EN BANC ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

No. 22-5277

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

NEW REPUBLICAN PAC,
Intervenor-Appellee.

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

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
PAC	Political Committee

SUMMARY OF ARGUMENT

The Federal Election Commission ("FEC") and New Republican have failed to refute End Citizens United PAC's ("ECU") showing that the *CREW* cases—and the district court's ruling—should be reversed.

Contrary to Appellees' claims, the Federal Election Campaign Act ("FECA") allows for judicial review of FEC nonenforcement decisions notwithstanding *Heckler v. Chaney*. FECA circumscribes the FEC's power to dismiss administrative complaints: Congress established checkpoints at which the FEC must act upon finding that allegations indicate a potential FECA violation, and expressly authorized courts to review FEC dismissals for legal error. As relevant here, the Commission assesses a complaint by voting on whether to find "reason to believe" its allegations. If reason to believe exists, the FEC "shall" investigate; if not, and the agency dismisses contrary to the recommendation of its General Counsel, the commissioners who precipitated the dismissal by voting against finding "reason to believe" must explain their reasons why to facilitate judicial review. Review of this decision does not infringe the FEC's discretion regarding "whether the agency *should* pursue a particular enforcement claim." FEC Br. 31. Even if a court holds the dismissal is contrary to law, *the FEC's* ability to decline enforcement remains undisturbed; at most, the agency's decision not to proceed may give a private complainant like ECU the option to file a citizen suit.

Appellees nevertheless claim that FECA fails to rebut the *Heckler* presumption, asserting FECA provides no "law to apply" for the judicial review it expressly authorizes. Yet, as Appellees admit, FECA itself is the "law to apply" to commissioners' legal reasoning about whether FECA was violated. If a court concludes that the FEC misinterpreted the Act or failed to reasonably apply it to the facts, then the dismissal is "contrary to law."

Appellees' repeated assertions that courts may not "second-guess" the FEC's resource and priority considerations are beside the point. Even assuming that purportedly "discretionary" rationales *were* unreviewable, the same cannot be said for the FEC's substantive conclusions, which are reviewable under FECA regardless of whether commissioners also attempt to invoke the agency's discretion. Prudential justifications—such as backlogs—fail to address the merits of the legal question at issue: why did the controlling commissioners vote against "reason to believe"?

What is more, commissioners cannot overrule Congress's choice to make the *action* of dismissal reviewable by offering an allegedly unreviewable *reason* for that action. Courts remain free to apply FECA to correct legal error—including errors in the threshold legal analysis that Appellees admit informs any ensuing "discretionary" rationale. Legal review entails no advisory opinion risk because prudential considerations do not answer why commissioners voted against finding

reason to believe, and regardless, a court cannot presume the agency would reassert discretion after its legal errors have been corrected.

In any event, even prudential considerations are reviewable in their own right to ensure conformance with basic standards of reasoned agency decisionmaking. Appellees' claims that courts lack the ability to "second guess" an agency's resource or priority considerations do not prove otherwise, and show only that courts should afford appropriate deference, as they did for decades before *CREW*. For example, a court need not second-guess the FEC's claimed priorities to nevertheless ensure the agency does not base those priorities on irrational premises, such as overt partisanship.

Finally, Appellees do not deny that the *CREW* cases give a non-majority partisan bloc of commissioners the power to shield legal errors from judicial review while nullifying FECA's private right of action. But their claim that this is "exactly what Congress intended" is untenable. While Congress designed the FEC so that a partisan bloc could prevent FEC enforcement, it does not follow that Congress also intended to allow non-majorities to thwart judicial review of their decisions. On the contrary, judicial review was intended to ensure the Commission's structure did not overshoot the goal of avoiding partisan bias in enforcement by frustrating enforcement altogether. Because the *CREW* cases allow exactly that, they should be reversed.

ARGUMENT

I. ECU Has Standing.

For the first time on appeal, New Republican—though not the Commission—challenges the district court's finding that ECU has standing. Its arguments are unavailing.

A. ECU suffered informational injuries.

The premise of New Republican's informational-standing challenge—that "ECU does not seek any information that" New Republican has not already disclosed—is wrong. New Republican Br. ("NR Br.") at 19.

First, Rick Scott did not make required disclosures upon becoming a candidate. FECA requires quarterly disclosures of a campaign's donors and spending once they become a candidate. 52 U.S.C. § 30104(a); *see* JA12. ECU alleges that Scott became a candidate as early as May 2017, JA16-22, but his campaign's first quarterly FEC report, filed in July 2018, reports no contributions prior to April 2018 and no disbursements prior to January 2018, JA211 & n.3. As a result, up to a year's worth of receipts and disbursements remain undisclosed. Once a candidate, Scott was also required to file Statements of Candidacy and Organization. *See* 52 U.S.C. §§ 30102(e), 30103(a)-(b). But because Scott failed to do so until April 2018, ECU still does not know how his campaign was structured, how it raised funds, and who was authorized to fundraise on its behalf *prior* to April

2018 (but after Scott became a candidate). *See* JA7. These are quintessential informational injuries under *FEC v. Akins*, 524 U.S. 11, 21 (1998).

