RECORD NO. 19-5161

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; NOAH BOOKBINDER,

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants Citizens for Responsibility and Ethics in Washington and Noah Bookbinder hereby certify as follows:

A. Parties and Amici. Appellants are Citizens for Responsibility and Ethics in Washington ("CREW"), a non-profit corporation, and Noah Bookbinder. Appellee is the Federal Election Commission. There were no amici curiae in the district court. Randy Elf has expressed an intent to appear as amicus in the appeal. Appellants understand additional amici curiae may appear in this matter.

B. Ruling Under Review. The ruling under review is the district court's March 29, 2019 order and accompanying memorandum opinion, ECF Dkt. Nos. 22, 23, in *CREW v. FEC*, No. 18-cv-00076-RC (Contreras, J.). The March 29, 2019 memorandum opinion is available at 380 F. Supp. 3d 30 and is reprinted in the Joint Appendix ("JA") at JA139–61. The March 29, 2019 order is printed in the JA at JA138.

C. Related Cases. This matter has not previously been before this Court or any other court. Appellants are unaware of any related case pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellant Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing, including financing of independent expenditures, to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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Daniel Tokaji, Beyond Repair: FEC Reform and Deadlock Deference (Mar. 28, 2018), https://bit.ly/2MCDZ88 29

FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* (May 2012), http://fec.gov/em/respondent_guide.pdf 46

FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 (1977), https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf....1, 45

FEC, *Statement of Chair Ellen L. Weintraub on the D.C. District Court Decision in* CREW v. FEC (New Models) (Apr. 15, 2019), https://go.usa.gov/xmWC4 ..... 12, 30

FEC, Statement of Policy, 72 Fed. Reg. 12,545 (Mar. 16, 2007)..... 46, 47

FEC, *Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman*, MUR 6391 and 6471 (Nov. 6, 2015), https://www.fec.gov/files/legal/murs/6391/15044381253.pdf.....15

GLOSSARY

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
CWA	Citizens for Working America
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
OGC	Federal Election Commission's Office of General Counsel

STATEMENT OF JURISDICTION

This Court has jurisdiction over this timely appeal from a final judgment in the United States District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court's jurisdiction was based upon 52 U.S.C. § 30109(a)(8)(A). Appeal was timely taken on May 28, 2019, within sixty days of the district court's March 29, 2019 decision under review.

STATEMENT OF ISSUES PRESENTED

(1) Whether a partisan bloc of the FEC, consisting of less than a majority of the commissioners, may immunize from judicial review the legal interpretations they use to justify a dismissal of an administrative complaint simply by inserting a two word phrase—"prosecutorial discretion"—in their statement of reasons explaining their vote to find no reason to believe a respondent violated FECA, notwithstanding Congress's explicit provision for judicial review of FEC non-enforcement decisions in 52 U.S.C. § 30109(a)(8).

(2) Whether the district court committed error by relying on a recent divided-panel decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), despite the fact that the divided-panel decision contravenes both Supreme Court and earlier D.C. Circuit precedent.

STATUTES AND REGULATIONS

52 U.S.C. § 30109 is reproduced in the Addendum.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

"Congress established the [FEC] at the front line of campaign finance law enforcement." *CREW v. FEC*, 923 F.3d 1141, 1143 (D.C. Cir. 2019) (en banc) (Pillard, J., dissenting). "To avoid agency capture, it made the Commission partisan balanced, allowing no more than three of the six Commissioners to belong to the same political party." *Id.* Under the FECA, "'[a]ll decisions of the' [FEC] '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.'" *Id.* at 1142 (Griffith, J., concurring) (quoting 52 U.S.C. § 30106(c)). "That balance created a risk of partisan reluctance to apply the law," however, "so Congress provided for judicial review of nonenforcement, and citizen suits to press plausible claims the Commission abandons." *Id.* at 1143–44 (Pillard, J., dissenting). Those provisions ensure the Commission cannot "'shirk its responsibility to decide'" whether a violation occurred. *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) ("*DCCC*") (quoting 125 Cong. Rec. 36,754 (1979)).[1]

[1] The legislative history of the 1976 amendments to the FECA that added the judicial review and citizen suit provisions confirm the purpose of the changes was to guard against underenforcement. 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 ("FECA

The statute "invites 'any person' to file a complaint with the [FEC] and provides that the Commission '*shall* make an investigation' of any complaint supported by 'reason to believe' that the statute is violated." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting) (quoting 52 U.S.C. § 30109(a)(2)); *see also FEC v. Akins*, 524 U.S. 11, 16 (1998) (describing FECA's complaint system as "ask[ing] the FEC to find [whether a respondent] . . . had violated the Act"). "It further provides that 'any party aggrieved' by an order dismissing a complaint, or by a failure of the Commission to act on a complaint within 120 days, 'may file a petition' for judicial review by this court." *CREW*, 923 F.3d at 1144 (Pillard, J. dissenting) (quoting 52 U.S.C. § 30109(a)(8)(A)). "If the court holds that 'the dismissal of the complaint or the failure to act is contrary to law,' the Commission has 30 days to conform, failing which the complainant may file a civil action to remedy the alleged violation." *Id.* (quoting 52 U.S.C. § 30109(a)(8)(C)). "[A] decision is 'contrary to law' if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or

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1976 Legislative History") (Statement of Sen. Clark) ("Recent events make clear that campaign regulation cannot be left to a commission that is under the thumb of those who are to be regulated."); *id.* at 75 (Statement of Sen. Scott) ("The restoration of public confidence in the election process require an active watchdog in this area, not a toothless lapdog."); *id.* at 92 (Statement of Sen. Mondale) (expressing concerns of "history of weak enforcement of campaign financing laws").

capricious, or an abuse of discretion." *Id.* (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)).

II. Proceedings Below

CREW filed an administrative complaint with the FEC on September 17, 2014 alleging the respondent corporation, New Models, failed to register and report as a political committee in violation of the FECA. JA019–62.[2] As revealed in proceedings started by CREW's complaint, New Models took advantage of the new opportunities conferred by *Citizens United v. FEC*, 558 U.S. 310 (2010), to make campaign-related expenditures in 2010 by distributing $265,000—about a third of its typical yearly budget—to a federal super PAC, CWA. JA083, JA107. New Models was CWA's sole contributor, and the super PAC spent the money influencing a South Carolina congressional race. *Id.* Both New Models and CWA admitted the transfer was to influence a federal election. *See id.*, 52 U.S.C. § 30101(8)(A).

New Models then took full advantage in the next election cycle—the first full cycle under the new legal regime. In 2012, New Models distributed at least $3,095,000 to four federal super PACs. JA074–75, JA108. It distributed $292,000 to CWA in January 2012, JA060, and $5,000 to Special Operations OPSEC

[2] Under the FECA, "political committees" are organizations that must publicly disclose the sources of all their funds. *See* 52 U.S.C. §§ 30101(4); 30104(b).

Political Committee, JA074. Most of its disbursements, however—about $2.8 million—occurred in October 2012, shortly before the election. JA053, JA056–57. That month, New Models distributed $2,171,000 to Now or Never PAC, JA056–57, and of $627,000 to the Government Integrity Fund Action Network, JA053. The super PACs reported that New Models's distributions were intended to influence elections, *see* JA053, JA056–57, JA060, JA108, and they all in fact engaged in extensive campaign activity that year, JA014–15. Together, New Models's distributions comprised 68.7% of its expenditures in 2012. JA108. They even comprised 51.7% of New Models's expenditures compared to its spending over the entire 2012 election cycle. *Id.*

New Models was not alone in the post-*Citizens United* world in taking advantage of its newfound ability to make disbursements to super PACs. The decision meant corporations could now lawfully make disbursements to other groups that would run ads, thus avoiding the FECA's one-time disclosure obligations for those making either independent expenditures or electioneering communications. 52 U.S.C. § 30104(c), (f). Further, while the recipient super PACs would disclose their contributors, 52 U.S.C. § 30104(b), the distributing corporation would not (unless also covered by political committee laws). In that way, despite *Citizens United*'s promise that voters would continue to enjoy "prompt" and "adequate" disclosure of "the funding sources" of money used in

elections, 558 U.S. at 369–71, voters instead run into "dead-end disclosure"—they learn the PAC was funded by a mysterious corporation and nothing more about who was behind the money. Examples of these types of arrangements designed to thwart transparency abound.[3] Money can then flow anonymously through entities like New Models into campaigns, even from prohibited sources like government contractors and foreign nationals—that is, unless disclosure is triggered under the FECA.

