

No. 19-5161

**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, No. 1:18-cv-00076-RC

**BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL
OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING EN BANC**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**

A. Parties and *Amicus*

To counsel's knowledge, the parties, intervenors, and *amicus* appearing before this Court are listed in the Appellants' Certificate as to Parties, Rulings, and Related Cases. Counsel understands additional *amici curiae* may appear in this matter.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in the Appellants' Certificate as to Parties, Rulings, and Related Cases.

C. Related Cases

The case on review was not previously before this Court. Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C) currently pending in this Court.

/s/ Daniel I. Weiner

Daniel I. Weiner

STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), *amicus* certifies that a separate brief is necessary because *amicus* has a unique perspective as a not-for-profit, non-partisan law and public policy institute that studies the systems and structures of election administration, which may be of significant value to the Court in considering Appellants' petition for a rehearing en banc. No other *amicus* is capable of providing this unique perspective.¹

¹ No party's counsel authored this brief in whole or part, or contributed money that was intended to fund preparing or submitting the brief, and no person other than *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) is a not-for-profit, non-partisan law and public policy institute that focuses on fundamental issues of democracy and justice.² Through the Election Reform Program, the Brennan Center studies the systems and structures of election administration and advances solutions to ensure these systems can properly carry out their responsibilities. This work includes documenting how partisan gridlock has increasingly prevented the FEC from fulfilling its duty to enforce federal campaign finance laws, as well as work with state and local election officials across the country on various campaign finance and election administration issues.

SUMMARY OF ARGUMENT

The petition for rehearing *en banc* should be granted. The Panel decision allows for easy circumvention of judicial review in cases where the Federal Election Commission (“FEC” or the “Commission”) has failed to enforce campaign finance laws, contravening the text of the Federal Election Campaign Act (“FECA”) and governing Supreme Court

² This brief does not purport to convey the position, if any, of the New York University School of Law.

precedents. *See generally* Petition for Rehearing En Banc, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 23, 2021) (hereinafter “Petition”).

When it created the FEC, Congress provided for expanded judicial review precisely because it recognized the evenly divided agency’s unique vulnerability to political manipulation. Today what Congress feared has come to pass: because of partisan stalemate, the FEC systematically fails to enforce campaign finance laws or perform many of its other statutory functions. The Panel’s decision abnegating judicial review has made an already bad situation significantly worse, by further weakening the judicial check on commissioners’ failure to enforce the law, encouraging escalating procedural gamesmanship on the part of both Republican- and Democratic-appointed commissioners, and, over the long term, sowing ever greater confusion on the part of regulated actors and the broader public. This Court cannot fix the FEC’s many problems, but it can and should undo its own error exacerbating them.

ARGUMENT

I. The FEC's Unique Structure Necessitates Robust Judicial Review of Non-Enforcement Decisions

Congress intended the FEC to be “an active watchdog” in ensuring “[t]he restoration of public confidence in the election process.” *Federal Election Campaign Act Amendments, 1976: Hearing on S. 2911, S. 2911 – Amdt. No. 1396, S. 2912, S. 2918, S. 2953, and S. 2987 Before the Subcomm. On Privileges and Elections of the S. Comm. On Rules and Admin., 94th Cong. 69 (1976)* (statement of Sen. Hugh Scott, Member, S. Comm. on Rules and Admin.); *see also* Federal Election Campaign Act Amendments, 1976, Subcomm. on Privileges and Elections of the Comm. on Rules and Administration (Feb. 18, 1976), Statement of Pres. Ford at 133 (“If [the FEC] becomes an empty shell, public confidence in our political process will be further eroded and the door will be opened to possible abuses in the coming elections”). Recognizing that the agency could become a political weapon, however, Congress created a structure virtually unique among federal agencies: the FEC is evenly divided, with no more than half its seats held by either major party.³

³ Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Ctr. for Just., 1 (2016) (hereinafter “Brennan Report”),

These partisan commissioners exert greater authority than commissioners in comparable bodies. For example, while nonpartisan career staff at most agencies have discretion to undertake initial investigations into potential violations,⁴ FEC staff cannot conduct even a preliminary investigation without a formal Commission vote finding “reason to believe” a violation occurred. 52 U.S.C. §§ 30106(c), 30107(a), 30109(a).

