

No. 19-5161

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-0076-RC

**BRIEF OF CAMPAIGN LEGAL CENTER
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Amicus Curiae Campaign Legal Center (“CLC”) certifies that it is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest. CLC works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

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GLOSSARY OF ABBREVIATIONS

CHGO	Commission on Hope, Growth, & Opportunity
CLC	Campaign Legal Center
CREW	Citizens for Responsibility & Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review

STATEMENT OF INTEREST¹

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan nonprofit organization dedicated to promoting and defending sound campaign finance reforms. CLC regularly litigates the constitutionality and implementation of the Federal Election Campaign Act (“FECA”), including by challenging FEC action under 52 U.S.C. § 30109(a)(8), and submitted amicus briefs in connection with both panel decisions at issue here, *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) (“*New Models*”), and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (“*CHGO*”).

SUMMARY OF ARGUMENT

En banc review is reserved for extraordinary cases that break from established precedent or present urgent issues meriting the full Court’s consideration. Fed. R. App. P. 35(a). The divided panel decision in *New Models* does both.

First, the majority opinion—building on the errors of *CHGO*—flouts decades of precedent affirming Congress’s “unusual” decision to submit FEC non-enforcement decisions to a judicial check. However, “[a]s the Commission explained in its brief to the court in [*CHGO*], when the Commission dismisses an administrative complaint, even as an exercise of prosecutorial discretion . . . *Heckler*

¹ Pursuant to Federal Rule of Appellant Procedure 29(a)(4)(E), amicus states that no person, other than amicus, authored this brief in whole or part, or contributed money to fund its preparation or submission. No party opposes CLC’s participation; the FEC takes no position.

v. Chaney does not bar judicial review. The law of the circuit... was well-established long before the decision in [*CHGO*].” See *CLC v. FEC*, 952 F.3d 352, 362 (D.C. Cir. 2020) (Edwards, J., concurring) (citations omitted). There was no justification for the panel’s reticence when FECA expressly provides for review and the relevant FEC dismissal was founded on substantive legal analysis.

Second, the panel’s decision is dangerous. Empowering minority blocs of Commissioners “to turn off statutorily directed judicial review like a light switch,” 993 F.3d at 901 (Millett, J., dissenting), does immense damage to the carefully balanced enforcement scheme prescribed by Congress. The decision endows minority blocs with discretionary prerogatives that FECA reserves for bipartisan majorities and empowers them to entrench impermissible statutory interpretations via unreviewable non-enforcement statements. The gamesmanship this invites is already exacerbating longstanding agency dysfunction and undermining FECA’s core objectives.

En banc review is necessary to restore uniformity and coherence to this Circuit’s § 30109(a)(8) decisions and bring them back into harmony with the statutory scheme Congress devised.

I. The panel decision is contrary to precedent and thwarts statutorily authorized judicial review.

The controlling Commissioners in this matter issued a 31-page legal analysis explaining why New Models could not be regulated as a political committee under

FECA, appended a 7-word dependent clause referring to prosecutorial discretion, and, “with a wave of that verbal wand,” ensured their legal determinations would escape all scrutiny. 993 F.3d at 896 (Millett, J., dissenting).

In considering this dismissal, the majority acknowledged that FECA is “unusual” in that it “allows a private party to challenge a nonenforcement decision”; it further conceded that this particular nonenforcement decision was prompted by the legal conclusion that New Models “was not a ‘political committee’ under the Act.” *Id.* at 882. Nevertheless, citing *CHGO*, the panel concluded that a glancing reference to discretion precluded review for legal error.

But both *New Models* and *CHGO* rest on a premise contradicted by governing precedent: that FEC dismissal decisions are “control[led]” by *Heckler v. Chaney*, 470 U.S. 821 (1985), and its “presumption” that “an agency’s decision not to undertake enforcement” is unreviewable, *CHGO*, 892 F.3d at 439. As the Supreme Court has confirmed, FECA “explicitly indicates the contrary.” *FEC v. Akins*, 524 U.S. 11, 26 (1998). *See also Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc) (noting that FECA “permits a complainant to bring to federal court an agency’s refusal to institute enforcement proceedings”), *vacated on other grounds by* 524 U.S. 11 (1998); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995).