CREW's complaint alleged New Models was required to disclose its contributors because it qualified as a political committee in 2012: its activities exceeded the $1,000 statutory threshold for political committee status, JA024, JA084, *see also* 52 U.S.C. § 30101(4), and New Models's extensive spending demonstrated its "major purpose" was to influence federal elections. JA025, JA087; *see also Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The FEC notified New

[3] Indictment, *United States v. Parnas*, 19-cv-725 (S.D.N.Y. 2019) (alleging shell corporation funneled foreign funds to political committee); Bryan Lowry and Steve Vockrodt, *Greitens campaign sought to conceal donors' identities, former staffer testifies*, Kansas City Star, May 2, 2018, https://bit.ly/2IbkWlK; Matt Corley, *Non-Profits Funding Super PACs Benefitting Greitens Have Links Behind the Scenes*, CREW (Nov. 1, 2016), https://bit.ly/2LY57x9 (reporting federal registered political committee was entirely funded by dark money corporation); Matt Corley, *Rove Group Makes Largest Ever Dark Money Contribution to a Super PAC*, CREW (Oct. 31, 2016), https://bit.ly/2t7OTdP (reporting Senate Leadership Fund, a registered political committee, received $11 million from One Nation, a dark money organization that does not reports its contributors); Theodoric Meyer, *Secret Donors Behind Some Super PACs Funneling Millions into Midterms*, ProPublica, Oct. 31, 2014, https://bit.ly/2leHOnk (discussing other examples).

Models of CREW's complaint on September 24, 2014. JA063. New Models responded on November 5, 2014, admitting that it crossed the statutory threshold but contesting its major purpose. JA066–69. After reviewing CREW's complaint and New Models's response, on May 21, 2015, the OGC recommended the Commission find reason to believe New Models violated the FECA by failing to register as a political committee. JA080.

Despite this recommendation, the Commission failed to find "reason to believe" New Models violated the FECA, with the two Republican-appointed commissioners (the "Partisan Bloc"), enough to deadlock the then four-person Commission, voting to find no reason to believe New Models violated the law. JA101. All four Commissioners then voted to close the file and dismiss the case. JA102.

On December 20, 2017, the Partisan Bloc who voted to find no reason to believe a violation occurred issued a statement of reasons to explain their vote. JA103–34. The "thirty-two page statement of reasons" "involved a robust interpretation of statutory text and case law." JA148, JA0153–54. They rejected New Models's concession that it crossed the $1,000 statutory threshold, stating *Buckley* limited all uses of "expenditure" in the Act to express advocacy communications, JA114–15, JA119, and interpreted *Buckley*'s "major purpose" test to look to New Models's "lifetime" of activities, contravening a court decision

finding such analysis unlawful, JA123; *see also CREW v. FEC*, 209 F. Supp. 3d 77, 93–94 (D.D.C. 2016). The Partisan Bloc's analysis firmly resolved the political committee issue: New Models "did not meet the statutory threshold for becoming a political committee," JA120, New Models "did not have the requisite major purpose to be a political committee," JA122, and New Models was definitively "not a political committee," JA104.

In the "last sentence of the thirty-two page" "extensive legal analysis explaining why they believed the group at issue was not a 'political committee,'" the Partisan Bloc "added [a] drop of discretion." *CREW*, 923 F.3d at 1148 (Pillard J., dissenting). They concluded, "[f]or these reasons, *and in the exercise of our prosecutorial discretion*, we voted against finding reason to believe that New Models violated the Act . . . ." JA133 (emphasis added). Tacked on in a footnote were two case cites and a single sentence: "Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be appropriate use of the Commission resources." *Id.*

That conclusion presumably rested on the Partisan Bloc's representation that, after receiving CREW's complaint, JA063, after the OGC recommended an investigation, JA073–87, and after New Models was notified of a pending Commission vote, JA088, New Models's activities took a turn. Its reported spending dropped from a high of $4.5 million in 2012 to only $1 million in 2015,

when it purportedly ceased operations altogether. JA108–09.[4] Thus, to the extent a rationale can be extracted from a single sentence, they explained that their conclusion that there was no "reason to believe that New Models violated the Act" *in 2012* relied on New Models's actions *in 2015*. JA133. In other words, as a result of New Models's *ex-post* activities, voters would never learn "the sources of [New Models's favored] candidate's financial support" or who was "funding [the Super PAC's] speech" through New Models's 2012 disbursements. *Buckley*, 424 U.S. at 67; *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc).

On January 12, 2018, within sixty days of the FEC's dismissal of CREW's complaint, CREW sought judicial review pursuant to 52 U.S.C. § 30109(a)(8)(A). Judge Contreras granted summary judgment to the FEC on March 29, 2019. In that decision, Judge Contreras asked whether a decision of a divided panel of this Court in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW/CHGO*")[5], meant an

[4] The Partisan Bloc apparently relied on extra-record evidence after conducting their own *sua sponte* investigation, in violation of one of their own stated policies to consider only materials submitted by parties. *See Statement of Reasons [of] Vice Chairman Donald F. McGahn and Comm'r Caroline C. Hunter* at 3–7, MUR 6462 (Sept. 18, 2013), https://bit.ly/2yjUzqf (stating agency is limited to considering "sworn complaint" to determine reason to believe).

[5] Shortly after Judge Contreras's decision, the en banc court denied a petition to rehear *CREW/CHGO*. *See CREW*, 923 F.3d 1141 (Mem.). Nonetheless, the two judges who wrote, either concurring in or dissenting from the denial, both expressed an interest in "reconsider[ing] the majority's holding en banc." *Id.* at 1143 (Giffith, J. concurring); *see also id.* at 1145 (Pillard, J., dissenting) ("The panel's significant disregard for circuit precedent calls for prompt correction.").

FEC decision that "involved a robust interpretation of statutory text and case law, with a brief mention of prosecutorial discretion sprinkled in" was unreviewable, notwithstanding 52 U.S.C. § 30109(a)(8)(A). JA154–55. Interpreting *CREW/CHGO* to impose a "'magic words' standard" despite apparent discomfort with that result, JA140, Judge Contreras found the dismissal was indeed unreviewable simply because the Partisan Bloc "invoked prosecutorial discretion," JA154. Accordingly, Judge Contreras concluded, "the Court is [] foreclosed from evaluating the [Partisan Bloc's] otherwise reviewable interpretations of statutory text and case law." JA161.

SUMMARY OF THE ARGUMENT

The FECA includes "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings." *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), *vacated in non-relevant part*, 524 U.S. 11 (1998). The statute provides that a court may review the Commission's dismissal of a complaint to determine whether the dismissal is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Until recently, courts understood that the statute required an inquiry into whether "the FEC dismissed the complaint as a result of an impermissible interpretation of [law]." *Orloski*, 795 F.2d at 161. The court below, however, found that a recent divided panel of this Circuit in *CREW/CHGO*, 892 F.3d 434, obliterated that standard, replacing it with

a new "magic words" test, JA140, one that allows even a minority partisan bloc of commissioners to block judicial review by invoking a simple incantation: "prosecutorial discretion."

Here, the district court concluded that those two words, "sprinkled" (that is, dropped twice) into a Partisan Bloc's statement of reasons, otherwise devoting "thirty [two] pages" to "reviewable legal analysis" explaining their conclusion that CREW's complaint did not raise a reason to believe a violation occurred, rendered the whole statement of reasons unreviewable. JA154. In other words, the court below found *CREW/CHGO* permitted a partisan bloc of commissioners to nullify the FECA's judicial review provision and to immunize their erroneous legal interpretations.

Their legal analysis here, despite involving a "robust interpretation of statutory text and case law," JA153–54, was indeed erroneous. The Partisan Bloc interpreted *Buckley* to prohibit applying the FECA's political committee rules—the rules that provide "voters with information as to where political campaign money comes from," 424 U.S. at 66—to an organization that spent 68.7% of its 2012 funds, more than $3 million, to influence federal elections, JA108. That analysis not only ignored plain statutory text and denied voters access to information as to where millions of dollars spent by New Models in federal elections came from, but

also deprives voters of the knowledge of the sources of hundreds of millions of dollars more routed through similar dark money groups to super PACs.

The district court, however, erred. The Partisan Bloc's "magic words" do not legally cut off the court's obligation to consider whether their interpretations of law were permissible. *CREW/CHGO* does not compel otherwise. First, that decision, which considered only a dismissal that was "squarely" based on prosecutorial discretion and which involved no legal analysis and resolved no claim, 892 F.3d at 439, has no application here. The district court erred in following dicta in a footnote to conclude differently. Second, assuming *CREW/CHGO* does apply, then it is in direct conflict with binding Supreme Court authority and Circuit authority which expressly provide for judicial review in situations like this, and which provide that dismissals resulting from commissioners' mere unwillingness to enforce are contrary to law. *CREW/CHGO* is further in conflict with the FECA, a conflict the divided panel created based on its misreading of *Heckler v. Chaney*, 470 U.S. 821 (1984). Finally, *CREW/CHGO* raises significant First Amendment concerns that require reversal.

For those reasons, CREW respectfully asks this Court to reverse the district court's decision and to find that either *CREW/CHGO* does not apply in situations like this where a dismissal rests on legal interpretation, or to find that *CREW/CHGO* contravenes earlier authority and thus is not binding. In either case,

CREW respectfully asks this Court to remand this case back to the district court to review the Partisan Bloc's legal interpretations to decide whether they are contrary to law.