There is obvious tension between this structure and the FEC’s mission to protect the integrity of our political process. *See CREW v.*

https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1137 (2000) (“[Multimember agencies] usually have an odd number of members, with no more than a bare majority from the same political party.”). One other federal agency, the Election Assistance Commission (EAC), is similarly organized, but its role is largely advisory. Karen L. Shanton, Cong. Rsch. Serv., IF10981, *The U.S. Election Assistance Commission: An Overview* 1 (2019).

⁴ *See, e.g.*, SEC, Enforcement Manual, § 2.3.1 (2017) (encouraging staff to “use their discretion and judgment in making the preliminary determination of whether it is appropriate to open a [Matter Under Inquiry]”); 16 C.F.R. § 2.1 (2000) (delegating limited authority to initiate investigations to Directors, Deputy Directors, and Associate Directors of FTC Bureaus and regional offices); EEOC, Regional Attorneys’ Manual, pt. 2, § 3(B) (2005) (delegating limited authority to Regional Attorneys to file and settle suits brought under certain anti-discrimination statutes).

FEC, 923 F.3d 1141, 1144 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of rehearing en banc) (“Congress acknowledged that the FEC’s politically balanced composition ... created a risk of political deadlock and non-enforcement of the law.”). One way Congress sought to resolve this tension was by granting courts an expanded role in ensuring that the FEC diligently enforces the law, including the unusual power to review dismissals of administrative complaints. *See* 52 U.S.C. § 30109(a)(8)(A) & (C); *FEC v. Akins*, 524 U.S. 11, 26 (1998) (Congress intended to “alter tradition” and subject the FEC to higher judicial scrutiny than other agencies). This grant of judicial authority “reflect[s] Congress’s judgment that judicial review is required, in part, ‘to assure ... that the Commission does not shirk its responsibility’ to pass on the merits of complaints.” *CREW v. FEC*, 892 F.3d 434, 451-52 (D.C. Cir. 2018) (Pillard, J., dissenting) (“*CHGO*”) (quoting *DCCC v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) (other quotations omitted)). Courts have frequently exercised this authority to correct the Commission’s legal errors and, more recently, those of controlling commissioners who blocked enforcement in deadlocked votes.⁵

⁵ *See, e.g., CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), *aff’d*,

II. The FEC Systematically Fails to Administer and Enforce Federal Campaign Finance Laws

As partisan polarization over campaign finance and other election law issues has intensified, the non-enforcement of federal campaign finance laws feared by Congress has become acute.⁶ Deadlocks were relatively rare prior to 2008; in 2006, for instance, the Commission deadlocked in approximately 4.5 percent of cases.⁷ After a new slate of Republican-appointed commissioners more firmly opposed to campaign finance regulation took office in 2008, however, the rate of partisan deadlocks soared.⁸ These commissioners have generally taken the position that a preliminary vote finding “reason to believe” a violation occurred is required before FEC staff can even review basic public materials, such as news stories, or gather information through routine,

971 F.3d 340 (D.C. Cir. 2020); *CREW v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018); *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016).

⁶ Brennan Report at 3.

⁷ See Off. of FEC Comm’r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 9 (Feb. 2017), <https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf>.

⁸ *Id.* at 8. Before deadlocking, most high-profile cases languish at the FEC for years. *Id.* at 1; Brennan Report, at 3-4.

informal contacts with other law enforcement agencies.⁹ Their disagreements with Democratic-appointed colleagues have paralyzed the FEC's ability to investigate most cases of significance, including matters where evidence of legal violations already exists in the public record.¹⁰

In total, the Commission deadlocked on at least one vote in over half of the enforcement matters it considered between 2012 and the first

⁹ See Matea Gold, *FEC Engulfed in Power Struggle Over Staff Independence*, Wash. Post (July 13, 2013), https://www.washingtonpost.com/politics/fec-engulfed-in-power-struggle-over-staff-independence/2013/07/13/72134cae-e8d5-11e2-a301-ea5a8116d211_story.html.

