ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; NOAH BOOKBINDER,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:18-cv-0076-RC
Before the Honorable Rudolph Contreras

BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Amicus Curiae Campaign Legal Center ("CLC") certifies as follows:

(A) Parties and *Amici*. Citizens for Responsibility and Ethics in Washington and Noah Bookbinder ("CREW") were the plaintiffs in the district court and are appellants in this direct appeal. The Federal Election Commission ("FEC" or "Commission") was the defendant in the district court, and is the Appellee here.

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

No person filed as amicus curiae before the district court. Randy Elf has expressed an intent to appear as amicus in the appeal. Other amici curiae may also appear in this matter.

(B) Ruling Under Review. The ruling under review is the district court's March 29, 2019 order and accompanying memorandum opinion, ECF Dkt. Nos. 22, 23, in *CREW v. FEC*, No. 18-cv-00076-RC (Contreras, J.). The March 20, 2019 memorandum opinion is reported at 380 F. Supp. 3d 30, and reprinted in the Joint

Appendix ("JA") at JA 139-61.

(C) Related Cases. This matter has not previously been before this Court or any other court. Amicus is not aware of any related case pending in this Court or any other court.

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GLOSSARY OF ABBREVIATIONS

AAN	American Action Network
CHGO	Commission on Hope, Growth, & Opportunity
CLC	Campaign Legal Center
CREW	Citizens for Responsibility & Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	FEC Office of General Counsel

STATUTES AND REGULATIONS

52 U.S.C. § 30109 is reproduced in an addendum to Plaintiffs-Appellants' Opening Brief.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Campaign Legal Center ("CLC") is a nonprofit organization dedicated to promoting sound campaign finance reforms and defending the important democratic principles they advance. CLC regularly participates in litigation to defend campaign finance laws, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010). CLC is also a Plaintiff-Appellant in another appeal raising many of the same issues regarding *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW/CHGO*") and FECA's judicial review provision, *Campaign Legal Center v. FEC*, No. 18-5249, which is currently pending before this Court.

All parties have consented to CLC's participation.

SUMMARY OF ARGUMENT

Transparency is a core purpose of the federal campaign finance laws. To serve the electorate's interest in knowing "where political campaign money comes from." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), the Federal Election Campaign Act ("FECA") contains numerous provisions that require accurate reporting from individuals, groups, and entities that give and spend money to influence elections.

[1] No person, other than amicus, authored this brief in whole or part, or contributed money to fund its preparation or submission.

One key means of accomplishing this goal is by requiring registration and comprehensive reporting for "political committees."[2]

In 2014, CREW filed an administrative complaint alleging that a self-described "issues" group called New Models had violated these important FECA provisions by spending millions of dollars to influence the 2012 elections without registering with the FEC as a political committee or complying with attendant campaign finance disclosure requirements. JA 19-62. CREW's complaint detailed how New Models had funneled millions of dollars—and a substantial majority of its annual budget—to super PACs in 2012, apparently with the "major purpose" of influencing elections for federal office. The FEC's Office of General Counsel ("OGC") recommended finding that there was "reason to believe" New Models had violated the law, but the Commission split evenly, 2-2, on that question. JA

[2] A "political committee" is any "committee, club, association, or other group of persons" that receives more than $1,000 in contributions or makes more than $1,000 in expenditures during a calendar year, 52 U.S.C. § 30101(4)(A). The FEC employs a two-prong test for determining political committee status. The first prong asks whether an entity or other group of persons has made more than $1,000 in "expenditures" or received more than $1,000 in "contributions" during a calendar year. *Id*. The second prong asks whether the organization has as its "major purpose the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.

Any entity that meets the definition of a "political committee" must file a "statement of organization," 52 U.S.C. § 30103, comply with organizational and recordkeeping requirements, *id.* § 30102, and file periodic disclosure reports of its receipts and disbursements, *id.* § 30104.

101. Lacking the four affirmative votes needed to proceed with an investigation, the Commission closed the case.

The partisan minority bloc of Commissioners who voted not to proceed thereafter released a Statement of Reasons explaining their conclusion, based on "a robust interpretation of statutory text and case law," JA 146, that New Models was not required to register and report as a political committee. Because that determination rested on incorrect and unsustainable interpretations of the campaign finance laws, CREW filed this lawsuit arguing that the decision was contrary to law and should be set aside. *See* 52 U.S.C. § 30109(a)(8)(A).

But the district court never reached that question. Instead, it found that the recent divided panel decision in *CREW/CHGO*, renders any deadlock dismissal with even a glancing reference to "prosecutorial discretion" automatically unreviewable—however "robust" or all-encompassing the legal reasons given for the dismissal might be.

