ORAL ARGUMENT NOT YET SCHEDULED

No. 22-7038

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

AMERICAN ACTION NETWORK,

Defendant-Appellee,

On Appeal from the United States District Court
for the District of Columbia, No. 1:18-cv-0945-CRC
Before the Honorable Christopher R. Cooper

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for *amicus curiae* Campaign Legal Center, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant.

References to the ruling at issue appear in the Brief for Appellant.

Amici is unaware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, and D.C. Circuit Rule 26.1, Campaign Legal Center submits its corporate disclosure statement.

Campaign Legal Center is a nonpartisan, nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Campaign Legal Center 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 publicly held corporation has any form of ownership interest in Campaign Legal Center, which has no parent corporation and does not issue stock.

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GLOSSARY OF ABBREVIATIONS

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

STATEMENT OF INTEREST[1]

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

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Campaign Legal Center affirms that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than Campaign Legal Center or its counsel contributed money that was intended to fund the preparation or submission of this brief. All appearing parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

The Court should reverse the district court's ruling, which, if adopted by this Court, would further gut the statutory scheme Congress created in FECA allowing for judicial review of the FEC's legal interpretations and private enforcement of the campaign finance laws when the FEC's refusal to enforce is contrary to law.

Even though disclosure of campaign spending is essential to the health of U.S. elections, and FECA provides for robust disclosure, U.S. elections are awash in "dark money"—spending funded by undisclosed interests intended to influence voters. Why? The FEC—the agency trusted with implementing and enforcing disclosure laws—has for years worked to undermine those laws by enabling their evasion and abdicating its duty to enforce them. Combined with the effect of the Supreme Court's 2010 ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010), the FEC's actions (and inaction) have caused a surge in dark-money spending by purported "social-welfare organizations," like American Action Network, which, in reality, are *de facto* political committees.

This undisclosed election spending has had serious consequences for American democracy, including allowing foreign money to influence U.S. voters and corrupt quid-pro-quo bribery to go undetected. No group better epitomizes the

dangers of dark-money spending than American Action Network, which has been, and remains, one of the nation's largest dark-money spenders since *Citizens United*.

CREW's lawsuit to hold American Action Network to account is precisely the remedy that Congress prescribed in FECA to ensure continued campaign-finance enforcement in the face of predictable FEC dysfunction. Congress foresaw that the FEC, as a six-member bipartisan agency, would be prone to gridlock. It therefore provided in FECA for a unique, two-step judicial review process, culminating in a private right of action, as a release valve for when the FEC's refusals to pursue enforcement are contrary to law, as here.

The district court was wrong to conclude that it was "bound" to follow this Court's split-decisions in *Commission on Hope* and *New Models*, which incorrectly found that a non-majority of Commissioners may insulate dismissals from judicial review, despite FECA's unique judicial-review provision, by merely uttering the magic words "prosecutorial discretion" in a written decision. As CREW has explained, *Commission on Hope* and *New Models* are inapplicable here, and in any event, should not be followed as they conflict with prior rulings of this Court and the Supreme Court. But what is more, the district court's ruling threatens the continued

viability of FECA's provision for judicial review of FEC paralysis and private enforcement of campaign finance law.

If *Commission on Hope* and *New Models* are extended to this case, it is not hyperbole that such a ruling could precipitate the end of enforcement of federal campaign finance disclosure laws. Since *Commission on Hope* and *New Models* were decided, the FEC has increasingly abdicated its responsibility to uphold transparency and accountability in U.S. elections. With a minority bloc of Commissioners ideologically committed to deregulating money in politics, there has been a drastic increase in deadlocked votes and a significant increase in references to prosecutorial discretion, in apparent attempts to insulate FEC decisions from judicial review.

Reversal of the district court's ruling is necessary to allow CREW to pursue a remedy for the Commission's failure to require American Action Network to disclose its dark-money spending and to correct the FEC's misinterpretation of what constitutes a political committee, which has allowed dark money to flourish in the U.S. political system. Until the courts act, dark money—such as the millions of dollars that American Action Network continues to raise and spend—will continue

to run rampant, and the public will be deprived of critical information concerning money in elections.

Because the district court wrongly decided this case, and because its decision threatens FECA's safeguards against FEC dysfunction, the future of campaign finance enforcement, and the regulation of dark money, this Court must reverse.

ARGUMENT

I. American Action Network's Spending Is Part of a Larger Dark-Money Problem Created by the FEC in the Wake of *Citizens United*

Robust campaign-finance disclosure is critical to the health of U.S. elections. Because our democracy is premised on "enlightened self-government," voters have a First Amendment interest in knowing "who is speaking about a candidate shortly before an election" so that they can "make informed choices in the political marketplace." *Citizens United*, 558 U.S. at 339, 367, 369 (citation omitted). Disclosure also plays a key role in "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam). Moreover, disclosure is essential for enforcing FECA's corruption-fighting limits on the amounts and sources of campaign contributions, including its ban on spending by foreign nationals to influence American voters. *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc). For these reasons, Congress required

broad disclosure of campaign-finance spending in FECA and entrusted the FEC with the responsibility to implement and enforce those laws.