Second, the value of New Republican's contributions to Scott remain undisclosed. New Republican baldly asserts that any unreported campaign activity conducted by Scott prior to announcing his candidacy is reflected in New Republican's own semiannual disclosure reports, NR Br. 19-20, but neither Scott nor New Republican disclosed the in-kind contributions that would result from such an arrangement. Under ECU's view of the law, both were required to separately disclose the "date, amount, and purpose" of those in-kind contributions. 52 U.S.C. § 30104(b)(6)(B)(iv). Instead, New Republican's reports indicate only generally that it engaged in $2.3 million in fundraising and $615,735 in spending between May 2017 and April 2018, JA221—without disaggregating New Republican's in-kind contributions to Scott from its other expenditures as FECA requires.[1] And even if *all* of New Republican's spending once Scott became a candidate represented in-kind contributions to Scott, New Republican would still be required to disaggregate

[1] ECU has not alleged that *none* of New Republican's spending during the contested period were operating expenses or independent expenditures. *See* NR Br. 19. Indeed, New Republican, whose stated purpose is to "represent and to support candidates who fit the 'New Republican' model" (not just Scott), supported other candidates in prior elections, JA16 & n.7, JA212-13, and spent nearly $1 million on a U.S. House race later in the 2018 cycle, JA218 n.47.

its post-candidacy in-kind contributions from its pre-candidacy operating expenditures. *See id.*; JA226 n.77.

Campaign Legal Center v. FEC, 31 F.4th 781 (D.C. Cir. 2022), confirms that conclusion. There, a PAC allegedly made coordinated contributions to the 2016 Clinton campaign while only reporting the PAC's disbursements in the aggregate manner New Republican has done here. *Id.* at 790. This Court observed that although "[the PAC] has disclosed its aggregated expenditures publicly, [] it has not broken down its expenditures to show which were coordinated contributions to the Clinton campaign." *Id.* at 783. It concluded that "[t]here is no doubt that those numerical amounts constitute factual information and that FECA requires them to be disclosed," and rejected the same appeal to *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), that New Republican makes here. 31 F.4th at 791; *compare id.* at 791-92, *with* NR Br. 18-20.

B. ECU suffered competitive injuries.

The FEC's dismissal also disadvantages ECU in fundraising, spending, and electoral success. Government action that "illegally structure[s] a competitive environment" injures "parties defending concrete interests" in that environment. *Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). That principle applies "to politics as well as business." *Id.*

New Republican was able to spend more dollars, more effectively than ECU, establishing competitive injury. Because, as ECU alleges, Scott "control[led]" New Republican, 52 U.S.C. § 30125(e)(1)(A); *see* JA7; JA22, New Republican was able to raise and spend millions for Scott in violation of FECA's soft-money ban and contribution limits, *see* JA120-22. But ECU, which complied with those limits, could contribute only $15,000 to Scott's opponent. JA10. And because its spending was controlled by Scott, New Republican was able to inject those excess contributions directly into Scott's campaign in a way that ECU, which would have had to make any additional spending as arms-length independent expenditures, could not. That injury can be directly "analogiz[ed] . . . to business rivalry." *Shays*, 414 F.3d at 87; *see La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (competitive injury when competitor's prices were exempted from price controls); *U.S. Telecomm. Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (competitive injury when competitor was permitted to receive subsidies); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 870 (D.C. Cir. 2001).

New Republican argues that competitor standing applies only to candidates. But *Shays* defined competitive injury more broadly, rooting injury not just in "genuine rivalry from candidates" but also from "parties in a position to exploit FEC-created loopholes," 414 F.3d at 87 (internal citation and quotation marks omitted). *See also Chamber of Com. of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir.

1995) (suggesting that plaintiff nonprofits could have "political competitor[s]" injured by violations of FEC regulations); *Nat. L. Party of U.S. v. FEC*, 111 F. Supp. 2d 33, 45 (D.D.C. 2000) (finding competitive injury to a political "[p]arty itself"). In the business context, competitor standing has never been limited to just direct market participants, but rather encompasses any "'parties defending concrete interests'" in a "'competitive environment,'" for example, unions. *Air Line Pilots Ass'n, Int'l v. Chao*, 889 F.3d 785, 788 (D.C. Cir. 2018) (quoting *Shays*, 414 U.S. at 87).