ARGUMENT

The court below understood *CREW/CHGO* to impose a "magic words" test that provides a partisan bloc of the FEC the "superpower . . . to kill any FEC enforcement matter, wholly immune from judicial review." *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting) (quoting FEC, *Statement of Chair Ellen L. Weintraub on the D.C. District Court Decision in* CREW v. FEC (New Models) 3 (Apr. 15, 2019), https://go.usa.gov/xmWC4 ("Weintraub Statement")). That decision was erroneous. First, *CREW/CHGO* does not impose a "magic words" test that eliminates review whenever a partisan bloc invokes prosecutorial discretion, and thus it does not apply here. Second, to the extent *CREW/CHGO* does apply, it is in clear conflict with prior Supreme Court and Circuit authority, conflicts with multiple aspects of the FECA, rests on erroneous interpretations of precedent, and raises significant First Amendment concerns. Accordingly, CREW respectfully requests this Court find *CREW/CHGO* is not binding and remand to the district court to review the commissioners' legal analysis used to justify their conclusion that CREW's complaint did not raise a reason to believe New Models may have violated the FECA.

I. Standard of Review

This Court reviews district court grants of summary judgment *de novo*. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). Summary judgment is appropriate where the moving party meets its burden of demonstrating the absence of a genuine dispute of material fact and that "'the moving party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

II. *CREW/CHGO* Does Not Apply Here

CREW/CHGO held that under *Chaney*, 470 U.S. at 832–33, an FEC dismissal based "squarely" on prosecutorial discretion was not subject to judicial review. 892 F.3d at 438–39. The district court nonetheless followed dicta in *CREW/CHGO* to apply that case here, where the dismissal was based on "thirty pages of seemingly reviewable legal analysis" and a "brief mention" of prosecutorial discretion was merely "sprinkled in." JA154. That was error. Rather, prior governing precedent permits judicial review of a "discretionary agency decision" for "an improper legal ground." *Akins*, 524 U.S. at 25. Further, the invocation of prosecutorial discretion here is simply too terse to satisfy the FEC's obligation to "articulate a satisfactory explanation for its action including a rational

connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

A. The District Court Improperly Followed Dicta

The district court below found that "*CREW/CHGO* is directly on point here" and was "binding Circuit law" that immunized the FEC's dismissal of CREW's complaint from judicial review. JA152–53. Yet *CREW/CHGO* concerned a very different case—one that did not consider a dismissal based on a "robust interpretation of statutory text and case law" that reached a firm resolution of the merits. *Cf. id.* The holding of *CREW/CHGO* thus does not apply here, and the district court erred in following dicta in the decision to conclude otherwise.

In *CREW/CHGO*, the D.C. Circuit considered an appeal from a dismissal of an FEC complaint against an organization, the Commission on Hope, Growth and Opportunity. 892 F.3d at 438. The commissioners who voted against enforcement issued a five-page statement explaining the dismissal was based on their "concern[s] that the statute of limitations had expired or was about to expire; that the association named in CREW's complaint no longer existed; that the association had filed termination papers with the IRS four years earlier; that it had no money; that its counsel had resigned; that the 'defunct' association no longer had any agents who could legally bind it; and that any action against the association would raise 'novel legal issues that the Commission had no briefing or time to decide.'"

Id.[6] As a result, the commissioners "'did not definitively resolve whether there was reason to believe CHGO was a political committee.'" *Id.* at 444 (Pillard, J., dissenting) (quoting CHGO SoR 4). In fact, a majority of the divided Circuit panel did "not believe the Commission made any legal decision" in dismissing the complaint, and rejected the idea of "teas[ing] out" such decisions by inferring interpretations that may have played a role in the exercise of discretion. *Id.* at 442–43; *see also id.* at 441 (majority). Accordingly, the majority found that the dismissal exclusively based on prosecutorial discretion was not reviewable because courts had no "judicially manageable standards" to apply. *Id.* at 441.

In stark contrast, here, the Partisan Bloc reached a firm conclusion on the legal question before them: they concluded, based on a lengthy analysis, that New Models was definitively "not a political committee." JA104. Rather than resting squarely on prosecutorial discretion like in *CREW/CHGO*, the New Models dismissal made only passing reference to prosecutorial discretion, touching on it in the concluding paragraph as a tag-along justification. Instead, the dismissal was based squarely on the Partisan Bloc's interpretation of *Buckley* to exclude groups like New Models from political committee reporting. Indeed, given their definitive

[6] *Quoting* FEC, *Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman*, MUR 6391 and 6471 (Nov. 6, 2015), https://www.fec.gov/files/legal/murs/6391/15044381253.pdf ("CHGO SoR").

judgment on the merits, the Partisan Bloc had no discretion to exercise. *See* 52 U.S.C. § 30109(a). Further, there is no need to tease out a legal interpretation from the assertion of discretion—here the legal interpretations stand front and center.

In deciding that *CREW/CHGO* governed, the district court relied on dicta in a footnote in the decision which would permit review of a dismissal only if it was "based *entirely* on [the commissioners'] interpretation of the statute." JA154–56 (quoting *CREW/CHGO*, 892 F.3d at 441 n.11). Yet the relegation of that assertion to a footnote should have alerted the district court that it was not in fact a binding holding of the panel, especially one, as explained *infra*, overturning decades of precedent and gutting a statute. Moreover, the footnote is not "determinative of the result" because *CREW/CHGO* did not consider a dismissal premised on both legal interpretation and discretion, "and therefore must be deemed not a holding." *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992). "Binding circuit law comes only from the holdings of a prior panel, not from its dicta." *Id.*

By relying on dicta, the district court ignored direct authority that required review of the legal errors below. "Under settled precedent, the Commission's enforcement discretion cannot block review of legal errors." *CREW*, 923 F.3d at 1145 (Pillard, J. dissenting). For example, the Supreme Court recognized that "those adversely affected by a discretionary agency decision generally have

standing to complain that the agency based its decision upon an improper legal ground." *Akins*, 524 U.S. at 25. While courts may not "carv[e] reviewable legal rulings out from the middle of non-reviewable *actions*," *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (emphasis added), FEC dismissal actions remain reviewable even after *CREW/CHGO*, which only limited review of certain FEC dismissal *reasons*. *See* 892 F.3d at 441 n.11 (recognizing FEC dismissals still reviewable if non-discretionary justification given). Reviewable agency action that is "predicated on a combination of both statutory and discretion grounds" remains reviewable "to ensure that the announced interpretations are consistent with the governing statute." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 245 n.9, 246 (D.C. Cir. 1986). Moreover, "[b]ecause '[courts] cannot know that the FEC would have exercised its prosecutorial discretion in this way' in the absence of the erroneous ingredients, [courts] review the legal ground even if the discretionary ground is legitimate, and remand if the former is tainted by error." *CREW*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Akins*, 524 U.S. at 25).

"If such an invocation [of prosecutorial discretion] does bar evaluation of the Commissioners' legal conclusions, it guts the case-by-case approach the FEC has adopted for determining when groups qualify as 'political committees.'" *Id.* at 1150. "If [the FEC] needs neither promulgate rules nor adjudicate the merits of

individual cases, any partisan, non-majority bloc of the Commission can indefinitely avoid developing law defining political committees." *Id.* at 1150–51. Rather, "[w]ere [the Court] to accept the [FEC's] contention, [the Court] would be handing [the FEC] carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action" with an incantation of prosecutorial discretion. *Int'l Union, Union Auto.*, 783 F.2d at 246. Indeed, one Commissioner predicted her colleagues would block review of "*every* future statement" of reasons supporting dismissal of a complaint by invoking prosecutorial discretion. Weintraub Statement 2.

The district court erred in relying on dicta in *CREW/CHGO*. That case does not extend beyond dismissals squarely and exclusively based on prosecutorial discretion. The district court's reluctance to apply *CREW/CHGO* here was well founded.

B. "Magic Words" Do Not Constitute Reasoned Decision-making

Beyond erroneously relying on dicta, the district court construed *CREW/CHGO* to impose a "magic words" standard that stands in stark conflict with black-letter administrative law: that an agency explanation must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. "[M]agic words" are

neither sufficient nor necessary to satisfy that duty. *See TransCanada Power Mkt. Ltd. v. FERC*, 811 F.3d 1, 10 (D.C. Cir. 2015) (collecting cases).

A magic-words test—one that conditions any judicial review on the presence or absence of a two-word phrase, "prosecutorial discretion"—detracts from, rather than contributes to, "reasoned decisionmaking by the agency." *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). That sort of "terse" reference to prosecutorial discretion does "not meet the standard of reasoned agency decision making" to uphold an agency action from legal challenge. *Robertson v. FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995); *see also Antosh v. FEC*, 599 F. Supp. 850, 856 n.5 (D.D.C. 1984) ("While the Commission is vested with some prosecutorial discretion, its actions cannot escape review." (citation omitted)). Rather, the FEC must provide a statement of reasons "to allow meaningful review." *Common Cause*, 842 F.2d at 449. There is no exception to that requirement where the reason given is prosecutorial discretion. *See, e.g.*, *Chaney*, 470 U.S. at 841 (Marshall, J., concurring) (noting FDA was "legally required to provide" a statement to justify nonenforcement, even if the statement was not reviewable on the merits); 5 U.S.C. § 555(e) (requiring even unreviewable actions be accompanied by a "brief statement of the grounds for denial").

