UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	)	Civ. No. 22-3281 (CRC)

PLAINTIFF'S OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS AND INTERVENOR AMERICAN ACTION NETWORK'S MOTION TO DISMISS

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INTRODUCTION

The Federal Election Commission ("FEC") admits that its dismissal of Citizens for Responsibility and Ethics in Washington's ("CREW") complaint against American Action Network ("AAN") was "contrary to law." Compl. Ex. 5; *see also* FEC Mem. of P. & A. in Supp. of Mot. to Dismiss 9 ("FEC MTD") (Weintraub's statement provides the "controlling rationale" for dismissal). The FEC now, finally, agrees with the analysis required by the law, recognized by this Court, and urged by CREW when it first brought AAN's lawbreaking to the FEC's attention in 2012. Compl. ¶ 58. It finally agrees that electioneering communications, except in exceedingly rare and extraordinary cases, are not grounds to excuse groups from publicly reporting as a political committee. *Id.* It finally agrees that the "major purpose" analysis must focus on a single year of activity, and that if a group exhibits a major purpose to influence elections in any given year, it must register and continually report until it lawfully terminates pursuant to the FECA. *Id.* Finally, the FEC agrees that based on that correct view of the law, "AAN met the definition of a political committee" by 2011 and "*does* have to disclose the identity of its donors." *Id.* ¶ 57.

If only it had reached this conclusion eleven years ago—the FEC could have remedied CREW's injury and prevented eleven years of additional injuries to CREW and to the country.

Notwithstanding this agreement, AAN and FEC counsel seek to delay AAN's reckoning and to permit AAN to evade its legal responsibilities. For its part, the FEC acknowledges that CREW will never receive a fair hearing on its claims against AAN from AAN's three partisan allies on the Commission, and that they have abdicated any attempt to apply the law to AAN. Yet that is no reason to dismiss this case. Rather, it is reason for the Court to expeditiously recognize CREW has exhausted (yet again) its attempts to obtain administrative relief, to authorize a direct action against AAN, and to create a forum for CREW to present the

voluminous evidence it obtained from AAN that proves CREW's claim.

AAN raises a number of unmeritorious arguments to permit it to continue to flout the law, while bemoaning the time it has taken to reach final judgment. But contrary to AAN's arguments, CREW has standing, as this Court previously recognized; CREW's claims are timely and AAN identifies no precedent suggesting otherwise; and *New Models* does not require dismissal here even if it did require dismissal of CREW's citizen suit, not least because *New Models* is not binding caselaw in this Circuit.

CREW's relief has been too long denied. CREW urges this Court to reject the FEC's and AAN's attempts to deprive CREW of its rights any longer.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Political Committee Disclosure

To ensure the public is "fully informed" about "[t]he sources of a candidate's financial support," *Buckley v. Valeo*, 424 U.S. 1, 67, 76 (1976), and about "who is speaking about a candidate" and might have officials "in [their] pocket," *Citizens United v. FEC*, 558 U.S. 310, 369, 370 (2010), the FECA imposes several disclosure obligations. Relevant here, it imposes an obligation on political committees to register and continually report and disclose information about their finances, including the identity of their donors who provide more than $200 a year. 52 U.S.C. § 30103(a), *id.* § 30104(b), (f)(2); 11 C.F.R. §§ 102.1, 104.3, 104.4, 104.20. The political committee's obligations continue until either it or the FEC terminates its status as permitted by the FECA. 52 U.S.C. § 30103(d).

The FECA defines a political committee as any group that takes "contribut[ions] or [makes] expend[itures] [of] more than $1,000 in a calendar year." *CREW v. FEC*, 209 F. Supp.

3d 77, 82 (D.D.C. 2016); 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Supreme Court has carved out from the statutory test otherwise qualifying groups that are neither under the control of a candidate nor have the requisite "major purpose" to nominate or elect federal candidates. *See Buckley*, 424 U.S. at 79. Determination of a group's "major purpose" is fact intensive, FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J"), but may be exhibited solely through a group's spending significant sums to influence federal elections, *see FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Spending on independent expenditures and all but "rare" and "extraordinary" electioneering communication can establish a group's major purpose. *CREW v. FEC*, 299 F. Supp. 3d 83, 97 (D.D.C. 2018); *accord CREW*, 209 F. Supp. 3d at 93 ("*[M]any* or even *most* electioneering communications indicate a campaign-related purpose."); Compl. ¶ 58 & Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR 6589R (AAN) (Sept. 30, 2022), https:/perma.cc/C9FDEESZ (the "Controlling FEC Statement")).

The test compares the group's campaign-related and non-campaign related spending in a "calendar year." Compl. Ex. 7 (Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub 3, MUR 6589R (AAN) (Dec. 5, 2016) (incorporated by reference in Controlling FEC Statement)); *see also CREW*, 209 F. Supp. 3d at 87–88 (deferring to controlling FEC opinion about the "relevant timespan" for major purpose test). Although neither courts nor the FEC have definitively decided the threshold, only groups that devote a majority of their spending to activity unrelated to influencing elections in a qualifying year may be excused from reporting. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-57 (4th Cir. 2012) (finding political committee status does not depend on whether "campaign-related speech amounts to 50% of all expenditures"); FEC, Supplemental E&J, 72 Fed. Reg. at 5605 (noting group

spending "50-75%" on campaign activity qualified as political committee).

A qualifying group is a political committee subject to the duties to report, and "the law does not require a committee to register as a [political committee] in order to be one." Statement of Reasons of Chairman Allen Dickerson, MUR 7920 (Oklahomans for T.R.U.M.P.) (June 29, 2022), https://perma.cc/6Q2C-PDY8.

B. The FECA's Private Right of Action and the FEC's Gatekeeping Adjudicatory Role

The FECA includes "a feature of many modern legislative programs," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990): paired civil enforcement through a government agency with private litigation, *see* 52 U.S.C. § 30107(e) (FEC's "exclusive" civil enforcement power subject to "[e]xcept[ion]" of private suits "in section 30109(a)(8)").

Congress subjected both mechanisms to significant safeguards. "To avoid agency capture, [Congress] made the Commission partisan balanced, allowing no more than three of the six Commissioners to belong to the same political party," *CREW v. FEC*, 923 F.3d 1141, 1143 (D.C. Cir. 2019) ("*CHGO II*") (Pillard, J., dissenting), while requiring a majority vote for any enforcement decision, *id.* at 1142 (Griffith, J., concurring) ("FECA thus requires that all actions by the Commission occur on a bipartisan basis."); 52 U.S.C. § 30106(c). "That balance created a risk of partisan reluctance to apply the law," however. *CHGO II*, 923 F.3d at 1143–44 (Pillard, J., dissenting).

Moreover, even apart from partisan deadlock, Congress worried that enforcement "cannot be left to a commission that is under the thumb of those who are to be regulated," FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 72 (1977), https://perma.cc/G23G-SQ7T (Statement of Sen. Clark). Industry capture of the FEC was all but

guaranteed, as the commissioners were to be appointed and overseen by the very people the agency regulated. Indeed, while the FEC's structure protected against partisan witch-hunts—a risk already guarded by the need to appeal to an independent judiciary, *see* 52 U.S.C. § 30109(a)(6)—it compounded the risk that it would become a "toothless lapdog" rather than the "active watchdog" required to "restor[e] [] public confidence in the election process." FEC, Legislative History at 75 (Statement of Sen. Scott).[1] The structure meant that, unlike other agencies whose underenforcement would be subject to democratic correction through appointment of new leadership, an FEC that failed to faithfully enforce the law would be subject to no correction, as even the election of a pro-enforcement President cannot result in the appointment of a majority of similar-minded commissioners. *See* 52 U.S.C. § 30106(a).

Accordingly, rather than rely solely on the agency, Congress provided private litigants with an avenue to protect the private rights to which the FECA entitles them, *FEC v. Akins*, 524 U.S. 11, 22 (1998), subject to the safeguard obliging any plaintiff to obtain preliminary adjudication by the FEC, *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (dismissing lawsuit filed without first presenting claim to the FEC and obtaining judgment); *see also Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("[T]he procedures [the FECA] sets forth … must be followed before a court may intervene."). The agency then acts as "first arbiter," screening out meritless complaints, while the FECA assures "plausible claims" are pursued either by the agency or by the private litigant. *CHGO II*, 923 F.3d at 1143–44, 1149 (Pillard, J., dissenting); *accord* Caroline Hunter, How my FEC Colleague is Damaging the Agency and Misleading the Public, *Politico*, Oct. 22, 2019, https://perma.cc/AW3K-KF6M ("In enforcement actions,

[1] *See also id.* at 92 (Statement of Sen. Mondale) (expressing concerns of "history of weak enforcement of campaign financing laws").

commissioners are like judges.").

The Commission does so by first adjudicating what is essentially an automatic motion-to-dismiss: judging whether a complaint raises a "reason-to-believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). If a majority concludes it does, then "the Commission *shall* make an investigation." *Id.* (emphasis added); *CREW v. FEC*, 55 F.4th 918, 923 (D.C. Cir. 2022) ("*New Models II*") (Millett, J., dissenting) ("If at least four of the six commissioners determine there is reason to believe a violation occurred, the Commission must go forward with an investigation."); *accord CHGO II*, 923 F.3d at 1144 (Pillard, J., dissenting). In that case, the FEC supplants the complainant in pursuing the case. If, on the other hand, the FEC, in its discretion, chooses not to pursue its own investigation contrary to that provision, that decision would trigger the complainant's right to seek relief themself in court for a meritorious complaint. 52 U.S.C. § 30109(a)(8)(C) (requiring judicial determination FEC's nonenforcement was "contrary to law").

If a majority does not conclude the complaint raises a reason-to-believe, the FEC may then choose to close the case by a majority vote. The commissioners who judged the complaint to lack merit must then "state their reasons why" they voted that way to permit a court to "intelligently determine whether the Commission is acting 'contrary to law.'" *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). "When the agency votes on whether there is a 'reason to believe' that a violation of FECA has occurred, it must give reasons for that action that are subject to judicial review." *CREW v. FEC*, 892 F.3d 434, 445 (D.C. Cir. 2018) ("*CHGO I*") (Pillard, J., dissenting).