Gottlieb v. FEC, 143 F.3d 618 (D.C. Cir. 1998), is not to the contrary. *Gottlieb* stands for the uncontroversial proposition that only parties that receive matching funds—namely, candidates—can assert an injury premised solely on the allocation of matching funds. *See id.* at 621. Unlike the PAC in *Gottlieb*, which "was never in a position to receive matching funds itself" and thus did not compete for those funds, 143 F.3d at 621, ECU directly competes with New Republican and Scott in fundraising, spending, and electoral success. *See* JA10-11.

C. ECU's injuries are redressable.

New Republican argues that because the particular remedies the FEC might negotiate, or a court might impose, remain uncertain, ECU's injuries are not redressable. NR Br. 24. But that is precisely the argument the Supreme Court rejected in *Akins*. *See* 524 U.S. at 25. For that reason, this Court has routinely found

the redressability requirement "easily satisf[ied]" when plaintiffs demonstrate injury from alleged FECA violations. *Campaign Legal Ctr.*, 31 F.4th at 784 (citing *Akins*, 524 U.S. at 21). None of New Republican's arguments or authority countermand *Akins*.[2]

II. FECA Rebuts the *Heckler* Presumption.

A. FECA circumscribes the FEC's authority to dismiss complaints.

Appellees have failed to refute ECU's showing that FECA makes FEC dismissals reviewable notwithstanding *Heckler*. *Heckler* described a "general presumption" that agency decisions are reviewable, subject to a "narrow" exception when an action is "committed to agency discretion by law," which is only presumed to apply in the agency nonenforcement context. 470 U.S. 821, 826 (1985) (citing APA § 701(a)(2)). But *Heckler* made clear that this presumption of nonreviewability is "rebutt[able]," remains "narrow," and does not apply if "Congress has indicated otherwise." *Id.* at 838. *Heckler* thus "did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers," *id.* at 839, and

[2] For example, New Republican cites *CREW v. FEC*, 475 F.3d 337 (D.C. Cir. 2007), an unusual case where the plaintiff sought a more precise valuation of an activist list shared with a campaign. *Id.* at 337-38. But the list itself had already been disclosed, *id.* at 339, the Commission had already estimated its value, *CREW v. FEC*, 401 F. Supp. 2d 115, 121 (D.D.C. 2005), and the court doubted that a more precise valuation was possible, *CREW*, 475 F.3d at 340.

Congress may "circumscrib[e] an agency's power to discriminate among issues or cases it will pursue," *id.* at 833.

Congress could hardly have circumscribed the FEC's power to dismiss enforcement matters more clearly. FECA allows challenges to "order[s] of the Commission dismissing a complaint," 52 U.S.C. § 30109(a)(8)(A), and authorizes district courts to declare "the dismissal of [a] complaint" contrary to law, *id.* § 30109(a)(8)(C). FECA further limits the FEC's discretion by establishing checkpoints at which the agency must take certain action if it finds that a complaint's allegations indicate a potential violation. Relevant here, FECA provides that the Commission "shall make an investigation" when there is "reason to believe" a violation occurred. *Id.* § 30109(a)(2). These provisions limit the FEC's discretion to dismiss a matter after failing to find reason to believe, even assuming FECA commits other actions to the FEC's discretion by law. *See, e.g.*, 52 U.S.C. § 30109(a)(6) ("[T]he Commission may . . . institute a civil action for relief.").

FECA thus differs from other statutes that fail to rebut the *Heckler* presumption because they lack a similar express judicial-review authorization and contain language committing an action to agency discretion. *See , e.g.*, *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir 2003) (denying review of agency's action under provision allowing that action "for any reason the Administrator considers appropriate"); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir.

2006) (denying review of agency's action under provision wherein "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code"). Instead, FECA resembles the statute in *Dunlop v. Bachowski*, 421 U.S. 560 (1975)—which *Heckler* distinguished—directing the Labor Secretary to investigate complaints and providing that "if he finds probable cause to believe that a violation . . . has occurred . . . he shall" pursue enforcement. 470 U.S. 833-34. Where the Secretary declined to proceed through the defined statutory checkpoint, "the principle of absolute prosecutorial discretion was inapplicable." *Id.* at 834 (cleaned up).

The FEC claims there are "good reasons" for the *Heckler* presumption, FEC Br. 17, but none of *Heckler*'s four "concerns" apply here.

First, unlike most agency decisions not to enforce, FECA "provides a focus for judicial review," *Heckler*, 470 U.S. at 832—a dismissal, which the agency must explain to facilitate judicial review.