Nothing in *CREW/CHGO* purported to alter this bedrock standard. Even if courts do not have judicially manageable standards to second-guess agency

determinations about "whether agency resources are best spent on this violation or another . . . [or] whether the particular enforcement action requested best fits the agency's overall policies," *CREW/CHGO*, 892 F.3d at 439 n.7 (quoting *Chaney*, 470 U.S. at 831–32), the Commission must still actually rest its decision on those determinations. Even where an agency enjoys discretion, it must provide a statement that "cogently explain[s] why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. Here, the invocation of prosecutorial discretion, tacked on as an afterthought to a lengthy legal opinion, meets none of these requirements.[7]

The district court erred in interpreting *CREW/CHGO* to impose a magic-words test that allows an agency to hide its judicially reviewable reasons for dismissal behind a terse invocation. *CREW/CHGO* did not confront that question, and a statement in a footnote should not be read to upend decades of administrative law.

[7] For example, the invocation does not explain why New Models's purported cessation of business in 2015 blocked relief in the form of contemporaneous disclosure. *See, e.g.*, Conciliation Agreement ¶VI.3, MUR 6538R, (Aug. 28, 2019), https://www.fec.gov/files/legal/murs/6538R/19044477418.pdf (requiring former president of defunct group to disclose past contributors).

III. If *CREW/CHGO* Applies, It Conflicts With Precedent And is Not Binding

For the reasons stated, the district court erred in finding *CREW/CHGO* applied here. Nonetheless, *CREW/CHGO* is "not binding" even where it does apply because its "holding conflicts with . . . the Supreme Court's decision in [*Akins*], 524 U.S. 11 [ ]; and with [this Court's] decisions in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); [*DCCC*], 831 F.2d 131 [ ], and *Orloski*, 795 F.2d 156." *CREW*, 923 F.3d at 1145 (Pillard, J., dissenting) (citing *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011)). Unlike this prior authority, *CREW/CHGO* "conflicts with the [FECA's] terms, structure, and purpose," *id.* at 1145 (Pillard, J., dissenting), misreads the case on which its analysis rests, *Chaney*, 470 U.S. 821, and affords unbridled discretion that "itself raises First Amendment concerns," *Akins*, 101 F.3d at 744. Accordingly, if the Court finds *CREW/CHGO* does apply here, CREW respectfully requests the Court recognize *CREW/CHGO*'s conflict with prior authority, the statute, and the Constitution, and declare *CREW/CHGO* is non-binding in this and all future cases.

A. Supreme Court and Prior Circuit Authority Require Judicial Review of Partisan Discretionary Dismissals

CREW/CHGO held that a partisan bloc of the Commission could not only block FEC enforcement, but also block judicial review and private suit by plaintiffs, merely based on the partisan bloc's unwillingness to enforce the law.

The decision, however, conflicts with the Supreme Court's recognition in *Akins* that the agency's prosecutorial discretion could not block a plaintiff from challenging legal error. *See* 524 U.S at 25. Further, it conflicts with this Court's prior precedents which held that the FEC's prosecutorial discretion was reviewable, *DCCC*, 812 F.2d at 1133–34; that a dismissal based on the agency's "unwillingness" to proceed was contrary to law, *Chamber*, 69 F.3d at 603; and that before proceeding to any discretionary review, courts must first assure themselves the FEC "permissib[ly] interpre[ted] . . . the statue," *Orlsoki*, 795 F.2d at 161. As each of these precedents predates *CREW/CHGO* and compels review here, notwithstanding any invocation of prosecutorial discretion, the district court erred in following *CREW/CHGO*.[8]

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 *Chaney*'s presumption against such review. *Akins*, 524 U.S. at 26. Unlike the statutes that *Chaney* found do not provide for review of agency nonenforcement, the FECA expressly includes "an unusual statutory

[8] Although the en banc court declined to review the panel decision in *CREW/CHGO* for inconsistency with this prior precedence, "deny[ing] rehearing en banc does not necessarily connote agreement with the decision as rendered," *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 129 (D.C. Cir. 1977) (en banc) (Leventhal, J., concurring), particularly where, as here, every judge who wrote—both concurring and dissenting from denial of en banc review—expressed disagreement with the panel decision. *See generally CREW*, 923 F.3d 1141.

provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings." *Akins*, 101 F.3d at 734. Rejecting the FEC's argument that the dismissal below was based on the agency's discretion and was thus unreviewable, Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8, the Supreme Court held that plaintiffs could seek review of even a "discretionary agency action" to obtain correction of any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25.[9]

In *DCCC*, this Court similarly recognized that discretionary dismissals—particularly those resulting from partisan splits of the Commission—are subject to judicial review. 812 F.2d at 1133–34. Rejecting the FEC's suggestion that a split was an unreviewable exercise of prosecutorial discretion, the Court recognized that "a 6-0 decision not to initiate an enforcement action presumably would be reviewable under the words of § [30109](a)(8)(C), although a unanimous vote might represent a firmer exercise of prosecutorial discretion than a 3-2-1 division." *Id.* The Court "resist[ed] confining the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits," rather holding "judicial

[9] The *CREW/CHGO* majority attempted to sidestep *Akins* by limiting its facts to a case that considered a dismissal "based entirely on [the FEC's] interpretation of the statute." *CREW/CHGO*, 892 F.3d at 441 n.11. Nevertheless, the decision also fails on its own interpretation of *Akins*, as the Court found plaintiffs' injury was redressable notwithstanding any invocation of discretion. *See CREW*, 923 F.3d at 1146 (Pillard, J., dissenting).

intervention serves as a necessary check" where the agency was "unable or *unwilling* to apply 'settled law to clear facts.'" *Id.* at 1134, 1135 n.5 (emphasis added).[10]

Similarly, this Court held in *Chamber* that a dismissal based on the FEC's "unwillingness" to proceed was not only subject to judicial review, but it was also an "easy" case for reversal. 69 F.3d at 603. This Court said "it would be easy to establish that such agency action was contrary to law" because "the Commission's refusal to enforce would be based not on a dispute over the meaning of the applicability of the rule's clear terms." *Id.* In *Chamber*, when two groups sought judicial review of an FEC regulation, the FEC challenged the plaintiffs' standing because three commissioners had already committed to exercising their discretion to block enforcement. *Id.* This Court found standing despite this discretionary commitment to nonenforcement, recognizing that the FECA "is unusual in that it permits a private party to challenge the FEC's decision not to enforce" and thus enforcement is not left to the discretionary choice of the commissioners. *Id.*[11]

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[10] *CREW/CHGO* ignored this authority, likely because the FEC did not dispute that its discretionary dismissals were in fact subject to judicial review. *CREW*, 923 F.3d at 1143 (Pillard, J., dissenting).

[11] Though related only to standing and not the merits, the conclusion that the FEC could not prevent enforcement through its discretionary enforcement choice was "necessary to [the opinion's] result" and thus part of its holding. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 67 (1996). If the commissioners' decision was indeed unreviewable, as *CREW/CHGO* held, then the plaintiffs faced no realistic threat of enforcement and would not have had standing.

Rather, it found that if the plaintiffs later violated the challenged regulation, a complainant could seek judicial review of the controlling bloc's discretionary dismissal of a complaint against the plaintiffs and "eas[ily]" secure judicial reversal because the agency's "unwillingness" to enforce was per se "contrary to law." *Id.* The complainant would either obtain Commission enforcement or else be permitted to bring its own suit against the plaintiffs. *Id.* Therefore "even without a Commission enforcement decision, [plaintiffs] [were] subject to litigation challenging . . . their actions if contrary to the Commission's rule." *Id.*[12] In sum, *Chamber* recognized the Commission was "obligat[ed] to pass on the merits of a complaint" because the FECA recognized that a valid complaint may either be pursued by the agency or by the complainants. *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting).

Finally, in *Orloski*, this Court recognized that all FEC dismissals are subject to review to determine whether they are contrary to law. 795 F.2d at 161. *Orloski* recognized dismissals could be contrary to law *either* because they contained legal error *or* because they were otherwise arbitrary, capricious, or an abuse of discretion. *Id.* Indeed, it recognized that the latter review was only appropriate where a court confirmed that the dismissal rested on "permissible interpretation[s] of the statute." *Id.* In other words, *Orloski* requires the FEC to show no legal error

[12] As with *DCCC*, *CREW/CHGO* ignored this authority.

in the controlling commissioners' analysis before a court moves to more deferential review.

CREW/CHGO is wholly inconsistent with *Akins*, *DCCC*, *Chamber*, and *Orloski*. Contrary to *Akins*'s command that *Chaney* was "explicitly" inapplicable and that plaintiffs may obtain correction of legal error contained in discretionary FEC actions, *CREW/CHGO* relied on *Chaney* to ignore the FEC's legal error in dismissal and to render the FEC's actions "unreviewable." *CREW/CHGO*, 892 F.3d at 438, 439 (holding *Chaney* "controls this case"). Contrary to *DCCC*'s holding that three commissioners' exercise of prosecutorial discretion was subject to judicial review, *CREW/CHGO* rendered the dismissal entirely beyond judicial review. *Id.* at 438. Contrary to *Chamber*'s command that dismissals of complaints "based not on a dispute over the meaning of the applicability of the rule's clear terms" but solely on the Commission's "unwillingness to enforce" are *per se* contrary to law, 69 F.3d at 603, *CREW/CHGO* treats such dismissals as above the law. Finally, contrary to *Orloski*'s command to only proceed to a discretionary "abuse of discretion" review after a court has confirmed the dismissal was based entirely on "permissible interpretation[s] of the [law]," 795 F.2d at 115, *CREW/CHGO* renders the partisan bloc's interpretations beyond judicial review. "[W]hen a decision of one panel is inconsistent with the decision of [the Supreme Court or] a prior panel," as

CREW/CHGO is, "the norm is the later decision, being in violation of that fixed law, cannot prevail." *Jackson*, 648 F.3d at 854.

