EN BANC ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

No. 22-5277

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,

Appellant,

v.

FEDERAL ELECTION COMMISSION AND NEW REPUBLICAN PAC,

Appellees.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:21-cv-2128-RJL (The Honorable Richard J. Leon)

BRIEF OF THE NRSC AND THE NRCC AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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January 2, 2025

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The NRSC (the National Republican Senatorial Committee) and the NRCC (the National Republican Congressional Committee), by counsel, provide the following information in accordance with Circuit Rule 28(a)(1):

A. Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in Appellant's En Banc Brief.

B. Rulings Under Review

References to the rulings below appear in Appellant's En Banc Brief.

C. Related Cases

The case on review was not previously before this Court or any other court. There are no related cases pending before this Court or any other court except two that this Court on its own motion held in abeyance pending en banc disposition of this case: *Campaign Legal Center v. FEC*, No. 22-5339 (abeyance order entered Oct. 15, 2024), and *CREW v. American Action Network*, No. 22-7038 (abeyance order entered Oct. 24, 2024).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the NRSC and the NRCC state as follows:

The NRSC has no parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in it.

The NRCC has no parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in it.

Dated: January 2, 2025

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

GLOSSARY viii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 3

I. The FEC's Prosecutorial Discretion Is Unreviewable. 3

II. The FEC May Invoke Prosecutorial Discretion In A Deadlock. 7

A. FECA Requires Four Votes To Enforce, Not To Dismiss. 8

B. The Statement Invoking Discretion Only Needs Three Votes. 11

III. The FEC's Prosecutorial Discretion Has Not Stopped FECA Enforcement. 15

IV. Exchanging The FEC's Prosecutorial Discretion For Unchecked Citizen Suits Would Raise Serious Constitutional Concerns. 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE

CIRCUIT RULE 29(d) CERTIFICATE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

AFL-CIO v. FEC,
333 F.3d 168 (D.C. Cir. 2003) 10

Akins v. FEC,
736 F. Supp. 2d 9 (D.D.C. 2010) 6

Al Bahlul v. United States,
967 F.3d 858 (D.C. Cir. 2020) 21

Biden v. Nebraska,
143 S. Ct. 2355 (2023) 9

**Buckley v. Valeo*,
424 U.S. 1 (1976) 18, 19

Buckley v. Valeo,
519 F.2d 821 (D.C. Cir. 1975) 10

Campaign Legal Center v. FEC,
89 F.4th 936 (D.C. Cir. 2024) 3

Common Cause v. FEC,
842 F.2d 436 (D.C. Cir. 1988) 11, 13, 14

CREW v. FEC,
475 F.3d 337 (D.C. Cir. 2007) 3, 17

**CREW v. FEC*,
892 F.3d 434 (D.C. Cir. 2018) 2, 4, 5, 7, 21

**CREW v. FEC*,
993 F.3d 880 (D.C. Cir. 2021) 2, 4, 5, 6, 8, 13, 16, 21

CREW v. FEC,
55 F.4th 918 (D.C. Cir. 2022) 16

Authorities upon which we chiefly rely are marked with asterisks.

DCCC v. FEC,
831 F.2d 1131 (D.C. Cir. 1987).....11, 13, 14

**End Citizens United PAC v. FEC*,
90 F.4th 1172 (D.C. Cir. 2024)..... 7, 8, 12, 13, 15, 16, 21, 22

FEC v. Akins,
524 U.S. 11 (1998).....6, 7

FEC v. NRSC,
966 F.2d 1471 (D.C. Cir. 1992).....11, 12

Free Enterprise Fund v. Public Company Accounting Oversight Board,
561 U.S. 477 (2010).....18

Gomez v. United States,
490 U.S. 858 (1989).....21

**Heckler v. Chaney*,
470 U.S. 821 (1985).....4

ICC v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987).....4

Laborers Local 236, AFL-CIO v. Walker,
749 F.3d 628 (7th Cir. 2014) 10

McCutcheon v. FEC,
572 U.S. 185 (2014).....11

Morrison v. Olson,
487 U.S. 654 (1988).....15

United States ex rel. Polansky v. Executive Health Resources, Inc.,
599 U.S. 419 (2023).....20