Second, FECA does not implicate separation-of-powers concerns because, unlike second-guessing "the decision of a prosecutor . . . not to indict," *Heckler*, 470 U.S. at 832, FECA "does not 'mandate' or 'require' the FEC to prosecute anyone," *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 26 (D.D.C. 2019). Instead, judicial review may, at most, trigger a citizen suit, and so "'[c]ontrary to law' dismissals

simply do not implicate prosecutorial discretion." *Id.*; *Campaign Legal Ctr. v. Iowa Values*, 573 F. Supp. 3d 243, 256 (D.D.C. 2021) (same).

Third, while agency nonenforcement decisions normally "do[] not infringe upon areas that courts are often called upon to protect," 470 U.S. at 832, under FECA, judicial review allows complainants "aggrieved" by a dismissal to remedy private injuries, *see* 52 U.S.C. § 30109(a)(8)(A); *Akins*, 524 U.S. at 19-26.

Finally, notwithstanding *Heckler*'s "administrative concern" that an agency nonenforcement decision often involves "factors which are peculiarly within its expertise," *Heckler* also held that courts could still review these factors if Congress desired, 470 U.S. at 831-32, and courts reviewing FEC dismissals have applied deference to account for agency expertise, ECU Br. 51-54.

B. FECA provides "law to apply" to FEC dismissals.

FECA requires courts to review FEC dismissals for whether they are "contrary to law." 52 U.S.C. § 30109(a)(8)(C). As reflected by this Court's interpretation of that standard in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), the "law" to apply is FECA itself and fundamental legal standards governing reasoned agency decisionmaking. ECU Br. 53-54.

1. FECA is the "law to apply" to a dismissal's legal analysis, and discretionary reasons cannot shield this review.

No party disputes that FECA provides "law to apply" to commissioners' legal analysis assessing a complaint's merits. As Appellees acknowledge, Congress,

through FECA, "has established positive law about what does and does not constitute a violation of FECA." NR Br. 1-2. FECA therefore has "provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833.

The FEC "routinely," FEC Br. 32, engages in a preliminary assessment of a complaint's legal merits by voting on whether to find reason to believe a violation occurred, 52 U.S.C. § 30109(a)(2). Regardless of whether the FEC is required to assess the merits in every case, *see* FEC Br. 30, where it does so—as here—FECA constrains its discretion by mandating that if reason to believe exists, the agency "shall" investigate, 52 U.S.C. § 30109(a)(2). Unlike the "decision of a prosecutor . . . not to indict," *Heckler*, 470 U.S. at 832, when the Commission dismisses after deadlocking on a reason-to-believe vote, "the Commissioners *finding no reason to believe* the allegations need[] 'to state their reasons why'" to "enable a reviewing court to 'intelligently determine whether the Commission is acting contrary to law.'" *End Citizens United PAC v. FEC*, 69 F.4th 916, 920 (D.C. Cir. 2023) (emphasis added) (quoting *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) ("[W]hen . . . the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why.")). Applying *Orloski*'s two-pronged standard, if a court finds that the controlling commissioners misinterpreted FECA or "fail[ed] to faithfully apply

FECA to the facts," then the dismissal is "contrary to law." *Commission on Hope I*, 892 F.3d at 449 (Pillard, J., dissenting).

FECA is thus the "law to apply," and that does not cease to be true when commissioners also assert "discretionary" justifications in support of a dismissal, as the *CREW* cases and Appellees claim.

First, any "discretionary" rationale included in a statement of reasons—such as a claim that the FEC lacks resources or has other priorities—does not bear on the reviewability of the commissioners' analysis on "the merits of the legal question at issue," FEC Br. 32, i.e., "why" the controlling commissioners "f[ound] no reason to believe," *End Citizens United PAC*, 69 F.4th at 920. The *CREW* cases and Appellees therefore err by concluding that a post-reason-to-believe FEC dismissal can be "*based* on enforcement discretion," *CREW v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021) ("*New Models I*") (emphasis added). Assuming *arguendo* that purely discretionary rationales are unreviewable in certain contexts, correcting a statement's faulty legal analysis would not constitute an "advisory opinion," *New Models I*, 993 F.3d at 889, because the court's review would necessarily "affect the rights of the litigants in the case before them," *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). At the same time, the agency's discretionary prerogatives remain undisturbed, because a finding that the dismissal is contrary to

law would not require the FEC to enforce, but would instead, at most, potentially allow the private complainant to do so. 52 U.S.C. § 30109(a)(8)(C).