Given “FECA’s express provision for the judicial review of FEC dismissal decisions,” *Heckler* is “inapposite.” *Lieu v. FEC*, 370 F. Supp. 3d 175, 183 (D.D.C.

2019) (citing *Akins*, 524 U.S. at 26). The contrary conclusion reached in these two decisions—that the legal bases of FEC non-enforcement decisions are unreviewable if accompanied by a reference to “discretion”—is untenable. By providing judicial review and a limited private right of action, Congress specifically intended to move Commission enforcement actions out of the *Heckler* framework and subject them to judicial oversight.

Predictably, *CHGO*’s radical departure from precedent has already generated dissent and inconsistent application in the three years since it issued. *See, e.g., CLC*, 952 F.3d at 356 (declining to decide whether to follow *CHGO* and proceeding to consider the merits of a “discretionary” dismissal); *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 16 (D.D.C. 2019) (“Nothing in *CHGO* suggests that the mere invocation of the phrase ‘prosecutorial discretion’ precludes judicial review.”).

But although *New Models* involves a particularly flimsy invocation of prosecutorial discretion to defeat review, it hardly stands alone. In a case litigated by amicus CLC, a district court recently declined to review the FEC’s 3-3 dismissal of a complaint alleging that a group failed to register as a political committee, *Pub. Citizen v. FEC*, No. 14-cv-00148-RJL, 2021 WL 1025813, *5 (D.D.C. Mar. 17, 2021)—based on a single footnote in the controlling Statement, which followed 28 pages of legal analysis and merely “note[d] that the Commission maintains broad

discretion” that it “could” have applied.² No discretionary grounds were mentioned save a complaint about the “introduction of new legal theories,” *id.*—itself a legal conclusion susceptible to review. But under *CHGO*, this terse nod to *Heckler* was enough to foreclose all scrutiny.

II. Empowering the FEC to issue legal determinations without scrutiny impairs its ability to carry out its important mandate.

The panel decision is an affront to the carefully balanced statutory scheme that Congress devised. It permits the FEC to block review of decisions incorporating extensive legal analysis and involving “even the most serious violations of federal campaign finance law” by simply calling up the “magic words” of enforcement discretion. *CREW v. FEC*, 923 F.3d 1141, 1144 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of reh’g en banc). Worse still, it empowers partisan minorities to do so.

The federal campaign finance laws are too important to leave entirely in the hands of one partisan faction of Commissioners. Congress did not grant them this authority, and recent developments at the FEC well illustrate why. Giving minority blocs the power to block judicial review of their interpretations of law only invites unsustainable decisionmaking and intransigence—a dynamic that has already

² Statement of Reasons at 28 n.117, MUR 6396 (Jan. 8, 2014), <https://www.fec.gov/files/legal/murs/6396/14044350970.pdf>.

exacerbated the FEC's longstanding gridlock and inflicted harm on the federal campaign finance laws it is charged to enforce.

A. The panel's "magic words" test precludes review in cases where the need for judicial intervention is at its apex.

Because the FEC is structured to operate by four-vote majority in nearly all of its functions, Congress provided for judicial review of non-enforcement decisions to "prevent the agency's frequent deadlock from sweeping under the rug serious campaign finance violations." *CHGO*, 892 F.3d at 442 (Pillard, J., dissenting). When the Commission acts affirmatively—by four or more votes—to exercise its prosecutorial discretion, and confines its explanation for that exercise to discretionary concerns, review may be more circumscribed. But treating the mere mention of discretion as an absolute bar to review in all cases, regardless of the substantive vote taken or whether it garnered majority support, short-circuits FECA's judicial check where it is most needed.