Printz v. United States,
521 U.S. 898 (1997).....19

Seila Law LLC v. CFPB,
591 U.S. 197 (2020).....18

Swift v. United States,
318 F.3d 250 (D.C. Cir. 2003) 20

**United States v. Texas*,
599 U.S. 670 (2023) 4, 10

Van Hollen, Jr. v. FEC,
811 F.3d 486 (D.C. Cir. 2016) 1, 10

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 20

Wagner v. FEC,
793 F.3d 1 (D.C. Cir. 2015) 9

Statutes

31 U.S.C. § 3730 20

52 U.S.C. § 30106 8

52 U.S.C. § 30107 8

52 U.S.C. § 30109 ..... 3, 8

Federal Election Campaign Act of 1971,
Pub. L. No. 92-225, 86 Stat. 3 (1972) 19

Federal Election Campaign Act Amendments of 1974,
Pub. L. No. 93-443, 88 Stat. 1263 19

Federal Election Campaign Act Amendments of 1976,
Pub. L. No. 94-283, § 313, 90 Stat. 475 19

Federal Election Campaign Act Amendments of 1979,
Pub. L. No. 96-187, § 309, 93 Stat 1339 (1980) 19

Congressional Materials

122 Cong. Rec. 6693 (1976) 9

125 Cong. Rec. 36754 (1979) 12

Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981 (1974) 9

Other Authorities

Certification, *In re NRCC, et al.*, MUR No. 2116 (June 5, 1986), tinyurl.com/bdffrnwx 14

Certification, *In re Ronald Reagan, et al.*, MUR No. 1252 (Sept. 3, 1980), tinyurl.com/bdh3cuzf.....14

End Citizens United, *About Us*, tinyurl.com/4572xcr6 (last visited Jan. 2, 2025) 17

Institute for Free Speech, *I don't like your blog, so I'll file a complaint* (Aug 13, 2008), tinyurl.com/4upffuu8 17

Statement for the Record of Commissioner Bradley A. Smith, *In re The Coalition NRCC, et al.*, MUR No. 4624 (Nov. 6, 2001), tinyurl.com/5n6mnkhc 17

GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review

INTEREST OF *AMICI CURIAE*[1]

The **NRSC** (the National Republican Senatorial Committee) is the principal national political party committee focused on electing Republicans to the U.S. Senate. The NRSC's membership includes all Republican Members of the Senate, including a respondent in the agency proceeding below.

The **NRCC** (the National Republican Congressional Committee) is the principal national political party committee devoted to electing Republicans to the U.S. House of Representatives. The NRCC's membership includes all Republican Members of the House.

For the NRSC, the NRCC, and their members, affirmation of the panel decision is essential to ensure that, as Congress instructed, enforcement of the Federal Election Campaign Act requires four affirmative votes by a bipartisan majority of Commissioners on the Federal Election Commission and, just as important, that a nonenforcement decision requires only three votes. Congress established the FEC in the shadow of Watergate and structured it so partisan political abuse would not chill "core constitutionally protected activity." *See Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (citation omitted). By requiring

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

bipartisan agreement, Congress blunted the risk that one political party could use agency enforcement to silence or damage another political party. But dismissal decisions do not pose the same risk, and Congress did not require bipartisan agreement for the FEC to decline enforcement.

Appellant End Citizens United seeks to upend the careful congressional design, arguing this Court went astray in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), *en banc reh'g denied*, 55 F.4th 918 (D.C. Cir. 2022) ("*New Models II*"), and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission on Hope*"), *en banc reh'g denied*, 923 F.3d 1141 (D.C. Cir. 2019), and that the panel should not have followed those decisions. In fact, both were well reasoned and consistent with FECA and the Supreme Court's teachings about prosecutorial discretion. End Citizens United urges this Court to replace the FEC's enforcement discretion with review by federal district judges that is untethered to statutory standards and with unchecked citizen suits that are impervious to Executive Branch control. But FECA directs neither result. And interpreting the statute as if it did would violate Article II while sanctioning the politically motivated enforcement actions that Congress sought to avoid.

At bottom, End Citizens United believes more enforcement is always better. But Congress, in the aftermath of the abuses of Watergate, made a different choice—as FECA's text, structure, history, and purpose all confirm. When the Commission,

deadlocked or otherwise, invokes its prosecutorial discretion to explain its nonenforcement decision, the decision is unreviewable.