Second, even if a post-reason-to-believe dismissal could be "based" on a discretionary rationale, that rationale could not transform an FEC dismissal into a "non-reviewable action[]," as the *CREW* cases claim, *Commission on Hope I*, 892 F.3d at 441-42. A commissioner's "discussion" of allegedly unreviewable *reasons* cannot overrule Congress's choice to make the "formal action" of dismissal reviewable. *Interstate Com. Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987). In FECA, Congress created one "dismissal" and made it reviewable. 52 U.S.C. § 30109(a)(8)(C). There is no such thing as a "prosecutorial discretion dismissal[]" as distinct from a "legal decision" dismissal, as the FEC suggests, FEC Br. 29; indeed, the agency's own policy statement makes clear that, "[a]t the initial stage of the enforcement process, voting to find reason to believe, or to dismiss, are the only actions contemplated by FECA," and "prosecutorial discretion" is merely a possible "*rationale* for voting to dismiss." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729-02, 19,730 (Mar. 20, 2024) (emphasis added).

Thus, even assuming Appellees are right that under the contrary-to-law standard, "enforcement discretion is an unreviewable *reason* for dismissing complaints, Commission decisions to dismiss complaints are undeniably reviewable

actions under the plain text of FECA." *CREW v. FEC*, 923 F.3d 1141, 1148 (D.C. Cir. 2019) ("*Commission on Hope II*") (Pillard, J., dissenting); *cf. Commission on Hope I*, 892 F.3d at 442 (incorrectly concluding that review would constitute "carving reviewable legal rulings out from the middle of non-reviewable actions").[3]

Within the context of a reviewable action, a court must correct erroneous legal analysis—including the "preliminary legal analysis" that New Republican acknowledges so often "informs" the agency's resource- and policy-related concerns (including in this case). NR Br. 2, 16. New Republican nevertheless claims such legal analysis is unreviewable because it is a "classic enforcement discretion consideration." *Id.* at 16. But *Heckler* made even "classic" components of discretion reviewable where Congress so provides, 470 U.S. at 832-33—and here, FECA makes the relevant FEC action reviewable and provides law to apply to the FEC's "preliminary" or other legal analysis. By allowing prudential justifications to shield accompanying legal analysis from review, the *CREW* cases make it easy for FEC commissioners to overrule Congress's provision for judicial review.

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[3] Because FECA rebuts the *Heckler* presumption for all FEC dismissals, even a Commission majority could not overrule that Congressional choice by asserting discretionary reasons. *Cf.* NR Br. 34-36. That said, the *CREW* cases' negative impacts are certainly more pronounced where, as here, a partisan nonmajority wields the power to block judicial review. ECU Br. II.A.

New Republican's own example proves the point. New Republican admits that "a dismissal may be 'contrary to law' if the FEC mistakenly concludes that it lacks the *power* to pursue it." NR Br. 36. But what if this mistaken legal analysis also informed the controlling commissioners' assessment that pursuing the matter would "consume significant resources," take too "long . . . to complete," or "set[] bad precedent"? *Id.* at 16. Under *CREW*, the very same legal analysis that was previously reviewable would now be beyond all scrutiny thanks to nothing more than commissioner "prose composition," *New Models I*, 993 F.3d at 887.

Reviewing the legal analysis underpinning a dismissal purportedly also "based" on discretionary reasons in no way obliges the court to issue an advisory opinion. Even when the FEC has "discretion about whether or not to take a particular action," aggrieved parties can "complain that the agency based its decision upon an improper legal ground." *Akins*, 524 U.S. at 25. If the court "agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Id.* That ruling is not advisory because the court "cannot know that the FEC would have exercised its prosecutorial discretion in this way" absent its erroneous legal interpretation. *Id.*

Third, the *CREW* cases erred by holding that discretionary rationales can shield the FEC's legal analysis from review for the additional reason that such

discretionary rationales are reviewable in their own right under bedrock legal standards governing reasoned agency decisionmaking. *See infra* Part II.B.2.

Finally, the claim that courts cannot apply FECA to a dismissal that Congress made reviewable and that the FEC justified with legal analysis conflicts with the principle that courts should not defer to an agency in exercising their duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). By allowing commissioners to turn off Congressionally mandated judicial review at will and effectively make law while doing so, the *CREW* cases raise significant separation-of-powers issues. ECU Br. 40-41. FECA's rebuttal of the *Heckler* presumption is explicit, but even if it were ambiguous, FECA should be read to allow review of both "discretionary" and legal rationales to "avoid the serious constitutional questions that would be raised by a contrary interpretation." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020).

In this case, FECA provides law to apply to the FEC's dismissal of ECU's complaint. The FEC deadlocked on a reason-to-believe motion as to ECU's Filing Claims. JA270-71. The three commissioners who voted against that motion issued a statement with pages of "Legal Analysis" explaining why they were "not persuaded" by the General Counsel's recommendation to find reason to believe, despite acknowledging that there was "significant evidence of Scott's potential earlier

candidacy." JA285-90. As ECU argued to the district court, this reasoning contravenes FECA because "[t]he record in this case establishes reason to believe." No. 21-cv-2128, ECF No. 23 at 23.