If judicial review demonstrates the analysis was correct, the FEC has lawfully performed its gatekeeping adjudicatory function and the case is at an end. If a court concludes the

commissioners' analysis was erroneous, however, then the court declares the error and remands to the agency. "[T]he Commission is [then] given the right of first refusal on enforcement," and "[i]f the agency is still opposed or unable to bring an enforcement action, no court will force it to do so; all that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J, dissenting).

Thus, while the FEC has "discretion," *see Akins*, 524 U.S. at 26, "prosecutorial discretion" only "settle[s] [the FEC's] own claims," and has no bearing in the FEC's adjudication of a private plaintiff's claims, *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008). "The statute, in other words, never requires the agency to bring an enforcement action that it does not want to bring." *New Models II*, 55 F.4th at 923 (Millett, J., dissenting). "It just opens the door to private enforcement by an aggrieved party." *Id.* That door may only be shut by a judicially-sustainable conclusion that the private complaint fails on the merits.

II. The FEC's Adjudication of CREW's Complaint and Exhaustion of CREW's Administrative Remedies

The Court is familiar with the history of this matter from prior decisions. *See CREW v. AAN*, 590 F. Supp. 3d 165, 166–17 (D.D.C. 2022) *on appeal* 22-7038 (D.C. Cir. Mar. 2022); *CREW v. AAN*, 410 F. Supp. 3d 1, 7–11 (D.D.C. 2019); *CREW*, 299 F. Supp. 3d at 88–92; *CREW*, 209 F. Supp. 3d at 82–85. CREW nonetheless provides a brief recap and update.

AAN was incorporated on July 23, 2009. Compl. Ex. 1, ¶ 7. Immediately upon its creation, AAN spent heavily to influence the 2010 federal elections. *Id.* ¶ 9, 10. Between May 6, 2010 and June 30, 2011, AAN spent $4,096,909 on independent expenditures and $14,038,625 on electioneering communications. *Id.* AAN's electioneering communications included ads that accused a member of Congress of supporting "Viagra for rapists" and urged viewers to express

their disagreement "in November." *CREW*, 410 Supp. 3d at 10. Combined, AAN's independent expenditures and electioneering communications comprised no less than approximately 70.4 percent of AAN's total spending between July 1, 2010 and June 30, 2011, its fiscal year overlapping the 2010 election. Compl. ¶ 35.

Public records demonstrate AAN's political activities did not end in 2011. AAN has spent more than $26 million on independent expenditures since 2011. *See* FEC, Independent Expenditures, American Action Network (last visited Jan. 26, 2023), https://perma.cc/44FP-7DHE.[2] That spending, however, ignores AAN's primary role now, which is to act as a disclosure shield for contributions to its associated super PAC, the Congressional Leadership Fund ("CLF"). To date, AAN has funneled almost $113 million in contributions to CLF, dollars for which CLF would have had to identify their source but for the use of AAN as an intermediary. AAN spent a significant amount of its remaining funds on ads supporting or opposing electorally "vulnerable" candidates. Alexandra Marquez, Conservative group spends more to blast Democrats on inflation, *NBC News*, July 27, 2022, https://perma.cc/6F65-GCHZ; Paul Steinhauser, Conservative advocacy group targets two House Democrats from Virginia in wake of Youngkin Victory, *FOXBusiness*, Nov. 16, 2021, https://perma.cc/APT6-GYQY ; *see also* Anna Massoglia, 'Dark money' groups have poured billions into federal elections since the Supreme Court's 2010 Citizens United decision, *OpenSecrets*, Jan. 24, 2023, https://perma.cc/UU2X-PPDV (reporting AAN spent $30.7 million in TV and online ads boosting or attacking candidates); AAN, 2019 Form 990, Part IV 8, https://bit.ly/3QVYr5r ("The

[2] AAN's last reported independent expenditure occurred in 2016, *see id.*, the last election cycle before a Court struck down an FEC regulation that was unlawfully limiting disclosure for entities making independent expenditures, *see CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017).

vast majority of [AAN's] expenditures were … contributions to … [CLF] … [and] work on political matters."). These included ads that would qualify as electioneering communications if they appeared on television, *see, e.g.*, AAN, Tell Diana DeGette: Open American Energy Production (June 17, 2022), https://bit.ly/3CWZXhM. AAN's President, Dan Conston, has also been hailed as part of the "nucleus of [newly elected House Speaker Kevin] McCarthy's political operation." Jake Sherman, *Punchbowl News*, Nov. 7, 2022, https://perma.cc/PFH3-NNQA; AAN, About Us (last visited Jan. 26, 2023), https://perma.cc/ANZ7-ZQHW.

Based on AAN's activities, CREW filed a complaint in 2012 with the FEC. Compl. ¶ 40. The FEC's General Counsel found CREW's complaint had merit, *id.* ¶ 41, but the three Republican commissioners judged the complaint to not even raise a reason to believe that AAN may have violated the FECA because, they concluded, the First Amendment and case law requires they treat AAN's electioneering communications as reason to excuse the group from reporting, *id.* ¶ 42. In a footnote, the three also described their legal analysis as "prosecutorial discretion." *Id.* ¶ 44. CREW challenged the subsequent dismissal, as well as a dismissal of a similar group based on similar analysis, and this Court concluded the justification offered "blinks reality." *Id.* ¶ 46; *CREW*, 209 F. Supp. 3d at 93.

On remand, the FEC again deadlocked, with the same three Republican commissioners again adjudicating CREW's complaint as meritless. Compl. ¶ 47. CREW again sought judicial review. *Id.* ¶ 49. On summary judgment, the Court found the analysis was again erroneous and the dismissal was contrary to law. *Id.* ¶ 49; *CREW*, 299 F. Supp. 3d at 97, 101. With the matter on remand to the FEC, CREW filed an amended complaint in 2018 substituting its current executive director as a complainant for its previous executive director. Compl. ¶ 50.

The FEC failed to conform with the Court's judgment within thirty days, and CREW

therefor exhausted its administrative remedies. Compl. ¶ 52. Accordingly, CREW brought a suit directly against AAN, as permitted by the FECA. *Id.* At AAN's request, the action was stayed for six months. *See* Minute Order, *CREW v. FEC*, No. 18-cv-945 (CRC) (D.D.C. Oct. 1, 2018). AAN subsequently moved to dismiss CREW's suit, but this Court rejected the motion, holding that CREW had standing, CREW's claims were exhausted, CREW's claims were not time-barred, and the FEC's statement of reasons were reviewable. *See generally AAN*, 410 F. Supp. 3d at 12–30. The Court rejected AAN's request to stay the matter further to certify for interlocutory appeal. *See CREW v. AAN*, 415 F. Supp. 3d 143, 144 (D.D.C. 2019).

The parties completed discovery on July 9, 2021. *See* Compl. ¶ 52; Joint Mot. to Modify Briefing Deadline ¶ 6, *CREW v. AAN*, No. 18-cv-945(CRC) (D.D.C. Sept. 16, 2021), ECF No. 65. Rather than proceed to final briefing, AAN sought reconsideration of the Court's decision about the impact of a passing reference to "prosecutorial discretion" in the superseded first statement of reasons. *See* Compl. ¶ 52. The Court found a recent divided panel decision precluded review of the second statement because it incorporated by reference the initial statement's mention of prosecutorial discretion and thus precluded CREW's citizen suit, *id.*, while acknowledging the decision is in tension with earlier binding Circuit law and "gut[s]" the FECA's statutory mechanism to exhaust private rights of action. *AAN*, 590 F. Supp. 3d at 168–69 (applying *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models I*")).

CREW appealed the court's judgment. Compl ¶ 52. Given the centrality of the propriety of *New Models* to this Court's decision—a decision over which the D.C. Circuit is "deeply split," *AAN*, 590 F. Supp. 3d at 174—AAN did not oppose a stay pending the resolution of CREW's petition to reconsider *New Models* en banc, *CREW v. AAN*, No. 22-7038 (D.C. Cir. Apr. 27, 2022). That stay was recently lifted. *See* Order, No. 22-7038 (D.C. Cir. Jan. 13, 2023).

The en banc court recently issued its order on the petition, denying rehearing en banc, *New Models II*, 55 F.4th 918, with one vacancy, two judges appointed during the pendency of the petition declining to participate, and half of the remaining Judges concurring in denial en banc, *id.* at 918–22. The concurrence did not attempt to reconcile *New Models* with prior conflicting precedents, instead stating that it served the purpose of ensuring a partisan "vetogate" against any enforcement. *Id.* at 920. In a dissent from denial of rehearing en banc, Judges Millett and Pillard noted that the prior petition to rehear *CHGO* en banc lost in "an evenly split decision." *Id.* at 926. The dissenting judges further outlined the many conflicts between both *CHGO* and *New Models* and earlier binding precedent, including of the Supreme Court, and stated that *New Models* "wrongly treats CREW's effort to pursue its private right to judicial review of [three] commissioners' [adjudication of CREW's claim] as if it were an attempt to force the Commission itself to proceed in the face of an agency exercise of constitutionally unreviewable prosecutorial discretion," does "serious and recurring harm," and makes a partisan non-majority bloc of the FEC a "law unto [them]sel[ves]." *Id.* at 922, 929.

Shortly before the en banc decision, CREW received notice that the FEC had on remand once again dismissed CREW's complaint against AAN. Compl. ¶ 53. The FEC then revealed that the Commission had taken a reason-to-believe vote on May 10, 2018, just after the Court's second remand. *Id.* ¶ 54, Ex. 4. In that vote, three commissioners, including two who had previously voted against finding reason-to-believe AAN violated the FECA, now judged CREW's complaint to be meritorious. *Id.* No vote was proposed to dismiss CREW's complaint or otherwise exercise prosecutorial discretion, indicating that they abandoned their interest in exercising such discretion. *Id.* Nonetheless, the Commission still failed to secure four votes to open an investigation because Commissioner Weintraub declined to join with her colleagues. *Id.*

In a statement released before the vote, Commissioner Weintraub explained that her colleagues had a "deep ideological commitment to impeding this country's campaign-finance laws" and were committed to "find[ing] a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us." Compl. Ex. 2 (Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, (Apr. 19, 2018), https://perma.cc/LW5C-LN6P).