The Court should affirm.

ARGUMENT

I. The FEC's Prosecutorial Discretion Is Unreviewable.

When the panel affirmed that the FEC's dismissal of the first complaint against New Republican PAC and Senator Rick Scott was unreviewable, it relied on a well-established principle of Circuit law: "a Commission dismissal is unreviewable if it turns in whole or in part on enforcement discretion." *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1178 (D.C. Cir. 2024) (cleaned); *see also Campaign Legal Ctr. v. FEC*, 89 F.4th 936, 939 (D.C. Cir. 2024) ("a Commission nonenforcement decision is reviewable only if the decision rests *solely* on legal interpretation." (emphasis in original)). Because the FEC expressly invoked its prosecutorial discretion when it dismissed the complaint, the panel affirmed the district court's holding that the FEC's dismissal decision "was not reviewable." *End Citizens United*, 90 F.4th at 1181.

Circuit law follows the Supreme Court's teaching. "The Supreme Court in [*FEC v.*] *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion." *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (citing *FEC v. Akins*, 524 U.S. 11, 25 (1998)); *see also* 52 U.S.C. § 30109(a)(6)(A)

("the Commission *may*, upon an affirmative vote of 4 of its members, institute a civil action" (emphasis added)). The general principle flowing from both Article II and the Administrative Procedure Act is that an agency's prosecutorial discretion is unreviewable. *United States v. Texas*, 599 U.S. 670, 678–81 (2023); *see Heckler v. Chaney*, 470 U.S. 821, 830–32 (1985).

In the Supreme Court's words, agency decisions about whether to enforce a statute are "generally committed to an agency's absolute discretion" and, therefore, cannot be second guessed by courts. *Chaney*, 470 U.S. at 831, 837; *see also Texas*, 599 U.S. at 679 ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" (citation omitted)); *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("it is entirely clear that the refusal to prosecute cannot be the subject of judicial review"). This Court's decisions in *Commission on Hope* and in *New Models* recognize that Congress intended the default rule to apply to FEC nonenforcement decisions because "[n]othing in [FECA] overcomes the presumption against judicial review." *Comm'n on Hope*, 892 F.3d at 439; *see also New Models*, 993 F.3d at 889.

End Citizens United says *Commission on Hope* and *New Models* wrongly interpreted FECA but offers little statutory analysis itself. End Citizens United quotes the provision authorizing a complainant to challenge an FEC dismissal decision as "contrary to law." Appellant's Br. 21 (quoting 52 U.S.C.

§ 30109(a)(8)(C)). From there, it asserts that it was "clear[ly]" "Congress's intent to make dismissal decisions reviewable notwithstanding any supposed reliance on agency enforcement discretion." *Id.* at 23 (punctuation omitted); *see id.* at 21–22 ("FEC enforcement dismissals, even those purportedly based in whole or in part on prosecutorial discretion, do not escape statutorily mandated review for legal error"). But quoting the statutory language being interpreted and then asserting one's view of it in conclusory fashion does not make an argument.

End Citizens United's failure to make its case from the statute is especially egregious because the decisions it attacks each explain in detail why FECA's authorization of "contrary to law" review cannot include review of enforcement discretion. In *Commission on Hope* and again in *New Models*, the Court said the statutory phrase "contrary to law" necessarily authorizes review only if there is "'law' to apply." *Comm'n on Hope*, 892 F.3d at 440 (quoting *Chaney*, 470 U.S. at 830); *see New Models*, 993 F.3d at 894 ("nonenforcement decisions may be reviewed for abuse of discretion only when there is 'law to apply'"). The Court also recognized in both decisions that although FECA clearly authorizes the FEC to exercise enforcement discretion, the statute contains no guidelines for the agency to follow in exercising its enforcement powers. That makes it impossible for a court to determine that any particular discretionary dismissal was contrary to law and shows that Congress did not intend that result. *See Comm'n on Hope*, 892 F.3d at

439 ("the operative statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (cleaned)); *New Models*, 993 F.3d at 889 ("FECA does not govern how the Commission may exercise its enforcement discretion"). Despite complaining about both decisions for years, End Citizens United has no answer to their persuasive reasoning. And it never identifies what "law" it thinks a reviewing court should apply if *Commission on Hope* and *New Models* are overturned.