In the dispositive Statement of Reasons here, a solitary invocation of the phrase "prosecutorial discretion" appears in the final sentence of the final page of the controlling Commissioners' 31-page legal opinion, and only after repeated pronouncements that New Models "cannot" be regulated as a political committee because, based on the controlling Commissioners' extensive analysis of the facts and the law, the group had not met the statutory or doctrinal tests to become one.

JA 103-133. According to the district court, however, "*CREW/CHGO* holds that the controlling Commissioners' legal analyses are reviewable only if they are the *sole reason* for the dismissal of an administrative complaint." JA 155.

That application of *CREW/CHGO* was fatally flawed in two key respects: first, because the legal analysis of whether New Models had violated FECA by failing to register and report as a political committee *was* the "sole reason" for the dismissal, on any fair reading of the controlling Commissioners' decision; and second, because even if their bare invocation of discretion could be read as a hypothetical alternative ground for dismissal, *CREW/CHGO* cannot shield the legal reasoning at the heart of their decision from review. To hold otherwise would do immense damage to the carefully balanced statutory scheme designed by Congress. Applying *CREW/CHGO* in this manner negates the statutory role of private complainants, displaces the judiciary's role in reviewing dismissals for legal error, and countermands the partisan balance that Congress carefully prescribed.

There are also important practical reasons to exercise caution before reading *CREW/CHGO* to give minorities on the Commission the power to vanquish challenges to their interpretations of law. The recent history of the Commission is one of mounting dysfunction and paralysis, particularly with regard to the important political committee disclosure provisions at issue here. Given this

context, the Court should resist a reading of *CREW/CHGO* that would allow dismissals explicitly founded on legal determinations to escape all judicial scrutiny merely because they also include a passing reference to "prosecutorial discretion."

"[T]o honor the presumption of review" generally applicable to agency action, exceptions to review are to be read "quite narrowly," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)—all the more so when Congress has evinced its clear intent to make review available, as it did here. 52 U.S.C. § 30109(a)(8); *FEC v. Akins*, 524 U.S. 11, 26 (1996). Withholding review in this case required an extreme reading of *CREW/CHGO* that was manifestly at odds with this statutory command. The decision below should be set aside.

ARGUMENT

I. *CREW/CHGO* does not shield non-discretionary dismissals from review.

A. Unlike in *CREW/CHGO*, the controlling Commissioners found conclusively that New Models was not a political committee and dismissed on that basis.

Rather than defend its dismissal of CREW's complaint on the merits, the Commission has primarily focused on shielding it from all judicial scrutiny. Indeed, since *CREW/CHGO* was decided, the Commission has consistently urged a reading of the decision under which any mere invocation of prosecutorial discretion erects a bar to judicial review that is automatic, absolute, and unbounded. The district court, if somewhat reluctantly, obliged.

However, *CREW/CHGO* does not control this case.

The dismissal of CREW's complaint against New Models was not "squarely" based on an exercise of prosecutorial discretion, as was the case in *CREW/CHGO*, 892 F.3d at 439, but on "a robust interpretation of statutory text and case law, with a brief mention of prosecutorial discretion sprinkled in." JA 146. And, as *CREW/CHGO* recognized, administrative complaints dismissed on the basis of the Commission's interpretations of law remain subject to the judicial review that FECA expressly provides. 892 F.3d at 441 n.11 ("The interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion.") (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985); *Akins*, 524 U.S. at 26). *See also* 52 U.S.C. § 30109(a)(8).

Indeed, the dismissal here was *entirely* premised on the controlling Commissioners' determination—following their lengthy analysis of the organization's "purpose, tax exempt status, public statements, and overall spending," JA 133—that New Models "cannot" be regulated as a political committee. *Id.* These Commissioners held definitively that New Models failed both prongs of the two-part test for political committee status, because supposedly the group (1) did not meet the statutory threshold to qualify as a "political committee" by receiving $1,000 in contributions or making $1,000 in expenditures (although New Models conceded it had, JA 77), and (2) lacked the requisite major

purpose of nominating or electing federal candidates. JA 122-23 n.95. And they stressed that either ground was "independently sufficient to substantiate [their] conclusion" that New Models was not a political committee. JA 123 n.95. This case therefore does not involve an FEC dismissal rooted in the kinds of judicially unmanageable prudential considerations that were at the heart of *CREW/CHGO*.

