RECORD NO. 19-5161

ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 12, 2020

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

REPLY BRIEF OF APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington and Noah Bookbinder
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix

SUMMARY OF THE ARGUMENT

As CREW demonstrated in its opening brief, the district court erroneously applied *CREW/CHGO* here to cut off judicial review because two commissioners (the "Partisan Bloc") invoked the "magic words" of prosecutorial discretion. In opposition, the FEC fails to cure that error. The FEC, like the district court, relies on dicta in *CREW/CHGO* to extend it beyond its holding over dismissals resting entirely on prosecutorial discretion, to apply here where there are over thirty pages of "robust" legal analysis and a firm resolution of the merits, with "prosecutorial discretion" merely "drop[ed]" in. *CREW v. FEC*, 923 F.3d 1141, 1148–49 (D.C. Cir. 2019) (en banc) (Pillard, J., dissenting). Binding precedent, however, compels review here. Further, if *CREW/CHGO* does apply here, it contravenes earlier binding authority compelling review of FEC dismissals, guts Congress's carefully crafted statutory scheme which, among other things, requires at least a bipartisan agreement of four commissioners to exercise prosecutorial discretion, and runs afoul of the Constitution.

That alone is enough to reverse the district court. The FEC also suggests, however, that this Court should affirm on the merits, despite the fact the district court below concluded *CREW/CHGO* prohibited consideration of the merits. While the prudent course would be to remand for the lower court to consider the

merits in the first instance, even the brief discussion permitted in a reply is enough to refute the FEC's arguments.

ARGUMENT

As demonstrated in CREW's opening brief, the district court erred in finding *CREW/CHGO* was "binding" and "directly on point" here. JA152–53. In opposition, the FEC fails to justify the district court's extension of *CREW/CGHO* beyond its holding to a case, like this one, which the panel addressed only in dicta. The FEC further fails to show that, if *CREW/CHGO* does apply here, that it is consistent with prior precedent, the statute, or the Constitution. Finally, while remand is the most prudent course, a short discussion is enough to refute the FEC's truncated briefing on the merits.

I. The District Court Erred in Extending *CREW/CHGO* To Apply Here

In its opposition, the FEC understandably abandons as indefensible the district court's interpretation of *CREW/CHGO*: that the Partisan Bloc could evade review simply by invoking the "magic words" of prosecutorial discretion. *Compare* JA140 *with* FEC Br. 17, 20. Nonetheless, the FEC continues to err in asserting dicta in *CREW/CHGO* bound the district court below.

The dismissal confronted in *CREW/CHGO* was "squarely" based on prosecutorial discretion. *CREW v. FEC* (*CREW/CHGO*), 892 F.3d 434, 439 (D.C. Cir. 2018). Indeed, the majority found the explanation for the dismissal did not

"reac[h] the merits" at all, *id.* at 441; *see also id.* at 443 (Pillard, J. dissenting) (noting majority interpreted dismissal to not reach "any legal decision"); *id.* at 444 (quoting dismissal as "not definitively resolv[ing]" merits). Thus, the holding that is "determinative of the result," *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992), is the panel's conclusion that a dismissal *solely* predicated on prosecution discretion and which involves no reviewable legal analysis is unreviewable, *CREW/CHGO*, 892 F.3d at 438, 441. There is no dispute that that does not describe the dismissal here which clearly involved "thirty-two-page[s]" of "robust interpretation of statutory text and case law" which conclusively resolved the merits. JA 148, JA153–54.[1]

To bridge this divide, both the FEC and district court rely on the divided panel's discussion of a case that was a mere hypothetical: a dismissal that involved both reviewable legal analysis and claims of discretion. *See CREW/CHGO*, 892 F.3d at 441 n.11. The panel's discussion of hypothetical future cases not before it, however, is the definition of advisory opinion and dicta. *Doe v. Fed. Democratic*

[1] The FEC's post-hoc attempts to supplement the Partisan Bloc's terse discussion, *see* FEC Br. 16–20, still fail to provide a rational explanation. For example, while the FEC spends more space on a statute of limitations's effect than the whole of the partisan bloc's discretionary "analysis," FEC Br. 17, it still fails to explain that statute's relevance since it does not apply to CREW's claims against New Models, *see CREW v. FEC*, 236 F. Supp. 3d 378, 391 (D.D.C. 2017) (statute of limitations did not apply to "remaining political-committee claim"); *see also CREW v. AAN*, No. 18-cv-945 (CRC), 2019 WL 4750248, at *15 (D.D.C. Sept. 30, 2019) (finding CREW's claim accrues *after* FEC's failure to conform).

Republic of Ethiopia, 851 F.3d 7, 10 (D.C. Cir. 2017). Accordingly, it did not bind the court below.

