No. 19-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON;
NOAH BOOKBINDER,

Plaintiffs-Appellants,

vs.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Columbia
No. 1:18-cv-00076
The Honorable Rudolph Contreras

MOTION FOR INVITATION TO FILE BRIEF OF AMICI CURIAE UNITED STATES SENATORS SHELDON WHITEHOUSE, JEFFREY A. MERKLEY, RICHARD BLUMENTHAL, MAZIE K. HIRONO, ELIZABETH WARREN, AND CHRIS VAN HOLLEN, IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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Attorney for Amici Curiae Senators Sheldon Whitehouse, Jeffrey A. Merkley, Richard Blumenthal, Mazie K. Hirono, Elizabeth Warren, and Chris Van Hollen

Movants, popularly elected members of the United States Senate, respectfully request an invitation from this Court under Circuit Rule 35(f) and Federal Rule of Appellate Procedure 29(b) to submit a brief as amici curiae supporting Petitioner-Appellants Citizens for Responsibility and Ethics in Washington and Noah Bookabinder's petition for rehearing en banc. *See, e.g., Committee on the Judiciary v. McGahn,* No. 19-5331, Document #1866426 (D.C. Cir. Oct. 15, 2020) (granting "motion for invitation to file brief of amici curiae by former Members of Congress in support of rehearing en banc"); *PHH Corp. v. Consumer Fin. Prot. Bureau,* No. 15-1177, Document #1661675 (D.C. Cir. Feb. 16, 2017) (granting "motion of current and former Members of Congress for invitation to file brief as amici curiae in support of respondent's petition for rehearing en banc"); *Wren v. District of Columbia,* No. 16-7025, Document #1695463 (Sept. 28, 2017) (granting motion of Everytown for Gun Safety for invitation to file brief as amicus curiae in support of en banc rehearing); *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n,* No. 13-5252, Document #1582585 (D.C. Cir. Nov. 9, 2015) (granting "motion for invitation to file brief amici curiae" filed by public-health organizations); *Elec. Power Supply Ass'n v. FERC*, No. 11-1486, Document #1512775 (D.C. Cir. Sept. 17, 2014) (granting "motion for invitation to file brief of amici curiae Environmental Defense Fund, [et al.]" supporting en banc rehearing). A copy of the proposed amicus curiae brief is being lodged herewith, as an Exhibit to this motion.

Movants seeking an invitation to file an amicus curiae brief are United States Senators Sheldon Whitehouse of Rhode Island, Jeffrey A. Merkley of Oregon, Richard Blumenthal of Connecticut, Mazie K. Hirono of Hawaii, Elizabeth Warren of Massachusetts, Chris Van Hollen of Maryland. As U.S. Senators, movants have seen firsthand how *Citizens United v. FEC,* 558 U.S. 310 (2010), upended our political ecosystem. We now are witnessing the FEC's utter failure to regulate in that decision's aftermath. Movants are disturbed and frustrated that a partisan non-majority of FEC Commissioners can neutralize the Federal Election Campaign Act, block the FEC's investigative powers, and evade judicial review merely by uttering the magic words "prosecutorial discretion." They ask the Court to grant their motion for an invitation from the Court to file a brief as *amici curiae* supporting *en banc* review to restore the judicial oversight over the FEC that Congress intended.

Movants hope that the Court will benefit from their unique perspective and experience and expertise as members of the Senate who are directly involved in electoral politics and who have a first-hand understanding both of the campaign-finance rules that the FEC is supposed to enforce, and the effects of the current regime of nonenforcement engendered by the conduct of a non-majority block of commissioners opposed to campaign-finance laws.

Proposed amici share a deep concern that the panel's decision in this case will hobble enforcement of campaign-finance laws duly enacted by Congress. Amici

therefore request an invitation to submit the accompanying amicus curiae brief urging the Court to grant rehearing en banc.

All parties were informed of the proposed amici's intention to file this motion for an invitation to file an amicus curiae brief. Petitioner-Appellants expressed consent to the motion. Defendant-Appellee Federal Election Commission stated through counsel that it "takes no position and entrusts [amici's] motion to the Court's discretion."