1. Unsustainable interpretations of law. The possibility of tacking on an additional "discretionary" ground for dismissal and thereby defeating judicial review will prove most irresistible—and pernicious—in cases where the agency lacks a defensible legal basis for refusing to proceed. Here, for example, the controlling group's insistence that their analysis of "major purpose" must look to New Models' entire lifetime of spending, JA107, 123 n.96, was not just manifestly unreasonable. The exact same approach in another case *had already been held contrary to law*. See

JA136. Nevertheless, a minority bloc has continued to rely on the same faulty legal analysis, even where it contradicts both judicial authority and the agency's binding statement of policy on major-purpose determinations.³

2. Interpretations of law that lack majority support. Shielding the legal determinations underlying deadlocked enforcement cases from judicial review also enables partisan minorities to codify their erroneous interpretations of FECA—although under FECA's "inherently bipartisan" design this is a power that only four Commissioners can exercise. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). While a minority "statement of reasons would not be binding legal precedent or authority for future cases," *CLC*, 952 F.3d at 358 n.2 (citation omitted), some Commissioners believe that split votes "should be considered binding" and treat them accordingly.⁴ As a practical matter, therefore, minority statements about the law *do* constrain future enforcement and the conduct of

³ *E.g.*, Statement of Reasons at 11, 16, MUR 6596 (May 13, 2019), https://www.fec.gov/files/legal/murs/6596/6596_2.pdf (rejecting consideration of calendar-year spending and treating 501(c)(4) tax-exempt status as indicative of major purpose); *CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (finding a refusal to consider group's calendar-year spending contrary to law); Political Committee Status, 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007) (rejecting tax status as valid "substitute[]" for holistic and "conduct-based" major-purpose determinations).

⁴ FEC Response to Questions from House Admin. Comm. 24 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf; *see also, e.g.*, Statement of Reasons at 3, MUR 7347 (Apr. 30, 2021), https://www.fec.gov/files/legal/murs/7347/7347_26.pdf (opining that "the Commission should not punish speakers who act in good-faith reliance on" minority statements).

regulated parties, at least in the eyes of the Commissioners who would treat them as precedential notwithstanding FECA and this Court's decisions. The controlling statement *here* relied heavily on minority dispositions, *see* JA103 n.3, 126-27 n.113, 130 n.127, and has itself been cited in later minority statements.⁵

3. Dismissals prompted by votes on legal questions. As CREW notes, Rehr's Pet. 15, the dispositive vote in this case was a legal one: whether there was reason to believe New Models violated FECA. If the controlling Commissioners indeed were not interested in making any legal findings, they could have moved to dismiss for discretionary reasons. *See* FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), http://fec.gov/em/respondent_guide.pdf. They did not do so, JA101-02, although the Commission can and frequently does follow that process.⁶

B. *New Models* and *CHGO* have exacerbated FEC dysfunction and harmed the core objectives of federal campaign finance law.

Congress provided for judicial oversight of enforcement dismissals to ensure that the Commission was not “turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know.” *CHGO*, 892 F.3d at 442 (Pillard, J., dissenting). The panel decision reads that safeguard out of the statute,

⁵ *See* Statement of Reasons at 8 n.47, MURs 6969, 7031, & 7034 (Sept. 13, 2018), https://www.fec.gov/files/legal/murs/6969/6969_2.pdf.

⁶ *See, e.g.*, Certification, MUR 7114 (June 26, 2017), <https://www.fec.gov/files/legal/murs/7114/17044430961.pdf> (voting to dismiss under *Heckler*).

and it does so notwithstanding the Commission's long history of dysfunction and its complete failure to enforce the important disclosure provisions at issue in both *New Models* and *CHGO*.

Even in the short interval since *CHGO*, the specter of unreviewability has brought FEC enforcement to a virtual standstill—and there is ample evidence that no-voting Commissioners now strategically invoke prosecutorial discretion to avoid judicial review. Since June 15, 2018, prosecutorial discretion has been referenced in the controlling Statement of Reasons with respect to **33** of the 50 FEC enforcement matters dismissed contrary to the Office of General Counsel's reason-to-believe recommendation (excluding matters in which the required rationale was not ever provided). *See* Appendix, attached hereto. This dynamic only compounds the usual problems plaguing the FEC, where complaints languish for years and deadlocks are routine.⁷

Commission stasis is particularly acute in matters concerning the political committee disclosure requirements, which lie “at the heart of the agency's mission”⁸ and its mandate under FECA to “provid[e] the electorate with information” and deter

⁷ *See, e.g., Oversight of the FEC: Hr'g Before Comm. on House Admin. [postponed]*, 116th Cong. (2019) (Statement of Adav Noti, Senior Director, Trial Litigation & Chief of Staff, CLC), <https://docs.house.gov/meetings/HA/HA00/20190925/109983/HHRG-116-HA00-Wstate-NotiA-20190925-U1.pdf>.