Nor, moreover, is that dicta persuasive, as the extension of *CREW/CHGO* to this case ran afoul of decades of actually binding prior precedent. As discussed below, the dicta contravenes authority finding FEC dismissals are reviewable notwithstanding any invocation of prosecutorial discretion. *See infra* Part II.A. Moreover, it contradicts the law that a reviewable agency action "predicated on a combination of both statutory and discretion grounds" remains reviewable. *UAW v. Brock*, 783 F.2d 237, 245 n.9, 246 (D.C. Cir. 1986). Contrary to the FEC's assertion, FEC Br. 24, this "part" of *UAW* was *not* overruled in *ICC v. Bro. of Locomotive Engineers*, 482 U.S. 270 (1987). Rather, *ICC* found an "unreviewable" action remained unreviewable even if the agency "discussed the merits … at length." *Id.* at 277, 280. There, as here, "it is the Commission's formal action, rather than its discussion, that is dispositive." *Id.* at 281; *see also Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). The FEC concedes, as it must, that its dismissals are reviewable. FEC Br. 20. That concession is "dispositive," and by rendering review dependent not on the FEC's "formal action" but its "discussion," *ICC*, 482 U.S. at 281, *CREW/CHGO*'s dicta flatly contradicts that precedent.

Nor would review be academic, because courts "cannot know that the FEC would have exercised its prosecutorial discretion" with a correct view of the law. *CREW*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *FEC v. Akins*, 524 U.S. 11, 25 (1998)). The FEC suggests otherwise, FEC Br. 22, but ignores the simple fact that on remand, the law requires at least *four* commissioners to agree to dismiss a complaint to "conform" with any declaration. *See* 52 U.S.C. §§ 30106(c); 30109(a)(8)(C).[2] If the Partisan Bloc again attempts to stymie action by deadlocking the Commission, they will simply run out the statutory clock to conform, *id.*, which results in CREW's citizen suit accruing. Thus, the FEC would need to show not only that the Partisan Bloc would stick to its discretionary assessment on remand, but prove that the *other* commissioners would join them—an unlikely reaction to a court's finding the Partisan Bloc's legal analysis was erroneous.

In sum, *CREW/CHGO*'s holding does not apply beyond dismissals exclusively based on prosecutorial discretion, and its dicta should not be followed to expand that decision into realms that put it in (further) conflict with precedent. The FEC fails to remedy the district court's error in relying on *CREW/CHGO*'s dicta to render the legal analysis below entirely unreviewable.

[2] As stated below, the FECA also required at least four votes to exercise prosecutorial discretion in the first place—something *CREW/CHGO* ignored. *See infra* II.B.1.

II. If *CREW/CHGO* Applies, It Contravenes Precedent, the Statute, and the Constitution

For the reasons stated above, it is enough for this Court to not expand *CREW/CHGO* beyond its holding to apply here. If, however, the Court concludes *CREW/CHGO* applies here, then the decision's conflict with precedent—a conflict born from its disregard for the FECA and the Constitution—means the decision is not binding. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). The FEC's attempts to salvage *CREW/CHGO* simply misrepresent that precedent, ignore the statute, and neglect the serious constitutional violation *CREW/CHGO* created.

A. The FEC Fails to Show *CREW/CHGO* is Consistent with Precedent

As discussed in CREW's opening brief, *CREW/CHGO* is in conflict with Supreme Court authority in *Akins*, and this Court's precedent of *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), *Democratic Congressional Campaign Committee v. FEC* (*DCCC*), 831 F.2d 1131 (D.C. Cir. 1987), and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). The FEC does not show otherwise.

First, with respect to *Akins*, the FEC distracts attention from what the case actually did to instead focus on an issue that wasn't before the Supreme Court—whether the FEC's dismissal of a *different* claim based on prosecutorial discretion alone was lawful. *See* FEC Br. 28 (discussing dismissal of prohibited campaign

contributions under then 2 U.S.C. §441b). The plaintiffs never challenged that separate dismissal, so its legality or reviewability wasn't before the Court. *See Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), *vacated by* 524 U.S. 11 (noting plaintiffs only challenge "the Commission's interpretation of the term 'political committee'").