The statement also expresses various supposed "discretionary" concerns, none of which can explain why the controlling commissioners voted against the General Counsel's reason-to-believe recommendation, and which are, in any event, still premised on legal conclusions and merits analysis. For example, the statement says going forward "would have necessitated a wide-ranging, costly, and invasive investigation." JA290. But that conclusion rests on the legal determination that deciding when Senator Scott became a candidate under FECA and FEC regulations would require "prob[ing] his subjective intent." JA290. There also is law to apply here: under FEC regulations and precedent, the candidacy inquiry "look[s] objectively to candidate activities, not to the stage of an individual's subjective decisionmaking process." ECU Br. 44. In yet another example, the statement also cites the "nearing . . . statute of limitations," JA290, which itself is law to apply in determining if the statute applies, when it expires, and whether it could be tolled.

2. Discretionary reasons are also reviewable under legal standards for reasoned agency decisionmaking.

While FECA is the law to apply to FEC dismissals regardless of whether commissioners also purport to rely on traditionally "discretionary" factors, those discretionary rationales are also reviewable themselves to ensure conformance with

basic standards of reasoned agency decisionmaking. Correcting arbitrary, capricious, and abusive FEC action under *Orloski*'s second prong, *see* ECU Br. 51-52, properly includes reviewing whether an assertion of discretion was based on irrational or factually unsustainable premises. While deferential, such review establishes essential guardrails to ensure that FEC dismissals are "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

For decades, courts have reviewed FEC dismissals for arbitrary or unreasoned decisionmaking, even when the Commission asserted discretion. ECU Br. 11, 51-54. Even under a permissible construction of the statute, an FEC dismissal cannot be, for example: insufficiently explained, *DCCC*, 831 F.2d at 1132; *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014); explained *post hoc*, *End Citizens United*, 69 F.4th at 920; pretextual, JA109-10 (citing *Dep't of Com. v. New York*, 588 U.S. 752, 781-85 (2019)); based on an irrational reading of the record, *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1193-94 (D.C. Cir. 2024); based on a misreading of case law, *CREW v. FEC*, 236 F. Supp. 3d 378, 392-95 (D.D.C. 2017); a departure from past practice without deliberate change, *Common Cause v. FEC*, 676 F. Supp. 286, 289 n.2, 292 (D.D.C. 1986); an "abdication of [the FEC's] duty to enforce the FECA," *Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 56 (D.D.C. 2021); or infected by partisan or racial bias, *La Botz*, 61 F. Supp. 3d at 33 n.5.

Courts can and have judged the legality of the FEC's discretionary reasoning against these standards. ECU Br. 51-52. Appellees' contrary arguments persistently confuse the issue of whether there is law to apply to discretionary reasons with whether courts could review such reasons *de novo*. For instance, New Republican emphasizes that "courts do not have the tools to *second-guess* how an agency balances its enforcement priorities, resource constraints, [and] backlogs." NR Br. 1 (emphasis added). True enough, and before the *CREW* cases, courts reviewing FEC discretion applied deference under *Orloski*'s second prong to account for agency expertise. ECU Br. 51. But legal standards nevertheless mark the outer bounds of how the FEC may order its priorities. For example, imagine a Democratic bloc of commissioners voted to dismiss and then asserted "prosecutorial discretion" because "this case seeking to prosecute a fellow Democrat does not fit our priorities." No second-guessing is required to find that such "partisan or discriminatory FEC behavior" is "arbitrary and capricious." *Hagelin v. FEC*, 411 F.3d 237, 243 (D.C. Cir. 2005).

Appellees nevertheless claim that discretionary rationales cannot be "contrary to law," and attempt to eliminate or minimize *Orloski*'s second prong in the process. But those claims are incompatible with FECA's authorization of challenges to FEC failures to act under the same "contrary to law" standard that applies to dismissals. ECU Br. 11. As Appellees do not dispute, in delay cases, courts necessarily review

the FEC's discretionary choices resulting in delay (applying the *Common Cause* and *TRAC* factors). NR Br. 31-32. Yet Appellees are unable to explain how the contrary-to-law standard could allow review of discretionary choices supporting inaction but not dismissal. *See Am. Soybean Ass'n v. Regan*, 77 F.4th 873, 881 (D.C. Cir. 2023) (describing "the commonsense interpretive rule that [a] word or phrase is presumed to bear the same meaning throughout a text" (internal quotation marks omitted)). New Republican's observation that the *TRAC* factors do not apply to dismissal cases, NR Br. 31, misses the point—which is that a clearly reviewable, "discretionary" reason for FEC inaction, *e.g.*, "the resources available to the agency," *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), does not somehow become invulnerable to review under FECA's contrary-to-law standard when the same reason is offered to justify a dismissal. New Republican also stresses that a court reviewing FEC delay "cannot order the FEC to pursue an enforcement action," NR Br. 31-32, but that is just as true here.