Commissioner Weintraub, as the commissioner responsible for blocking the last reason to believe vote, released the "controlling rationale" for the dismissal. FEC MTD 9; Compl. ¶¶ 57–60, Ex. 5. In it, the FEC "explicitly *disclaim[ed]* in [their] entirety the reasoning contained" in the prior statements of reasons in this matter, stated the FEC "did *not* dismiss this matter pursuant to its prosecutorial discretion" and "unequivocally disclaims prosecutorial discretion as a rationale for the Commission's dismissal of this matter." Compl. ¶ 56, Ex. 5. The FEC further stated the dismissal did not rest on the statute of limitations. *Id.*

Rather, the FEC held, "the evidence before the Commission showed that AAN met the definition of a political committee, which *does* have to disclose the identity of its donors." *Id.* ¶ 57, Ex. 5. The FEC held that "activity that extends well beyond express advocacy" is relevant to "determine political committee status." *Id.* ¶ 58, Exs. 2, 5–7. In particular, all but "rare" or "extraordinary" electioneering communications exhibit an electoral purpose and cannot serve to excuse a group for political committee reporting. *Id.* Additionally the major purpose analysis looks to a single calendar year of activity, and if a group spends a majority of its funds to influence elections in the year it meets the statutory test, it cannot be excused. *Id*. Employing those standards, the FEC concluded AAN spent a least $17 million, or "at least 62.6 percent … of AAN's total spending [in 2010] [to] suppor[t] federal campaign activity." *Id.* ¶ 59, Ex. 5. The

FEC held that the "dismissal of this matter was unreasonable, giving the facts before the Commission, the law governing this activity, and the reasoning" provided, and so "[t]he Commission's dismissal of this matter was contrary to law." *Id.* ¶ 60, Ex. 5.

In complete agreement with the FEC, CREW brought the instant suit within sixty days of the vote to close to obtain a judicial declaration that the dismissal was contrary to law. *See* Compl. ¶ 53.

III. The Continued Growth of Dark Money

In the decade-plus that the FEC has abdicated enforcement of the law against AAN, its failure to police dark money has bred the corrupt reality that groups like CREW feared. To provide just a few examples: Lev Parnas used a dark money vehicle to launder Russian money and use it to purchase influence over the President and other officials to win business licenses. Shayna Jacobs, Giuliani associate Lev Parnas convicted in campaign finance fraud case, *Wash. Post.*, Oct. 22, 2021, https://perma.cc/7SAF-S94K; *see also* Anna Massoglia, GOP operatives funneling Russian money to Trump is the latest 'straw' donor scheme, *OpenSecrets*, Sept. 22, 2021, https://perma.cc/DM7C-YG57. A crypto-currency billionaire—currently facing criminal charges—used his money to buy "bipartisan influence" and bragged about making tens of millions of dollars of those contributions "dark." Nik Popli, Here's What we Know About Sam Bankman-Fried's Political Donations, *Time*, Dec. 14, 2022, https://perma.cc/D3B5-FNVX. A truth-challenged congressman facing bi-partisan calls for resignation has been connected to a potentially fraudulent scheme to solicit donations on false pretenses, using the cover of an unregistered section 501(c)(4) nonprofit to solicit funds. Alexandra Berzon and Grace Ashford, The Mysterious, Unregistered Fund That Raised Big Money for Santos, *NY Times*, Jan. 12, 2023, https://perma.cc/Y5NE-YYSK. A speaker of a state house used a dark money group to carry out

a bribery scheme. Sharon Coolidge and Dan Horn, 'Dark money' group admits involvement in Householder bribery scandal, *Cincinnati Enquirer*, Feb 5, 2021, https://perma.cc/S9NV-EDX7. An insurance executive used a dark money group's spending as a bribe. Matt Corley, Convicted insurance exec's nonprofit contributed to national dark money groups, *CREW*, Apr. 16, 2020, https://perma.cc/J9W8-A53A. A former state Attorney General used dark money groups to win favors for payday lenders. Nicholas Confessore, A Campaign Inquiry in Utah Is the Watchdogs' Worst Case, *NY Times*, Mar. 18, 2014, https://perma.cc/DS9Q-5WBW.

These examples are only the tip of the iceberg given the amounts of dark money that have flooded the system. One analysis concluded that more than $2.6 billion were spent in U.S. elections in the decade following *Citizens United* without disclosure as to its source. Massoglia, 'Dark money' groups have poured billions into federal elections (aggregating FEC reported expenditures by groups not disclosing donors). Another analysis found that dark money topped $1 billion in the 2020 election *alone*. Anna Massoglia and Karl Evers-Hillstrom, 'Dark money' topped $1 billion in 2020, largely boosting democrats, *OpenSecrets*, Mar. 17, 2021, https://perma.cc/NK4L-E6MS (aggregating FEC reported spending, unreported political spending, and contributions to political groups by groups not disclosing donors).

One prosecutor called dark money the "perfect animal for bribery." Ohio corrupt case HB6: Winks, nods, texts and more can prove bribery, at 5:46–:50, Ohio Politics Explained (Jan. 9, 2023), https://bit.ly/3HaD5wL. The FEC's acquiescence, or worse, active abdication of campaign finance enforcement, including political committee registration and disclosure, has fed and nurtured that beast, which only continues to grow.

ARGUMENT

Neither the FEC nor AAN raise meritorious objections to this lawsuit. The FEC argues

this suit is futile, but only shows that the three Republican commissioners of the FEC are committed to abdicating enforcement of campaign finance laws against their partisan ally, AAN, and similar groups and that CREW will not have a fair hearing on remand. The import of the FEC's argument, if any, is to show that any chance of FEC enforcement is nonexistent and that CREW's citizen suit should be authorized immediately. For its part, AAN's arguments fare no better: CREW has standing, this suit is timely, the FEC has now disclaimed any reliance on prosecutorial discretion, and the Court should disregard nonbinding precedent.

I. This Action is Not Futile Even if Further FEC Proceedings Are

The FEC asks this Court to dismiss this action because "three Commissioners—a sufficient number to vote down any reason to believe vote on remand—have released a statement explaining … they opposed revisiting" the AAN matter and rather "favor[ed] closing the file." FEC MTD 12. Accordingly, the FEC asserts this action is "futile." *Id.* The FEC, however, cites no authority under § 30109(a)(8)(C) dismissing a suit where three commissioners are immovably committed to legal error and to granting impunity to their political allies. The simple reason for the omission is that Supreme Court authority flatly contradicts the FEC's position.

In *FEC v. Akins*, the FEC argued that a § 30109(a)(8)(C) lawsuit should be dismissed because, on remand, the FEC would "decid[e] in the exercise of its discretion not" to enforce. 524 U.S. at 25. Yet the Supreme Court found that promise immaterial and refused to dismiss the suit, "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Id.*; *see also CREW*, 209 F. Supp. 3d at 85 n.3 ("[T]he mere fact the FEC has discretion to dismiss CREW's complaint for another reason does not vitiate the redressability of CREW's claim.").

Here, the FEC points to even less. There is no promise by the agency to exercise

prosecutorial discretion on remand—rather only a free-floating statement explaining no vote and with no legal effect that "take[s] no position" on the question of whether CREW's claim should proceed written by three commissioners who may or may not be sitting if this case is remanded. Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, 6, MUR 6589R (AAN) (May 13, 2022) ("Dickerson, et al. Statement"), https://perma.cc/C4CX-7QAG (cited by FEC MTD 10, 12); *see also* Allison Desy, Keith Newell, & Willard West, Commissioners linger in 'holdover' status, IRW, Sept. 28, 2021, https://perma.cc/F8D7-6W5G (Commissioner Sean Cooksey's term expired April 30, 2021). Even if the statement promised to vote to exercise discretion, the three commissioners could not alone exercise that power. *See* 52 U.S.C. § 30106(c); FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage of Enforcement, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (exercise of prosecutorial discretion "requires the vote of at least four Commissioners"); *e.g.* Certification, MUR 7460 (FPFG) (Apr. 8, 2021), https://perma.cc/WUB4-4ST5 (6-0 vote to exercise prosecutorial discretion), *see also Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 92–93 (D.C. Cir.1995) (agency actions must occur through "majority-suppor[t]").

The FEC's showing aside, the FEC is incorrect to assert that these three may "preordai[n]" the outcome of this case. FEC MTD 12. If the three commissioners once again voted against reason to believe on remand, that would merely demonstrate a failure to conform, and thus reinstate CREW's citizen suit against AAN. That is what occurred in this very matter after this Court found, for the second time, that the FEC's dismissal was contrary to law: a reason-to-believe vote failed, Compl. ¶ 54, and the FEC thereby failed to conform with this Court's judgment and CREW was able to bring suit, *see AAN*, 410 F. Supp. 3d at 11.

This result flows from the structure and purpose of the FECA. The purpose of § 30109(a)(8)(C) review is to ensure enforcement where the FEC proves "unable or unwilling" to enforce. *DCCC*, 831 F.2d at 1135 n.5. Where the FEC proves incapable of providing relief on a "plausible claim," *CHGO II*, 923 F.3d at 1144 (Pillard, J., dissenting)—i.e., where any attempt at obtaining relief from the agency is "futile"—then that plaintiff may bring their own lawsuit.