CREW/CHGO conflicts with binding Supreme Court and Circuit precedent. This Court is bound to follow the precedent of the Supreme Court and the prior decisions of this Circuit. As such, the Court should declare *CREW/CHGO* is in conflict and thus will not be followed here, was erroneously followed below, and is not binding on any future court.

B. *CREW/CHGO* Conflicts with the FECA

As the above authority shows, Congress created both a significant check against partisan abuse of the FEC and significant safeguards against partisan gridlock by permitting judicial review of nonenforcement and civil suits where the FEC is disinclined to proceed with a meritorious complaint. *CREW/CHGO*, however, conflicts with that structure. First, it empowers a partisan bloc of commissioners to veto enforcement by either the agency or civil plaintiffs, upending Congress's requirement of bipartisan consent for any FEC decision. Second, *CREW/CHGO* nullifies the citizen suit provision by rendering the prerequisite for exhaustion—a judicial finding the dismissal was contrary to law—impossible.

1. *CREW/CHGO* Upends the FEC's Bipartisan Structure

The FECA "requires that all [enforcement] actions by the Commission occur on a bipartisan basis." *CREW*, 923 F.3d at 1142 (Griffith, J., concurring). The statute provides that FEC enforcement actions require the consent of four commissioners, while prohibiting any more than three commissioners from sharing a political party. 52 U.S.C. § 30106(a)(1), (c). Bipartisan agreement is thus necessary for decisions to enforce, and for decisions not to enforce. *See id.* at § 30106(c) ("*All* decisions of the Commission . . . shall be made by a majority vote" and "the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take *any* action" over enforcement (emphasis added)). *CREW/CHGO* upends this structure, instead allowing a partisan bloc of three commissioners (or fewer in the event of an understaffed Commission) to veto any enforcement action.

The FECA requires bipartisan agreement by the FEC for any enforcement action, including a dismissal brought about by a partisan deadlock. Where four votes are unavailable for any option, *nothing* happens—neither an investigation nor a dismissal—until a bipartisan coalition of four commissioners can come to an agreement. The FECA does not automatically dismiss cases that do not enjoy four votes to proceed. *See* 52 U.S.C. § 30106(c). Where there is a partisan deadlock on the merits that prevents any action and the declining commissioners remain

intransigent, one commissioner from the other party may acquiesce in dismissal in order to submit the partisan bloc's idiosyncratic interpretations of law to judicial review.[13] In that case, the only question which enjoys the bipartisan support of four commissioners, and thus the only position adopted by the agency, is whether the blocking commissioners' legal and factual determinations are correct.[14] The personal belief of three commissioners that resources are better spent elsewhere (or not spent at all) or that there are other agency priorities (or none at all) is simply irrelevant: the FECA does not empower this partisan minority bloc to speak on

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[13] Notably, this is not necessary where there is a partisan split on the prudence of moving forward with an investigation. If four commissioners agree a complaint raises a reason to believe a violation may have occurred, the FEC must investigate, even if three commissioners would rather not for prudential reasons. *See* 52 U.S.C. § 30109(a)(2).

[14] For this reason, *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000), erred in concluding an analysis of three commissioners could ever deserve deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Three commissioners may never speak for the Commission and a statement adopted by three commissioners never bears force of law, *Common Cause*, 842 F.2d at 449 n.32, a prerequisite for *Chevron* deference, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (deference only to "agency's 'authoritative' or 'official position'"); *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (*Chevron* unavailable when authority to make rules with "force of law . . . was not invoked"); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* applies only to statements with "force of law" with "binding" effect); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) (lack of statement's binding effect on third parties "conclusively confirms" deference unavailable); Daniel Tokaji, Beyond Repair: FEC Reform and Deadlock Deference 3 (Mar. 28, 2018), https://bit.ly/2MCDZ88 (FEC deadlocks do not deserve *Chevron* deference). In remanding this action to the court for review, this Court should clarify that *In re Sealed Case* is no longer good law and that courts owe no deference to interpretations endorsed by fewer than four FEC commissioners.

behalf of the agency.[15] The only bipartisan position enjoying four votes is the decision to dismiss because of a disagreement on the law and facts that prevents further agency action.

CREW/CHGO ignores this fact, and instead treats a partisan bloc of commissioners as if they are the entire Commission who may freely direct the agency without concurrence from their colleagues across the aisle. This risks the possibility that "any partisan, non-majority bloc of the Commission can indefinitely avoid developing law." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting). Worse, it gives that bloc "unreviewable" authority to interpret the FECA in ways that do not enjoy bipartisan support and are clearly contrary to law. *CREW/CHGO*, 892 F.3d at 438. It gives a partisan bloc "carte blanche to avoid review by announcing new interpretations of statutes only in context of decisions not to take enforcement action," and then immunize those interpretations from judicial review by uttering the magic words of prosecutorial discretion. *Int'l Union, Union Auto*, 783 F.2d at 246; *see also* Weintraub Statement 2.[16] Regulated groups

[15] Where four or more commissioners agree to dismiss on the basis of prosecutorial discretion, these concerns are not present. Nonetheless, for the reasons addressed below and as held in *Chamber*, the FECA still contemplates that citizen suits should be permitted, and the dismissal found contrary to law. This case, however, does not raise that specific situation.

[16] *See, e.g.*, *Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen* 7, MUR 7135 (Trump for President) (Sept. 6, 2018), https://www.fec.gov/files/legal/murs/7135/7135_2.pdf (interpreting "reason to believe" standard, then summarily stating "[f]or these reasons, *and in exercise of*

then know they can evade legal enforcement for actions that, while prohibited by law, are permitted by the partisan bloc of commissioners, secure in their belief that a court will never be able to review those determinations.

"Giving a non-majority of the [c]ommissioners enforcement discretion removes an institutional check on political deadlock that Congress wrote into FECA." *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting). "Non-majority discretion to block action is fatal to FECA if that enforcement discretion is—as [*CREW/CHGO*] would have it—both judicially unreviewable, and effective in shielding all other grounds from review." *Id.* It is a "superpower . . . to kill any FEC enforcement matter, wholly immune from judicial review." *Id.* Indeed it is a superpower in use, as the partisan bloc have cited prosecutorial discretion in every statement of reasons providing their interpretation of the political committee rules since *CREW/CHGO*.[17] It is a power Congress expressly denied, however, and *CREW/CHGO* erred in providing it.

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our prosecutorial discretion, we voted against finding reason to believe and to close the file" (emphasis added)).

[17] *See* JA133; *Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'r Caroline C. Hunter* 19, MUR 6956 (Crossroads GPS) (May 13, 2019) https://www.fec.gov/files/legal/murs/6596/6596_2.pdf; *Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen* 8, MUR6969 (MMWP12 LLC), MURs 7031 & 7034 (Children of Israel) (Sept. 13, 2018), https://eqs.fec.gov/eqsdocsMUR/6969_2.pdf.

2. *CREW/CHGO* Nullifies the Statutory Citizen Suit Provision

CREW/CHGO conflicts with the FECA's structure in another way: it renders the FECA's citizen suit provision superfluous. The FECA not only permits complainants to sue the FEC when it fails to enforce, but it also gives complainants a private right of action to seek a direct judicial remedy against the violator. 52 U.S.C. § 30109(a)(8)(C). Under the FECA, the FEC plays an important gatekeeping role to guard against frivolous complaints. *See id.* Yet the FECA also recognizes the concrete interest of private individuals and the vital importance of enforcement. So, it permits complainants to seek a civil remedy where they raise "plausible claims" and the FEC declines enforcement. *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting); *see also CREW v. AAN*, No. 18-cv-945, 2019 WL 4750248 (D.D.C. Sept. 30, 2019).

By creating a private right of action and not leaving enforcement solely to a government agency, Congress recognized that campaign finance law not only serves the common interest in guarding against a corrupt government, but also equally serves particular and concrete interests of individual persons. Campaign finance laws guarantee disclosure, providing each voter "with information as to where political campaign money comes from . . . in order to aid th[at] vote[r] in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66–67 (internal quotation marks omitted). This information allows each voter to "place each

candidate in the political spectrum more precisely," and "alert[s] the voter to the interests to which a candidate is most likely to be responsive." *Id.*; *see also Akins*, 524 U.S. at 21 (disclosure also serves all persons' First Amendment interests in sharing information with "others to whom they would communicate it"). The information also allows all persons "to detect any postelection special favors that may be given in return" for political support. *Buckley*, 424 U.S. at 67; *see also Citizens United*, 558 U.S. at 370 (information allows persons to see if "elected officials are 'in the pocket' of so-called moneyed interests").