The critical interests served by campaign-finance disclosure, however, are being undermined by the recent rise of dark money. That rise was triggered by the Supreme Court's 2010 decision in *Citizens United*, which invalidated the half century-old federal ban on corporate expenditures to influence elections. In so doing, *Citizens United* released a flood of new, anonymous money into U.S. elections that has greatly stressed existing laws governing the disclosure of such spending.

But *Citizens United* did not itself invalidate any reporting requirement; rather, the decision strongly endorsed the federal disclosure law challenged in the case. *See* 558 U.S. at 368-70. As detailed below, "the re-emergence of dark money" following *Citizens United* "is best understood as primarily a failure of the Federal Election Commission" to effectuate the existing disclosure requirements and transparency objectives of FECA. *See* Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 387 (2013).

A. The FEC Facilitated the Rise of Dark Money by Undermining and Failing to Enforce Federal Disclosure Requirements

Dark money enters federal elections by evading FECA's two-tiered regime for the disclosure of the sources funding independent campaign-related spending.

First, FECA requires groups whose major purpose is campaign activity to register as a "political committee" and to file regular, comprehensive reports disclosing all receipts and disbursements exceeding $200. *See* 52 U.S.C. §§ 30102, 30103, 30104(a), (b). Second, FECA requires groups that do not qualify as a political committee, yet who spend directly on certain types of election ads, to file event-driven reports disclosing limited donor and other information. *See* 52 U.S.C. § 30104(c).

Following *Citizens United*, political spenders increasingly sought to avoid this disclosure regime by funneling their money through groups organized under Section 501(c) of the Internal Revenue Code—which typically claimed they did not qualify as "political committees" under FECA, *see* 52 U.S.C. § 30101(4), and were subject to only minimal reporting requirements under federal tax law, *see* I.R.C. § 6033. Predictably, independent campaign-related spending surged in the 2010 federal elections, topping out at more than $300 million—a fourfold increase from the total independent spending in the previous midterm elections in 2006. *See Outside Spending*, OpenSecrets.org, http://www.opensecrets.org/outside-spending/by_cycle (last visited Apr. 3, 2023). In further contrast to the 2006 elections, in which virtually all independent spending was disclosed, almost half of the total election-related spending in 2010 evaded disclosure because it was routed through opaque 501(c)

groups. *See* Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OpenSecrets.org (May 5, 2011), https://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape/. The largest two spenders were the U.S. Chamber of Commerce, a 501(c)(6) group, and American Action Network, a 501(c)(4) nonprofit, which spent more than $32.3 and $23.1 million, respectively. *Top Election Spenders*, OpenSecrets.org, https://www.opensecrets.org/dark-money/top-election-spenders?cycle=2010#spenders (last visited Apr. 3, 2023).

The FEC ushered in this dark-money era by weakening federal campaign finance law on multiple fronts. First, the agency unduly limited the event-driven reporting requirements for non-political committee groups, both with respect to "independent expenditures" (ads expressly advocating the election or defeat of a federal candidate) and "electioneering communications" (broadcast ads about federal candidates that target the relevant electorate just before an election). Most significantly, in 2007, the Commission promulgated a regulation that narrowed the electioneering-communications disclosure requirements, allowing corporations—including 501(c)(4) nonprofit corporations—engaged in such spending to disclose only those donors who contributed "for the purpose of *furthering* electioneering communications." 11 C.F.R. § 104.20(c)(9) (emphasis added); *see also* FEC

Electioneering Communications, 72 Fed. Reg. 72,899, 72,913 (Dec. 26, 2007). In other words, the 2007 regulation allowed groups making electioneering communications to disclose only those donors who affirmatively earmarked their donations for specific election-related spending. This additional hurdle mimicked a similar earmarking requirement the FEC had previously put into place for independent expenditures. *See CREW v. FEC*, 971 F.3d 340, 343-44 (D.C. Cir. 2020). Combined, these earmarking requirements effectively meant that groups—like American Action Network—who claimed ignorance of the intentions of their donors, were no longer required to disclose *any* of their donors to the public. *See, e.g.*, Taylor Lincoln & Craig Holman, Fading Disclosure: Increasing Number of Electioneering Groups Keep Donors' Identities Secret, Pub. Citizen (2010) (finding that the reporting for only ten percent of $79.9 million spent on electioneering communications in 2010 included donor information).