In contrast, with respect to the dismissal that was before the Court, the FEC contended that it was *both* premised on legal analysis and discretion, *see* CREW Br. 23, and the Court did not question that characterization. Rather, it said that even if the dismissal was a "discretionary agency action" it was still reviewable to determine if the agency "based its decision upon an improper legal ground." *Akins*, 524 U.S. at 25.[3] Even as to a subsequent discretionary dismissal, which the Court suggested might be possible, it expressly stated such dismissal would have to be "lawful"—i.e., at least an act of a majority of the agency based on correct interpretations of law. *Id.*

Similarly, the FEC fails to reconcile *CREW/CHGO* with *Chamber*. Rather, the FEC tortures the decision's straight-forward holding: that a dismissal based on an "unwillingness" to proceed was an "easy" case of a contrary to law dismissal

[3] The FEC oddly suggests that the "discretionary agency action" to which *Akins* referred was not prosecutorial discretion, FEC Br. 30, but immediately preceding this sentence, the Court expressly referenced "prosecutorial discretion," *Akins*, 524 U.S. at 25.

which would set up a citizen suit. *Chamber*, 69 F.3d at 603. The FEC's attempt to cast this discussion as dicta fails: but for that decision, the plaintiffs there would not have had standing because they had no expectation of enforcement. *Id.*; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (discussion necessary to result is a holding).[4] In the end, the FEC admits *CREW/CHGO* directly contradicts *Chamber*, but suggests *Chamber* was "eviscerated" by *Akins*. FEC Br. 34. As discussed above, however, *Akins* did not find the Commission's unwillingness to enforce was not contrary to law—rather it found a dismissal was reviewable even if it was based on discretion. 524 U.S. at 25. Nor would any statement recognizing the FEC has prosecutorial discretion run afoul of *Chambers*, *see Akins*, 524 U.S. at 25, because four commissioners could exercise any such discretion by dismissing a meritorious case contrary to law and then refusing to conform. In that event, the FEC retains complete control of its resources and priorities—the only result is the recognition of a complainant's "plausible claim[]" that it may pursue on its own. *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting).

Similarly, the FEC's attempts to minimize *DCCC* and *Orloski* do not demonstrate *CREW/CHGO* is consistent with them. *DCCC* held judicial review

[4] The possibility commissioners might "change [their] mind" only "seem[ed]" to confer standing, *Chamber*, 69 F.3d at 603; *cf.* FEC Br. 33, but the fact that discretionary dismissals are contrary to law proved the plaintiffs were "subject to litigation" and had standing, *Chamber*, 69 F.3d at 603.

was not limited to cases where "the Commission act[s] on the merits" and thus found the Commission had to "explain coherently the path they are taking" for all dismissals. 831 F.2d at 1134,1133. Yet if discretionary dismissals are wholly unreviewable, as *CREW/CHGO* held, there would be no need for such statements for them. Similarly, contrary to *Orloski*'s order of operations requiring courts to first satisfy themselves that a dismissal involves only "permissible interpretation[s]" of law before going any further, 795 F.2d at 161, *CREW/CHGO* renders any interpretation permissible by subjecting review to a partisan bloc's whims.

Finally, the FEC's purportedly contrary authority does not salvage *CREW/CHGO*. *CREW v. FEC* (*Am. for Tax Reform*), 475 F.3d 337, 340 (D.C. Cir. 2007) , did not render any FEC dismissal unreviewable—indeed its single statement about the Commission's prosecutorial discretion was entirely dicta, *see id.* (addressing issue "[n]o one contends"), and the Court even recognized review was still permissible to "correc[t] errors of law," *id.* Rather, the Court found it lacked jurisdiction to consider the issue because the information sought by plaintiffs was already public and was not covered by the FECA. *Id.* at 339–40. Similarly, the FEC simply misrepresents *Hagelin v. FEC*, 411 F.3d 237 (D.C. Cir. 2005). The dispute in *Hagelin* was over the Commission's factual findings, so the Court applied a "highly deferential" standard of view that upheld that finding

because it was "supported by substantial evidence." 411 F.3d at 243-4. Neither *Americans for Tax Reform* nor *Hagelin* support *CREW/CHGO*.

Prior to *CREW/CHGO*, all precedent recognized all dismissals by the FEC are subject to judicial review, and even recognized dismissals based on an unwillingness to enforce are contrary to law. Prior to *CREW/CHGO*, the FEC also recognized that fact—which is why the FEC did not contest reviewability in that case. *See CREW/CHGO*, 892 F.3d at 440 (recognizing the FEC accepted the availability of judicial review). *CREW/CHGO*, however, swept aside this law, largely without even discussing it, to hand a partisan bloc a "superpower" found nowhere in law. *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting). Assuming *CREW/CHGO* is not distinguishable on its facts, then its irredeemable conflict with this binding precedent renders it inapplicable as a matter of law.

B. The FEC Fails to Show *CREW/CHGO* Comports with the FECA

CREW/CHGO's conflict with this prior precedent stems from its disregard for the statutory scheme adopted by Congress. Rather, *CREW/CHGO* said nothing in the FECA altered what was already law in the APA, 892 F.3d at 437, meaning the whole judicial review provision of 52 U.S.C. § 30109 was entirely "superfluous." *TRW Inc v. Andrews*, 534 U.S. 19, 31 (2001). This remarkable conclusion is one reason *CREW/CHGO* departs so starkly from prior caselaw, and why *CREW/CHGO* cannot be squared with the statute.