In *CREW/CHGO*, the controlling Commissioners explained the "discretionary" considerations underpinning their dismissal in great detail. They justified their ultimate decision not to continue with ongoing enforcement efforts against the respondent, a pop-up political group that had dissolved and vanished while the complaint was pending, almost exclusively in terms of concerns about scarce agency resources and the dim prospects for success. They found, *inter alia*, that the "defunct" association "no longer existed," "had filed termination papers with the IRS in 2011," and "had no money . . . [or] counsel . . . [or] agents who could legally bind it." 892 F.3d at 438. They also cited concerns that any agency action against the association would "raise[] novel legal issues that the Commission had no briefing or time to decide." Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman at 4, MURs 6391 & 6471 (CHGO) (Nov. 6, 2015), https://www.fec.gov/files/legal/murs/6391/15044381253.pdf.

Moreover, the dismissal in *CREW/CHGO* came after the Commission had already voted unanimously to *authorize an investigation* of the group at the reason-to-believe stage; its OGC then spent significant time and effort to conduct that investigation, which "encountered procedural and evidentiary difficulties from the outset," *id.* at 1, that only multiplied over time, until it ultimately became clear that "any conciliation effort would be futile," *id.* at 4. Indeed, OGC itself acknowledged that these practical obstacles would make further efforts a "pyrrhic" exercise, even as it ultimately recommended proceeding to a probable cause finding. *Id.* at 1. For their part, the controlling Commissioners suggested that the "information learned during this period [of investigation] did not definitively resolve whether there was reason to believe CHGO was a political committee" one way or the other, and believing that "the case had become an academic exercise," they voted to close the case. *Id.* at 4. Nevertheless, they conceded that after four years of investigation, the dismissal "admittedly [brought] th[e] matter to a frustrating conclusion." *Id.* at 1.

Here, however, the linchpin of the Commissioners' decision to dismiss—and the explanation that they gave repeatedly and emphatically across thirty-one pages of legal analysis—was their conclusion that New Models did not violate the law. The no-voting Commissioners even reached beyond the preliminary "reason to

believe" inquiry to make a final determination of political committee status.[3] This is not the "discretionary" terrain over which a partisan bloc of FEC Commissioners enjoy unfettered and unreviewable discretion under *CREW/CHGO*.

B. A glancing reference to "prosecutorial discretion" does not supersede the express legal rationale they gave.

This appears to be the first decision where controlling Commissioners firmly based their action on an elaborate legal analysis that led them to conclude that there was *no violation*, but a court instead sustained the action based on a passing reference to enforcement discretion in the Commissioners' explanation. By its plain terms, the dismissal of CREW's complaint was based on the controlling Commissioners' determination that New Models was not a political committee. A conclusory reference to enforcement discretion and a footnote citing *Heckler v. Chaney* does not transform the basis of their decision, which must stand or fall based on the actual reason they gave.

Under the familiar principle of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), an agency action "explicitly based" on particular reasons "must likewise be judged on that basis," *id*. at 87. Here, the controlling Commissioners stated explicitly that

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[3] That the controlling Commissioners refused to proceed at the preliminary reason-to-believe stage further undercuts their appeal to "discretion." The reason-to-believe standard is low, *see* Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007), and it is implausible to believe that the controlling Commissioners would not have considered it satisfied absent their erroneous legal analysis.

the "reasons" for their votes not to proceed were those stated in their 32-page opinion, which led them to find conclusively that "New Models's major purpose was not the nomination or election of federal candidates . . . , and that New Models was not a political committee." JA 104.[4] Only after 31 pages of analysis is there any mention of "prosecutorial discretion," and it comes as little more than an afterthought, tacked on to the final sentence of the final page of their statement:

> Based on our review of the evidence in the record, . . . New Models's organizational purpose, tax exempt status, public statements, and overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates. As a result, it cannot (nor should it) be subject to the "pervasive" and "burdensome" requirements of registering and reporting as a political committee. For these reasons, ***and in exercise of our prosecutorial discretion***, we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.

JA 133 (emphasis added). This token invocation of discretion cannot bear the dispositive weight the district court would give it.

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[4] Indeed, the same partisan minority bloc has since referred to the New Models decision as *authority* on the proper analysis of political committee status. *See* Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen at 8 n.47, MURs 6969, 7031, and 7034 (Children of Israel *et al.*) (Sept. 13, 2018), https://eqs.fec.gov/eqsdocsMUR/6969_2.pdf ("[I]n MUR 6872 (New Models), two Commissioners *determined* that an organization that made contributions to a Super PAC did not 'receive contributions . . . [or] ma[k]e expenditures' and '[t]herefore did not meet the statutory threshold for becoming a political committee.'") (emphasis added).