Consistent with FECA's authorization of "contrary to law" review for FEC delay, arbitrary agency decisionmaking is no less a form of *legal* error than is an agency's misconstruction of a statute. ECU Br. 48. New Republican objects, citing the language of the APA's judicial-review provision, 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), NR Br. 49. But that text undermines its objection, since section 706(2)(A) is

"a standard that—through the use of the word 'otherwise'—directly links discretion with acting in 'accordance with law.'" Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 Fordham L. Rev. 679, 682-83 (2014); *see also Commission on Hope I*, 892 F. 3d at 437 ("FECA's 'contrary to law' formulation, for example, reflects APA § 706(2)(A).").

New Republican next claims that FECA's cause of action for parties found to have committed minor reporting violations, *see* 52 U.S.C. § 30109(a)(4)(C)(iii), evinces that "Congress deliberately limited judicial review" with respect to the contrary-to-law standard. NR Br. 49-50. But New Republican overlooks that this cause of action was added to FECA "[i]n 1999," *Combat Veterans for Cong. PAC v. FEC*, 795 F.3d 151, 154 (D.C. Cir. 2015), decades after the contrary-to-law standard in section 30109(a)(8) was enacted and thirteen years after *Orloski* was decided. Insofar as section 30109(a)(4)(C)(iii) says anything about the contrary-to-law standard, it further confirms Congress acquiesced in *Orloski*'s interpretation by not altering it at that time. ECU Br. 49-50.

For its part, the FEC concedes *Orloski*'s second prong correctly described FECA's contrary-to-law standard, and acknowledges that the standard is "consistent" with "Chapter 7 of the APA." FEC Br. 36-37. Like the *CREW* majorities, however, the FEC goes astray by attempting to shoehorn *Orloski*'s second prong into a framework that does not allow courts to review FEC dismissals

invoking discretion. *Id.* at 36-41. The FEC's claim that *Orloski*'s second prong functions only to allow review of unreasonable applications of permissible FECA interpretations ignores that APA § 706(2)(A)'s "'arbitrary or capricious' provision[] is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984).

C. Controlling precedent confirms that FECA rebuts the *Heckler* presumption.

Given FECA's text and structure, Supreme Court and Circuit precedent recognize that FECA rebuts the *Heckler* presumption. ECU Br. 26-29. Most significantly, the Supreme Court in *Akins* held that FECA "explicitly indicates" that FEC "decision[s] not to undertake an enforcement action" are subject to judicial review, notwithstanding *Heckler*. 524 U.S. at 26.

The FEC contends that the *CREW* cases are "supported by" and "consistent with" these precedents. FEC Br. 23-29. Yet the FEC itself did not agree with that view in 2017, when in *Commission on Hope I*, it relied on *Akins*, *Heckler*, and *DCCC* to argue that FEC dismissals asserting discretion (like the one in that case) "remain subject to judicial review." Brief for FEC, *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (No. 17-5049), 2017 WL 3206534, at *27.

Appellees' hairsplitting attempts to distinguish *Akins* and Circuit precedent all fail. Appellees first claim that *Akins* "only" "answer[s] the question of standing."

FEC Br. 25; NR Br. 32. But "*Akins*' standing holding is, a fortiori, support for reviewability here" because, in analyzing redressability, "the Court necessarily (and unequivocally) decided that the non-enforcement decision by the FEC was subject to judicial review." *Commission on Hope II*, 923 F.3d at 1146 (Pillard, J., dissenting).

Appellees also assert that *Akins* only rejected the claim that *all* FEC dismissals are unreviewable, without foreclosing the possibility that dismissals based in part on discretion are unreviewable. FEC Br. 26; NR Br. 32. But the FEC did not argue in *Akins* that all FEC dismissals are unreviewable; rather, citing *Heckler*, it argued that section 30109(a)(8)(A) "should be given a narrow construction" because "the Commission's authority to exercise prosecutorial discretion" on remand made it "particularly speculative" that a favorable ruling would redress the plaintiffs' injury. Br. for Pet'r, *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 523890, at *23, 29-30. In rejecting that claim, *Akins* ruled that FECA "explicitly indicates to the contrary," 524 U.S. at 23, 29, finding that FECA "categorically rebuts" the *Heckler* presumption, *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1189 (D.C. Cir. 2024) (Pillard, J., dissenting). Indeed, *Akins* held that a complainant has standing to challenge whether a "discretionary agency decision" was "based . . . upon an improper legal ground," 524 U.S. at 25, further reinforcing that *Akins*' holding was not limited to *non*-discretionary dismissals.