In recognition of both the collective harm to the nation and the concrete and particularized harm inflicted on individuals by violations of campaign finance law, Congress split civil enforcement between a government agency and private individuals. *See* 52 U.S.C. § 30107(e) (providing FEC's "exclusive" civil enforcement power "[e]xcept" for citizen suits "in section 30109(a)(8)). In so doing, Congress was adopting "a feature of many modern legislative programs." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990); *see also, e.g.*, 15 U.S.C. §§ 15, 15f (antitrust laws); 16 U.S.C. § 1540(g) (Endangered Species Act); 42 U.S.C. § 2000e-5(f) (anti-discrimination employment law); 42 U.S.C. § 4305 (energy statute); 42 U.S.C. § 7604 (air pollution statute). The FECA presents a similar duality in enforcement, although with a significant gatekeeping role for the FEC appropriate in light of the potential First Amendment interests involved.

Before a private party can bring its own suit, it must file a complaint with the FEC. 52 U.S.C. § 30109(a). If the FEC chooses to enforce itself, the complainant can do nothing more. If the FEC chooses not to enforce, however, then the complainant can seek judicial review of the FEC's actions. If a court agrees with the FEC that the complaint lacked merit, then the court affirms the FEC's judgment of dismissal and the complainant cannot then file a private suit. *Id.* If, however, the court finds the complaint had merit and the Commission committed legal error in its analysis, or acted unreasonably in its consideration of the facts, then a court declares the FEC has acted "contrary to law" and remands to the FEC for reconsideration. 52 U.S.C. § 30109(a)(8)(C). The FEC then faces a choice: it can (1) choose to "conform" with the court's declaration and proceed with enforcement or a new lawful dismissal, or (2) choose not to conform, and thus step aside and allow the private plaintiff to file suit against the subject of the complaint "to remedy the violation." *Id.* So structured, the FECA creates a sensible gatekeeping role for the FEC—one that permits "plausible claims" to proceed while protecting against partisan "enforcement-shirking." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting).

CREW/CHGO, however, renders the possibility of a contrary to law judgment essentially impossible by giving a partisan bloc an unreviewable veto over private enforcement. That renders private suits impossible in the exact

situation private suits are most sensible: where the FEC recognizes a complaint has merit but still declines enforcement simply as a matter of its own discretion. Indeed, it would be absurd to interpret the FECA to condition a private plaintiff's suit entirely on the FEC's decisions about "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 requests best fits the agencies overall priorities," or "whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831. None of those factors are implicated when a private person—rather than the FEC—brings suit. "If [the] failure to [enforce] results from the desire of the [commissioners] to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense." *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001).

Recognizing the Commission's discretionary decision to decline enforcement is "contrary to [the] law" of the FECA, 52 U.S.C. § 30109(a)(8)(C), would not risk opening flood gates of private litigation or otherwise remove the FEC from its intended gatekeeping role. Rather, it would permit individuals to bring citizen suits when they allege "plausible claims," *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting), even when the FEC believes its resources are best spent elsewhere. *CREW/CHGO*, however, blocks these suits when they are most useful and, by making judicial review contingent on the voluntary choice of a partisan

bloc of commissioners, impermissibly renders the FECA's citizen suit provision "superfluous, void, [and] insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

C. *CREW/CHGO* Misreads *Chaney*

Binding precedent and statutory text thus make clear that FEC dismissals, even discretionary dismissals, are in fact reviewable. The divided circuit panel in *CREW/CHGO*, however, departed from this authority because it thought *Chaney* compelled it to immunize FEC legal error from judicial review whenever commissioners voluntarily "plac[e] their judgment" on prosecutorial discretion. *See CREW/CHGO*, 892 F.3d at 439. The panel read *Chaney* to provide a discretionary partisan veto on judicial review. That is not, however, what *Chaney* provides.

In *Chaney*, the Supreme Court held that the APA and another statute did not provide for judicial review of the Food and Drug Administration's decision to decline prohibiting states from using drugs in lethal injections. 470 U.S. at 836–37. In explaining its decision to treat, as a category, all nonenforcement actions as unreviewable under these statutes by congressional design, the Court recognized that nonenforcement actions often involve "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831.

Accordingly, *Chaney* properly read does not apply here for at least four reasons: (1) it conditions review on actions, not reasons; (2) it did not involve a statue like the FECA in which Congress explicitly provided for review; (3) it dealt with statutes that provided courts no law to apply; and (4) it concerned agency action that was solely prosecutorial rather than adjudicative.

1. Agency Reasons Do Not Render Agency Action Unreviewable

While *Chaney* held an agency's nonenforcement actions are, as a category, presumptively unreviewable, it did not render otherwise reviewable agency action unreviewable based on the agency's expressed justification. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987) (the agency's "formal action, rather than its discussion," was "dispositive" on the availability of review). Rather, *Chaney* left in place the law that "judicial review of a final agency action" is a matter for the decision "of Congress," *Abbott Labs v. Garder*, 387 U.S. 136, 140 (1967), not a matter the agency can voluntarily evade, *see Chaney* 470 U.S. at 837.[18] Even after *Chaney*, "if an agency justifies a reviewable action with a discretionary reason—as the blocking Commissioners purported to do here—the action itself does not thereby become unreviewable." *CREW*, 923 F.3d at 1148 (Pillard, J., dissenting).

[18] *See also, e.g., Assoc. of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 341–42 (D.C. Cir. 2002) (considering case where Congress explicitly stripped court's jurisdiction to review).

Accordingly, the reviewability of FEC dismissals does not depend on where commissioners "plac[e] their judgment." *Cf. CREW/CHGO*, 892 F.3d at 439. Rather, it depends on the statute and whether Congress "intend[ed] to alter [the] tradition" that nonenforcement decisions are "committed to agency discretion." *Chaney*, 470 U.S. at 832. *CREW/CHGO* thus erred in reading *Chaney* to place into the hands of the agency—and in fact a partisan minority bloc of commissioners—a choice that belongs only to Congress.

2. The FECA Expressly Provides for Judicial Review of FEC Dismissals

In the FECA, unlike in the two statutes considered in *Chaney*, Congress "explicitly" chose to alter the tradition and subject FEC nonenforcement to judicial review. *Akins* 524 U.S. at 26. *Chaney* therefore does not apply to review under the FECA.

As explained above, in *Akins*, the Supreme Court recognized *Chaney* has no application in cases like this. There, the FEC dismissed a complaint based in part on discretion and the FEC asserted *Chaney* therefore blocked review—an assertion the Court rejected. *Id*. *Akins* recognized that *Chaney* found "that agency enforcement decisions 'have traditionally been "committed to agency discretion"' and concluded that Congress did not intend to alter that tradition in enacting the APA." *Id.* (quoting *Chaney*, 470 U.S. at 832). By contrast, the Court held the

FECA "explicitly" showed Congress *did* intend to alter that tradition and provide for review of FEC dismissals, so it found *Chaney* inapposite. *Id.*

Chaney itself similarly recognized Congress can provide review for agency nonenforcement, distinguishing the statutes before it from another one the Court previously found compelled judicial review of nonenforcement and left no room for agency discretion. 470 U.S. at 833. *Chaney* found the two statutes before it lacked the mandatory enforcement language in the statute the Court considered in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), which provided the Secretary of Labor "*shall* investigate [a] complaint and, if he finds probable cause to believe that a violation occurred . . . *shall* . . . bring a civil action." *Chaney*, 470 U.S. at 833 (emphasis added). That language provided "sufficient standards to rebut the presumption of unreviewablility." *Id.* That language is also remarkably similar to the FECA's provisions stating that "[i]f the Commission . . . . determines . . . that it has reason to believe that a person has committed . . . a violation of this Act . . . , the Commission *shall* make an investigation of such alleged violation," 52 U.S.C. § 30109(a)(2) (emphasis added); and "*shall* attempt . . . to correct or prevent such violation" "[i]f the Commission determines . . . that there is probable cause," *id.* at § 30109(a)(4) (emphasis added). Just like the statute in *Dunlop*, and unlike the statutes in *Chaney*, the FECA rebuts the presumption of unreviewability.

CREW/CHGO waived this distinction away by focusing on a much later step in the proceedings—when, after an investigation, after a finding of probable cause, and after a failed attempt at conciliation, the Commission considers whether to file suit. 892 F.3d at 439. At that point, the statute switches from the mandatory to the permissive, providing the Commission "may . . . institute a civil action." 52 U.S.C. § 30109(a)(6)(A). Any discretion at that remote step has no relevance, however, to the proceedings at issue here where the FECA is clear—if there is reason to believe, the Commission "shall" investigate. 52 U.S.C. § 30109(a)(2). Nor is it correct to think this mandatory action is pointless if the Commission could simply choose not to sue at the end: the FECA provides discretion about one *means* of enforcement, but not the *fact* of enforcement. Rather, the FECA mandates that the Commission "*shall* attempt . . . to correct or prevent the violation involved." 52 U.S.C. § 30109(a)(4)(A)(i), (ii) (emphasis added). Even in a case where that attempt fails and the Commission chooses not to sue, proceeding to this point would be quite valuable to a complainant and the public. Even without a lawsuit, the complainant and public would learn the Commission, based on an investigation, found both reason to believe and probable cause to believe the respondent violated the law. 52 U.S.C. § 30109(a)(2), (4). In addition, disclosure of the agency's analysis and investigatory materials after the investigation ended would inform them about the facts and interpretations substantiating those

findings. 11 C.F.R. § 111.20; *cf. AFL-CIO v. FEC*, 333 F.3d 168, 174, 178 (D.C. Cir. 2003) (upholding agency's interpretation of 52 U.S.C. § 30109(12)(A) to not apply post-investigation; recognizing public interest in release of information that played "meaningful role [agency's] decisionmaking").