¹⁰ Brennan Report, *supra*, at 4; *see, e.g.*, MUR 7313, 7319, and 7379 (Michael Cohen et al.), <https://bit.ly/2UdxtwR> (deadlocked on investigating former President Donald Trump and the Trump Organization despite testimony from Trump's former lawyer, Michael Cohen, about their involvement in conduct that led to Cohen himself being convicted of criminal campaign finance violations); MUR 6661 (Robert E. Murray et al.), <https://bit.ly/2SDjikd> (deadlocked on investigating alleged coercion of campaign contributions despite evidence of coercive solicitation practices); MUR 6485 (W Spann LLC et al.), <https://bit.ly/3AdCtSn> (deadlocked on investigating complaint of LLCs to evade disclosure rules despite one contributor admitting he created an LLC solely to circumvent those rules); MUR 6880 (Carolina Rising), <https://bit.ly/3qyir0J> (deadlocked on investigating social welfare organization for failure to register as a political committee despite organization stating on live television that it spent a majority of its funds to elect a federal candidate).

quarter of 2019; typically the votes where it achieves consensus involve minor violations, housekeeping matters, or frivolous complaints.¹¹

Entire areas of campaign finance law are now unenforced because of this gridlock—most notably rules limiting coordination between candidates and outside groups such as super PACs that can raise unlimited funds so long as their activities are “independent” of the candidate. *See SpeechNow.org v. FEC.*, 599 F.3d 686, 693-94 (D.C. Cir. 2010) (en banc). Despite widespread disregard for independence requirements,¹² between 2010 and 2019 the Commission voted to investigate only one minor case, which it ultimately decided not to pursue.¹³ As the present case and others show, the Commission has

¹¹ *See* FEC, Responses to Questions from the Committee on House Administration 20 (2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf; Brennan Report, at 3.

¹² *See* Brent Ferguson, *Candidates and Super PACs: the New Model in 2016*, Brennan Ctr. for Just. 2-4 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Super_PACs_2016.pdf; Adam Wollner, *10 Ways Super PACs and Campaigns Coordinate, Even Though They're Not Allowed To*, Atlantic (Sept. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/>.

¹³ *See* Responses to Questions from the Committee on House Administration, *supra*, at 24-25; Rachael Marcus & John Dunbar, *Rules*

also largely failed to enforce the requirement that groups whose “major purpose” is to influence elections register as political committees, which would require them to disclose their contributors.¹⁴ This persistent deadlock on registration and reporting requirements has helped to facilitate the flood of “dark money” from undisclosed donors (including potentially prohibited foreign sources) in federal elections.¹⁵

The Commission’s rulemaking function has also become essentially dormant in the last decade because of partisan gridlock. It took almost five years for the Commission to delete two regulations

against Coordination Between Super PACs, Candidates Tough to Enforce, Ctr. for Pub. Integrity (Jan. 13, 2012), <https://publicintegrity.org/politics/rules-against-coordination-between-super-pacs-candidates-tough-to-enforce/>; Soo Rin Kim, *FEC Challenged Again to Find Coordination in Current Campaigns*, Huffington Post (Oct. 7, 2016), https://www.huffpost.com/entry/fec-challenged-again-to-f_b_12386356 (describes FEC’s failures to enforce rules limiting coordination).

¹⁴ See, e.g., *FEC*, Certification for MUR 6880 (Carolina Rising) (Oct. 18, 2016) <https://www.fec.gov/files/legal/murs/6880/16044402299.pdf>; see also *FEC*, Certification for MUR 6402 (American Future Fund) (Nov. 18, 2014) <https://www.fec.gov/files/legal/murs/6402/14044364829.pdf>; see also 52 U.S.C. § 30104.