End Citizens United wrongly claims (at 26–29) that the Supreme Court in *Akins* endorsed review of the FEC's prosecutorial discretion. There, the FEC had issued a legal interpretation of 2 U.S.C. § 431(4)(A) (now 52 U.S.C. § 30101(4)(A)) to dismiss the first charge in an administrative complaint and invoked prosecutorial discretion to dismiss a second charge in the same complaint. *See Akins*, 524 U.S. at 25; *Akins v. FEC*, 736 F. Supp. 2d 9, 13–15 (D.D.C. 2010) (detailing procedural history). The complainant subsequently challenged in court the FEC's dismissal of the first charge only.

Deciding the question of Article III standing only as to that first claim, the *Akins* Court held it justiciable notwithstanding the Commission's argument that it could have dismissed that one based on discretion too. 524 U.S. at 25; *see also* FEC Br. 30, *Akins*, 524 U.S. 11 (No. 96-1590) (available at 1997 WL 523890) ("Respondents have not challenged the Commission's authority to exercise its

prosecutorial discretion in that manner."). The Court acknowledged that the FEC had dismissed the second claim based on "prosecutorial discretion" and might yet still, on "remand," also dismiss the first "in the exercise of its lawful discretion." *See Akins*, 524 U.S. at 25 (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). But the Court found Article III causation and redressability satisfied as to the first claim because it "[could not] know" how "the FEC would have exercised its prosecutorial discretion" had it known its legal reason for dismissal was wrong. *Ibid.* (citing *Chaney*, 470 U.S. 821); *see also Comm'n on Hope*, 892 F.3d at 438 n.6 ("The [*Akins*] Court held only that the complainants had standing even though, on remand, the Commission might invoke its prosecutorial discretion to dismiss the remaining charge, as it had done with respect to the § 441b allegation."). That entire analysis would have been beside the point if the FEC's dismissal decisions were reviewable regardless of whether they rested on legal analysis or discretion. Thus, far from showing that all FEC dismissals are reviewable, *Akins* confirms discretionary dismissals are not.

II. The FEC May Invoke Prosecutorial Discretion In A Deadlock.

In addition to contesting the FEC's enforcement discretion, Appellant disputes its manner of invocation. Echoing the dissent, End Citizens United says the Commission may invoke prosecutorial discretion only when four commissioners agree. Appellant's Br. 30–45; *see End Citizens United*, 90 F.4th at 1188–90 (Pillard,

J., dissenting). But Congress made a different judgment and required four affirmative votes only to enforce an administrative complaint, not to dismiss.

A. FECA Requires Four Votes To Enforce, Not To Dismiss.

FECA enumerates matters for which the votes of four FEC commissioners are required and does not include dismissals on that list. The statute requires "the affirmative vote of 4 members of the Commission" to initiate enforcement. 52 U.S.C. § 30106(c); *see also id.* §§ 30107(a)(6), 30107(a)(9), 30109(a)(1). "Yet," as the panel majority explained, "no provision in FECA requires four votes to dismiss a complaint." *End Citizens United*, 90 F.4th at 1180 n.6; *accord New Models*, 993 F.3d at 891 n.10 ("None of the referenced paragraphs [in § 30106(c)] include dismissal"). Because *expressio unius est exclusio alterius*, Congress's decision to omit dismissals from the list of actions for which four affirmative votes is required shows four votes are not needed to decline enforcement.

FECA's structure confirms its text. Congress established the FEC as a six-member body while providing that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). By coupling FECA's four-vote requirement with a three-member party affiliation limit, Congress ensured that commissioners from a single political party could not easily hijack the FEC to chill political activity by individuals or organizations affiliated with a different political party.

The "historical and governmental contexts" surrounding FECA's enactment amplify Congress's concern. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (quoting F. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv. L. Rev. 1876, 1913 (1999)); *see also ibid.* ("Context is not found exclusively within the four corners of a statute." (cleaned)). Congress established the Commission in the shadow of Watergate. Among the "'deeply disturbing examples' of corruption 'surfacing after the 1972 election,'" *Wagner v. FEC*, 793 F.3d 1, 12–13 (D.C. Cir. 2015), were allegations that President Nixon had leveraged the law enforcement capabilities of the executive branch to investigate and prosecute his perceived "political 'enemies,'" Final Report of the Select Comm. on Presidential Campaign Activities, S. Rep. No. 93-981, at 108 (1974); *see also id.* at 130–50 (documenting "misuse of government agencies," especially law enforcement, for "political ends").