Indeed, *CREW/CHGO*'s argument proves too much. If the FECA's use of "may" at the civil litigation stage rendered the agency's nonenforcement unreviewable, then *no* FEC dismissal could be reviewed. The FEC's ultimate discretion about whether to bring a civil suit is present in every enforcement proceeding. If the FEC's discretion about filing suit renders its dismissals unreviewable, it does not matter whether the FEC rests dismissal "entirely on its interpretation of the statute," *CREW/CHGO*, 892 F.3d at 441 n.11, because it is the agency's "formal action, rather than its discussion, that is dispositive," *ICC*, 482 U.S. at 281. Yet courts have consistently recognized that FEC dismissals *are* subject to judicial review, notwithstanding the FECA's permissive use of "may" at the final stages of the proceedings. *See, e.g.*, *Akins*, 524 U.S. at 26; *DCCC*, 812 F.2d at 1133–34; *Chamber*, 69 F.3d at 603.

The FECA "explicitly" indicates *Chaney* is inapposite in cases like this. *Akins*, 524 U.S. at 26. Congress expressly provided for judicial review of FEC dismissals, and *CREW/CHGO* was wrong to overrule Congress on that point.

3. The FECA Provides the "Law to Apply"

Chaney concluded the two statutes before it provided courts with no "law to apply" to review nonenforcement, which often relies on matters "peculiarly within [the agency's] expertise." 470 U.S. at 831, 835. *CREW/CHGO* believed similar problems infected judicial review of the FEC's discretionary nonenforcement decisions, 892 F.3d at 440, yet it ignored the fact that the FECA "[s]upplies [l]aw to [a]pply," *id.* at 446 (Pillard, J., dissenting). First, the FECA supplies the "contrary to law" standard by which courts review commissioners' legal interpretations to decide whether they are "permissible." *Orloski*, 792 F.2d at 161. Second, even assuming that standard alone does not sufficiently constrain the agency's actions, as *CREW/CHGO* did, the FECA provides additional constraints. Under the Act, the Commission is forbidden from dismissing a properly filed complaint before an investigation unless it finds the complaint failed to meet the reason-to-believe threshold or, at least, the Act forbids the Commission from dismissing a complaint based on a reason to believe finding without providing a justification rationally connected to that merits determination. Accordingly, the FECA provides more than enough law to apply.

To start, the FECA explicitly states the law courts are to apply: whether a dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). A dismissal is "contrary to law" if it resulted from "an impermissible interpretation" of law.

Orloski, 792 F.2d at 161. That is a judicially manageable standard. *See id.* at 162–67; *Akins*, 101 F.3d at 740–44.

Notwithstanding *Orloski*, *CREW/CHGO* held the contrary to law standard was insufficient because Congress "never identifie[d] what 'law' it ha[d] in mind." 892 F.3d at 440. Accordingly, *CREW/CHGO* concluded that without a law prohibiting FEC dismissal that the FEC could contravene, there was no role for courts to play.

CREW/CHGO, however, ignored the very text of the FECA, which supplies that law. The FECA prohibits discretionary pre-investigation dismissals either in all cases or, at least, in cases where commissioners trigger dismissal by voting to find a complaint does not raise a reason to believe, as the Partisan Bloc did here.

Statutes like the FECA which condition agency enforcement on a merits determination "obligat[e] [the agency] to examine [the matters] and determine if they fall foul of the Act's dictates." *Shelley v. Brock*, 793 F.2d 1368, 1374 (D.C. Cir. 1986) (considering statute conditioning enforcement on "if" the agency "finds probable cause"). By conditioning an investigation only on the commissioners' determination about whether a complaint raises a reason to believe, 52 U.S.C. § 30109(a)(2), Congress ensured the Commission could not "shirk its responsibility to decide" whether a complaint states a plausible claim, *DCCC*, 831 F.2d at 1134; *see also Akins*, 524 U.S. at 16 (the FECA procedures "asks the FEC

to find [whether a respondent] . . . had violated the Act"); *Chamber*, 69 F.3d at 603 (FEC only permitted to dismiss based on "the meaning of the applicability of the rule's clear terms").[19] A commissioner's prudential assessment is irrelevant: as long as four commissioners agree there is reason to believe a violation may have occurred, the FEC "shall" investigate. 52 U.S.C. § 30109(a)(2). Any claim of discretion must be justified "by specific reference to the terms of the authority vested in [it] by the Act." *Shelley*, 793 F.2d at 1371.

For example, courts have recognized the NLRA requires the NLRB to decide every complaint brought to it on the merits, *see Int'l Union, UAW v. NLRB*, 427 F.2d 1330, 1332 (6th Cir. 1970) ("We find no authorization in the statute for the Board's abstention from its duty to decide complaints properly brought before it."); *see also Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983), at least where that failure is not "harmless," *Fortuna Enter, LP v. NLRB*, 665 F.3d 1295, 1304–05 (D.C. Cir. 2011). The NLRA, like the FECA, imposes an "[i]f . . . shall" condition on NLRB proceedings. *See* 29 U.S.C. § 160(c). Given Congress's intent to mimic NLRA enforcement process in the FECA, *see* FECA 1976 Legislative History 804 (House Committee Report) (describing the "essence not only of NLRA's administrative

[19] Whether or not the "the Commission must bring actions in court on every administrative complaint" it deems credible does not negate this duty. *Cf. CREW v. FEC*, 475 F.3d 337, 341 (D.C. Cir. 2007).

enforcement scheme, but of this Act's enforcement procedures as well"), it is clear the FECA similarly imposes on the Commission a "duty to decide complaints properly brought before it." *Int'l Union, UAW*, 427 F.2d at 1332.

The FECA, like the NLRA and like the statute at issue in *Shelley* and *Dunlop*, conditions agency action on a merits determination. In so doing, Congress provided "meaningful standards for defining the limits of [the FEC's] discretion," *Chaney*, 470 U.S. at 834. Under the FECA, the sole basis by which the FEC can decline proceeding with a properly filed complaint to an investigation is to render a lawful decision on the merits that a complaint fails to raise reason to believe. Any pre-investigation dismissal not premised on that lawful determination violates the FECA's command to investigate. It is "contrary to law." 52 U.S.C. § 30109(a)(8)(C).

Moreover, even assuming that discretionary pre-investigation dismissals may be lawful in some cases, the FECA still prohibits what occurred here: abusing the reason to believe determination to evade any need to secure four votes for discretionary dismissal.

As discussed above, any enforcement action by the FEC requires a bipartisan four-vote majority. That also applies to the FEC's claimed power to exercise prosecutorial discretion: it requires the affirmation of "at least four Commissioners." FEC, Statement of Policy, 72 Fed. Reg. 12,545, 12,545–46 (Mar.

16, 2007); *accord* FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (May 2012), http://fec.gov/em/respondent_guide.pdf. Here, even crediting the Partisan Bloc's terse reference to prosecutorial discretion, only two commissioners expressed any desire to exercise that discretion. JA134. If the two commissioners requested a vote to dismiss on prosecutorial discretion,[20] that vote would have failed and CREW's complaint would not have been lawfully dismissed. By voting that CREW's complaint failed to raise a reason to believe, however, they were able to block any further agency action without securing bipartisan agreement. JA101–02.[21]

Accordingly, it was the Partisan Bloc's vote on the merits that is the "reaso[n]" the FEC "depart[ed] from recommendations of the General Counsel." *Common Cause*, 842 F.2d at 438. It is that vote they must then explain. A "reason

[20] *Cf.* Certification, MUR 7213 (Labor United for Connecticut) (Aug. 7, 2018), https://eqs.fec.gov/eqsdocsMUR/18044453135.pdf (four votes to "[d]ismiss as a matter of prosecutorial discretion").

[21] While the Partisan Bloc's vote does not automatically result in dismissal, as dismissal also requires four votes, it nonetheless prevented further action and raised the possibility the matter would languish at the agency. *See* 52 U.S.C. § 30106(c) (four votes needed for "any action"); *see also, e.g.*, Certification, MURs 7014, 7017, 7019, and 7090 (DE First Holdings) (May 10, 2018), https://www.fec.gov/files/legal/murs/7014/18044443619.pdf (closing file); Certification MURs 7014, 7017, 7019, and 7090 (DE First Holdings) (Dec. 12, 2017), https://eqs.fec.gov/eqsdocsMUR/18044443619.pdf (deadlocking reason to believe vote 2-0). To prevent CREW's complaint from thereafter languishing at the agency, the two commissioners wishing to proceed here joined with the Partisan Bloc to dismiss, but one explained she did so because she wished to subject her colleagues' "legal mistake" to judicial review. *See* JA135–37.

to believe" exists, however, whenever "a complaint credibly alleges that a significant violation may have occurred." FEC, Statement of Policy, 72 Fed. Reg. at 12,545. In explaining their vote, therefore, the commissioners must supply "rational connection between the facts found and the choice made." *State Farm*, 462 U.S. at 43. Consideration of prudential matters like "the limited resources available" to the FEC therefore "is entirely inappropriate" in explaining a decision on the merits, *Shelley*, 793 F.2d at 1376. Those considerations simply have no rational connection to the Partisan Bloc's choice to find CREW's complaint failed to credibly allege New Models violated the law. The "age of the activity and the fact that [New Models] appears no longer active" in 2017 similarly has no rational connection to their decision to conclude New Models was "not a political committee" in 2012. JA104, JA133. A decision on the merits based on such considerations is simply contrary to law. *Chamber*, 69 F.3d at 603.