¹⁵ See Trevor Potter & Bryson Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2020 Became the ‘Dark Money’ Election*, 27 Notre Dame J. L. Ethics & Pub. Pol’y 383, 387 (2013); Norman I. Silber, *Foreign Corruption of the Political Process Through Social Welfare Organizations*, 114 Nw. U. L. Rev. Online 104, 105-06 n.2 (2019).

invalidated by *Citizens United*, and FEC regulations still make no mention of super PACs. See Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62, 797 (Oct. 21, 2014) (revising 11 C.F.R. §§ 104, 114). The Commission has also failed to respond to fundamental political and technological changes. See Internet Communications, 71 Fed. Reg. 18, 589 (Apr. 12, 2006) (rules governing internet ads predate the rise of social media). And it increasingly fails to issue even routine guidance to candidates and other political actors through its advisory opinion process, for which the rate of deadlocks increased more than fivefold between 2008 and 2017.¹⁶

III. Insulating Statements of Reasons from Congressionally Mandated Judicial Review Exacerbates the Problem of FEC Dysfunction

The Panel's decision expanding on the erroneous ruling in *CHGO* has exacerbated dysfunction at the FEC. The decision further weakens the judicial check Congress intended to place on commissioners' arbitrary refusal to enforce the law, encourages escalating procedural gamesmanship on the part of commissioners themselves, and makes it

¹⁶ Brennan Report at 5.

even harder for regulated actors and the broader public to understand the law.

As Judge Millett explained, under the Panel’s decision, three commissioners may now stymie any judicial review of an FEC non-enforcement decision by cursorily discussing “prosecutorial discretion” in their statement of reasons, no matter how erroneous their other stated reasons for blocking enforcement. *See* Dissent at 19.¹⁷ This elevation of “prosecutorial discretion” to a “get out of judicial review free card” thwarts enforcement of the law even in cases involving clear-cut violations, negating any incentive for commissioners to even attempt to conform their reasoning to governing law. *Id.* at 1. Such a failure to enforce valid campaign finance laws not only allows the risk of *quid pro quo* corruption to increase,¹⁸ but also directly harms voters by depriving them of campaign disclosures to which they are legally entitled. *See Citizens United*, 558 U.S. at 371 (disclosure “enables the electorate to make informed decisions and give proper weight to different speakers

¹⁷ In effect, the Panel’s holding negates the purpose of a Statement of Reasons, which this Court intended to *facilitate*—not prevent—judicial oversight of Commission dismissals. *See DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987).

¹⁸ *See Soo Rin Kim, supra.*

and messages.”); *Akins*, 524 U.S. at 20 (discussing Congressional intent “to protect voters” who benefit from campaign disclosures through the judicial review provision).

Ironically, the Panel’s extreme deference to one partisan bloc of FEC commissioners actually encourages procedural gamesmanship on both sides. Even as Republican-appointed commissioners seek to shield their dismissal decisions with cursory invocations of prosecutorial discretion, Democratic-appointed commissioners have adopted the practice of holding enforcement matters open indefinitely and then refusing to authorize Commission lawyers to defend against the ensuing private lawsuits challenging the Commission’s delay—resulting in default judgments that allow complainants themselves to sue alleged violators. *See* 52 U.S.C. §30109(a)(8)(A), (C). In response to Republican protests, Democratic commissioners have responded that this is the only way to obtain enforcement of the law.¹⁹

¹⁹ *See* Nihal Krishan, *Elections Commission Chief Uses the ‘Nuclear Option’ to Rescue the Agency from Gridlock*, Mother Jones (Feb. 20, 2019), <https://www.motherjones.com/politics/2019/02/elections-commission-chief-uses-the-nuclear-option-to-rescue-the-agency-from-gridlock/>; Shane Goldmacher, *Democrats’ Improbable New F.E.C. Strategy: More Deadlock than Ever*, N.Y. Times (June 8, 2021),

The Panel's decisions also make it even harder for candidates, parties, and other participants in the political process to understand their legal obligations under laws that may impact their constitutionally protected speech. The breakdown of the FEC's regulatory processes already has sown confusion among regulated actors.²⁰ Dueling statements from commissioners advancing divergent legal theories in enforcement cases, while having no legal force, are likely to further mislead members of the regulated community and the broader public. While federal courts cannot fully take on the role of a functional regulator, by shirking judicial review even in cases where it is obviously warranted they exacerbate the risk of confusion resulting from the Commission's partisan stalemate.

<https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html>.

²⁰ Brennan Report at 2, 5.

CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to grant *en banc* review.

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CERTIFICATE OF COMPLIANCE

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