Although the lower court acknowledged that this "discussion of prosecutorial discretion covered *one paragraph* of the thirty-two-page statement of reasons," JA 148 (emphasis added), even that is too generous. The sum total of that "discussion" appears in a seven-word dependent clause, to which is appended a footnote containing one short sentence of explanation, a statutory reference, and two case citations. *See* JA 133 & n.139 ("Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources.") (citing *Heckler v. Chaney*, 470 U.S. 871 (1985); 28 U.S.C. § 2862; and *Nader v. FEC*, 823 F. Supp. 2d 53, 65-66 (D.D.C. 2011)).

CREW/CHGO does not preclude review in these circumstances. The controlling Commissioners raise prosecutorial discretion only as an afterthought, with virtually no corresponding discussion that might elucidate their reasons. Insofar as footnote 139 gestures at genuine "prudential" reasons that *could* support dismissal, amicus is aware of no case, before this one, where a court refused to consider the explicit legal grounds underpinning an FEC enforcement dismissal based on a single unexplained reference to a *conceivable* alternative rationale. Broadly invoking the Commission's "prosecutorial discretion" is not tantamount to an acknowledgment of whether, much less why, its discretion was actually exercised in a particular case. As in *Akins*, "we cannot know" based on this

afterthought "that the FEC would have exercised its prosecutorial discretion in this way" if their legal conclusions were deemed incorrect, 524 U.S. at 25, and hence the passing reference to discretion does not obviate the need to review the controlling Commissioners' stated legal basis for their action.

Their brief "explanation," buried in a footnote, amounts to a conclusory observation that New Models "appear[ed]" to be "no longer active" and a faint suggestion that the case might be growing stale, JA133 n.139—both factors that, even if adequately explained or true, were seemingly attributable to *the Commission's* delay.[5] Otherwise, the Commissioners assert only that pursuing the

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[5] The controlling Commissioners' professed concerns about "the age of the activity" ring hollow when they appear to have been responsible for running out the clock. CREW's complaint was filed in September 2014. New Models responded to the complaint in November 2014. By May 2015, OGC had completed its report and provided its recommendations to the Commission, where the matter was held over for more than *two years*. *See* JA 88 (Oct. 15, 2015 notice letter advising New Models that "we expect the Commission to vote on the matter in 2016"); JA 99 (Nov. 3, 2016 notice that a vote was expected "in the first half of 2017"); JA 100 (Nov. 3, 2017 notice that there would be a vote "by the end of this year").

At some point between receiving the first notice in 2015 about the Commission's upcoming vote and the eventual vote *more than two years later*, New Models apparently decided to dissolve, so its purported dissolution was not addressed by OGC or confirmed in the administrative record. An unsubstantiated statement that an entity is "defunct"—based on extra-record materials unearthed by the controlling Commissioners while the matter was languishing on their docket awaiting a vote—should not defeat a complainant's right of judicial review. *Cf. Nader*, 823 F. Supp. 2d at 65-66 (stressing that the complainant was largely responsible for the "difficulties identified by the FEC in terms of staleness of evidence and the defunctness of several of the [respondent] groups").

matter would be "an *inappropriate use* of agency resources," JA 133 n.139 (emphasis added)[6]—and no wonder they think so, given their unequivocal belief that New Models did not violate the Act.

CREW/CHGO cannot mean that any time three or fewer Commissioners justify a decision with clearly reviewable reasons, but then add a superfluous "discretionary" explanation in a concluding footnote, the whole otherwise reviewable action is transformed into an unreviewable exercise of prosecutorial discretion. As Judge Pillard has noted, "[e]ven if the [*CREW/CHGO*] majority were right that enforcement discretion is an unreviewable *reason* for dismissing complaints, Commission decisions to dismiss complaints are undeniably reviewable *actions* under the plain text of FECA (confirmed by decisions of the Supreme Court and this circuit)." *CREW v. FEC*, 923 F.3d 1141, 1148 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of rehr'g en banc). While an "otherwise unreviewable action" does not "become[] reviewable" simply because "the agency gives a 'reviewable' reason," *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987), an otherwise *reviewable* action based on an obviously *reviewable* reason does not become unreviewable simply because the agency also tacks on the words

[6] Notwithstanding the district court's characterization, the controlling Commissioners never noted concerns about "*limited*" agency resources (JA 140) (emphasis added)—only the "appropriate use" of them. JA 133 n.139.

"prosecutorial discretion." The agency's rationale for dismissal cannot be manipulated in this manner to defeat review.