These abuses featured heavily in the congressional debates leading up to the enactment of FECA and its subsequent amendments. The combination of the party-affiliation limit with the four-vote requirement was seen by Members of Congress as the essential "safeguard" that would "keep politics, or the appearance of politics" out of FEC decisions to prosecute. 122 Cong. Rec. 6693 (1976) (statement of Sen. Howard Cannon). But Congress expressed no similar concerns about the risk of allegedly partisan decisions to *decline* enforcement, which cannot have a similar

chilling effect on protected political and electoral activity. Contrary to End Citizens United's assertions (*see* Appellant's Br. 6–7), the legislative record shows Congress was concerned about abuses that might result from Commission *overenforcement*, not underenforcement.

Congress's concern makes perfect sense given the Commission's role. "Unique among federal administrative agencies, the [FEC] has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). Unlike "agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights" guaranteed by the First Amendment. *Van Hollen*, 811 F.3d at 499.

Because the Commission's enforcement decisions are all taken in this critical area of negative liberty, *see Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 639 (7th Cir. 2014) ("the First Amendment . . . 'directs what government may not do to its citizens, rather than what it must do for them'"), Congress wisely required a four-vote bipartisan majority before the agency can proceed. But when the FEC "elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty," *Texas*, 599 U.S. at 678, so there is no risk of "any 'chilling effect,'" *Buckley v. Valeo*, 519 F.2d 821, 843 n.50 (D.C. Cir. 1975) (subsequent

history omitted). Unsurprisingly, Congress did *not* require bipartisan agreement for FEC decisions to decline enforcement. The First Amendment instructs Congress to "err on the side of protecting political speech," *see McCutcheon v. FEC*, 572 U.S. 185, 209 (2014) (plurality opinion), and that is exactly what Congress did when it required four votes to proceed with enforcement and not to dismiss.

What End Citizens United characterizes as a misreading of the statute is thus a critical feature—as decades of Circuit precedent confirm. When then-Judge Ruth Bader Ginsburg explained that the FEC often "deadlocks and for that reason dismisses a complaint," *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987), she affirmed a basic tenet of the congressional design: FECA requires "four affirmative votes" to proceed with enforcement not to "dismiss[,]" *id.* at 1133; *accord Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("a deadlock vote results in an order of dismissal").

B. The Statement Invoking Discretion Only Needs Three Votes.

Beginning with *DCCC*, this Court has held that when "the Commission deadlocks and dismisses," "the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Although a statement is not required by FECA, the Court found one necessary "to make judicial review a meaningful exercise." *Ibid.* (citing *DCCC*, 831 F.2d at 1134–35). "Since those Commissioners constitute a controlling

group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Ibid.*

End Citizens United and the dissent argue Commission deadlocks should in general be reviewed against the judicially required statement issued by the controlling group of commissioners. But they resist that approach when the controlling commissioner statement invokes discretion, calling it "perverse" to "treat a non-majority's statement of reasons, elicited to facilitate judicial review, as instead its ticket to bypass judicial review altogether." *End Citizens United*, 90 F.4th at 1189 (Pillard, J., dissenting); *see* Appellant's Br. 36 ("Perversely, the CREW cases allow a partisan-aligned bloc to use a document intended to facilitate judicial review to nullify review."). Whatever the merits of that policy-based criticism, it does not land against the statute but against *DCCC*.

Prior to *DCCC*, all deadlock dismissals were deemed unreviewable exercises of prosecutorial discretion. So, if a Commission *majority* dismissed based on an interpretation of FECA, that was "reviewable in court solely to assure that the Commission's action is not based on an error of law." 125 Cong. Rec. 36754 (1979) (statement of Sen. Claiborne Pell). But "if the Commission consider[ed] a case and [was] evenly divided as to whether to proceed, that division which under the act precludes Commission action on the merits [was] not subject to review any more than a similar prosecutorial decision by a U.S. attorney." *Ibid.*; *see also ibid.*

(explaining statutorily "limited" contrary-to-law review did not "work a transfer of prosecutorial discretion from the Commission to the courts"). Because the FEC's deadlocks were unreviewable, the agency often did not explain them. *See Common Cause*, 842 F.2d at 451 n.34.