The FEC's complete lack of on-point authority is thus unsurprising. Rather, the FEC cites authority where the outcome was mandated by statute, *see Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001) ("the decision was not only right but legally inevitable"); *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35-36 n.10 (D.D.C. 2016) (any action on remand "would be near impossible to square [with] a requirement that the Forest Service's exercise of its limited authority be done expeditiously"); where the agency provided an adequate alternative lawful basis for its actions, *see NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 63–64 (2d Cir. 1982) (while ALJ cited potentially unlawful burden shifting precedent, it still independently found firing was "clearly pretextual" which would independently support result); or authority that did not even resolve whether remand would be futile, *see Keats v. Sebelius*, No. 13-1524, 2019 WL 1778047, at *7 (D.D.C. Apr. 23, 2019) (raising, but not deciding, question whether remand would be futile to decide whether agency had and carried out legal duty to review employee file for employee being tried for possession of child pornography).[3]

[3] The FEC also cites *Checkosky v. SEC*, 139 F. 3d 221 (D.C. Cir. 1998), but only for its limited authority on judicial notice, *see* FEC MTD 11, likely because the case undercuts its argument. There, the SEC sought to sanction an accountant, but could not "articulate a discernable standard" that commanded a majority of the commissioners. *Checkosky*, 139 F.3d at 227. The court concluded that because no such pronouncement was likely, it would not remand but rather dismiss the agency's action as unlawful. *Id.* Here, too, there is little likelihood of a majority opinion commanding the approval of FEC commissioners, and the end result is that the agency's action here, dismissal of CREW's complaint, is contrary to law.

Indeed, the only FECA-related authority the FEC cites, *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996), expressly cuts against the FEC's theory here. In that case, the court found that it would be futile to remand the agency's decision to sue the defendant, notwithstanding the fact the original decision was unlawfully voted on by ex-officio members, because the FEC had already "ratif[ied]" the decision with a properly constituted Commission. *Id.* at 708. Notably, the court expressly rejected a claim of "statutory authority to review the FEC's decision to sue," and contrasted that with "a decision not to sue" which the court recognized was reviewable under 52 U.S.C. § 30109(a)(8)(C). *Id.* at 709. In other words, a remand to reconsider a decision to sue was futile because it could not be reexamined; but that is not true of a decision to dismiss.[4]

Even if the FEC is correct that three commissioners on remand will refuse to conform with this Court's judgment, then the import of that is not what the FEC suggests. Rather than provide a basis to dismiss CREW's suit, it instead shows that providing the FEC "the right of first refusal," *New Models II*, 55 F.4th at 929 (Millett, J., dissenting), is "no more 'than an exercise in futility." *NCPAC v. FEC*, 626 F.2d 953, 957 (D.C. Cir. 1980). Because "it is clear beyond doubt that the [FEC] will not grant the relief in question," CREW should be found to have immediately exhausted its administrative remedies and be authorized to bring a citizen suit. *Id.*; *see also Hagelin v. FEC*, No. 96-2132, 96-2196, 1996 WL 566762, *4 (D.D.C. Oct. 1, 1996)

[4] Presumably, the FEC intentionally ignores earlier FECA authority which cited futility in choosing not to remand a dismissal because that authority is clearly contravened by later case law barring courts from creating their own justifications and requiring them to rely solely on contemporary statement provided by the agency. *Compare In re FECA Litig.*, 474 F. Supp. 1044, 1047 (D.D.C. 1979) (refusing to remand as futile because court did "not believe that ascertaining the specific motive underlying the Commission's decision" was necessary) *with DCCC*, 831 F.2d at 1135 ("The Commission or the individual Commissioners should first be afforded an opportunity to say why DCCC's complaint was dismissed") *and Common Cause v. FEC*, 842 F.2d 436, 450 (D.D.C. 1988) (upholding dismissal in part on basis of futility solely because the court "decline[d] to give retroactive effect to our ruling in *DCCC*").

(Hogan, J., from the bench) ("I believe that the Court may be able in certain extraordinary circumstances to hear a case if the pursuit of the FEC remedy would be futile.").[5] It demonstrates that the FEC has "abdicat[ed] [] its statutory responsibilities." *CHGO I*, 892 F.3d at 440 n.9 (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

If three commissioners are indeed wedded to immunizing AAN from the reach of the federal campaign finance laws, that merely demonstrates Congress's wisdom in not leaving citizens' vital rights to a partisan bloc of commissioners. The purported futility of remand does not demonstrate the dismissal was lawful or deprive CREW of its legal right to seek relief for its injuries; it merely justifies expeditiously permitting CREW to seek its own relief.

II. CREW has Standing

The FEC makes no further argument for dismissal, but intervenor AAN once again contests CREW's standing. This Court has already concluded CREW has standing to seek relief from the injuries AAN caused and continues to cause. *AAN*, 410 F. Supp. 3d at 12–15; *see also CLC v. FEC*, 31 F.4th 781, 783 (D.C. Cir. 2022) (organization materially identical to CREW for these purposes has standing to bring FECA claim); *CREW v. FEC*, 316 F. Supp. 3d 349, 383 (D.D.C. 2018) (CREW has standing to assert FECA informational injury claims). Aware of its previous failures, AAN argues a recent Supreme Court decision, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), revolutionized informational injury and swept away all prior precedents. AAN Mem. of P. & A. in Supp. of its Mot. to Dismiss 2 ("AAN MTD"). Not so.

In relevant part, in *TransUnion*, a group of plaintiffs asserted an injury from "formatting

[5] Although where "Congress specifically mandates, exhaustion is required," *Perot*, 97 F.3d at 559, CREW will have met all mandatory exhaustion requirements when it receives a judgment from this court in its favor.

defects in certain mailings sent to them by *TransUnion*." 141 S. Ct. at 2200. The Court found the plaintiffs failed to establish an injury-in-fact. *Id.* at 2212–13. The United States, as *amicus curiae*, suggested the plaintiffs suffered an informational injury, citing *FEC v. Akins*, 524 U.S. 11, and *Public Citizen v. DOJ*, 491 U.S. 440 (1989). *Id.* at 2214. In distinguishing those cases, the Court reaffirmed such standing where plaintiffs "allege they failed to receive any required information" under "public-disclosure law[s]." *Id.* In an aside, the Court added that, "[m]oreover, the plaintiffs have identified no 'downstream consequences' from failing to receive the required information." *Id.* (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020) (recognizing failure to disclose information required by the FECA will have "downstream consequences" because the information "would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office" (quoting *Akins*, 524 U.S. at 21))).

Contrary to AAN's suggestion, courts considering *TransUnion* have concluded that, even treating the need to show at least one "downstream effect[]" as a necessary element to establish an informational injury,[6] the case does not "wor[k] a sea change to its informational injury jurisprudence." *Kelly v. RealPage, Inc.*, 47 F.4th 202, 214 (3d Cir. 2022); *see also Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408, 416 (5th Cir. 2022) ("*TransUnion* did not upset our approach to injury-in-fact"). That is true for the D.C. Circuit as well.

[6] The sentence is ambiguous in context. It is not clear if the Court was merely noting that plaintiffs had not alleged some *other* injury that was caused by the formatting error, or reversing precedent to append another requirement for informational injury in a single passing sentence without even acknowledging that fact. *Cf. Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) ("[A] plaintiff seeking to demonstrate that it has informational standing generally 'need not allege any additional harm beyond the one Congress has identified.'" (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016)); *Zivotofsky ex rel. Ari Z v. Sect'y of State,* 444 F.3d 614, 617 (D.C. Cir. 2006) ("[W]hy [plaintiff] wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing."), *aff'd in relevant part*, *Zivotosfky v. Clinton*, 576 U.S. 1 (2012).

As this Court recognized in previously adjudicating CREW's standing, the D.C. Circuit already required plaintiffs claiming informational injury to show the information "would help them." *AAN*, 410 F. Supp. 3d at 13 (quoting *Jewell*, 824 F.3d at 1040–41). "Whether framed as" a deprivation of useful information "or a 'downstream consequence,' … the upshot is the same: a plaintiff seeking to assert an informational injury must establish a nexus among the omitted information to which [it] was entitled, the purported harm caused by that specific violation, and the 'concrete interest' that Congress identified as 'deserving of protection' when it created the disclosure requirement." *Kelly*, 47 F.4th at 213. That is precisely what CREW has alleged here: "it regularly review[s] disclosure reports required by the FECA and uses the information they contain regarding campaign expenditures for a host of programmatic activities." *AAN*, 410 F. Supp. 3d at 13; *see also* Compl. ¶¶ 9–11; *CLC*, 31 F.4th at 783 (recognizing standing by "watchdog group" after *TransUnion* based on similar allegations)

AAN nonetheless argues that the downstream effects of its deprivation of CREW's informational rights are not cognizable, because it describes CREW's work as "asses[ing] anyone else's legal compliance," which AAN asserts does not establish an injury in fact. AAN MTD 15–16. But CREW does not seek a "legal conclusion." *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). Rather, CREW seeks facts to which it is entitled to permit it to help "others to whom CREW would communicate" to "evaluate candidates for office," to permit it and others "to evaluate the role that [AAN']s financial assistance might play in a specific election," *CLC*, 31 F.4th at 783, to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity" and to "gather[] data necessary to detect violations" of the Act, *Buckley*, 424 U.S. at 67–68 (listing purposes of FECA disclosure). The FEC's failure to protect against the deprivation of that

information has clear "downstream effects." *TransUnion*, 141 S. Ct. at 2214. It not only prevents CREW's work and "necessarily reduces the quantity of [CREW's] expression" in violation of CREW's First Amendment rights, *see Citizens United*, 558 U.S. at 339, but undermines the very "free functioning of our national institutions," *Buckley*, 424 U.S. at 66.

AAN has previously contested such uses are "derivative," *see AAN*, 410 F. Supp. 3d at 12, but again that is not so. CREW uses the information to evaluate potential corruption and to pursue violations of the Act. Compl. ¶¶ 9–10. While CREW cannot use the information to vote, neither could the plaintiffs in *Akins*, but the Court recognized they had standing because the restraint on speech was itself an injury. *See Akins*, 524 U.S. at 21 (standing for plaintiffs who may share info with others to use to evaluate candidates), *rev'g in relevant part Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc) (requiring plaintiffs to establish information was "[]related to any election in which they voted" and that they "vote[d] in various federal elections in which [the defendant] allegedly made contributions that qualified it as a political committee").