Second, the Commission has abdicated its responsibility to enforce FECA's requirement that groups whose major purpose is federal campaign activity must register as political committees and comply with comprehensive reporting obligations, *see* 52 U.S.C. §§ 30102, 30103, 30104. Whether a group has an electoral major purpose is a fact-sensitive inquiry that examines, among other things, a group's public statements, solicitations, and whether the group has had "sufficiently

extensive spending on Federal campaign activity." FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601-02 (Feb. 7, 2007). This "major purpose" test has gained additional importance given the regulatory loopholes the FEC has created in the event-driven reporting requirements for non-major purpose groups. But predictably, American Action Network and other 501(c)(4) groups have resisted political committee status, denying that their major purpose is campaign-related, and seeking to comply only with the far more permissive disclosure regime for non-political committees. The FEC has aided this disclosure evasion—both by refusing to find that politically-active groups are "political committees" under FECA and by putting forward impermissible interpretations of the relevant law to avoid such status determinations.

Indeed, since 2010—when American Action Network aired its first campaign ad—the FEC has *never* voluntarily concluded in an enforcement matter that a nonprofit organization was a political committee because its major purpose was to influence a federal election.[2] The Commission has obstinately refused to enforce its political committee-status rules even in the face of facts, like those in this case, that

[2] Once since 2010, the FEC *involuntarily* concluded that a nonprofit group was a political committee in response to a court order compelling it to do so. *See* Statement of Reasons of Comm'r Caroline C. Hunter at 1, Matter Under Review ("MUR") 6538R (Americans for Job Security) (July 2, 2020), https://www.fec.gov/files/legal/murs/6538R/6538R_2.pdf.

compellingly demonstrate a group has a major purpose of influencing federal elections. *See* Appellant's Br. at 16-19.

For example, in 2015, the Commission rejected its General Counsel's recommendation to find reason to believe that a nonprofit corporation, Crossroads GPS, failed to register as a political committee, even though during the 2012 elections alone, the nonprofit spent 73.4 percent of its annual budget—more than $137 million—on communications supporting or opposing federal candidates.[3] Similarly, in 2017, the Commission rejected its General Counsel's recommendation to find that a 501(c)(4) group, New Models, had triggered political-committee status when, in 2012, 68.5 percent of the group's disbursements were contributions to political committees.[4] As a result, voters are still in the dark about Crossroads GPS's and New Models's donors and other details of their spending.

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[3] *See* First Gen. Counsel's Rpt. At 14, 32, MUR 6596 (Crossroads GPS) (Mar. 10, 2014), https://www.fec.gov/files/legal/murs/6596/19044463201.pdf; Statement of Reasons of Vice Chairman Matthew S. Petersen & Comm'r Caroline C. Hunter, MUR 6596 (Crossroads GPS) (May 13, 2019), https://www.fec.gov/files/legal/murs/6596/6596_2.pdf.

[4] *See* First Gen. Counsel's Rpt. at 3, 5-6, MUR 6872 (New Models) (May 21, 2015), https://www.fec.gov/files/legal/murs/6872/17044432599.pdf; Statement of Reasons of Vice Chairman Caroline C. Hunter & Comm'r Lee E. Goodman, MUR 6872 (New Models) (Dec. 20, 2017), https://www.fec.gov/files/legal/murs/6872/17044435569.pdf.

Additional examples abound, illustrating how the FEC has effectively abdicated enforcing the law against *de facto* political committees like American Action Network. Given this and other failures, the agency bears primary responsibility for the rise of dark money influencing U.S. elections today.

B. Dark Money Has Flooded U.S. Elections, with Harmful Consequences for Voters

As a result of the FEC's near-complete abdication of its statutory responsibilities, federal elections are awash in dark money—despite Congress mandating disclosure of non-trivial donors to groups, like American Action Network, that spend money to influence elections, and despite the Supreme Court repeatedly endorsing "effective disclosure" as a constitutional means to enable voters to make "informed choices in the political marketplace." *Citizens United*, 558 U.S. at 368-70. Since 2010, dark-money groups have spent more than $2.6 billion to influence federal elections.[5] To put this figure in perspective, this means almost $1 out of every $3 in independent spending reported to the FEC since *Citizens United* can be traced to dark-money groups. *Id.*

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[5] Anna Massoglia, *'Dark money' groups have poured billions into federal elections since the Supreme Court's 2010 Citizens United decision*, OpenSecrets.org (Jan. 24, 2023), https://www.opensecrets.org/news/2023/01/dark-money-groups-have-poured-billions-into-federal-elections-since-the-supreme-courts-2010-citizens-united-decision/.

Dark money has made its way into federal elections not just through purportedly "independent" expenditures by non-disclosing groups, but also through these groups' direct contributions to federal political committees. Since 2010, dark-money groups have made more than $1.6 billion in contributions to "independent expenditure-only" political committees, known as "super PACs," first authorized by the FEC after the D.C. Circuit's decision in *SpeechNow.org*, 599 F.3d 686. During the 2010 election cycle, for example, 501(c)(4) organizations gave less than $7 million in political contributions to federal committees; by 2020, political contributions from such groups topped $723 million. Anna Massoglia, *Dark money gets darker with less disclosure in the 2022 election,* OpenSecrets.org (May 19, 2022), https://www.opensecrets.org/news/2022/05/dark-money-gets-darker-with-less-disclosure-in-the-2022-election/. This practice makes even ostensibly transparent entities like federally registered political committees into vehicles for laundering dark money into U.S. elections. Indeed, American Action Network is itself a significant dark money donor, making almost $8.9 million in known dark-money contributions between July 2010 and June 2015. *See Political Nonprofits: Top Donors*, OpenSecrets.org, https://www.opensecrets.org/outside-spending/dark-money-groups/top_donors (last visited March 29, 2023).