DATED: June 30, 2021

Respectfully submitted,

/s/ Eric Alan Isaacson

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(g), I hereby certify that this motion complies with the type-volume limitation of Fed.R.App.P. 27(d) because its body contains 554 words, excluding the parts exempted by Fed.R.App.P. 32(f). I further certify that this motion complies with the typeface requirements of Fed.R.App. 32(a)(5) and the type-style requirements of Fed. R.App.P. 32(a)(6), because the brief was prepared in a 14-point Times New Roman font using Microsoft Word.

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/s/ Eric Alan Isaacson

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici curiae Senators Sheldon Whitehouse of Rhode Island, Jeffrey A. Merkley of Oregon, Richard Blumenthal of Connecticut, Mazie K. Hirono of Hawaii, Elizabeth Warren of Massachusetts, and Chris Van Hollen of Maryland hereby certify as follows:

(A) Parties and Amici. Citizens for Responsibility and Ethics in Washington and Noah Bookbinder are plaintiffs in the district court and appellants in this Court. The FEC is the defendant in the district court and the appellee in this Court. No amici appeared before the district court. The following individual and entity have appeared as amici before this Court: Randy Elf and Campaign Legal Center. U.S. Senators Sheldon Whitehouse, Jeffrey A. Merkley, Richard Blumenthal, Mazie K. Hirono, Elizabeth Warren, and Chris Van Hollen have filed a motion seeking an invitation to file this brief as amici curiae supporting a petition for rehearing en banc.

(B) Ruling Under Review. Plaintiffs-appellants appealed the March 29, 2019 order of the United States District Court for the District of Columbia (Contreras, J.), which denied plaintiffs' motion for summary judgment and granted the FEC's cross-motion for summary judgment. The district court's order appears in the Joint Appendix ("JA") at 138; the Memorandum Opinion is reported at *Citizens for Responsibility & Ethics in Washington v. FEC*, 380 F. Supp. 3d 30 (D.D.C. 2019),

and is reprinted at JA139-61. A panel of this Court affirmed the district court's decision with an opinion issued April 9, 2021, and published as *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n,* 993 F.3d 880 (D.C. Cir. 2021).

(C) Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

DATED: June 30, 2020

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I. STATEMENT OF INTEREST

Amici curiae presenting this brief are U.S. Senators Sheldon Whitehouse of Rhode Island, Jeffrey A. Merkley of Oregon, Richard Blumenthal of Connecticut, Mazie K. Hirono of Hawaii, Elizabeth Warren of Massachusetts, and Chris Van Hollen of Maryland.

As popularly elected U.S. Senators, amici have seen firsthand how *Citizens United v. FEC,* 558 U.S. 310 (2010), upended our political ecosystem. We now are witnessing the FEC's utter failure to regulate in that decision's aftermath. We are disturbed and frustrated that a partisan non-majority of FEC Commissioners can neutralize the Federal Election Campaign Act, block the FEC's investigative powers, and then evade judicial review merely by uttering the magic words "prosecutorial discretion." We ask the Court to grant *en banc* review to restore the judicial oversight over the FEC that Congress intended. [1]

[1] This brief is being lodged with a Rule 35(f) Motion for Invitation to File Brief of Amici Curiae. All parties were informed of amici's intention to file a motion for an invitation to file this brief. Petitioner-Appellants expressed consent to the motion. Defendant-Appellee stated that "takes no position and entrusts [amici's] motion to the Court's discretion." No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the *amici curiae*, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed.R.App.P. 29(a)(4)(E).

II. ARGUMENT

A. As *Citizens United* Transformed the Campaign Finance Landscape FEC Commissioners Ideologically Opposed to Campaign Finance Regulation Have Deadlocked the FEC and Eviscerated Enforcement of the Federal Election Campaign Act

Citizens United v. FEC, 558 U.S. 310, 319 (2010), sent a seismic shock through our campaign-finance system, to the benefit of wealthy political players with vast means and motive to spend massive sums in elections. Political spending by deep-pocketed special interests exploded. The Center for Responsive Politics reports that super PACS spent over $3 billion on federal elections from 2010 through 2020.[2] In fact, "[s]uper PACs account for more expenditures in campaigns than those spent by the individual candidates."[3] Non-party independent groups spent $4.5 billion on elections from 2010 through 2020, compared with just $750 million in the two

[2] *See* Trevor Potter, *A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done,* 27 Geo. Mason L. Rev. 483, 494 & n.69 (2020) (citing data available at https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S and explaining that "for the spending total from 2010 to 2020, click on the 'select CYCLE' drop down menu and select each cycle from 2010 to 2020, then add all the spending cycles together.").