DCCC rejected the FEC's position that all "deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion." 831 F.2d at 1133–34. But, as *New Models* explained, *DCCC* was "focused on the facts of that case" and "did not 'answer . . . for all cases' the question of whether a Commission dismissal due to deadlock is 'amenable to judicial review.'" 993 F.3d at 894 (quoting *DCCC*, 831 F.2d at 1132). After *New Models*, the statement of reasons *DCCC* required must be examined to determine whether the deadlock was based on unreviewable "enforcement discretion" or reviewable "legal arguments." *Id*.

Contrary to the dissent, there is nothing strange about examining a statement to determine whether it sets forth judicially reviewable statutory arguments or invokes unreviewable enforcement discretion. And the supposed anomaly of looking to a "non-majority" statement, *see End Citizens United*, 90 F.4th at 1189 (Pillard, J., dissenting); Appellant's Br. 34–35, is simply the byproduct of *DCCC*'s project to make reviewable some deadlocks when previously all were *per se* unreviewable. It has nothing at all to do with *Commission on Hope* or *New Models*.

It makes no difference that End Citizens United now says a "dismissal" has always required a separate vote that followed the agency's substantive deadlock. Appellant's Br. 35 (citing *Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 381–82 (D.C. Cir. 2024)). To begin with, numerous cases show that End Citizens United's claim is simply untrue.

In the seminal *DCCC* case, for example, all agree the FEC issued a "dismissal due to a deadlock." 831 F.2d at 1132. Yet, the Commission's vote certification shows it never took a separate vote to dismiss. Certification, *In re NRCC, et al.*, MUR No. 2116, at 14 (June 5, 1986), tinyurl.com/bdffrnwx. That means the deadlocked enforcement vote occasioned the dismissal.

The same was true in *Common Cause*, the case *45Committee* cited for its mistaken dictum. There, "as in *DCCC*, the Commission dismissed the complaint for lack of the requisite four votes." *Common Cause*, 842 F.2d at 449. As in *DCCC*, the Commission's vote certification shows no vote to dismiss, only a failed vote to enforce on a 3-3 deadlock. Certification, *In re Ronald Regan, et al.*, MUR No. 1252, at 982–84 (Sept. 3, 1980), tinyurl.com/bdh3cuzf. Neither the Commission nor this Court has ever required a separate vote to dismiss.

Regardless, there is no support for End Citizens United's self-serving position that a three-commissioner statement speaks for the FEC when it provides legal reasons (which End Citizens United argues should be reviewed) but not when it

invokes prosecutorial discretion. If *DCCC* was right to require an explanation from the controlling commissioners after a deadlock, then that statement speaks for the agency in either case. As the panel rightly observed, "nothing in [the] caselaw suggests [the Court] must turn a blind eye to the invocation of prosecutorial discretion in a deadlock dismissal." *End Citizens United*, 90 F.4th at 1180 n.6.

III. The FEC's Prosecutorial Discretion Has Not Stopped FECA Enforcement.

End Citizens United argues that unless *New Models* and *Commission on Hope* are reversed, there will be "profoundly damaging effects on the operation of federal campaign finance law" as judges are unable "to 'prod a reluctant FEC to act' on plausible claims." Pet. Reh'g En Banc 1, 16; *see also* Appellant's Br. 37–38.

The short answer is that what End Citizens United deems a problem is in fact the careful, conscious congressional plan for the agency. "Under our system of government, the primary check against prosecutorial abuse is a political one." *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting). As explained, Congress imposed a bipartisan enforcement requirement, lest one political party seize control of the agency and use it to chill the protected speech and expression of another political party. But that requirement does not apply to dismissal, as FECA's text, structure, history, and purpose all confirm.

Nor is End Citizens United correct that "partisan FEC minorities" "routinely" invoke discretion "to entrench impermissible statutory interpretations without

recourse to the judicial check." Pet. Reh'g En Banc 16; *see* Appellant's Br. 39–45.[2] For one thing, positions that fail to command a Commission majority do not bind the agency or the regulated community. For another, the Commission may often *want* judicial review to confirm its legal interpretation.