II. This Court should resist a reading of *CREW/CHGO* that would empower partisan minorities of FEC Commissioners to shut down any judicial review of their legal decisions.

Withholding review here stretches *CREW/CHGO* well beyond its breaking point. The panel majority specifically noted that it was *not* inhibiting the review that FECA expressly provides for dismissals based on interpretations of law, *see* 52 U.S.C. § 30109(a)(8)—and as discussed in Part I, *supra*, this dismissal was entirely based on a "robust" legal analysis of CREW's complaint.

CREW/CHGO cannot be read to block judicial review of a dismissal by a deadlocked reason-to-believe vote simply because a controlling group of Commissioners, *in addition to* interpreting the law, applying it to the facts, and concluding unreservedly that no violations occurred, also uttered the words "prosecutorial discretion" or "agency resources." To treat such invocations as rendering their legal analysis *per se* unreviewable would not only be in tension with the prior precedents of the Supreme Court and this Circuit, *CREW*, 923 F.3d at 1145 (Pillard, J., dissenting in denial of rehr'g en banc), but also would encourage partisan minorities to announce their legal interpretations under the aegis of a "discretionary" dismissal, secure in the knowledge that these

pronouncements would escape all scrutiny—effectively entrenching views of the law that lack majority support, and worse, that *may be incorrect*.

This is not at all what Congress had in mind when it created FECA's "unusual" judicial review provision. *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("[FECA] is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce.") By providing judicial review and a limited private right of action, Congress specifically intended to prevent the Commission from "shirking" its duty to enforce the law. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). *CREW/CHGO* did not, and could not, nullify this important aspect of the statutory scheme.

A. Giving partisan blocs unqualified control over the reviewability of their own legal interpretations runs counter to the statutory scheme.

Allowing a minority bloc to defeat the judicial review that FECA provides simply by invoking "discretion"—after they have already decided as a matter of law that enforcement "cannot" proceed because, under their interpretation of FECA, New Models "did not meet the statutory threshold for becoming a political committee" or satisfy the major purpose test, JA 133—would vitiate the Act's enforcement scheme.

Congress expressly provided for judicial review of certain FEC non-enforcement decisions, 52 U.S.C. § 30109(a)(8)—an "unusual" provision necessitated by the Commission's evenly balanced composition and important

mandate. *See* 52 U.S.C. § 30106(a)(1) (providing that no more than three members of the Commission can be from a single party); *id.* § 30106(c) (providing that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote").

The Commission is therefore "inherently bipartisan in that no more than three of its six voting members may be of the same political party," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), and almost all Commission functions require four votes. Interpreting *CREW/CHGO* to foreclose review wherever discretion is claimed only by one faction of a deadlocked Commission fundamentally conflicts with the Act's bipartisan design, because while four-vote majority decisions at the FEC are "inherently bipartisan," deadlocks are not. At a minimum, therefore, *CREW/CHGO* should not be extended to preclude review of erroneous legal principles "adopted" by non-majorities to dismiss enforcement complaints.

Here, the controlling Commissioners' decision was clearly founded on their conclusive determination that FECA was not violated. Refusing to review their decision on the merits because they also made an oblique reference to discretion would eviscerate the Act's judicial review provision. That is why, before *CREW/CHGO*, courts subjected all dismissals to some degree of scrutiny, even those based squarely on a four-vote *majority's* exercise of discretion. Most of the

decisions preceding *CREW/CHGO* contain only generalizations about the FEC's discretion, and until *CREW/CHGO*, none refused to review a deadlock "decision" not to take enforcement action because a minority of Commissioners cited agency discretion—much less where they cited it as an afterthought.

For example, *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011), which the controlling Commissioners cited here, *see* JA 133 n.139, upheld a unanimous 6-0 dismissal where the Commission's exercise of prosecutorial discretion was thoroughly explained and supported in the record; undertaken on OGC's express recommendation; and provided as the sole basis for the decision. *See id.* at 58, 65-66 (recognizing that "unlike in the *Heckler* case, judicial review is available under FECA to complainants dissatisfied with the FEC's decisions not to investigate," but finding that OGC had "provided reasonable grounds" to dismiss allegations in a 575-page administrative complaint). The understanding reflected in decisions like *Nader*—that some form of "reasonableness" review applies even to majority dismissals "sole[ly]" premised on discretion—may well have been "squash[ed]" by *CREW/CHGO*. JA 154. But *CREW/CHGO* does not preclude review in decisions premised squarely, if not quite entirely, on *non*-discretionary legal grounds. *Id.*