AAN also asserts that the information is not in fact useful to CREW because, it claims, "the Complaint only seeks the identity of AAN's donors for activities that took place mid-2009 to mid-2011." AAN MTD 16. AAN is wrong on three grounds. First, CREW's relief is not limited to pre-2011 information. As this Court recognized, if AAN qualified as a political committee by 2011, "[m]aking CREW 'whole'" would "require ordering AAN to disclose everything it would have had to disclose had it complied with the law in the first instance": specifically, its donors "from post-June 2011" through to today and into the future. *AAN*, 410 F. Supp. 3d at 21, 22.[7] Second, even knowledge of AAN's 2009–11 donors is useful to CREW's

[7] AAN contests this result and its qualification as a political committee prior to 2011, of course, *see* AAN MTD 1, but for purposes of standing, the court must "assume that on the merit the

work. *See, e.g.*, Matt Corley, Hensel Phelps donations to pro-Buck dark money group finally revealed, *CREW*, Nov. 19, 2019, https://perma.cc/J99A-ZU2X (reporting on government contractor contributor revealed after nine years who made illegal contribution to a member of Congress who was also the contributor's former employee). AAN does not suggest these donors are no longer involved in influencing elections. Those donors supported candidates of the Republican party and helped flip the House, and many members serving then still serve today. Moreover, the influence AAN's donors were able to exert and continue to exert likely impacts policies that remain in effect. Third, AAN cites nothing to suggest that its personal assessment of what is and what is not interesting has any bearing on whether the information is useful to CREW and thus has any bearing this Court's jurisdiction.

Since 2009 and continuing through today, AAN has funneled millions in funds from unknown and potentially illegal sources into US elections without any disclosure, buying influence and access and corrupting the democratic processes. AAN clearly has no plans to stop. Yet the FEC has shown itself unable and unwilling to apply the law to AAN, injuring and continuing to deprive CREW of information which has severe downstream effects.

III. CREW's Suit is Timely

The FEC dismissed CREW's complaint against AAN on August 29, 2022. Compl. ¶ 53 & Ex. 3 (citing Certification, MUR 6589R (AAN) (Aug. 29, 2022), https://perma.cc/B8ET-SUNH). CREW filed this suit on October 27, 2022, *see* Compl., within the sixty days provided by the FECA to challenge a dismissal, *see* 52 U.S.C. § 30109(a)(8)(B). AAN nevertheless claims CREW's suit is "untimely." AAN MTD 2. AAN oddly accuses CREW of a "novel" claim that

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plaintiffs would be successful in their claims." *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007).

the FECA's clock runs from the date the FEC voted to close the file. *See id.* at 17. Yet it is AAN's nonsensical reading that is "far outside the mainstream" and "brazen." *Id.* at 19.

Until recently, it was undisputed that it is the vote to "clos[e] the file" that "terminat[es] [the FEC's] proceedings." *Doe, 1 v. FEC*, 920 F.3d 886, 871 n.9 (D.C. Cir. 2019). It is that vote to close the file that starts the FECA's sixty-day clock. *See Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) ("[T]he date of dismissal was January 9, 1991.") *and* Certification, MUR 2163 (Am. Jewish Comm.) (Jan. 9, 1991), *available at* page 618, https://perma.cc/92CJ-6UD2 (6-0 vote to "[c]lose the file"); *Jordan v. FEC*, 68 F.3d 518, 518 (D.C. Cir. 1995) ("The Commission voted to dismiss Jordan's complaint on July 24, 1991") *and* Certification, MUR 3178 (Handgun Control PAC) (July 24, 1991), *available at* page 195, https://perma.cc/G952-TAXW (5-0 vote to "[c]lose the file"); *CREW v. FEC*, 799 F. Supp. 2d 78, 83 (D.D.C. 2011) ("[T]he FEC voted to dismiss MUR 5908 on June 29, 2010, thereby triggering Plaintiffs' 60-day clock in which to appeal the dismissal") *and* Certification, MUR 5908 (Peace Through Strength PAC) (June 29, 2010), https://perma.cc/VZ5R-NWNU (5-0 vote to "[c]lose the file").[8] Even those who now suggest votes to close are meaningless previously recognized that "[w]ithout four votes to close the file, the matter remains in limbo." *See* Statement of Chair James E. "Trey" Trainor III on the Dangers of Procedural Disfunction 7 (Aug. 28, 2020), https://perma.cc/W8QV-R7QP; *see also* Institute for Free Speech *Amicus Curiae Brief* 4, *CLC v. FEC*, 20-cv-809-ABJ (D.D.C. Aug. 16, 2021) (former employer of Republican commissioner Allen Dickerson recognizing that "[n]either the FECA nor the Commission's regulations specify that a matter terminates when

[8] This rule permits the FEC to continue to deliberate in the face of an apparent deadlock. *See* Certification, MUR 6920 (ACU) (Jan. 24, 2017), https://perma.cc/SST6-2TR2 (approving conciliation after prior deadlock on merits)

commissioners tie 3-3 on whether reason exists to believe the respondent violated the Act"). [9]

Indeed, AAN's own authority demonstrates this rule. In *CHGO I*, the Court recognized the dismissal occurred "in 2015," with the vote "to close the file," 892 F.3d at 436, 441 n.13, not when the relevant deadlock occurred in 2014, *CREW v. FEC*, 236 F. Supp. 3d 378, 387 (D.D.C. 2017). Similarly, in *Common Cause*, the "deadlock dismissal" referred to occurred in 1983, 842 F.2d at 438, when six commissioners voted to "close the file," Certification, MUR 1252/1299 (Am. for An Effective Presidency) (May 24, 1983), *available at* page 28–29, https://perma.cc/56RH-ULU7, not at the time of the challenged deadlock in 1980, Certification, MUR 1252 (Am. for An Effective Presidency) (Sept. 17, 1980), *available at* page 982–84, https://perma.cc/Y58V-GE4W.[10]

This rule *was* uncontested, but that changed when FEC commissioners responded to the radical revision of precedent in *CHGO*. While that case conferred on the blocking commissioners a unilateral power to terminate judicial review, it only applied to closed cases, and closure still required the consent of another commissioner. *See* 52 U.S.C. § 30106(c). Previously, a commissioner believing a complaint raised a reason to believe might still vote to close "in the interests of transparency of agency operations, closure for respondents, public accountability for the nay-saying commissioners, or in the hopes the complainant will sue the agency and obtain

[9] Commissioner Weintraub does not contest any contrary D.C. Circuit authority, *cf.* AAN MTD 2, because no such authority exists. Rather she criticized erroneous decisions that permit a non-majority of the Commission to invoke, after the fact, powers the Commission rejects, or that defer to a non-majority's interpretation of law, *see* Compl. Ex. 5 at 3 n.11 & 12.

[10] CREW exhaustively reviewed FEC and judicial precedent on the matter in a recent *amicus* brief filed in another matter. *See* Br. of *Amicus Curiae* CREW in Supp. of FEC Mot. to Dismiss, *45Committee v. FEC*, 1:22-cv-01749 (D.D.C. Aug. 29, 2022), ECF No. 18-1. In short, the FEC and the courts have always required an affirmative majority vote by the Commission to terminate a proceeding and begin the clock to sue.

judicial reversal." Statement of Commissioner Ellen L. Weintraub on the Opportunities Before the D.C. Circuit in the *New Models* Case to Re-Examine *En Banc* its Precedents Regarding 'Deadlock Deference,' 9 (Mar. 2, 2022), https://perma.cc/NY99-B9BZ ("Weintraub, Deadlock Deference"). But in the wake of *CHGO*, closure no longer promised judicial review of rules that would guide regulated entities, even those that "blink[] reality." *CREW*, 209 F. Supp. 3d at 93. Faced with that dilemma, commissioners seeking to faithfully enforce the law began withholding their vote to close so they could continue to negotiate with their colleagues or permit a plaintiff to challenge a failure to act in court and thus seek the judicial review that the FECA guarantees but that *CHGO* obliterated in dismissal cases. Weintraub, Deadlock Deference 11.

Only when the need to obtain bipartisan agreement was a condition on the Republican commissioners desired outcome did AAN's novel interpretation emerge: the claim that "a split vote on whether to initiate enforcement … in practical terms, results in an agency 'action' terminating the complaint." *Amicus Curiae* Brief of 45Committee 2, *CLC v. FEC*, No. 20-cv-0809 (D.D.C. Jan. 7, 2022). But that is not the law.

For its part, it's not clear what exactly AAN thinks dismissed this case if not the August 2022 vote to close the file. AAN does not suggest the case closed at the time of the last reason-to-believe deadlock in 2018, *see* Compl. ¶ 54, a suggestion that would be disproven by the authority above and would violate CREW's due process rights, as CREW was not (and lawfully could not be) informed about the vote within its 60-day window to sue, *see Jordan*, 68 F.3d at 519; 11 C.F.R. § 5.4(a)(4). AAN appears to suggest that the case might have been dismissed in 2014. Of course, it was—when the Commission voted to "close the file." Compl. ¶ 42. CREW sued within sixty days and won judgment declaring that dismissal, as well as another dismissal against another *de facto* political committee, was contrary to law. *See CREW*, 209 F. Supp. 3d at

95. The Court then reinstated the case and remanded. *Id.* To the extent that AAN suggests that CREW is limited to a single suit under § 30109(a)(8)(C) and may not challenge a subsequent dismissal on remand, no matter the legal or constitutional error committed, it is AAN's suggestion that rests on no "judicial opinion, scholarly writing, or other authority." *Cf.* AAN MTD 19. For the same reasons, any suggestion that the FEC's subsequent unlawful dismissal in 2016—a dismissal also judged contrary to law before the matter was again remanded to the agency—has no bearing here. *Cf.* AAN MTD 19.

In sum, CREW's suit here, filed within sixty days of the FEC's dismissal, is timely. AAN's revisionist history and attempts to mislead this Court on the state of the law fails to carry its burden to justify the dismissal it seeks.