The rise of dark money is more than an academic issue of agency failure, and instead has real consequences for American voters. As recent experience has proven, dark-money spending creates an attractive avenue for foreign actors to surreptitiously pour money into our elections. Because federal law—as interpreted by the FEC—allows politically active groups like American Action Network to conceal their donors, it is impossible to know whether their money is coming from domestic or foreign sources.

In 2016, for example, the FEC deadlocked—as it did here—on whether even to investigate a complaint that a shell corporation had given more than $1 million to a super PAC; a subsequent Department of Justice probe revealed that the super PAC contribution had not only been laundered through the shell corporation as alleged, but actually came from a foreign fugitive. *See* Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel Indictment Exposes How FEC Dysfunction Opens Our Elections to Foreign Meddling*, Campaign Legal Ctr. (May 15, 2019), https://campaignlegal.org/update/delay-deadlock-dismiss-pras-michel-indictment-exposes-how-fec-dysfunction-opens-our.

Dark money has also caused corruption closer to home, skewing public policy in favor of dark-money donors at the expense of average Americans. In Wisconsin, for example, the Texas-based CEO of a lead paint company facing lawsuits from

lead-poisoned Wisconsin children gave $750,000 to a dark-money group supporting state politicians; those politicians then rewrote the law to block the children's lawsuits.[6] The ill children and their families could not possibly match the money given by the Texas CEO—and because the money was given in secret, they could not even call out the connection between the money and the legislation. Similarly, in Ohio, a failing energy company received a $1.3 billion bailout from state officeholders—in exchange for $61 million in dark-money contributions between 2017 and 2020, funneled through 501(c)(4) groups that paid for political ads. The scheme remained hidden from Ohio voters for years until it finally became public during a federal prosecution.[7]

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[6] *See, e.g.*, Pawan Naidu, *Secret Cash Helped Those Who Rewrote Wisconsin Law to Block Claims of Lead-Poisoned Kids*, Milwaukee Journal Sentinel (Sept. 23, 2018), https://www.jsonline.com/story/opinion/contributors/2018/09/23/secret-cash-helped-those-who-rewrote-state-law-block-lead-claims/1405053002/; *see also* Peter Earle, *Senate Must Act to Bring Dark Money to Light,* Daily Kos (Apr. 30, 2019), https://www.dailykos.com/stories/2019/4/30/1854342/-Senate-Must-Act-to-Bring-Dark-Money-to-Light.

[7] *See* Jessie Balmert, *What You Need to Know About Ohio's Corruption Scandal, Larry Householder Conviction*, Cincinnati Enquirer (Mar. 5, 2023), https://www.cincinnati.com/story/news/politics/2023/03/05/who-is-larry-householder-matt-borges-firstenergy-corruption-trial/69968232007/; Marty Schladen, *Householder Trial: Millions in Dark Money Used to Call Dark Money 'Dirty'*, Ohio Capital J. (Feb. 1, 2023), https://ohiocapitaljournal.com/2023/02/01/householder-trial-millions-in-dark-money-used-to-call-dark-money-dirty/.

C. American Action Network Has Played a Leading Role in the Rise of Dark Money

As even a cursory history of recent federal elections attests, American Action Network has been—and remains—a major player in the rise of dark money, deftly exploiting the loopholes the FEC has created through its practice of non-enforcement and narrow interpretations of FECA.

As CREW has alleged, between July 2009 and June 2011 alone, American Action Network spent more than $19 million to influence federal elections, out of its $27.1 million in total spending. *See* Compl., ECF No. 1 ¶¶ 55-59 (Apr. 23, 2018). Indeed, American Action Network reported to the Internal Revenue Service that, from July 2010 to June 2011, almost 76 percent of its total spending—$19.4 million out of $25.7 million—was for elections. *See* Kim Barker & Al Shaw, *How Some Nonprofit Groups Funnel Dark Money Into Campaigns*, ProPublica (Oct. 4, 2012), https://projects.propublica.org/dark-money/index.html.

In the years since the spending at issue in this case, American Action Network has consistently ranked among the most active dark-money groups in American politics. In the six years after *Citizens United*, American Action Network spent $44 million to influence federal elections—making it the sixth most politically active dark-money group in the country. Michael Beckel, *Dark Money Illuminated: The Top 15 Dark Money Groups in the Post-Citizens United Era*, Issue One (Sept. 11,

2018), https://issueone.org/articles/dark-money-illuminated-the-top-15-dark-money-groups-in-the-post-citizens-united-era/. During the 2020 election cycle alone, American Action Network spent an additional $43 million to influence federal elections. *See* Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won With It in 2020.*, (Jan. 29, 2022), https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html. And in 2022, American Action Network spent more than $30.7 million on political ads and $46.4 million in political contributions. Massoglia, *'Dark money' groups have poured billions into federal elections*.