1. *CREW/CHGO* Conflicts with the FECA's Bipartisan Structure

It is telling that in the whole of its opposition, the FEC never addresses *CREW/CHGO*'s decision to gut the requirement that "[a]ll decisions of the Commission" must be bipartisan. 52 U.S.C. § 30106(c). Rather than grapple with *CREW/CHGO*'s transfer of power from the agency to a partisan minority bloc, the FEC simply pretends *CREW/CHGO* deals with bipartisan "Commission decision[s]." *See, e.g.*, FEC Br. 31.

Sidestepping the issue, the FEC takes exception to CREW's suggestion that this Court correct a longstanding error in *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), before remanding for a determination of the merits. FEC Br. 37–38. That case erred by conferring *Chevron* deference without regard to whether the statement under review bears "force of law." *United States v. Mead Corp.*, 533 U.S. 218, 236-7 (2001); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (deference only available to "agency's 'authoritative' or 'official position'").[5] While corrective guidance on this point would preserve judicial resources, even *In*

[5] Contrary to the FEC's assertion, FEC Br. 38, *Kisor* follows the rule that deference is only available to the agency's "authoritative policy." *Kisor*, 139 S. Ct. 2416; *see also id.* at 2424 (noting interpretation without "precedential value" would not "reflect[] the considered judgment of the agency as a whole"). The FEC's other authority recognizing courts do not defer to nonbinding statements, which the FEC concedes includes the Partisan Bloc's here. *See* FEC Br. 37. Finally, while the FEC cites two cases it asserts follow *In re Sealed Case*, neither case addressed the propriety of *Chevron* to nonbinding statements are thus are inapposite. *See* FEC Br. 37–39.

re Sealed Case did not purport to overrule the FECA's bipartisan majority requirement, as *CREW/CHGO* did.

The FEC simply ignores the lack of a bipartisan vote to exercise prosecutorial discretion—a legal prerequisite to exercise such power, even assuming such dismissals are not contrary to law. 52 U.S.C. § 30106(c); FEC, Statement of Policy, 72 Fed. Reg. 12,545, 12,545–46 (Mar. 16 2007); *but see* 52 U.S.C. § 30109(a)(2) (agency "shall" investigate whenever there is "reason to believe"). Rather, there was a bipartisan vote to close the file after two commissioners rendered a decision on the merits that there was no reason to believe New Models violated the FECA. JA101–02. A justification with a "rational connection" to that vote must explain that decision with a sole focus on the merits. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Shelley v. Brock*, 793 F.2d 1368, 1371 (D.C. Cir. 1986). It does not permit the Partisan Bloc to usurp the agency and unilaterally rewrite history by insisting that the bipartisan commission's decision was to exercise prosecutorial discretion all along. Yet that is precisely what *CREW/CHGO* permits.

Congress carefully wrote the FECA to keep all FEC powers—to permit or to block enforcement—in the hands of bipartisan coalitions of commissioners. *CREW/CHGO* acted without regard for this structure, which led it to conflict with earlier precedent which heeded Congress's design.

2. ***CREW/CHGO* Nullifies § 30109**

In 52 U.S.C. § 30109, Congress laid out a multistep process to ensure fair enforcement and to protect against "enforcement-shirking." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting). Consistent with a desire to protect against frivolous partisan-motivated complaints, the Commission plays a primary gatekeeping role not only over the agency's enforcement, but also as a preliminary adjudicator over private claims. *See Perot v. FEC*, 97 F.3d 553, 557 (D.C. Cir. 1996) (dismissing claim brought against respondent prior to FECA exhaustion). The Commission is tasked with an early determination on the merits: to decide whether a complaint raises a "reason to believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). If there is, the FECA accords no lawful discretion to the Commission. Rather the FEC "shall" investigate, *id.*, and "shall" enforce if that investigation establishes probable cause, *id.* at § 30109(a)(4); *see also Heckler v. Chaney*, 470 U.S. 821, 834 (1985) ("if … shall" statute "withdrew discretion from the agency…" (discussing *Dunlop v. Bachowski*, 421 U.S. 560 (1975))).[6] If four commissioners choose to ignore those mandates—perhaps because they think a plausible claim is "small-scale, inconsequential, or difficult to prove" or a respondent is "blameless" despite injuring the complainant, FEC Br. 44—then they

[6] Contrary to the FEC's suggestion that the FECA's use of "if" confers absolute and unreviewable discretion on the Commission, FEC Br. 44, the statute in *Dunlop* used the exact same "if … shall" conditionality as the FECA. 421 U.S. at 562 n.2.

may choose not to proceed, but a citizen suit is then permitted so complainants can protect themselves. But what the Commission may not do is refuse to adjudicate a complainant's claim, *see, e.g.*, 52 U.S.C. § 30109(a)(8)(C) (permitting suit for a failure to act), or nullify that claim by simply declining to decide it.