In any event, the Commission does have a means of signaling that its "discretionary" concerns predominate when a case might otherwise be justified on multiple grounds: by directly voting to dismiss for that reason. *See* FEC,

Guidebook for Complainants and Respondents on the FEC Enforcement Process 12 (May 2012), http://fec.gov/em/respondent_guide.pdf ("Pursuant to an exercise of its prosecutorial discretion, the Commission may dismiss a matter when, *in the opinion of at least four Commissioners*, the matter does not merit further use of Commission resources.") (emphasis added). If the controlling Commissioners indeed were not interested in making any legal findings, the Commission could have taken substantive votes on whether to dismiss for discretionary reasons under *Heckler*. They did not do so,[7] even though the Commission can and frequently does follow that process.[8]

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[7] *See* Statement of Chair Ellen L. Weintraub on the D.C. District Court Decision in *CREW v. FEC (New Models)*, at 2 & n.7 (Apr. 15, 2019), https://www.fec.gov/resources/cms-content/documents/2019-04-05_ELW_Statement_-_DDC_decision_in_New_Models.pdf (noting that the controlling Commissioners "could have moved to dismiss the case based on prosecutorial discretion but, in fact, made no such motion").

[8] *See, e.g.*, Certification, MUR 7213 (Labor United for Conn.) (Aug. 7, 2018), https://www.fec.gov/files/legal/murs/7213/18044453135.pdf (dismissing as a matter of prosecutorial discretion); Certification, MUR 7114 (Casperson for Congress) (June 26, 2017), https://www.fec.gov/files/legal/murs/7114/17044430961.pdf (same); Certification, MUR 6361 (Tea Party) (May 21, 2015), https://www.fec.gov/files/legal/murs/6361/15044373623.pdf (same). *See also* General Counsel's Rept., MUR 7161 (Rodini for Supervisor 2016) (Sept. 14, 2017), https://www.fec.gov/files/legal/murs/7161/17044431896.pdf (recommending discretionary dismissal pursuant to FEC's "Enforcement Priority System").

B. Treating *CREW/CHGO* as a "magic words" test would regularly preclude review of minority legal interpretations in cases where the need for judicial intervention is at its apex.

When the Commission operates by four-vote majority—as it was designed to do in nearly all of its functions—and fairly explains the discretionary bases for its action, its discretionary decisions may be entitled to more weight. But validating any purported exercise of discretion as an absolute bar to review encourages partisan minority blocs to cloak unjustifiable legal decisions in "prudential" garb.

That is precisely was happened here. For example, the controlling group's insistence that their analysis of New Models' "major purpose" must look to the organization's entire lifetime of spending, including the eight years of its existence before *Citizens United* and *SpeechNow* freed corporations to make expenditures (and contributions to super PACs) to influence federal elections, JA 107, 123 n.96, was not just manifestly unreasonable. The exact same approach in another case *had already been held contrary to law*. *See CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) ("*CREW/AAN*") ("Looking only at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can change.") (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)). *See also* JA 136. The possibility of tacking on an additional "discretionary"

ground for dismissal and thereby defeating judicial review is likely to be most tempting in cases where the controlling bloc lacks a defensible legal basis for refusing to proceed.

And it would effectively enable partisan minorities to codify their erroneous legal interpretations. The controlling Commissioners have already cited their New Models decision in other matters, *see supra* note 4, and have stressed their "consistent[] reject[ion]" of a "myopic focus on one year of spending" when applying the major-purpose test across many MURs, making it de facto controlling. JA 123 n.96.[9] That is why, "[e]ven if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether"—because that "would be handing agencies carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement actions." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986).

The per se rule of unreviewability applied below therefore tends to protect the very legal interpretations that are most in need of judicial correction. Before

[9] *See also* Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'r Caroline C. Hunter at 16 n.1, 16-18, MUR 6596 (Crossroads GPS) (May 13, 2019), https://eqs.fec.gov/eqsdocsMUR/6596_2.pdf (asserting, remarkably, that a "calendar-year approach" to the major-purpose inquiry "*conflicts*" with Judge Cooper's decision in *CREW/AAN*).

elevating *CREW/CHGO* into a "magic words" rule, this Court should also consider the effects on the regulated community of allowing an impermissible construction of FECA to stand or an important interpretive question go unanswered. Indeed, "'[m]ost political operatives, whether on the right or the left, want clarity,'" according to one former Republican FEC commissioner, even if "'[t]hey might not always be thrilled with the answers.'" Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, at 2, Brennan Ctr. for Justice (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf (noting that "gridlock at the FEC creates risk and uncertainty" for regulated parties, and "[i]n recent years both Republican and Democratic officeholders have been accused of criminal offenses that might have been avoided with the help of clearer FEC guidance").