Beyond its sheer volume, American Action Network's undisclosed spending illustrates the value of disclosure and the dangers in its absence, as American Action Network lies at the heart of a web of interconnected dark money, exerting influence over multiple players in the political system without any duty to disclose its donors and other important information to the public.

For example, American Action Network's co-founder and chairman Norm Coleman also chairs another dark-money nonprofit group, the Republican Jewish Coalition, and helped found and serves as chair of the board for the Congressional Leadership Fund, a super PAC aligned with House Republican leadership. *See* Eli Clifton, *Norm Coleman Oversees GOP Congressional War Chest, Then Lobbies On*

Saudi Arabia's Behalf, The Intercept (Sept. 22, 2022), https://theintercept.com/2022/09/22/saudi-arabia-norm-coleman-lobbyist-republicans/. Thanks only to media coverage, Republican Jewish Coalition was identified as one of American Action Network's largest known donors in 2010, contributing $4 million to the group; American Action Network returned the favor by contributing $200,000 to the Coalition. *See* Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, ProPublica (Aug. 18, 2012), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare. Still, as neither group was required to disclose their donors, they were free to swap dark money for dark money.

Meanwhile, the Congressional Leadership Fund—American Action Network's self-described "sister super PAC" with which it shares both staff and resources, including an office[8]—is the vehicle for most of American Action

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[8] *See American Action Network and Congressional Leadership Fund Announce Dan Conston as President for 2020 Cycle*, Am. Action Network (Dec. 4, 2018), https://americanactionnetwork.org/press/american-action-network-and-congressional-leadership-fund-announce-dan-conston-as-president-for-2020-cycle/; Anna Massoglia, *'Dark money' groups aligned with party leadership steer hundreds of millions of dollars into 2022 federal elections*, OpenSecrets.org (Nov. 4, 2022), https://www.opensecrets.org/news/2022/11/dark-money-groups-aligned-with-party-leadership-steer-hundreds-of-millions-of-dollars-2022-federal-elections; Reity O'Brien, *PAC Profile: Congressional Leadership Fund*, Ctr. for Public Integrity (Oct. 3, 2012), https://publicintegrity.org/politics/pac-profile-congressional-leadership-fund/.

Network's political contributions, including $30 million during the 2020 election cycle and $39 million in 2022 alone.[9] In total, since 2011, American Action Network has given more than $113 million in dark money to the Congressional Leadership Fund[10]—which has flowed "from there, into ads and other support for Republican congressional candidates." Clifton, *Norm Coleman Oversees GOP Congressional War Chest*. These dark-money contributions—which accounted for almost 20 percent of the Congressional Leadership Fund's war chest in 2020, *id.*—have helped the Fund become one of the largest sources of independent expenditures in American politics. *See, e.g.*, *Congressional Leadership Fund, Summary of Outside Spending in 2020 and 2022*, OpenSecrets.org (last visited Mar. 30, 2023), https://www.opensecrets.org/orgs/congressional-leadership-fund/summary?id=D000069888 (finding that the Fund poured more than $142.7 million into 2020

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[9] *See* Congressional Leadership Fund, 2022 Receipts from American Action Network, FEC (last visited March 29, 2023), https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00504530&contributor_name=American+Action+Network&min_date=01%2F01%2F2022&max_date=12%2F31%2F2022; Anna Massoglia, *Secret donors are already pouring 'dark money' into 2022 elections*, OpenSecrets.org (Aug. 3, 2021), https://www.opensecrets.org/news/2021/08/secret-donors-are-already-pouring-dark-money-into-2022/.

[10] *See* Congressional Leadership Fund, Total Receipts from American Action Network, FEC (last visited Apr. 4, 2023), https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00504530&contributor_name=American+Action+Network.

federal elections, and more than $227.3 million into the 2022 midterms—the third and second most outside spending by any political committee during each election cycle, respectively).

This "arrangement — a dark-money-to-PAC pipeline — is a common one, allowing the tax-exempt group [American Action Network] to funnel dark money into the explicitly political coffers of the PAC." Clifton, *Norm Coleman Oversees GOP Congressional War Chest*. American Action Network effectively serves as a conduit for donations to the Congressional Leadership Fund, shielding the identities of donors who would otherwise be disclosed had they donated to the PAC directly. In this way, American Action Network has used its evasion of political-committee status to help the Congressional Leadership Fund evade *its* disclosure requirements, depriving American voters of still more information to which they are entitled.