In that way, the FEC commissioners are no different than "judges"—as one commissioner of the Partisan Bloc recognized. Caroline Hunter, *How my FEC Colleague is Damaging the Agency and Misleading the Public*, Politico (Oct. 22, 2019) https://politi.co/38SzuBi ("In enforcement actions, commissioners are like judges"). As judges with the power to "cancel or release" New Models from CREW's "own private claims," the commissioners are obligated to render decisions on the merits rather than award or deny claims based on mere whim. *Burlington Resources Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008); *see also Thermtron Prod., Inc. v. Hermandsdorfer*, 423 US. 336, 344 (1976) (judges may not dismiss action because they are "too busy to try it").[7] And like judges, their rulings are always subject to higher review.

CREW/CHGO, however, renders the whole of the FEC's enforcement structure—Commission review of complaints, judicial review of dismissals, and

[7] The FEC need not have the authority to unilaterally "impose penalties or any other remedy" against a respondent, FEC Br. 50, to act as an adjudicatory tribunal. So long as it may dispose of private claims, then it is an adjudicator to which prosecutorial discretion does not apply. *Burlington*, 513 F.3d at 247.

citizen suits—entirely subject to the whims of a partisan minority of commissioners. The FEC is silent on this "void[ing]" of 52 U.S.C. § 30109. *TRW*, 534 U.S. at 31.[8]

In the end, the FEC cannot bring *CREW/CHGO* into line with the plain terms of the FECA and prior precedent. Instead, the FEC pretends private parties have no claims to adjudicate because the FEC's enforcement authority is purportedly "exclusive," FEC Br. 3, 48, while ignoring the "except[ion]" to that exclusivity: citizen suits under section 30109(a)(8), 52 U.S.C. § 30107(e). The FEC also suggests private suits run afoul of the First Amendment, FEC Br. 37, but courts overseeing private suits must also do so "in a manner sensitive to [parties'] First Amendment Rights," *id.*at 49; *see also, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 209 n.6 (1979) (Marshall, J., dissenting) (noting "courts have displayed sensitivity to First Amendment values in assessing motions"). The FEC's need to flatly ignore

[8] At most, the FEC argues that they have at times exercised their whim to enforce. But its examples hardly show anything other than abdication. The FEC conveniently ignores that the single example of enforcement for a political committee violation like that here, FEC Br. 26 n.3, was in fact only the result of a Court order forcing enforcement after finding an earlier abdication of enforcement was contrary to law, *see CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016). Nor do any of the FEC's other examples recite the Partisan Bloc's interpretation of the political committee test, *see* FEC Br. 40, and contrary to the FEC's assertion, some invoke prosecutorial discretion, *see* MUR 6781, https://bit.ly/2M8970s (finding enforcement would be "imprudent"); MUR 7006, https://bit.ly/2PF6G7C ("declin[ing] to adopt" interpretation that would expend agency resources in litigation), and others aren't even statements of the Partisan Bloc at all.

its role in adjudicating private claims simply demonstrates *CREW/CHGO* is not salvageable.

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

As CREW's opening brief showed, the First Amendment guarantees access to speech without reliance on the "faith" of government officials. *Cf.* FEC Br. 39. In its opposition, the FEC concedes that its decisions on complaints, including dismissals, impact CREW's "First Amendment interests," FEC Br. 42, and does not contest that the First Amendment prohibits government officials' unbridled discretion over such interests. Rather, the FEC argues that there is no "willing speaker," *id.* at 43, that alternative means of communication still exists, *id.*, and that the existence of CREW's right depends on its having validly stated a meritorious claim against New Models, FEC Br. 42. The FEC is wrong on the first point, its second point is both wrong and irrelevant, and it gets the importance of the last point backwards.

First, there is a "willing speaker." *Greg v. Barrett*, 771 F.2d 539, 547 (D.C. Cir. 1985) (quoting *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). There is no dispute Congress has constitutionally compelled organizations that qualify as political committees to speak to each and every member of the public though disclosure, *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976), vesting each person with an individual and concrete right to that speech,

Akins, 524 U.S. at 20–21. As there is no reason to think New Models would take "the extraordinary measure of continuing their injurious conduct in violation of the law," *Nat'l Wrestling Coaches Ass'n v. Dep't of Ed.*, 366 F.3d 930, 941 (D.C. Cir. 2004), it is a willing speaker that will comply with its legal obligation so CREW can exercise its right to receive the information to which it is entitled.