In short, the FECA provides judicially manageable standards for courts to apply in reviewing FEC dismissals. Under *Orloski*, a dismissal is "contrary to law" if it involves "impermissible interpretations" of law. 792 F.2d at 161. Even assuming that a plaintiff must show that FEC dismissal was not only premised on legal error, but that it was itself unlawful, the FECA still provides law for courts to apply. The FECA prohibits pre-investigation dismissals of properly filed complaints if they raise a reason to believe or, at least, prohibit commissioners

from justifying their reason to believe determination by pointing to discretionary concerns that lack any rational connection to the choice made. Unlike in *Chaney*, here there is law to apply.

4. The FEC Acts as an Adjudicator, Not a Prosecutor

Chaney also does not apply in situations like this because the FEC is not simply a prosecutor deciding whether to bring an enforcement proceeding. Rather, as explained above, the FEC is deciding whether a complainant has stated sufficient cause for either the agency or the complainant to proceed. "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). Where the decision "also purport[s] to cancel or release [private] parties' own private claims," however, "the Commission exercise[s] authority beyond that of a prosecutor and more akin to that of a court." *Id.* "By exercising dispositive authority, it correspondingly narrow[s] its discretion." *Id.*

The FECA not only places the FEC's prosecutorial determinations with the Commission, it also places initial adjudicatory authority over a private party's claims with the Commission as well. 52 U.S.C. § 30109(a)(8)(C). If the Commission lawfully decides a complaint lacks merit, it releases a respondent from the possibility of that private claim.

Where an agency is merely deciding whether to bring its own enforcement action, concerns such as its "whether agency resources are best spent on this violation or another," or "whether the particular enforcement action requests best fits the agencies overall priorities" are appropriate. *Chaney*, 470 U.S. at 83. Where the agency also adjudicates a private claim, however, those concerns have no "rational connection" to the choice made. *State Farm*, 462 U.S. at 247.

A court's decision that the FEC's dismissal is contrary to law, on the other hand, does not compel FEC enforcement. Rather, it merely impacts who "shall have primary responsibility for" enforcing campaign finance laws in this instance. *See Nat'l Wildlife Fed. v. EPA*, 980 F.2d 765, 773 n.3 (D.C. Cir. 1992). The FEC is then free to stand aside and permit private suit. 52 U.S.C. § 30109(a)(8)(C). Where judicial review would not result in an order compelling the agency to "remed[y] or sanctio[n] a particular statutory violation but instead determine who will have overall responsibility" to enforce in a particular instance, *Chaney* does not apply. *Nat'l Wildlife Fed.*, 980 F.2d at 773 n.3.

In sum, *CREW/CHGO* erred in reading *Chaney* to control this case. *Chaney* does not render an otherwise reviewable agency action unreviewable merely based on the reason given by the agency, it does not apply to the FECA, it does not apply where the statute provides law to apply, and it does not apply where the agency

adjudicates private claims. The Supreme Court's and this Circuit's prior precedent did not make these mistakes and must take precedence over *CREW/CHGO*.

D. *CREW/CHGO*'s "Unreviewable" Discretion Raises Significant First Amendment Concerns

Finally, as this Court recognized en banc, affording the Commission enforcement discretion "raises First Amendment concerns." *Akins*, 101 F.3d at 744. Those concerns are at their highest where that discretion is entirely "unreviewable." *CREW/CHGO*, 892 F.3d at 438.

"[E]very action the FEC takes implicates fundamental rights." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). Not only do its decisions implicate First Amendment rights to speak by deciding when the FECA applies, but it also makes equally constitutionally sensitive decisions affecting individuals' rights "in receiving information" by deciding what will be disclosed. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Ca.*, 475 U.S. 1, 8 (1986) (recognizing First Amendment protects both rights to speak and rights to receive); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) (recognizing "First Amendment rights of the public to know the identity of those who seek to influence their vote"). In deciding whether to apply the FECA to a respondent like New Models, the Commission decides whether others will receive information to which Congress entitled them—if it chooses not to enforce, it censors their receipt of that information. *See Citizens United*, 558 U.S. at 333, 341 (finding

unconstitutional FEC's claimed authority that could permit a "ban on books" or "pamphlets," stating "voters must be free to obtain information").

Given the constitutionally unique position of the FEC—impacting both speakers' and listeners' rights with its enforcement decisions—enforcement discretion raises significant constitutional concerns. The "liberty to communicate [cannot] . . . depen[d] upon the exercise of [a government official's] discretion." *Schneider v. New Jersey, Town of Irvington*, 308 U.S. 147, 164 (1939). Accordingly, the Constitution denies government officials "unbridled discretion" to decide if and when to apply rules that impact First Amendment rights—either a speaker's or a listener's rights. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *see also Lamont v. Postmaster Gen. of the United States*, 381 U.S. 301, 305 (1965) (official's discretion over plaintiff's receipt of mail violated First Amendment even if the government was not required to establish mail service in the first place).[22]

CREW/CHGO, however, confers just such unbridled discretion on the FEC, and indeed on a partisan bloc of commissioners. Under the divided D.C. Circuit panel decision, commissioners are free to pick and choose enforcement on a

[22] It does not matter that CREW enjoys the right to this information as the result of Congress's decision to enact the FECA: the First Amendment limits the government's discretion over speech "even when the limited public forum is one of its own creation." *Rosenberg v. Rector and Visitors of the Uni. of Va.*, 515 U.S. 819, 829 (1995).

whim—censoring a complainant's access to speech that Congress has constitutionally compelled—and to do so without any judicial oversight or legal guidance. This raises a very significant risk that discretion can and will be used to reward those (either respondents or complainants) with viewpoints supported by the blocking commissioners, and to impede those with viewpoints deemed disagreeable.[23] Of course, the First Amendment deprives officials of this discretion even in the absence of evidence of any viewpoint discrimination—the Constitution prohibits unbridled discretion in a First Amendment sensitive area regardless of how it is used. *See, e.g.*, *Kaahumanu v. Hawaii*. 682 F.3d 789, 806 (9th Cir. 2012); *Child Evangelism Fellowship of Md. Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002).

Given the "serious constitutional problems" inherent in interpreting the FECA to confer unreviewable enforcement discretion on the FEC, the Court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf*

[23] At least one FEC commissioner has weighed the viewpoints of complainants and respondents in the context of enforcement. In a discussion about the Commission's discretion to delay consideration of enforcement matters, one commissioner defended that discretion by citing his analysis of the viewpoints of parties before the Commission and stating "discretion is important and has a partisan impact." FEC, Minutes of May 21, 2015 Meeting, https://www.fec.gov/resources/updates/agendas/2015/transcripts/Open_Meeting_Captions_2015_05_21.txt.

Coast Bldg. and Const. Trades Council, 485 U.S. 568, 575 (1988). For reasons stated above, it is far from the plain intent of Congress to prohibit judicial review of nonenforcement actions—in fact, it is contrary to the very intent expressed in the statute. This Court sitting en banc recognized Congress's intent to afford fulsome judicial review in finding that "First Amendment concerns" counseled against affording the FEC any discretion that might shortchange that review. *Akins*, 101 F.3d at 744. *CREW/CHGO* never considered the serious constitutional problems it was creating in affording unbridled enforcement discretion to the FEC. This Court should avoid those problems by reinstating judicial review for discretionary dismissals of the FEC and bridling the FEC's discretion by directing review to the only issue that matters: the merit of the complaint.

CONCLUSION

The district court below granted summary judgment to the FEC here based entirely on its conclusion that *CREW/CHGO* was "directly on point here" and was "binding Circuit law." JA152–53 The district court erred in both those judgments. *CREW/CHGO* concerned a statement of reasons that justified dismissal squarely on the basis of prosecutorial discretion—not a case like this one where there was extensive legal analysis leading to a firm conclusion on the merits, with prosecutorial discretion merely dropped in as "magic words" in an attempt to immunize the decision from review. The district court also erred, however, in

concluding *CREW/CHGO* was binding case law as it conflicts with prior precedent—a conflict that arises from *CREW/CHGO*'s disregard for the FECA, its misreading of *Chaney*, and its disinterest in the Constitution. Plaintiffs respectfully request this Court reverse the decision below.

Dated: October 22, 2019.

Respectfully submitted,

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Counsel for Appellants

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I hereby certify that on October 22, 2019, I electronically filed the Brief of Appellant and Joint Appendix with the Clerk of Court for the United States Court of Appeals or the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

I further certify that I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

/s/ Stuart McPhail
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ADDENDUM

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52 U.S.C. § 30109. 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, 2018.

(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), subpenas 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.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) against any person who has failed to file a report required under section 30104(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 30104(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 30111(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.

(C) In the case of a knowing and willful violation of section 30124 of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.