IV. Neither the Dismissal of CREW's Citizen Suit nor *New Models* Justify Dismissal of This Suit

Finally, AAN argues that this case is precluded because three ex-commissioners, explaining their decision to block enforcement in 2014, vaguely mislabeled their legal analysis "prosecutorial discretion." AAN MTD 22.[11] AAN rests this argument on this Court's recent dismissal of CREW's citizen suit against AAN. *Id.* at 23 (citing *AAN*, 590 F. Supp. 3d at 174, *on appeal* 22-7038). Yet there are key differences between this suit and that citizen suit. Moreover, the FEC has now confirmed the statement is part of the commissioners' abdication of enforcement. Further, that dismissal rested on law that cannot be reconciled with earlier precedents of this Circuit and "gut[s] the statutory scheme that Congress created in the FECA."

[11] Thus, in contrast to the statement in *New Models*, the initial statement here "reference[d] their merits analysis as [the only] ground for exercising prosecutorial discretion." *Cf. New Models II*, 55 F.4th at 920 (Rao, J., concurring). Accordingly, even under the terms of *New Models*, review remained available. *See id.* (only because the statement provided "an independent ground of prosecutorial discretion" was review unavailable).

AAN, 590 F. Supp. 3d at 168–69. Accordingly, if this case cannot be distinguished from *CHGO* and *New Models*, those decisions must be disregarded. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail.").

A. As the Challenged Dismissal Disclaims Prosecutorial Discretion, Prosecutorial Discretion Cannot Preclude Review

This suit challenges the FEC's dismissal of CREW's complaint in 2022. The FEC recognizes that the "controlling rationale" for that dismissal is found in the 2022 Statement of Commissioner Weintraub, as she is the latest commissioner to prevent a reason-to-believe vote. FEC MTD 9 & n.4. In that statement, the FEC "disclaims in its entirety the reasoning contained" in prior controlling statements of reasons and "unequivocally disclaims prosecutorial discretion as a rationale for the Commission's dismissal of this matter." Compl. ¶ 56 & Ex. 5. Accordingly, "here, [t]he statement of reasons issued by the controlling Commissioner[] explicitly [does not] rel[y] on prosecutorial discretion." *New Models I*, 993 F.3d at 885.

The Controlling FEC Statement is unlike the one whose challenge gave rise to CREW's previous citizen suit. There, the Court found the statement of reasons "incorporate[d] by reference" the first's reference to prosecutorial discretion. *AAN*, 590 F. Supp. 3d at 174 n.7. The Court thus concluded review of the statement was effectively precluded. *Id.*[12]

No such incorporation can be inferred here. Rather, the official position of the FEC disclaims any exercise of prosecutorial discretion in CREW's case against AAN.

Aware of this, AAN exclusively relies on the Court's hypothetical for dismissing

[12] CREW does not "acknowledge" that incorporation occurred, *cf.* AAN MTD 24 n.4, but it does acknowledge that incorporation served as the Court's basis to dismiss.

CREW's citizen suit: "if the passing reference to prosecutorial discretion in the initial statement made the first dismissal unreviewable under *New Models*, then the Court lacked the power to issue the remand order that resulted in the second statement" and "[t]he result would have been a dismissal of CREW's case, and the Commissioners never would have issued a second statement." *AAN*, 590 F. Supp. 3d at 174 n.7. The Court did not rely on this, finding it need not reach the question because of incorporation, addressed above, but AAN now argues that the first statement not only precluded that second suit, but all future attempts by CREW to seek relief for its injuries from AAN.

AAN's argument runs headlong into binding precedent to the contrary, however. For example, in *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984), after a district court struck an agency's rule due to a failure to "provide an adequate explanation," the agency revised the rule and explanation rather than appeal the adverse judgment, *id.* at 1162–63. An intervening party wished to defend the prior explanation as "adequate," and thus urged the appellate court to find the district court had erred. *Id.* at 1165. Nevertheless, the D.C. Circuit rejected the attempt because the prior explanation had been superseded by new agency action, rendering it a "dead letter [that] cannot be revived in favor of intervenors." *Id.* at 1165–66.

Here, too, the first two statements of reasons are now "dead letter[s]." *Regan*, 727 F.2d at 1165. Indeed, they died from willful abandonment. First, the FEC could have appealed its losses, but chose not to. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("[C]onsequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong on a legal principle subsequently overruled in another case."); *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981) ("whether initial judgment

was correct or not" has no impact on consequences once final). Second, the commissioners who first claimed to support prosecutorial discretion reversed course and voted *in favor* of pursuing CREW's claims and did not move to exercise prosecutorial discretion. *See* Compl. ¶ 54 & Ex. 4 (Certification MUR 6589R (AAN) (May 10, 2018), https://perma.cc/US95-WQDP). Their vote indicates they abandoned any claim to prosecutorial discretion. Third, the Controlling FEC Statement now expressly "disclaims" prosecutorial discretion. *Id.* ¶ 56 & Ex. 5. While AAN prefers the FEC's earlier position, it is "axiomatic that an agency is free to change its mind." *Nat'l Cable & Telecomm'n Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009).

AAN protests the treatment of Commissioner Weintraub's statement as the controlling rationale, claiming that it is "effectively a dissent." AAN MTD 27. Yet, as the FEC recognizes, the very D.C. Circuit precedent that AAN chastises Commissioner Weintraub for opposing commands the result it rejects. Under that precedent, courts "requir[e] a statement of reasons by the declining-to-go-ahead Commissioners when a deadlock vote results in an order of dismissal." *Common Cause*, 842 F.2d at 449; *accord New Models I*, 993 F.3d at 883 (the "controlling Commissioners" are "[t]he Commissioners who voted against proceeding" and speak as "the Commission"). Here, Commissioner Weintraub is the person who caused the Commission to "fail[] to muster four votes in favor of initiating an enforcement proceeding," *CHGO I*, 892 F.3d at 437, and thus she now speaks as the Commission in this matter.

Nor, for that matter, did the failed reason-to-believe vote put this Court's jurisdiction in the citizen suit "in question." AAN MTD 27. That suit was premised on CREW's exhaustion of its administrative remedies and the FEC's failure to "conform" with the Court's 2016 declaration in thirty days. *AAN*, 410 F. Supp. 3d at 11. Once those thirty days passed, the FECA provides no additional basis for the FEC to undermine CREW's citizen suit. Moreover, even if the FEC could

later conform outside of the thirty days, a failed reason-to-believe vote hardly does so. Nor would it in any way "moot" CREW's citizen suit. AAN MTD 27, because it did not preclude a court from providing "an effective remedy," *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008): requiring AAN to disclose unlawfully withheld information.

Accordingly, this case is in no way premised on reviewing a statement of reasons that invokes, even by incorporation, prosecutorial discretion. Rather, it concerns a statement that disclaims prosecutorial discretion, including any past invocations by anyone. AAN cites nothing for its proposition that once a commissioner invokes prosecutorial discretion, it binds all future commissioner determinations, nor anything to support its but-for counterfactual speculation.[13] As the FEC now disclaims any prosecutorial discretion to justify non-enforcement against AAN, prosecutorial discretion cannot prevent judicial review.

B. The First Statement of Reasons Did Not Speak for the Agency and Could Not Invoke the Agency's Prosecutorial Discretionary Powers

Putting aside its being superseded and disclaimed, the first statement of reasons that purported to invoke prosecutorial discretion was still signed by only three commissioners and issued nearly two months after the majority action to close the file that it purported to explain. *See* Compl. ¶¶ 42–43. Accordingly, the statement is nothing more than a "post-hoc rationalization" that fails to express the views of "the proper decision makers." *Local 814, Int'l Broth. of Teamster v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976).

[13] Such counterfactual speculation is hardly reliable. For example, it fails to account for CREW's 2018 Amended Complaint. Compl. ¶ 50. If the Court held that it could not review the first statement of reasons, nothing would have precluded CREW, or its then new executive director, from filing a new complaint against AAN rather than asking to amend a purportedly legally defunct complaint. In that case, the only dismissal in this MUR would be the 2022 dismissal and the only statement of reasons would be Commissioner Weintraub's 2018 statement.

First, "[c]ourts do not … give credence to … post hoc rationalizations for agency action, but instead 'consider only the regulatory rationale offered by the agency at the time of such action.'" *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002). There is nothing in the record to indicate the rationalization provided accurately memorializes a contemporary analysis.

Second, the statement is not from the proper decisionmakers, i.e. it is not "a majority-supported statement'" that explains the majority's vote to dismiss. *Cf. Oil, Chemical and Atomic Workers*, 46 F.3d at 92 (quoting *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1436–37 (D.C. Cir. 1989)); *see also id.* at 93 ("We insist that the agency, to which Congress has delegated principal policymaking authority, choose and clearly articulate its rules."). Since *DCCC*, courts have, as a matter of convenience, reasonably assumed that where a majority "dismiss[es] due to a deadlock," that majority is dismissing *because* of their colleagues' decision to vote against the merits of the complaint. *See DCCC*, 831 F.2d at 1133; *Common Cause*, 842 F.2d at 449 (statement needed from only deadlocking commissioners "when a deadlock vote results in an order of dismissal"). Accordingly, it at least approximates the requirement for the majority decisionmakers to issue a statement when courts assume that statement would merely point to their colleagues' adjudication of the merits of the complaint.

But it ignores the need for a statement from the decisionmakers to examine the deadlocking commissioners' statement outside of the context in which it is offered. The deadlocking commissioners' statement does not explain the dismissal—only a statement by the majority voting to close the file may do that. Rather, it is a statement serving to explain their judgment on the merits of the complaint as failing to raise a reason-to-believe that precluded enforcement by either the FEC or a private party. It is only because the non-majority judged the complaint to lack merit could they deadlock agency action, and only that deadlock on the merits

motivated the majority to dismiss. A non-majority's vote to invoke prosecutorial discretion on its own would have no legal effect. *See* 52 U.S.C. § 30106(c); FEC, Statement of Policy, 72 Fed. Reg. at 12,546. By voting to close the file, the majority is not delegating, and legally cannot delegate, to the minority a power to invoke powers through its obligation to provide a statement. *See* 52 U.S.C. § 30106(c).