Thus, this case is far afield from *Barrett* where the Court found no willing speaker in a challenge by citizens who wanted the congressional record to reflect a verbatim transcript of floor debates. 771 F.2d at 541. The plaintiffs there could not demonstrate any legal right to a verbatim transcript. Instead, they relied on a theory that a representative wanted to communicate to the plaintiffs the true "context" of his speech, and so could compel a separate representative (over which the first enjoyed no legal right to compel) to provide that context. *Id.* at 548. This Court rejected this "indirect" theory of speech, whereby someone could claim a First Amendment right to communicate via an unwilling third person's speech. *Id.* Here, however, Congress has legally compelled New Models to speak. As such, there is speech CREW is legally entitled to receive. What is censoring CREW's access, however, is the Partisan Bloc of FEC commissioners who "s[i]t directly astride the channel of communication," empowered by *CREW/CHGO* with unbridled discretion to "restric[t] the flow of information." *Id.*

Second, no adequate alternative avenue of speech exist except by means of this process. It is obvious that New Models is only willing to speak in the face of legal compulsion. That is, after all, why Congress compelled it. *Buckley*, 424 U.S. at 62 (noting prior disclosure rules were "circumvented"). Thus, there are no other adequate alternative avenues for CREW to receive information except through the FEC. *Cf.* FEC Br. 43. Nor, even if there were, would that alleviate the constitutional infirmity of *CREW/CHGO*. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975). Thus, for example, an officer's unbridled discretion over a public forum is no less unconstitutional because petitioners could use "some other" forum for their speech. *Id.* Same here: the FEC's unconstitutional unbridled discretion over this channel of communication to CREW, which in fact is the only channel in existence, cannot be remedied on the hypothetical possibility CREW might learn elsewhere the information the FEC is censoring.

Third, the FEC simply gets backwards the importance of its concession that if CREW stated a valid legal claim, it has a constitutionally protected First Amendment right. FEC Br. 42. It is the validity of that claim, and the invalidity of the Partisan Bloc's analysis of that claim, of which CREW seeks judicial review. It is that analysis the court below found impossible because of the terse invocation

of prosecutorial discretion. But, as the FEC concedes, the only point of prosecutorial discretion is to dismiss claims that "have merit." FEC Br. 21. In other words, the dismissal was either due to a lack of merit, a question CREW is entitled to have reviewed, or due to discretion, which concedes the claim has merit and thus would violate CREW's First Amendment rights.

This Court sitting en banc was right to recognize the FEC's discretion "itself raises First Amendment concerns." *Akins*, 101 F.3d at 744. The Court was correct before when it found such concerns deprived the FEC of discretion, and *CREW/CHGO* was wrong to ignore those concerns.

III. The FEC's Truncated Merits Arguments Fail, But the Court Should Remand for the Merits or Order Supplemental Briefing

The FEC suggests this Court affirm on an alternative ground not reached by the district court: that the Partisan Bloc's erroneous legal analysis was not contrary to law. FEC Br. 50. It provides only the barest of arguments on the merits, however: six pages and the few pages CREW can devote here, to summarize 125 pages of briefing below. The Court's "usual practice[, however,] is to remand for the district court to consider arguments about the merits in the first instance." *Almaqrami v. Pompeo*, 933 F.3d 774, 784 n.3 (D.C. Cir. 2019). Alternatively, the Court can order supplemental briefing to ensure it has a complete understanding of the issues. Nonetheless, a brief discussion suffices to reject the FEC's truncated merits argument.

A. Review of the Merits is *De Novo*

First, review here is not "[d]eferential," as the FEC claims. FEC Br. 51. Rather, the Partisan Bloc's legal interpretations only enjoy deference, if ever, *see supra* pp. 11–12, subject to the confines of the *Chevron* doctrine. *Orloski*, 795 F.2d at 161 (applying *Chevron* in determining whether commissioners' interpretation was permissible); *CREW*, 209 F. Supp. 3d at 87 (applying *Chevron*); *see also Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) (subsuming *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981)).

Here, no deference is warranted. This case involves two legal interpretations: the Partisan Bloc's interpretation of *Buckley*'s "major purpose" test, and their interpretation of "expenditure" in 52 U.S.C. § 30101(4). On the first, courts do not "defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). Indeed, this Court sitting en banc already found the propriety of the FEC's interpretation of *Buckley*'s "major purpose" test is "decide[d] *de novo*." *Akins*, 101 F.3d at 740 ("It is undisputed that the statutory *language* is not in issue, but only the limitation … put on this language by Supreme Court decisions."); *see also CREW*, 209 F. Supp. 3d at 87 (affording commissioners' "major purpose" interpretation "no deference").