Appellees' attempts to minimize this Circuit's rulings in *DCCC*, *Chamber of Commerce*, and *Orloski* fare no better, as members of this Court have observed. *See, e.g.*, *Commission on Hope II*, 923 F.3d at 1146-47 (Pillard, J., dissenting); *ECU*, 90 F.4th at 1184 (Pillard, J., dissenting).

III. FECA Allows Three Commissioners to Block FEC Enforcement, Not Judicial Review.

As ECU has explained, the *CREW* cases undermine FECA and the vital pro-democracy interests it serves by giving a non-majority bloc of commissioners the power to shield legal errors from judicial review, upending the FEC's bipartisan balance, and nullifying FECA's private right of action. ECU Br. 30-45. New Republican claims this is "exactly what Congress intended." NR Br. 47.

That claim is insupportable. Despite deriding the legislative history ECU cites as "not the law," NR Br. 34-35, New Republican relies on a floor debate statement, *id.* at 43 (citing 125 Cong. Rec. 36,754 (Dec. 18, 1979) (statement of Sen. Pell)), which this Court discredited in concluding that FECA does not "confin[e] the judicial check to cases in which, as per Senator Pell's statement, the Commission 'act[s] on the merits,'" *DCCC*, 831 F.2d at 1134.

Lacking support in the legislative record, Appellees emphasize the uncontroversial point that Congress designed the FEC so that a partisan bloc could prevent FEC enforcement "on partisan lines." NR Br. 42. But it does not follow that Congress also intended to empower the agency, let alone a partisan nonmajority of

commissioners, to nullify judicial review and citizen suits. *Commission on Hope II*, 923 F.3d at 1142-43 (Griffith, J., concurring). Quite the opposite: judicial review was intended to ensure the FEC's structure did not overshoot the goal of stopping partisan enforcement. ECU Br. 31-34. Even then, Congress's fix for this problem is a limited one that does not infringe on the FEC's prosecutorial discretion, as no court can require the agency to enforce the law.

Next, New Republican asserts that overturning the *CREW* cases would risk an increase in "politicized enforcement" from frivolous citizen suits. NR Br. 44. But its own alleged evidence undercuts that claim. New Republican cites a 26-year-old study purportedly showing that, like any adjudicatory body, the FEC has had to address allegedly "technical or trivial violations," including those filed by partisan actors. *Id.* And yet, New Republican cannot point to even a single alleged "nuisance" citizen suit filed in the four decades preceding the *CREW* cases, much less to any decrease in such suits since 2018. *Id.*

Neither Appellee denies that since the *CREW* cases, the FEC has increasingly invoked prosecutorial discretion when dismissing matters, driving home the potential for abuse. ECU Br. 33. The FEC believes it deserves credit for not asserting prosecutorial discretion to shield *every* case from judicial review, and it identifies eight such matters since August 2019. FEC Br. 34-35 n.4. But ultimately, it is irrelevant whether commissioners use their misbegotten power to sidestep judicial

review indiscriminately or strategically; it fatally undermines the statutory enforcement scheme either way.

Appellees also emphasize that courts "must presume an agency acts in good faith." FEC Br. 34; NR Br. 38. But here, a partisan bloc, not the "agency," has asserted discretion. In any event, one need not assume bad faith to conclude that the *CREW* cases incorrectly "set [the] agenc[y] free to disregard legislative direction in the statutory scheme that the agency administers," *Heckler*, 470 U.S. at 833, because commissioners can always point to some genuine budgetary concern or conflicting priority that dovetails with a desire to block judicial review.

Finally, the FEC suggests that the *CREW* cases' harmful effects are tempered because the agency's prosecutorial discretion "has an outer limit," FEC Br. 35—a claim in obvious tension with the notion that the FEC has "*unreviewable* prosecutorial discretion," *Commission on Hope I*, 892 F.3d at 438 (emphasis added). And this supposed outer limit turns out to be no limit at all: it would take at least four commissioners to "consciously and expressly adopt[] a general policy" abdicating enforcement, *Heckler*, 470 U.S. at 833 n.4, while the *CREW* cases permit just three to shield any single enforcement dismissal from judicial review.

CONCLUSION

The Court should reverse the *CREW* cases and the judgment below, and remand to the district court.

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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 6,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I certify that on January 23, 2025, 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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