C. Pervasive dysfunction and gridlock at the Commission only heighten the need for a judicial check.

1. *Since CREW/CHGO, a minority bloc of FEC Commissioners has increasingly cited "discretion" as a reason to dismiss matters at the preliminary reason-to-believe stage.*

Concerns that "prosecutorial discretion" will now regularly be invoked to avoid judicial review are not unfounded. Indeed, Commission dismissals rejecting an OGC recommendation to proceed at the reason-to-believe stage are increasingly referring to "prosecutorial discretion" and "agency resources," generally alongside a substantial legal analysis, and have done so without exception in deadlock cases

addressing the political committee disclosure rules since *CREW/CHGO*. *See* CREW Br. at 31 & n.17. A reflexive rule that treated any whisper of "discretion" as enough to render a dismissal unreviewable would potentially immunize a broad swath of legal interpretations from judicial scrutiny.

For example, earlier this year—*seven years* after the initiating complaint was filed—the Commission deadlocked on whether there was reason to believe a group that spent $138,646,864 in 2012 (73.4% of its total spending that year)[10] to influence federal elections should have registered as a political committee. The controlling Commissioners explained that their "application of the judicially approved case-by-case approach for determining major purpose . . . *necessarily* leads to the conclusion that Crossroads GPS's major purpose is not the nomination or election of federal candidates and, therefore, that it is not a political committee under the Act." Statement of Reasons at 14, MUR 6596, *supra* note 9 (emphasis added). Then, after 18 single-spaced pages of legal analysis explaining why Crossroads GPS "was not a political committee," *id.* at 19, they added that "it would *also* be a proper exercise of the Commission's prosecutorial discretion to dismiss this matter so that Commission enforcement resources can be better

[10] *See* First General Counsel's Rept. at 32, MUR 6596 (Crossroads GPS) (Mar. 7, 2014), https://www.fec.gov/files/legal/murs/6596/19044463201.pdf.

allocated," citing "the lapse of time since the events at issue in this matter occurred." *Id.* (emphasis added).

This Court should consider the broader agency context before extending *CREW/CHGO* unnecessarily. The recent history of the FEC is one of mounting deadlock and delay. *See, e.g.*, Weiner, *Fixing the FEC*, *supra*, at 3-4 (noting "sharp rise in party-line deadlocked votes," nearly all at the reason-to-believe stage).[11] Complaints languish for years, and deadlocked votes prevent the Commission from taking action, even in cases where there appears to be nominal agreement about what the law requires and compelling evidence that the law was violated.[12]

Given this context, there is good reason to proceed cautiously before reading *CREW/CHGO* to endow minority blocs with the power to invoke "discretion" as

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[11] *See also Oversight of the Fed. Election Comm'n: Hr'g Before Comm. on House Admin. [postponed]*, 116th Cong. (2019) (Statement of Adav Noti, Senior Director, Trial Litigation & Chief of Staff, Campaign Legal Center), https://docs.house.gov/meetings/HA/HA00/20190925/109983/HHRG-116-HA00-Wstate-NotiA-20190925-U1.pdf.

[12] *See, e.g.*, Statement of Reasons of Vice Chair Ellen L. Weintraub at 2, MURs 6968, 6995, 7014/7017/7019/7090 (Tread Standard LLC *et al.*) (June 19, 2018), https://eqs.fec.gov/eqsdocsMUR/7014_1.pdf ("The Commission has been receiving complaints alleging the use of LLCs in conduit contribution schemes since 2011," but "ha[s] yet to make a finding" because, "[e]ven though the law is clear," a controlling bloc thought enforcement would be "'unfair'"); Office of FEC Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 14 (Feb. 2017), https://www.fec.gov/resources/about-fec/Commissioners/ravel/statements/ravelreport_feb2017.pdf.

an absolute bar to review—at least where, as in this case, they engage in extensive legal analysis on the merits. As one district court judge recently quipped:

> "The [FEC] is the only government agency that does exactly what Congress designed it to do: nothing." The punchline of that old Washington joke may be increasingly true, but its premise is uncharitable to Congress. Because when Congress mandated that the six-member Commission be split down party lines, it anticipated that partisan deadlocks were likely to result. *So it legislated a fix*.