The same is true of the Partisan Bloc's interpretation of § 30101(4) because they did not independently interpret it, but rather "rest[ed]" their reading "on [their] interpretation of Supreme Court opinions." *N.Y. N.Y., LLC*, 313 F.3d at 590 (holding NLRB's interpretation of NLRA warranted no deference because interpretation "purport[ed] to rest on the Board's interpretation of Supreme Court opinions"). Similarly, here, the Partisan Bloc rested their interpretation of § 30101(4) entirely on their reading of *Buckley* to define "expenditure," wherever used in the FECA, to reach only "express[] advoca[cy]." JA121.[9] As such, it receives no deference. In any event, even if *Chevron* deference were theoretically available, the Partisan Bloc still cannot ignore the plaint text of the statute. *Chevron*, 467 U.S. at 843.

B. The FECA Plainly Defines "Expenditure" to Include New Models's Distributions

New Models qualifies as a political committee if it made more than $1,000 in "expenditures." 52 U.S.C. § 30101(4). An "expenditure" includes any "distribution, … deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* at

[9] The Partisan Bloc also rested on *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc), to interpret the Constitution to prohibit any regulation, even disclosure, of contributions to Super PACs because such contributions raise "no anti-corruption" concern. JA122. As with *Buckley*, this interpretation warrants no deference.

§ 30101(9)(A)(i). There is no dispute New Models's distributions were to influence Federal elections. JA053, JA056–57, JA060, JA083, JA107–08. Nor is there any dispute that New Models's transfers were "distribution[s]," "deposit[s]" or "gift[s] of money." Thus, New Models's transfers meet the plain statutory definition of an expenditure.

The Partisan Bloc rejected this plain reading, however, because they interpret *Buckley* to "circumscribe[] the definition of 'expenditure'" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified [federal] candidate." JA109 (citing *Buckley*, 424 U.S. at 79–80). Accordingly, because New Models's expenditures were not for its own express advocacy, they reasoned the spending could not be expenditures within the meaning of the Act, and thus could not qualify New Models as a political committee. *Id.*

The Partisan Bloc completely misapplied *Buckley*, however. First, the portion of the opinion they cite made clear it was limiting a particular use of expenditure "for the purposes *of that section*" alone. 424 U.S. at 80 (emphasis added). That section triggered disclosure for making a single expenditure in excess of $100, *id.* at 74–75, and the Court construed the provision to be coextensive with a parallel provision limiting expenditures, *id.* at 39, 78–80. Congress subsequently ratified that change. *See* 52 U.S.C. § 30104(c). In contrast, *Buckley* expressly did

not limit the expenditures that trigger political committee reporting, rather relying the creation of a new "major purpose" test to address all constitutional concerns. *Id.* at 79; *see also Shays v. FEC*, 511 F. Supp. 2d 19, 26–27 (D.D.C. 2007) (recognizing *Buckley*'s distinct cures to each section stand independently).

Indeed, reading *Buckley* as the Partisan Bloc proposes leads to gross absurdities. The FECA's definition of "independent expenditure" (i.e., express advocacy), would be rendered circular, 52 U.S.C. § 30101(17), and sections distinguishing between "independent expenditure[s]" and other "expenditure[s]" would be meaningless, *see, e.g.*, 52 U.S.C. § 30101(9)(B)(iii), § 30104(b)(4), (f)(3)(B)(ii).

Nor do New Models's expenditures raise no "anti-corruption" concern sufficient to subject it to disclosure. *Cf.* JA122. This Court already held transfers to Super PACs can trigger disclosure. *SpeechNow.Org*, 599 F.3d at 698.

Finally, the FEC's suggestion that New Models's distributions cannot be "expenditures" because the Super PAC recipients reports them as "contributions" is without basis in law. FEC Br. 53. The FECA does not exempt contributions from the definition of "expenditure." *Compare* 52 U.S.C. § 30101(9)(A) *with id.* at § 30101(B)(vi) (exempting in certain circumstances from expenditure any cost "in connection with the solicitation of contributions"); *and id.* at § 30104(f)(3)(B)(ii) (excepting from definition any "expenditure or an independent expenditure").

Rather, it expressly mandates that certain transfers be reported as *both* a contribution and an expenditure, 52 U.S.C. § 30116(a)(7)(C)(ii) (coordinated expenditures are both contributions as to maker and expenditures as to candidate). Moreover, the FEC has previously recognized a group's contributions can qualify it as a political committee. *See* Advisory Opinion 2000-25 (Minnesota House DFL Caucus) at 4 (Oct. 13, 2000), https://bit.ly/2RufXP3; Advisory Opinion 1996-13 (Townhouse Associates, LLC) at 4 (June 10, 1996), https://bit.ly/2M25JSo; Advisory Opinion 1996-18 (Int'l Ass'n of Fire Fighters) at 2–3 (July 14, 1996), https://bit.ly/2IiKfhE, Advisory Opinion 1987-12 (Costello) at 2 (June 12, 1987), https://bit.ly/2Ob5tpD.