To be sure, the statements at issue in *CHGO* and *New Models* were also post-hoc rationalizations by commissioners other than the proper decisionmakers. But neither case addressed either issue, and "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

C. The FEC has Abdicated Enforcement Against AAN And Other *De Facto* Political Committees

Further, assuming the superseded initial post-hoc statement by non-decision-makers is determinative for purposes of this case, it does not preclude review because the FEC has "abdicat[ed] [] its statutory responsibilities" with respect to AAN and, indeed, against any *de facto* political committee. *CHGO I*, 892 F.3d at 440 n.9. It is the FEC's position here that the Republican commissioners will never faithfully enforce the law against AAN. Although two eventually voted to find CREW's complaint raised a reason to believe, Compl. ¶ 54, they apparently did so to use that vote to undermine CREW's suit and were still committed to "find[ing] a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us." Compl. Ex. 2.

Indeed, the only apparent modern case where the FEC required a group to report as a political committee is Americans for Jobs Security—and only because of this Court's order. *See*

CREW, 209 F. Supp. 3d at 82; Meghan Faulkner, Uncovering Massive Dark Money Donors, 3 Lawsuits Later, *CREW*, Sept. 20, 2019, https://perma.cc/GN9N-XMTF; Statement of Reasons of Commissioner Caroline C. Hunter 1, MUR 6538R (July 2, 2020), https://perma.cc/WVV6-M4NN (enforcing law only because "my hand was effectively forced by a federal district court"). That disclosure revealed important information, even nine years after the fact, that showed among other things a donor to a member of Congress was a prohibited source: a federal contractor and the member's former employer. Matt Corley, Hensel Phelps donations to pro-Buck dark money group finally revealed. In no other case in the eleven years since CREW first filed its complaint against AAN has the FEC required a *de facto* political committee to disclose its donors to the public, as required by law, including in numerous cases found to be meritorious by either the FEC's General Counsel or the Democratic commissioners.

The FEC admits that three commissioners will not permit any repeat of its Americans for Job Security enforcement, and that they will not afford CREW a fair hearing on remand. Indeed, the FEC's representations to this Court show CREW has never had a fair hearing from the Commission for its claims against AAN, and never will against any *de facto* political committee. Rather, because the FEC—or at least a sufficient number of commissioners to block action—have "abdicat[ed]" enforcement, its dismissal is reviewable, *CHGO I*, 892 F.3d at 440 n.9 (claims of prosecutorial discretion do not terminate review if they are part of the agency's abdication of enforcement), even if the initial post-hoc superseded statement by a non-majority were the determinative explanation for review here.

D. *New Models* and *CHGO* Conflict with Binding Precedent and Must be Disregarded

Finally, even assuming that this case is "on all fours" with *New Models*, AAN MTD 22,

that would still not support dismissal. That is because *New Models*, and the earlier precedent on which it relies, *CHGO*, irreconcilably conflicts with earlier binding precedents of the Supreme Court and D.C. Circuit, as both members of the D.C. Circuit and this Court have recognized. As both *New Models* and *CHGO* are "inconsistent with the decision[s] of a prior panel," these decisions, "being in violation of that fixed law, cannot prevail." *Sierra Club*, 648 F.3d at 854; *see e.g.*, *Rockwell Cap. Partners, Inc. v. CD Int'l Enter., Inc.*, 311 F. Supp. 3d 52, 56 n.3 (D.D.C. 2018) ("To the extent that [a later Circuit decision] is contrary to [an earlier decision], the Court is bound to follow [the earlier decision] because it was decided first.").

1. Applying *New Models* and *CHGO* Here Conflicts with FECA Precedent

New Models is "not binding" because it, and its precursor, *CHGO*, "conflict[] 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 [v. FEC]*, 795 F.2d 156 [(D.C. Cir. 1986)]." *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting) (citing *Sierra Club*, 648 F.3d at 854); *accord New Models I*, 993 F.3d at 900–01 (Millett, J., dissenting); *CLC v. FEC*, 952 F.3d 352, 358–59 (D.C. Cir. 2020) (Edwards, J., concurring).[14]

First, *New Models* conflicts with binding Supreme Court authority in *Akins*. The majority in *New Models* held that the "FECA cannot alter the APA's limitation on judicial review," *New Models I*, 993 F.3d at 889, and that, notwithstanding the plain language of 52 U.S.C.

[14] *See also generally* Br. of Election Law Scholars as *Amici Curiae* in Supp. of Appellants' Pet. for Rehearing En Banc, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 30, 2021) (explaining "significant conflict in the rulings of this Court" with *New Models*, that decision permits "one party [to] dominate the FEC's decision-making" and "threatens Congress's carefully crafted framework for the enforcement of campaign finance law").

§ 30109(a)(8)(A), "the [FEC's] decision not to bring an administrative enforcement action is 'committed to agency discretion by law' and therefore unreviewable," *id.* at 888. In contrast, *Akins* recognized the APA's "traditiona[l]" limit on review, but found that the FECA "explicitly indicates [] the contrary." *Id.* at 900 (Millett, J., dissenting) (quoting *Akins*, 524 U.S. at 26 (holding *Chaney*, 470 U.S. 821, does not apply to review of FEC dismissals)); *accord CHGO II*, 923 F.3d at 1146 (Pillard, J., dissenting); *CLC*, 952 F.3d at 361 (Edwards, J., concurring). Rather, "as the Supreme Court has specifically held, 'reason-to-believe' assessments under the [FECA] are expressly excepted from the general presumption that decisions not to enforce the law are unreviewable." *New Models II*, 55 F.4th at 927 (Millett, J., dissenting).[15]

New Models tried to revise *Akins*'s history to limit the case to dismissals premised on "only legal reasons." 993 F.3d at 889 n.8. Yet the FEC in *Akins* claimed the dismissal under review *was* discretionary, *compare id. with* Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8 (invoking prosecutorial discretion), and the Supreme Court expressly stated that the FECA extends review to even "discretionary agency decision[s]" to correct any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25. Rather, courts "cannot know that the FEC would have exercised its prosecutorial discretion" with a correct view of the law. *Id.*

In short, *Akins* recognizes the FECA provides "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings," *Akins*, 101 F.3d at 734, without exception. Indeed, the provision is not so unusual

[15] *New Models*'s textual hook for discretion was the FEC's discretion in the remedy at the end of an enforcement action it pursues. 993 F.3d at 890 (quoting 52 U.S.C. § 30109(a)(6)(A)). But that discretion exists for every action, including the action in *Akins*, and yet the Court recognized the "decision not to undertake an enforcement action" was still reviewable. 524 U.S. at 26.

when the statutory scheme is understood as a whole. The FECA does not "attempt to force the Commission itself to proceed in the face of an agency exercise of constitutionally unreviewable prosecutorial discretion." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). Rather, it authorizes judicial review of the agency's adjudication of a private party's claim to permit it to show exhaustion and "pursue its private right[s]." *Id.*

Second, *New Models* conflicts with this Court's decision in *DCCC*, which recognized the FEC's discretionary dismissals, even those with unanimous backing, are reviewable. 831 F.2d at 1133–34 (recognizing both "6-0 decision" and "3-2-1 decision" to "exercise of prosecutorial discretion" are reviewable). Rather than limit review to dismissals based "exclusively on an interpretation of the relevant statutory and regulatory standards," *New Models I*, 993 F.3d at 894, *DCCC* held the FECA did not "confin[e] the judicial check to cases in which … 'the Commission acts on the merits,'" 831 F.2d at 1134; *see also Common Cause*, 842 F.2d at 449 (applying *DCCC* to discretionary rationales). Instead, review extends to commissioners' "unwilling[ness]" to enforce to ensure they do not "shirk [their] responsibility to decide" a matter on the merits. *DCCC*, 831 F.2d at 1134, 1135 n.5.

Third, *New Models* conflicts with *Chamber*, which similarly held the Commission's "unwillingness" to proceed was reviewable, and that it presented an "easy" case for reversal. 69 F.3d at 603. In *Chamber*, the court's jurisdiction depended on the fact that, "even without a Commission enforcement action" due to prosecutorial discretion, "[plaintiffs] [were] subject to litigation challenging ... their actions" 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" and thus would be contrary to law. *Id.*; *see also CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting) (Commission "oblig[ed] to pass on the merits of a complaint," and "[i]f three Commissioners

could vote 'no' at the reason-to-believe stage on grounds of prosecutorial discretion, there would be little to check 'the Commission's unwillingness to enforce its own rule'" (quoting *Chamber*, 69 F.3d at 603)). But that is only true if a discretionary dismissal could be found contrary to law.

Fourth, *New Models* conflicts with *Orloski*, which held that all FEC dismissals are subject to review. 795 F.2d at 161. Indeed, *Orloski* recognized that, as the first step in any review, the commissioners must demonstrate their analysis is based only on "permissible interpretation[s]" of law. *Id.* Moreover, "a decision dismissing a complaint 'is contrary to law' even 'under a permissible interpretation of the statute' if it involves 'an abuse of discretion.'" *CHGO II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Orloski*, 795 F.2d at 161).

Each of these decisions accords with the FECA's basic structure for review of private complaints: the FEC acts as a "first arbiter" to weed out unmeritorious complaints, subject to judicial review. *CHGO II*, 923 F.3d at 1149. But where nonenforcement is the result of the FEC's "unwillingness," *DCCC*, 831 F.2d at 1134; *accord Chamber*, 69 F.3d at 603; *see also Orloski*, 795 F.2d at 161, review is not thwarted. Rather, that is an "easy" case because it demonstrates that there is no dispute over the complaint's merit. *Chamber*, 69 F.3d at 603. Courts do not thereby compel the FEC to act; rather, they merely find a plaintiff has exhausted their attempts to seek administrative relief and permit the plaintiff to bring a suit in its own name.