CREW v. Am. Action Network, No. 18-cv-945 (CRC), 2019 WL 4750248, at *1 (D.D.C. Sept. 30, 2019) (emphasis added). Now more than ever, the legislative "fix" Congress devised—FECA's judicial review provision—must be preserved, given the self-evident, and "increasingly true," *id.*, possibility that the agency's decisionmaking will be mired in partisan deadlock. In some areas of the campaign finance laws, in fact, persistent deadlocks have tipped the Commission toward total abandonment of its statutory mandate. This is hardly the time for courts to take a backseat.

2. A minority bloc of FEC Commissioners has persistently refused to find that any group can satisfy their test for political committee status, casting further doubt on the district court's decision to treat this latest dismissal as unreviewable.

Examining the last decade of FEC enforcement MURs reveals that the Commission, by virtue of one minority bloc's intransigence, has adopted a de facto policy of non-enforcement as to certain core provisions of FECA. These concerns are particularly acute in two areas of law: (1) illegal coordination between outside

spenders and candidates, and (2) application of the major-purpose test to determine political committee status.

In the area of illegal coordination between spenders and candidates, the Commission has effectively conceded its total non-enforcement. When asked by the House Administration Committee in an oversight proceeding, the Commission acknowledged that it has not pursued a single violation of the coordination regulations since *Citizens United*. *See* FEC Response to Questions from House Admin. Comm. at 24-25 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf. *See also* Chair Ellen L. Weintraub's Suppl. Responses to Questions from House Admin. Comm. at 4 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf ("Since the Supreme Court's decision in *Citizens United*, how many times has the Commission found a violation of the coordination regulations?"—"The simple answer is **zero**.").

As for political committee status, the pattern is largely the same. Since 2010, non-reporting entities have spent more than $964 million to influence federal elections. *See* Center for Responsive Politics, *Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees*, OpenSecrets.org, https://bit.ly/2EcD0dz (last visited Oct. 28, 2019). In that time, the Commission has not applied the major purpose test to pursue enforcement against a single group for failure to

register and report as a political committee—except, in one case, after litigation and a court order that their refusal to take action was contrary to law. *See* Conciliation Agreement, MUR 6538R (Americans for Job Security) (Sept. 9, 2019), https://www.fec.gov/files/legal/murs/6538R/19044477418.pdf.

And in cases where OGC recommended a reason-to-believe finding in response to alleged political committee violations, the same partisan minority bloc has continued to rely on the same faulty legal analysis to justify refusing to proceed. Earlier this year, in MUR 6596 (Crossroads GPS), they again rejected a "slavish application" of the major-purpose test that considers a group's spending within the relevant calendar year, and treated 501(c)(4) tax-exempt status as "significant[ly]," if not decisively, indicative of a group's major purpose. Statement of Reasons at 11, 16, MUR 6596. *See CREW/AAN*, 209 F. Supp. 3d at 94 (finding that "[t]he Commissioners' refusal to give any weight whatsoever to an organizations' relative spending in the most recent calendar year" was arbitrary and "cannot be what Congress contemplated in defining 'political committee' in terms of calendar-year spending") (citing 52 U.S.C. § 30101(4)); FEC, Political Committee Status, 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007) ("[N]either FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.").

In effect, in these deadlock "decisions," a partisan minority on the Commission is engaging in an iterative, case-by-case process of refining the legal analysis of political committee status—although under FECA this is a power that only four Commissioners can exercise. This history tends to undermine the district court's characterization of New Models as a "single-shot enforcement case." JA 159 ("The Controlling Commissioners did not indicate that their decision regarding New Models would dictate their decisions regarding other organizations."). Instead, given the near-total refusal to enforce FECA's political committee disclosure requirements by a minority bloc of Commissioners, judicial intervention is especially warranted. This is true whether or not the reasons given for dismissal mentioned "discretion."

The FECA disclosure requirements at the heart of CREW's administrative complaint directly advance compelling interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. By refusing to consider the adequacy of the controlling Commissioners' legal rationale, the district court all but ensured that the public will continue to be deprived of this critical information concerning millions of dollars spent to influence federal elections. *See* Statement of Reasons of Chair Ellen L. Weintraub at 1, MUR 6538R (Americans for Job Security) (Oct. 11,

2019), https://www.fec.gov/files/legal/murs/6538R/6538R_1.pdf (noting that although disclosure prompted by court action came "*nine years* too late" to inform 2010 voters, only judicial intervention finally enabled the commission to "enforce[e] the disclosure laws at the heart of the agency's mission").

CONCLUSION

For these reasons, the decision below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,340 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I electronically filed this Amicus Curiae Brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

I further certify that I caused the required copies of the Amicus Curiae Brief to be filed with the Clerk of the Court.

/s/ Tara Malloy
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