[3] Ann Ravel, *A New Kind of Voter Suppression in Modern Elections,* 49 U. Memphis L. Rev. 1019, 1034 (2019) (hereafter "*New Kind of Voter Suppression*").

decades prior.[4] The 2016 election saw "90 billionaires with Super PAC contributions totaling $562 million."[5]

The theory undergirding *Citizens United* was that campaign-spending corruption would be checked by disclosure requirements allowing voters' to see what interests are behind the messages designed to influence them. *Citizens United* was expressly premised on the bedrock assumption that "[g]overnment may regulate corporate political speech through disclaimer and disclosure requirements." *Citizens United,* 558 U.S. at 319.

The Court's opinion presumed that "effective" and "prompt disclosure of expenditures [would] provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."[6] But effective disclosure requires effective enforcement—which the FEC has not provided, as this case dramatically shows. Sophisticated players funnel vast sums of cash into entities organized under section 501(c)(4) of the Internal Revenue Code that do not have to

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[4] Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United,* OpenSecrets.org (Jan. 14, 2020), https://www.opensecrets.org/news/reports/a-decade-under-citizens-united .

[5] Ravel, *New Kind of Voter Suppression, supra* note 3, at 1034 (citing Paul Blumenthal, *Super PAC Mega-Donors Expand Election Influence with Record $1 Billion in Contributions*, HUFFINGTON POST (Nov. 1, 2016), https://www.huffingtonpost.com/entry/super-pac-do-nors_us_5817b30be4b0390e69d21648).

[6] *Citizens United,* 558 U.S. at 370.

publicly disclose their contributors, turning those organizations to political work.[7] Since 2010, § 501(c)(4) "dark money" organizations have spent over $900 million on political expenditures, compared to $103 million in the previous decade.[8] DonorsTrust and other groups strip identities off donations and launder the "dark money" into super PACs in the political arena. And the problem is only getting worse.[9]

Former FEC commissioner Trevor Potter writes: "As the Court made clear in *Citizens United*, the law *still* has very important requirements of full disclosure of the sources of campaign funding and of the independence from campaigns and parties of the new unlimited spending. And it is these requirements—transparency and non-coordination—that the gridlocked FEC has been unable to enforce."[10]

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[7] *See, e.g.,* Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election,* 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 463-64 (2013) (discussing the formation of Crossroads GPS, a 501(c)(4) spin-off of super PAC American Crossroads, formed to protect donors from disclosure).

[8] Outside Spending, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/index.php?type=A&filter=N.

[9] *See* Anna Massoglia & Karl Evers-Hillstrom, *'Dark money' topped $1 billion in 2020, largely boosting Democrats*, OpenSecrets, Mar. 17, 2020, https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/ (documenting $660 million contributions to super PACs from dark money groups).

[10] Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate*

The FEC, the designated cop on the beat, has been deliberately disabled by a non-majority of its own Commissioners who seek to prevent meaningful enforcement of campaign-finance laws. The FEC managed to function for its first three decades because commissioners of both parties generally were committed to the rule of law. That no longer is true. Political polarization has led to the appointment of commissioners who adamantly oppose meaningful enforcement.[11] With four votes needed to approve any agency action,[12] "the FEC consistently

Money in American Elections, 69 Admin. L. Rev. 447, 450 (2017) (hereafter *"Crippling of the FEC*").