New Models, however, corrupts this system. It confuses the FEC's prosecutorial discretion over the pursuit of its *own* claims with a power to veto claims private litigants wish to bring. Indeed, "[t]he harm worked by this decision is serious and recurring." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting) (citing evidence that, since the *CHGO* decision, two-thirds of dismissals contrary to the agency's general counsel's recommendation have cited prosecutorial discretion). Indeed, at a time the FEC's lax enforcement has enabled incidents like a donor's

scheme to shunt tens of millions of dollars into elections through straw donors, *see* Chad Day, Paul Kiernan, Sam Bankman-Fried's Alleged Campaign Finance Violations Explained, *Wall Street Journal*, Dec. 14, 2022, https://perma.cc/X4JF-PH2T, *New Models* has proven fatal to every private litigant trying to protect their rights under the FECA where they seek to challenge a FEC dismissal that occurred after the decision came down.

Courts are bound to follow the earlier line of cases that faithfully applied the FECA and to disregard *CHGO* and *New Models*. Accordingly, they cannot serve as a basis to dismiss this action.

2. Applying *New Models* and *CHGO* Here Conflicts with Settled Administrative Law

In addition to the FECA precedents discussed above, *New Models* further conflicts with earlier settled authority on administrative law that leaves the FEC as an agency unlike any other: a "law unto itself." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting).[16]

First, *New Models* conflicts with the rule that it is "formal action, rather than its discussion, that is dispositive" on reviewability. *ICC v. Bhd. Of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987). The question of "judicial review of a final agency action" is a matter "of Congress," *Abbott Labs v. Garder*, 387 U.S. 136, 140 (1967), rather than something commissioners can voluntarily decline, *cf. Chaney*, 470 U.S. at 837 (nonenforcement decisions categorically unreviewable under APA). "[T]he availability of judicial review [does not] turn[] on an agency's prose composition," *New Models I*, 993 F.3d at 887, like whether a "statement of reasons explain[ing] the dismissal turned in whole or in part on enforcement discretion," *id.* at

[16] *See also generally* Br. of Profs. of Administrative Law as *Amici Curiae* in Supp. of Pls.-Appellants, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 30, 2021) (*New Models* contravenes "clear statutory test (and an on-point Supreme Court case interpreting that text)" and "lacks support in the law").

894; *cf. id.* at 883 (courts cannot "teas[e] out" reviewable reasons from unreviewable action).

Here, even improperly looking to the first statement of reasons, the *action* the agency took was to deadlock on a vote to find reason to believe a violation occurred, and then to unanimously close the case. Compl. ¶ 42. Where there is a "dismissal due to a deadlock" on a reason to believe vote, courts look to review that "deadlock[ing]" action, *DCCC*, 831 F.2d at 1133, and Congress "explicitly" provided for review of such votes, *Akins*, 524 U.S. at 26. Consequently, the first judgment against reason-to-believe was reviewable, and an attempt to "justify [that] reviewable action with a discretionary reason, … does not thereby [render that action] unreviewable," *CHGO II*, 923 F.3d at 1148 (Pillard, J., dissenting).

Second, *New Models* conflicts with the obligation to provide an explanation "rational[ly] connect[ed] [to] the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983). Here, the initial choice made was to close the file due to three commissioners negatively adjudicating CREW's complaint: an adjudication that not only blocked FEC enforcement, but suit by CREW too. Compl.¶ 42. Accordingly, the commissioners needed to "state their reasons why" they concluded CREW could not bring its *own suit*. *DCCC*, 831 F.2d at 1132. In other words, because the commissioners adjudicated the complaint on the merits, any justification must be "rational[ly] connect[ed]" to the merits. *State Farm*, 463 U.S. at 43.

Prosecutorial discretion cannot explain, however, a decision adjudicating a private complaint. *Burlington Res.*, 513 F.3d at 247 ("prosecutorial discretion" may only "settle[e] [agency's] own claims"); *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) ("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."); *cf. New Models II*, 55 F.4th at 919 (Rao, J. concurring) (only "an agency's refusal to institute" *its own* "proceedings falls within 'the special province of the Executive Branch'"). The invocation of prosecutorial discretion was a *non-sequitur* that failed to explain the commissioners' judgment that CREW's complaint lacked merits and that CREW could not pursue its claim on its own. Rather, an explanation must go to the merits of CREW's complaint, a subject for which there is always "law to apply" and not "peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831; *CHGO I*, 892 F.3d at 445 (Pillard, J., dissenting) (commissioners "must give reasons for that action that are subject to judicial review."). This Court therefore did not review the "unreviewable," *cf. New Models I*, 993 F.3d at 889; it disregarded it as beside the point. The invocation of prosecutorial discretion was, to the extent it had any intention, a "pretextual basis" offered only to cut off review. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

Third, *New Models* ignores the rule that courts "are [not] free to guess … what the agency would have done had it realized that it could not justify its decision" through the analyses provided. *New Models I*, 993 F.3d at 902, n.5 (Millett, J., dissenting) (quoting *Int'l Union, United Mine Workers v. Dep't of Labor*, 358 F.3d 40, 44–45 (D.C. Cir. 2004)); *accord CHGO II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Akins*, 524 U.S. at 25). Here, even assuming the second statement incorporated discretion, the agency eventually realized its error and disclaimed discretion, and the very same commissioners voted to proceed with enforcement. For the same reason, the decision did not produce an "advisory opinion," *cf. New Models II*, 55 F.4th at 921 (Rao, J., concurring). "Even [though] the Commission [was initially] determined for reasons within its discretion not to pursue this case, [this Court's] judicial decision on whether the complaint shows reason to believe the Act was violated ha[d] concrete consequences for the

ability of private complainants to file suit." *New Models II*, 55 F.4th at 928–29 (Millett, J., dissenting). Specifically, it permitted CREW to bring its citizen suit.

New Models exempts the FEC from these general rules of administrative law. Indeed, by ignoring the FECA's structure and subjecting private complainants' right to seek judicial relief to an unreviewable veto by a partisan block of executive officials, *New Models* "impermissibly threatens the institutional integrity of the Judicial Branch." *CFTC v. Schor*, 478 U.S. 833, 851 (1986). By abandoning judicial review of FEC adjudication of private complaints, courts are not avoiding "order[ing] the Executive Branch to undertake an enforcement action it opposes," but rather empowering that branch to preclude private individuals from appealing to the judiciary by "bring[ing] a lawsuit in [their] own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). To avoid "offend[ing] the separation of powers," however, "Article I adjudicators" may only "decide claims submitted to them by consent" and only "so long as Article III courts retain supervisory authority over the process." *Wells v. Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015); *see also Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 475 (D.C. Cir. 2020) (Rao, J.) (existence of "appellate review" that provides "adequate opportunity to secure judicial protection against arbitrary action" necessary for agency adjudication to satisfy due process); *CLC v. Iowa Values*, 573 F. Supp. 3d 243, 256 (D.D.C. 2021) (complainant's § 30109 claims do not assert "public rights," but private ones). *New Models* violates all these conditions. No party consents to present their private right claims to the FEC; rather, they do so under mandate of the FECA. *Perot*, 97 F.3d at 559. Worse still, *New Models* subjects an Article III court's supervisory authority to "a judicial-review kill switch," *New Models II*, 55 F.4th at 922 (Millett, J., dissenting), operated at the whim of Article I bureaucrats not subject to any "degree of electoral accountability," *Collins v. Yellen*, 141 S. Ct.

1761, 1784 (2021); *see* 52 U.S.C. § 30106(a)(1) (president forbidden from appointing majority of like-minded commissioners). Not only do separation of powers concerns "ha[ve] no purchase" here, *New Models* II, 55 F.4th at 929, *New Models* brings about a violation of the separation of powers.

New Models's departure from precedent also offends the First Amendment by empowering an unaccountable partisan-aligned non-majority with "unbridled discretion" to censor plaintiff's access to "facts"—"the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs"—and thus "necessarily reduce[] the quantity of expression" by CREW and others. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011); *Citizens United*, 558 U.S. at 341 (FEC acts unconstitutionally when it blocks "voters [ability] to obtain information"); *Buckley*, 424 U.S. at 19; *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) ("First Amendment rights … to know the identity of those who seek to influence their vote."). *New Models* presents "serious constitutional problems" due to its complete departure from "the intent of Congress" and all precedent. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Under *New Models*, not just the FEC, but a partisan-aligned electorally-unaccountable non-majority bloc of FEC commissioners are "law unto [them]sel[ves]." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting). That law, however, is a radical departure from all binding precedents, and thus is "not binding" here. *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting). Accordingly, this Court may disregard *New Models* and *CHGO*, and permit CREW to fulfill the purposes of the FECA and finally protect itself from AAN's interminable lawlessness.

CONCLUSION

CREW has suffered over a decade of injuries from AAN's malfeasance. It is past time to show AAN that it is not above the law. Unfortunately, notwithstanding the FEC's recent enlightenment, the FEC's counsel admits that CREW will never receive a fair hearing for its complaint before the Commission as at least three commissioners have permanently abdicated any enforcement of CREW's claims against AAN. That simply proves the FEC correct: the dismissal here was "contrary to law." This Court should deny the motions to dismiss so it can proceed to expeditiously authorize CREW to bring its own citizen suit and permit CREW its day in court to present the evidence of AAN's overwhelming electoral activities and purposes.

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/s/ Stuart McPhail
Stuart McPhail
smcphail@citizensforethics.org
(D.C. Bar No. 1032529)
Adam J. Rappaport
arappaport@citizensforethics.org
(D.C. Bar No. 479866)
Citizens for Responsibility and Ethics
in Washington
1331 F. Street N.W., Suite 900
Washington, D.C. 20004
Telephone: (202) 408-5565
Fax: (202) 588-5020

COUNSEL FOR CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I served Plaintiff's Opposition to Defendant Federal Election Commission's Motion to Dismiss and Intervenor American Action Network's Motion to Dismiss and accompanying proposed order by using the court's CM/ECF system, thereby serving all persons required to be served.

/s/ Stuart McPhail
Stuart McPhail