In short, the plain text of the FECA compels the conclusion New Models's distributions are "expenditures" within the meaning of 52 U.S.C. § 30101(4). The Partisan Bloc's refusal to accord the text its plain meaning should be rejected.

C. The Partisan Bloc's "Major Purpose" Interpretation Has Already Been Declared Unlawful

Finally, the Partisan Bloc concluded New Models's "major purpose" was not to elect candidates because the $3.1 million New Models's spent doing so in 2012—68.7% of its spending that year, and exceeding New Models's total spending in all other years, *see* FEC Br. 56—did not constitute a majority of New

Models's spending "during its lifetime," JA123.[10] That erroneous interpretation of *Buckley*'s "major purpose" test has already been declared contrary to law. *CREW*, 209 F. Supp. 3d at 94. The Partisan Bloc's test would mean a "half-century-old organization with a substantial spending history could commend spending handsomely on election-related ads and continue such expenditures for decades before its new 'major purpose' would be detected." *Id*. at 94 (citing *MCFL*, 479 U.S. at 262). Rather, to ensure the test takes account of the fact a group's purpose can change, the test must focus on a shorter period. *See id.* at 83 (group's spending "three-fourths" of funds in one year sufficient to demonstrate its major purpose). Yet, here, the Partisan Bloc test ignored New Models's changed activities in 2012 because of its spending history from other years.

Moreover, their test continues to ignore salient facts, like that New Models's post-2010 political spending was illegal prior to 2010. Or that New Models's post-2012 activities are in response to notice of the FEC complaint. JA063. Nor could a change in purpose from politics, even if earnest, alter the fact that once New Models's purpose was to influence elections (and it satisfied the statutory test), it qualified as a political committee and any later change in purpose alone would not

[10] The FEC's focus on a lack of confessional statements, FEC Br. 55, is beside the point, as a group's activities alone can qualify it as a political committee, *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 262 (1986) (group becomes political committee if its political spending is "extensiv[e]").

alter that qualification. *See* 52 U.S.C. § 30103(d) (providing limited circumstances group may cease to be political committee). The Partisan Bloc's "lifetime" test (or the FEC's "outlier" test, FEC Br. 56), would void that termination provision, however, and permit political committees to terminate (or avoid registration all together) just by reducing their total lifetime spending on politics to less than 50%.

The test also ignores the law. Under the FECA, it is a group's "calendar year" activities that qualify it as a political committee. 52 U.S.C. § 30101(4). Nothing in *Buckley* altered that temporal scope. Indeed, courts have routinely looked at a group's single year of activities to determine their major purpose. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 235–37 (D.D.C. 2004) (group's "major purpose … in 1996"); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 858 (D.D.C. 1996) ("major purpose in 1989 and 1990"); *see also* Conciliation Agreement, MUR 6538R (Americans for Job Security) ¶¶ 14, 15 (Sept. 9, 2019) https://bit.ly/2MbbuiZ (conduct "[b]etween November 1, 2009 and October 31, 2010" determined group's major purpose).

In the end, the "major purpose" limitation is designed to ensure the public knows "who is speaking about a candidate," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010), and to be "fully informed," about "[t]he sources of a candidate's financial support," *Buckley*, 424 U.S. at 67, 76, while excluding groups for which disclosure would not "fulfill the purposes of the Act," *id.* at 79. An interpretation

of *Buckley* that denies voters access to information about who is funding millions of dollars of campaign spending merely because an anodyne sounding group like "New Models" served as a link in the funding chain goes far beyond *Buckley*'s limited approach to gut the FECA. *See* CREW Br. 4–5.

In sum, the Partisan Bloc misinterpreted *Buckley* to gut the FECA's political committee rules, opening the door to millions of dollars in dark money, including from foreign powers. Nothing in *Buckley* compels their "lifetime" test which works not to keep voters informed while weeding out irrelevant groups, but to maximize evasion of the FECA's legal requirements. That was why that test was already declared unlawful, and why this Court should do the same.

CONCLUSION

The district court erred in following *CREW/CHGO* to cut of judicial review here. The case does not apply and, even if it did, contravenes binding authority. The decision below warrants reversal for consideration of the merits. Alternatively, if this Court takes up the merits itself, CREW's respectfully requests the Court find the dismissal below was contrary to law.

Dated: December 20, 2019.

Respectfully submitted,

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I hereby certify that on December 20, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

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