[11] Former Commissioner Trevor Potter writes that "a new set of Commissioners arrived in 2008, and since then the partisan gridlock in Congress was imported into the FEC, and the Commission has deadlocked time and again on virtually every important issue." Potter, *Crippling of the FEC, supra* note 10, at 449*:*

[12] *See* 52 U.S.C. §30106(c) ("the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title or with chapter 95 or chapter 96 of title 26"). "Since a four-member majority is required for the Commission to perform most significant actions, a three-member bloc is enough to prevent action." Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?,* 131 Harv. L. Rev. 1421, 1431 (2018).

stalemates on important questions."[13] As a result of "its persistent stalemates on critical questions, the FEC is no longer capable of performing its basic functions."[14]

"Over the past decade," Potter writes, "the only government agency tasked with administering and enforcing campaign finance laws has systematically failed at both of those tasks, and, in doing so, has ushered in an era of secret, unaccountable political spending on an unprecedented scale, and a political system that voters increasingly perceive to be tilted in favor of wealthy special interests." [15]

If the premise of Citizens United is true that election funding transparency protects the public from corruption, then the reciprocal must also be true: without transparency there will be corruption in our democracy. This is no small thing. It demands redress.

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[13] Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference,* at 172, in *Democracy by the People: Reforming Campaign Finance in America* 172-200 (Eugene D. Mazo & Timothy K. Kuhner, eds.; Cambridge & New York: Cambridge University Press 2018) (hereafter "*Beyond Repair*").

[14] Tokaji, *Beyond Repair, supra* note 13, at 173; *see also* Michael S. Kang, *The End of Campaign Finance Law,* 98 Va. L. Rev. 1, 40-41 (2012) ("What has happened since *Citizens United* ... is not new regulation—it is the rollback of existing regulation. Instead of a hydraulics of campaign finance regulation, we are seeing a reverse hydraulics of campaign finance deregulation ....").

[15] Potter, *Dereliction of Duty, supra* note 2, at 502.

B. Extreme Deference to FEC "Prosecutorial Discretion" Frustrates Congress's Clear Campaign Finance Regulatory Scheme

Congress has a strong interest in the faithful enforcement of FECA, especially with respect to regulation and transparency surrounding outside spending. The Court's deference to claims of supposed "prosecutorial discretion" that strategically limit judicial review undermines that intent.

Congress designed the FEC to have a bipartisan structure with a total of six commissioners, and never more than three from the same party;[16] and provided that the FEC would be able to take action only on the vote of four commissioners.[17] This balance of power ensured that the agency would not pursue a partisan enforcement agenda. But it created the danger of deadlock: when commissioners divide three-to-three along party lines, no agency action can be taken. To protect effective enforcement of campaign-finance laws against deadlock, Congress built into the system a provision for citizens aggrieved by inaction to take their complaints to court.[18] Congress thus ensured judicial review of FEC partisan gamesmanship that could frustrate enforcement.

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[16] *See* 52 U.S.C. §30106(a)(1).

[17] *See* 52 U.S.C. §30106(c).

[18] *See* 52 U.S.C. §30109(a)(8)(A).

That intent of Congress has been frustrated in this Court by a jurisprudence of deference that allows commissioners unable to garner a majority for their position nonetheless to block enforcement with deadlock and then to block review. Former Commissioner Potter noted this Court's perplexing "inclination to treat the deadlocking, or controlling, Commissioners' statement of reasons for their refusal to enforce the law as the agency 'decision' when, in many ways, no decision has actually taken place."[19] This permits non-majority positions articulated by commissioners who block enforcement by deadlocking the commission to prevail—preventing the enforcement intended by Congress.[20]

Worse still, recent panel decisions in *CREW v. FEC* ("*Commission on Hope*")[21] and in this case allow non-majority commissioners to also block judicial review, simply by adding the "magic words" that the deadlock is a matter of "prosecutorial discretion."[22] Again, taking the premise of *Citizens United* to heart,

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[19] *See* Potter, *Dereliction of Duty, supra* note 2, at 497.

[20] Tokaji, *Beyond Repair, supra* note 6.

[21] 892 F.3d 434 (D.C. Cir. 2018).

[22] Potter, *Dereliction of Duty, supra* note 2, at 498 ("In an apparent effort to render a 3-3 'decision' not to proceed unreviewable, these Commissioners, who have not effected a majority decision, have nevertheless begun sprinkling 'passing invocation[s] of prosecutorial discretion' into their statements of reasons justifying their votes blocking enforcement....")

if a partisan minority can systematically block disclosure, it can systematically open a gate for corruption, so it is no small matter when the Court accepts this stratagem.