⁸ Statement of Reasons at 1, MUR 6538R (Oct. 11, 2019), https://www.fec.gov/files/legal/murs/6538R/6538R_1.pdf.

corruption. *McConnell v. FEC*, 540 U.S. 93, 196 (2003). Since at least 2010, the Commission has not applied the major-purpose test to pursue enforcement against a *single* group for failure to register as a political committee—except, in one case, after a court ruled that its basis for refusing to take action was contrary to law.⁹ References to prosecutorial discretion have appeared with regularity in this line of dismissals. *See* CREW Merits Br. at 31 & n.17.¹⁰ In the meantime, non-disclosing entities have spent over \$1 billion to influence federal elections. *See* Center for Responsive Politics, *Outside Spending by Nondisclosing Groups, Cycle Totals*, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited June 28, 2021).

If anything, recent enforcement dismissals appear even more calculated to evade review. For example, controlling Commissioners have released *multiple* contemporaneous Statements of Reasons—one leaning heavily on prosecutorial

⁹ Statement of Reasons at 1, MUR 6538R (July 2, 2020), https://eqs.fec.gov/eqsdocsMUR/6538R_2.pdf (“I voted to approve [enforcement] in this matter because my hand was effectively forced by a federal district court.”).

¹⁰ The concluding reference to “discretion” here (JA 133) was almost identical to several other statements that likewise relied on extensive legal findings that groups “cannot and should not” be regulated as political committees. *See* Statement of Reasons at 28, MUR 6402 (Dec. 23, 2014), <https://www.fec.gov/files/legal/murs/6402/14044364910.pdf>; Statement of Reasons at 27, MUR 6589 (July 30, 2014), <https://www.fec.gov/files/legal/murs/6589/14044362004.pdf>; Statement of Reasons at 26, MUR 6538 (July 30, 2014), <https://www.fec.gov/files/legal/murs/6538/14044361962.pdf>.

discretion and another containing a “supplemental” legal rationale.¹¹ Some of these dispositions may be defensible; others, less so. But the *New Models* opinion shuts down any inquiry into that question—even upon a mention of prosecutorial discretion “so fleeting you will miss it if you blink.” 993 F.3d at 905 (Millett, J., dissenting).

Political operators are undoubtedly aware that appeals to “discretion” now provide an increasingly potent defense to FEC enforcement; indeed, one former Commissioner publicly advised respondents to “equip the agency with the reasons why discretion is appropriate.”¹² Leaving *CHGO* and *New Models* in place can only make matters worse. The decisions appear to have opened new arenas of confrontation and stalemate, with those Commissioners who favor enforcement reportedly even withholding votes to close some deadlocked cases—or defend them in court—lest their colleagues attempt to immunize their contrary interpretations of law from judicial check by an invocation of prosecutorial discretion. As the *New York Times* summarized: “The twist in the raft of unclosed cases is that they remain formally under active investigation and are thus confidential, meaning that

¹¹ *E.g.*, Statement of Reasons at 1, MUR 7181 (May 10, 2021), https://www.fec.gov/files/legal/murs/7181/7181_09.pdf (providing a supplemental “legal analysis” for two of three controlling Commissioners detailing “why the complaint should also have been dismissed on its merits”).

¹² Jeremy Broggi, Lee Goodman & Shane Roberts, *FEC’s Prosecutorial Discretion Deemed Unreviewable by D.C. Circuit, Again*, JDSupra (May 19, 2021), <https://www.jdsupra.com/legalnews/fec-s-prosecutorial-discretion-deemed-8594602>.

Republican Commissioners are unable to tell the courts what has happened and why.

In other words, they can't cite their own 'prosecutorial discretion.'"¹³

CONCLUSION

For the foregoing reasons, en banc rehearing should be granted.

Dated: June 30, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(b)(4) because it contains 2,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2021, I electronically filed this Amicus Curiae Brief 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.

/s/ Tara Malloy
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