American Action Network's entanglement with another dark-money group and a registered PAC is even more concerning given that Norm Coleman—the chairman of all three—is a registered foreign agent with a $175,000-per-month contract to lobby American officials on behalf of Saudi Arabia.[11] Without required

[11] *See* Eli Clifton, *Saudi lobbyist oversees millions in dark money GOP campaign donations: Experts question former Sen. Norm Coleman's role as both foreign agent for Riyadh and Republican fundraiser.*, Responsible Statecraft (Sept. 22, 2022), https://responsiblestatecraft.org/2022/09/22/saudi-lobbyist-oversees-

disclosure, there is no way to know whether American Action Network's spending includes illegal foreign-national contributions.

Still, this is not all. Little is known of American Action Network's donors,[12] but what is known illustrates why the American people need to know who is funding the dark-money groups spending to influence their votes. Since 2010, for example, American Action Network has received at least $14.6 million from the Pharmaceutical Research and Manufacturers of America and $3.3 million from insurance giant Aetna—making the drug and healthcare lobby its largest known donor.[13] At the same time, American Action Network has run multiple multi-

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millions-in-dark-money-gop-campaign-donations/; Eli Clifton, *Will the RNC return funds from alleged foreign agent?: Thomas Barrack's links to the GOP go well beyond Donald Trump.*, Responsible Statecraft (July 26, 2021), https://responsiblestatecraft.org/2021/07/26/will-rnc-return-funds-from-alleged-foreign-agent/?highlight=%22american%20action%20network%22 (noting that Coleman has been a paid foreign agent since 2014).

[12] Issue One, which has catalogued American Action Network's known contributions, estimated that it was able to source only $1 of every $9. Beckel, *Dark Money Illuminated*; *see also Dark Money Illuminated* at 8, 18-20, Issue One (Sept. 2018), https://issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf (identifying more than $22 million in contributions to American Action Network from 23 previously undisclosed donors).

[13] *See* Josh Israel, *Dark money group spends millions telling people lower drug prices will kill them*, The Am. Independent (May 10, 2021), https://americanindependent.com/dark-money-hr-3-government-medicare-negotiate-drug-prices-ads-pharmaceutical-industry/; *Donors, Key Findings, and Profiles of the Top 15 Dark Money Groups*, Issue One (Sept. 2018),

million-dollar ad campaigns targeting voters—who have no way of knowing who paid for the ads—with claims about federal officeholders and their policies regarding prescription drugs, the Affordable Care Act, and Medicare benefits.[14]

As this case and all available evidence thus indicates, American Action Network is and always has been a major player in the rise of dark money in U.S. elections, exploiting the shortcomings in federal campaign finance laws created and exacerbated by FEC nonfeasance.

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https://issueone.org/donors-key-findings-and-profiles-of-the-top-15-dark-money-groups/.

[14] *See, e.g.*, Josh Israel, *Dark money group targets House Democrats with false claims that Biden will cut Medicare*, The Am. Independent (Mar. 6, 2023), https://americanindependent.com/dark-money-american-action-network-house-democrats-joe-biden-medicare-ads/; Israel, *Dark money group spends millions telling people lower drug prices will kill them*; *American Action Network Launches One Million Robocalls To Support the American Health Care Act*, Am. Action Network (Mar. 16, 2017), https://americanactionnetwork.org/press/american-action-network-launches-one-million-robocalls-support-american-health-care-act/.

II. The Court Should Rule in CREW's Favor to Preserve the Role Congress Intended Judicial Review and Private FECA Enforcement to Play in Checking FEC Intransigence

This Court should rule in CREW's favor because Congress intended for private enforcement actions like this one to check the FEC's unwillingness to enforce the law, itself a predictable result of the agency's bipartisan structure. The district court was incorrect to find that it was "bound" to apply the split-panel decisions in *Commission on Hope* and *New Models*, which, as the district court recognized, threaten to "gut" FECA's safeguards against a minority of the Commission entrenching their mistaken legal views while evading judicial oversight. JA52.

A. FECA's Judicial Review and Private Enforcement Provisions Are Particularly Critical in Political-Committee Cases Like This One Where the FEC Has Abdicated Enforcement

By Congressional design, the FEC is a six-member body, and "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). Four members—a majority of the Commission—must agree for the Commission to take any enforcement action. *Id.* § 30106(c). By structuring the agency this way, "Congress designed the Commission to ensure that every important action it takes is bipartisan." *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). For example, after a

complainant such as CREW has filed an administrative complaint alleging a FECA violation, the FEC may decide, "by an affirmative vote of 4 of its members," to investigate the complaint's allegations by finding "reason to believe" a violation has occurred. 52 U.S.C. § 30109(a)(2). While enforcement thus requires bipartisan agreement, a result of this structure is that a partisan minority bloc of Commissioners can prevent the agency from enforcing the law. *See, e.g.*, *CREW v. FEC*, 923 F.3d 1141, 1143-44 (D.C. Cir. 2019) ("*Commission on Hope II*") (Pillard, J., dissenting) ("Th[e FEC's] balance created a risk of partisan reluctance to apply the law.").