The panel opinion in this case allows a partisan non-majority of FEC commissioners to create law without any review, in violation of the APA and FECA's requirement of bipartisanship. A minority of just two FEC Commissioners overruled the General Counsel's opinion to conclude that New Models was not a political committee. They spent 30 pages justifying that decision, but failed to mention a recent, potentially controlling case rejecting their legal analysis.[23] This created questionable agency law that Congress intended courts to review. Yet the panel majority explained: "Despite the authority to review a nonenforcement decision to determine whether it is 'contrary to law,' we recently held that a Commission decision based even in part on prosecutorial discretion is not reviewable."[24] As Judge Millett pointed out in her dissent, "under the majority opinion, whether the words are inserted by the controlling commissioners in a deadlocked vote or by a majority of the full Commission, a final agency decision becomes unreviewable with just a rhetorical wink at prosecutorial discretion."[25] Likewise, Judge Pillard observed in a similar case, "If a partisan bloc of the FEC can

[23] *See CREW v. FEC (American Action Network)*, 209 F.Supp.3d 77 (2016).

[24] Slip op. at 2 (citing *Commission on Hope*, 892 F.3d 434).

[25] Millett, J., dissenting, at 2.

thwart a case like this one, FECA's controls on campaign money, including the political-committee registration and disclosure requirements here, are not worth much."[26]

C. FEC is a Captured Agency and the Court Should Not Blindly Defer to Its "Discretion"

The FEC has a non-majority bloc of commissioners exhibiting a pattern and practice to undermine, not enforce, campaign-finance laws. They are "ideologically opposed to the mission of the agency."[27] This case is a classic example: In addition to all of the other flaws we discuss, here the commissioners delayed acting on CREW's complaint for three years and then pointed to the time lapse as a reason for not investigating the complaint.

In 2017, former commissioner Ann Ravel warned that "a controlling bloc of three Republican commissioners who are ideologically opposed to the F.E.C.'s

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[26] *CREW v. FEC ("Commission on Hope II")*, 923 F.3d 1141, 1145 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of en banc rehearing).

[27] Potter, *Dereliction of Duty, supra* note 2, at 501; *see also, e.g.,* Matea Gold, *Trump's FEC Nominee Has Questioned the Value of Disclosing Political Donors,* Washington Post (Sept. 15, 2017) ("James E. 'Trey' Trainor III, the conservative Texas lawyer nominated by President Trump this week to serve on the Federal Election Commission, has challenged the principle that the public benefits from the disclosure of political donors, arguing that voters could be distracted from the content of political messages if they focus on who is financing ads."), http://wapo.st/2y3YYbQ [https://perma.cc/5QKA-CJND].

purpose regularly ignores violations or drastically reduces penalties."[28] The pattern is obvious. When Caroline Hunter, a longtime Republican commissioner announced last summer that she was leaving the Commission to join the Koch-funded legal team at "Stand Together," she bragged that she had dedicated her time as an FEC commissioner to opposing "unnecessary government regulations and unfair enforcement actions."[29] The Trump White House then said that it would nominate Allen Dickerson, the "legal director at the Institute for Free Speech, which broadly takes an anti-regulatory approach to campaign finance."[30] The deliberate "dysfunction and deadlock" so eloquently exposed by Commissioner Ravel clearly is going to continue. The FEC's dysfunction heightens the need for robust judicial review.

We might as well be blunt. America is presently besieged by a massive covert operation funded by dark money and seeking ever-increasing dominance over our governance. Hundreds of articles in the press and academia document this dark-

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[28] Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission,* New York Times, Feb. 20, 2017; *see generally* Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* (FEC, Feb. 2017).

[29] Daniel Lippman & Zach Montellaro, *FEC losing quorum again after Caroline Hunter resigns,* POLITICO, June 26, 2020 https://www.politico.com/news/2020/06/26/fec-caroline-hunter-resigns-341396

[30] *Id.*

money armada. It is essential to this armada's operation that the FEC be disabled. And that is why we are where we are.

III. CONCLUSION

The full Court should grant rehearing *en banc* in order to restore the judicial review of FEC actions as Congress intended.

DATED: June 30, 2021

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