended private suits to be rare. In any event, that path remains available in cases subject to judicial review under section 30109(a)(8).

Campaign Legal Center's concern that prosecutorial discretion will be "regularly . . . invoked" (Opp'n at 22) is not a reason to defer applying *CREW*. That argument contravenes the presumption of regularity of government officials. *E.g.*, *United Steelworkers, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) ("An administrative official is presumed to be objective [and] mere proof that she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that

presumption."). And *CREW* itself noted that *Heckler* "left open the possibility that an agency nonenforcement decision may be reviewed if 'the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities.'" 892 F.3d at 440 n.9 (quoting *Heckler*, 470 U.S. at 833 n.4). Campaign Legal Center understandably makes an abdication argument only in passing here rather than in full given the Commission's extensive past and current enforcement of section 30122. That history includes enforcement against an LLC for section 30122 violations in the matter previously cited (FEC Mot. at 17 n.2), and in two additional matters conciliated just last year, *see* Conciliation Agreement, MUR 7247 (Sept. 7, 2017), https://www.fec.gov/files/legal/murs/7247/17044430333.pdf ($6,700 civil penalty); Conciliation Agreement, MUR 7005, et al. (Aug. 11, 2017), https://www.fec.gov/files/legal/murs/7056/17044424631.pdf ($65,000 civil penalty).

III. SUMMARY AFFIRMANCE IS APPROPRIATE

Finally, Campaign Legal Center argues that summary disposition is inappropriate because the mandate in *CREW* has not yet issued. (Opp'n at 19.) But Campaign Legal Center cites no authority indicating that this Court's opinions are precedential only after issuance of a mandate. "A decision of this court is binding upon a later panel and upon the district court." *Belbacha v. Bush*, 520 F.3d

452, 457 (D.C. Cir. 2008); *see Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (per curiam) (noting that, "[i]n its intra-circuit application, [s]tare decisis demands that we abide by a recent decision of one panel of this court" unless the opinion is withdrawn by the panel or overruled *en banc*); *United States v. Doe*, 730 F.2d 1529, 1531 n.2 (D.C. Cir. 1984) ("We cannot, however, overrule the decision of another panel of this court; a panel's decision may be rejected only by the court en banc.").

Texas v. United States, which Campaign Legal Center cites (Opp'n at 19), does not support its argument. There, this Court noted only that, under Supreme Court Rule 45, "Supreme Court judgments . . . do not take effect until at least 25 days after they are announced, when the Court issues a certified copy of its opinion and judgment in lieu of a formal mandate." 798 F.3d 1108, 1118 (D.C. Cir. 2015). This Court, however, has not limited the precedential effect of published decisions until after issuance of the mandate. *See Vo Van Chau v. U.S. Dep't of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (noting that the district court is bound by a decision of a panel of the Court of Appeals and that "[t]he fact that a party has petitioned for rehearing, automatically resulting in the stay of the mandate under Rule 41, is irrelevant" (quoting *Ass'n of Civilian Tech. v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985)); D.C. Cir. Handbook of Practice and Internal Proc. at 56 ("Handbook") (explaining that though the mandate may be issued later "[t]he

Court will enter its judgment in a case on the same date its decision is issued"). The mandate in *CREW* will eventually communicate the judgment to the district court, but as the Eleventh Circuit has concluded, a delay in delivery of the mandate "in no way affects the duty of this [Court] . . . to apply now the precedent established" by the opinion "as binding authority." *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992).

Ultimately, Campaign Legal Center's belief that *CREW* was wrongly decided or "at odds with Supreme Court precedent" (Opp'n at 2-3) is a not valid reason for not applying *CREW* here. It is the "rare[]" case (Handbook at 58) that is modified *en banc*; *CREW* is binding now and its application here readily supports summary affirmance.

CONCLUSION

This Court should summarily affirm the district court's decision in favor of the Commission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also 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 the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2018, I electronically filed the Federal Election Commission's Reply in Support of its Motion for Summary Affirmance with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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