Given this structure, Congress "anticipated that partisan deadlocks were likely to result," and so, in FECA, "legislated a fix"—a statutory provision allowing administrative complainants to seek judicial review of FEC nonenforcement decisions, potentially culminating in a private right of action against the alleged lawbreaker. JA34. Congress provided for "citizen suits," such as this case, "in anticipation of [the] FEC's regulatory breakdown . . . as a safeguard to protect the First Amendment rights of complainants." *Campaign Legal Ctr. v. Iowa Values*, 573 F. Supp. 3d 243, 257 (D.D.C. 2021).

FECA's private enforcement mechanism has taken on greater importance as the FEC has become more dysfunctional in recent years. Many commentators have observed "a sharp rise in party-line deadlocked votes" at the FEC since 2008, with

one minority bloc of the Commission appearing to ideologically oppose the regulation of money in politics. *See, e.g.*, Daniel I. Weiner, Brennan Ctr. for Justice, *Fixing the FEC: An Agenda for Reform* (Apr. 30, 2019), https://www.brennancenter.org/media/161/download; *see also* Trevor Potter, *Money, Politics, and the Crippling of the FEC*, 69 Admin. L. Rev. 447, 449 (2017). As one former Commissioner observed in 2017, "[a] bloc of three Commissioners routinely thwarts, obstructs, and delays action on the very campaign finance laws its members were appointed to administer" due to their "ideological opposition to campaign finance law." Ann M. Ravel, *Dysfunction and Deadlock* at 1 (Feb. 2017), https://beta.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

The statistics bear this out. Between 2006 and 2016, the number of deadlocked substantive votes in enforcement matters jumped from 2.9 percent to 30 percent. *Id.* By 2019, "of the enforcement matters that the Commissioners consider[ed] in their official meetings, *a majority* (approximately 50.6% since 2012) ha[d] at least one deadlock and fail[ed] to reach the four affirmative votes necessary to pursue the matter." Adav Noti, *Statement to the Committee on House Administration* at 3 (Sept. 25, 2019), https://docs.house.gov/meetings/HA/HA00/20190925/109983/HHRG-116-HA00-Wstate-NotiA-20190925-U1.pdf. But even this figure understates the

gridlock, "as many of the matters that the FEC resolves without deadlocked votes are minor and uncontroversial. In enforcement cases involving major violations or high-profile elections, the deadlock rate is even higher." *Id.*

This case illustrates perfectly the FEC's dysfunction, as well as the need for robust judicial review of FEC dismissals and private FECA enforcement. As CREW details, *see* Appellant's Br. at 19-23, the FEC deadlocked three times on whether to pursue enforcement of American Action Network's alleged disclosure violations, twice in response to district court orders. After CREW filed its administrative complaint, the FEC's General Counsel recommended that the Commission investigate the allegations against American Action Network. Yet the Commission deadlocked, with the no-voting Commissioners issuing a legal analysis that the district court later described as "blink[ing] reality." JA159 The court thus held the FEC's dismissal contrary to law and remanded. The agency then deadlocked again, this time employing reasoning that the district court later found had already been rejected by the Supreme Court—twice. *See* JA160-161. After the case was remanded a second time, the FEC failed to conform within 30 days, triggering CREW's statutory right to bring this citizen suit against American Action Network, to pursue the enforcement of FECA that the Commission would not.

B. The Court Should Not Allow *Commission on Hope* and *New Models* to Nullify FECA's Judicial Review and Private Enforcement Provisions

This Court should reverse the district court's ruling to ensure, as Congress intended, that private actions remain a viable method of enforcing FECA's disclosure requirements, particularly given the FEC's complicity in the rise of dark money. As the district court twice held, a minority of the Commission acted contrary to law in its refusals to find reason to believe that American Action Network should disclose its spending as a political committee. In the decision on review, the district court "st[oo]d[] by its prior reasoning," yet dismissed CREW's suit anyway under the misimpression that it was "[b]ound" to do so by this Court's split-panel decisions in *Commission on Hope* and *New Models*. JA121. Although those rulings state that FEC dismissals are sometimes unreviewable when based on prosecutorial discretion, they do not and should not preclude review in this case, for four reasons.

First, as CREW rightly points out, *see* Appellant's Br. at 23-31, the controlling Commissioners did not invoke, nor incorporate by reference, any exercise of prosecutorial discretion in their 2016 Statement of Reasons, which superseded their 2014 Statement—rendering the earlier Statement a dead letter.

Second, even the 2014 Statement's invocation of prosecutorial discretion is reviewable, as it "was rooted entirely in [the commissioners' erroneous] legal

misgivings," and not in "resource-based [concerns] or on the controlling Commissioners' legal analysis [or] other prudential considerations of the sort . . . identified by the Supreme Court in Heckler as grounds to shield discretionary nonenforcement decisions from judicial review." JA115, JA118.

Third, even if *Commission on Hope* and *New Models* are read to preclude judicial review here, the Court should decline to follow them because, under the law of this Circuit, "when 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." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). As CREW details, the split-panel rulings in *Commission on Hope* and *New Models* contravene the Supreme Court's decision in *FEC v. Akins*, 524 U.S. 11 (1998) and this Court's decisions in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987), and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). *See* Appellant's Br. at 31-39.