As the record here illustrates, the FEC dismissed one complaint based on prosecutorial discretion and another based on legal reasoning. Because only the second could be reviewed, only it afforded the agency an opportunity to claim a judicial imprimatur for its view that on the facts here "a coordination violation was impossible as a matter of law." *End Citizens United*, 90 F.4th at 1182–83.

This case is no outlier. Since *Commission on Hope*, "the Commission has continued to dismiss matters based solely on judicially reviewable legal determinations." *New Models*, 993 F.3d at 891 (collecting cases). And since *New Models*, "the Commission has dismissed numerous complaints without invoking prosecutorial discretion, allowing those decisions to be reviewed." *New Models II*,

[2] End Citizens United mistakenly claims (at 34) the FEC invokes prosecutorial discretion 75 percent of the time. But the "analysis" End Citizens United cites is in fact a seriously flawed and self-serving polemic from CREW that concededly excludes from the denominator every dismissal that did not deadlock and every dismissal that, in CREW's opinion, was based on "evidence." *See* CREW Amicus Br. Supp. Pet. Reh'g En Banc, Addendum A at 1 n.1 (filed Feb. 28, 2024), Doc. #2042736. Although less clear, CREW also appears to engage in other selective exclusions and potential double counting. *See id.*, Addendum A at 2 n.2, 3 n.3. CREW's tabulations are patently unreliable.

55 F.4th at 921 (Rao, J., concurral) (collecting cases). The alleged fear is unwarranted.

Nor is it a problem that the FEC regularly invokes its enforcement discretion. "No one contends that the Commission must bring actions in court on every administrative complaint." *CREW*, 475 F.3d at 340. For many years, "the substantial majority of the complaints filed with the Commission [have been] filed by political opponents of those they name as respondents." Statement for the Record of Commissioner Bradley A. Smith, *In re The Coalition NRCC, et al.*, MUR No. 4624, at 2 (Nov. 6, 2001), tinyurl.com/5n6mnkhc. "These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'" *Ibid.*; *see also* Institute for Free Speech, *I don't like your blog, so I'll file a complaint* (Aug 13, 2008), tinyurl.com/4upffuu8.

Again, the record here is instructive. The self-proclaimed mission of the eponymously named End Citizens United is to "end" the Supreme Court's landmark ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010). *See About Us*, tinyurl.com/4572xcr6 (last visited Jan. 2, 2025). The respondents in the agency proceeding, meanwhile, are both strong supporters of the First Amendment and of the rigorous constitutional protection for political speech the *Citizens United* decision vindicates. It is thus perhaps not surprising that End Citizens United

targeted these respondents with one complaint that all agree was legally meritless and with another that the Commission dismissed in exercise of its discretion. That the FEC may decline to take up nakedly partisan or ideologically motivated disputes between politically-minded organizations is hardly cause for alarm.

IV. Exchanging The FEC's Prosecutorial Discretion For Unchecked Citizen Suits Would Raise Serious Constitutional Concerns.

End Citizens United argues *New Models* and *Commission on Hope* must be reversed because neither recognizes in FECA an untrammeled private right of action impervious to FEC discretion. Appellant's Br. 36–38. But End Citizens United's statutory interpretation must be rejected on constitutional grounds.

Article II is clear: "The entire 'executive Power' belongs to the President alone." *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) ("The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."). That means, among other things, that responsibility for enforcing federal law must remain solely within the Executive Branch. *Seila Law*, 591 U.S. at 213–14.

That rule does not change in the campaign finance context. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court held Congress could not constitutionally assign responsibility for FECA enforcement to its adjuncts outside the Executive Branch. *See id.* at 140–41. The reason, the *Buckley* Court explained, is that "conducting civil litigation in the courts of the United States for vindicating

public rights" is an exclusively "executive functio[n]" that "may be discharged only by persons who are 'Officers of the United States' within the language of" Article II. *Id.* at 139–40.

The *Buckley* Court had no occasion to address the constitutionality of FECA's citizen suit provision because Congress had not yet enacted it.[3] But its reasoning applies *a fortiori*. The congressional adjuncts in the scheme the *Buckley* Court rejected at least had *some* accountability to the President, *see id.* at 126–27 (describing an appointments process with limited presidential involvement), whereas self-appointed FECA plaintiffs have *none*. *See also Printz v. United States*, 521 U.S. 898, 922–23 (1997) ("unity in the Federal Executive . . . would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws"). Thus, under *Buckley*'s reasoning, it appears that Congress cannot authorize private citizens to enforce FECA in civil litigation.