Fourth, and finally, if permitted to frustrate private enforcement in cases like this one, *Commission on Hope* and *New Models* would—in the words of the district court—"gut the statutory scheme that Congress created in FECA" to ensure enforcement even in the face of FEC intransigence and dysfunction. JA52. As

detailed above, Congress provided for judicial review of enforcement dismissals as well as a limited private right of action to ensure that the Commission was not "turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know." *Commission on Hope*, 892 F.3d at 442 (Pillard, J., dissenting); *see also Citizens United*, 558 U.S. at 368-70. This "fix" that Congress legislated in anticipation of frequent FEC partisan deadlocks would be nullified if a minority bloc of Commissioners could block judicial review by basing a "dismissal on legal interpretations couched as 'prosecutorial discretion' or, worse yet, simply sprinkl[ing] the term throughout a Statement of Reasons in order to circumvent judicial review." JA113. Nevertheless, *Commission on Hope* and *New Models* have been read to do just that, notwithstanding the Commission's long history of dysfunction and its complete failure to enforce the important disclosure provisions at issue in both cases, and here.

The consequence has been that, since *Commission on Hope* and *New Models* were decided, the specter of unreviewability has brought FEC enforcement to a virtual standstill, with ample evidence that no-voting Commissioners now strategically invoke prosecutorial discretion to avoid judicial review.[15] The

[15] *See* MUR 7181 (Independent Women's Voice), https://www.fec.gov/data/legal/matter-under-review/7181/ (issuing a statement of reasons relying on

Commission's stasis is particularly acute in matters, as here, concerning political-committee disclosure requirements, which lie "at the heart of the agency's mission"[16] and its mandate under FECA to "provid[e] the electorate with information" and deter corruption. *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

Although the Commission abdicated its duty to enforce the political committee disclosure rules long before *Commission on Hope* and *New Models*, *see supra* pp. 9-12, those rulings have only made matters worse: a minority of the Commission may now effectively entrench their view of the law, no matter how blinkered, free from judicial oversight.

In 2016, for example, the district court in this case found it contrary to law when applying the major purpose test for the FEC to measure the percentage of American Action Network's spending on election-influencing activity over the

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prosecutorial discretion and then following up with a supplemental statement of reasons with legal analysis, in a seeming attempt to evade judicial review while still shaping the law); *see also* Jeremy Broggi, Lee Goodman, & Shane Roberts, *FEC's Prosecutorial Discretion Deemed Unreviewable by D.C. Circuit, Again*, JDSupra (May 19, 2021), https://www.jdsupra.com/legalnews/fec-s-prosecutorial-discretion-deemed-8594602 (former Commissioner—in article co-authored by American Action Network's counsel—publicly advising respondents to "equip the agency with the reasons why discretion is appropriate . . ., and then be prepared to pursue those reasons in district court and, if necessary, to the D.C. Circuit").

[16] 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.

course of its lifetime, as opposed to during the relevant election cycle. *See CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (noting that doing so "runs the risk of ignoring the not unlikely possibility . . . that an organization's major purpose can change," and that a bona fide nonprofit group can transform into a political committee) (emphasis omitted). Nevertheless, in another matter where the Commission split on whether an organization was a political committee, the controlling bloc stating that the group's "major purpose did not change . . . based on its contributions to political committees in one calendar year." Statement of Reasons of Vice Chairman Caroline C. Hunter & Comm'r Lee E. Goodman, MUR 6872 (New Models). That incorrect legal interpretation was then insulated from judicial review based on the controlling Commissioners' invocation of prosecutorial discretion. *See New Models*, 993 F.3d 880.

Emboldened by the lack of consequences for disregarding the 2016 decision in this case, a minority bloc of Commissioners went still further in 2019, stating—without even mentioning the 2016 decision—that it was inappropriate to "determin[e] an organization's major purpose via a narrow snapshot" and, incredibly, that courts have upheld the "Commission's consideration of a multi-year spending history." Statement of Reasons of Vice Chair Petersen & Comm'r Hunter at 16, MUR 6596 (Crossroads GPS). Yet again, the Commissioners then insulated

their flawed legal reasoning with a brief reference to prosecutorial discretion, *id.* at 19.

This case and others like it thus illustrate that, by repeating flawed interpretations of law in unreviewable decisions, a minority bloc of Commissioners has succeeded in making their opinion as good as law for the regulated community. After watching the Commission let organization after organization off the hook while closing the door to judicial review, nonprofit dark-money groups—like American Action Network—know they can act with impunity, spending huge sums of money to influence elections without ever having to register or report their activity.

CONCLUSION

For the foregoing reasons, Campaign Legal Center respectfully requests that this Court reverse the district court's dismissal of this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus curiae brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 6,491 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 brief has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I certify that on April 5, 2023, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

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