[3] The current citizen suit provision was enacted in 1980. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 309(a)(8)(A), 93 Stat 1339, 1361 (1980). The 1976 amendments also contained a citizen suit provision, *see* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 313(a)(9)(C), 90 Stat. 475, 485 (authorizing "a civil action to remedy the violation involved in the original complaint"), but the statute the *Buckley* Court reviewed did not, *see* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 18 (1972) (no such provision); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1284–87 (same).

In another context, the Supreme Court has reserved the question whether private suits to enforce federal prerogatives "violate Article II." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000). There, three Justices have explained that "there are substantial arguments that the *qui tam* device is inconsistent with Article II" because it assigns the "interests of the United States in litigation" to "private relators." *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., joined by Barrett, J., concurring) (cleaned); *see also id.* at 449 (Thomas, J., dissenting) (same).

If the Supreme Court considers *qui tam* a close constitutional question, then End Citizens United's construction of FECA plainly is on the wrong side of the line. In addition to "the long tradition of *qui tam* actions" absent in the FECA context, *Stevens*, 529 U.S. at 774; *see ibid.* ("*Qui tam* actions appear to have originated around the end of the 13th century"), the False Claims Act preserves the Executive Branch's enforcement discretion by authorizing the Government to intervene and "dismiss the action notwithstanding the objections of the person initiating the action," 31 U.S.C. § 3730(c)(2)(A); *see Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (citing Article II and explaining "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States"). As interpreted by *Commission on Hope* and *New Models*, FECA similarly preserves prosecutorial

discretion "because a court may not authorize a citizen suit unless it first determines that the Commission acted 'contrary to law'" and this it "cannot do" when the agency "exercise[s] its discretion." *Comm'n on Hope*, 892 F.3d at 440; *see New Models*, 993 F.3d at 891. But under End Citizens United's misinterpretation of FECA, there is no role for enforcement discretion because the agency complainant could sue notwithstanding "the FEC's invocation of prosecutorial discretion." Appellant's Br. 38.

"It is [the Supreme Court's] settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *accord Al Bahlul v. United States*, 967 F.3d 858, 875 (D.C. Cir. 2020) ("A statute is to be construed where fairly possible so as to avoid substantial constitutional questions." (cleaned)). End Citizens United's interpretation does that and then some. Because End Citizens United's construction is contrary to the ordinary meaning of the statute and unnecessarily raises serious constitutional concerns, the Court should reject it.

CONCLUSION

FECA allows "only a modest role for the courts in determining whether a dismissal or failure to act is 'contrary to law,'" *End Citizens United*, 90 F.4th at 1180, as the panel rightly held. The statute does not allow courts to second-guess the

FEC's enforcement discretion. And it "does not confer on the courts a general power to enforce the law, which instead belongs to the Commission in the exercise of its executive power." *Id.* at 1181.

The Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, on January 2, 2025, that:

1. This document complies with the word limit under Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), this document contains 5,067 words.

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/s/ Jeremy J. Broggi
Jeremy J. Broggi

CIRCUIT RULE 29(d) CERTIFICATE

The NRSC and the NRCC were the only *amici* appearing in support of Appellees and affirmance at any prior phase of this litigation, and no additional parties "wish[ing] to participate as *amici*" in support of Appellees and affirmance have "file[d] a notice of intent." *See* D.C. Cir., *Handbook of Practice and Internal Procedures* 39 (Dec. 12, 2024).

Furthermore, the NRSC and NRCC are national political party committees that speak for a wide segment of the regulated community, including candidates. Founded in 1916 and 1866, respectively, the NRSC and the NRCC bring historical and institutional perspectives that more recently formed organizations often lack. The views offered by the NRSC and the NRCC are likely to benefit the Court and merit a brief separate from other potential *amici*.

/s/ Jeremy J. Broggi
Jeremy J. Broggi

CERTIFICATE OF SERVICE

I certify that on January 2, 2025, a true and correct copy of this Brief was filed and served electronically upon counsel of record registered with the Court's CM/ECF system.

/s/ Jeremy J. Broggi
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