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United States Court of Appeals for the District of Columbia Circuit

No. 22-7038

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 in No. 1:18-cv-00945-CRC
Honorable Christopher Reid Cooper, U.S. District Judge

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March 29, 2023

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellant provides the following certificate as to parties, amici curiae, and related cases. The Plaintiff-Appellant is Citizens for Responsibility and Ethics in Washington ("CREW"). The Defendant-Appellee is American Action Network ("AAN"). No amici appeared in the district court. Plaintiff-Appellant anticipates amici are likely to appear in this appeal.

The ruling under review is the judgment of the district court, entered March 2, 2022, reprinted in the Joint Appendix ("JA") at JA107 and JA124. The opinion is reported at 590 F. Supp. 3d 164 (D.D.C. 2022).

This matter has not previously been before this Court or any other court. Plaintiff-Appellant is unaware of any related case pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Plaintiff-Appellant CREW submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing, including financing of independent expenditures, to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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GLOSSARY

AAN	American Action Network
APA	Administrative Procedure Act
CHGO	Commission on Hope, Growth, and Opportunity
CLC	Campaign Legal Center
CLF	Congressional Leadership Fund
CREW	Citizens for Responsibility and Ethics in Washington
FECA	Federal Election Campaign Act
FEC	Federal Election Commission
MUR	Matter Under Review

INTRODUCTION

In the 13 years since *Citizens United*, dark money groups have evaded federal laws and undermined the decision's promised transparency. One of the biggest abusers is AAN, which publicly reports spending at least $150 million to influence federal elections and counting—an amount that still understates AAN's true electioneering—without disclosing the source of those funds.

As early as 2012, AAN's public reports showed most of the group's spending went to influencing federal elections. Consequently, to ensure transparency about the source of funds used to influence elections, AAN was obligated by the FECA to register as a political committee and disclose its funding sources. AAN, however, did not. CREW, deprived by AAN of information essential to its work and to which it is entitled under the FECA, sought relief from the FEC and, failing that, began the process to seek its own relief in court.

Unfortunately, a partisan aligned bloc of the FEC—half the bipartisan six-member Commission—sought to block both enforcement by the FEC and CREW's right to seek its own relief against AAN by employing the only authority the FECA confers on the Commission's non-majority: adjudicating a complaint to fail on the merits, creating agency gridlock that is often only broken through dismissal. The non-majority bloc exercised this authority despite the fact that they could identify

no legal infirmity in CREW's complaint to justify blocking enforcement. Accordingly, their first attempt to block CREW's complaint was later thrown out by a district court for resting on an analysis that "blinks reality," *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016), and abandoned by the agency on remand when the agency reconsidered CREW's complaint. But the commissioners again blocked proceedings, and CREW again sought judicial review of their efforts, as permitted by the FECA.

The explanation offered for the commissioners' continued resistance was that AAN's electioneering communications—ads regulated by the FECA as electioneering and that trigger disclosure because they clearly identify candidates and target their electorate shortly before their election—were cause to *excuse* AAN from political committee disclosure obligations. *See generally* JA343–JA361 (the "2016 Statement"). Indeed, AAN's ads went further, attacking the candidates' political records, even falsely accusing them of supplying Viagra to "rapists," and urged viewers to take action "in November." JA356. The commissioners' analysis was so wanting that the district court questioned the commissioners' sincerity before finding their dismissal of CREW's complaint was, again, contrary to law. *See* JA155, JA161.

The FEC took no steps to reconsider or remedy the error within the thirty days the FECA provides. That exhausted CREW's attempts to seek remedy through the agency and, under the FECA, gave rise to the instant suit by CREW directly against AAN. In this suit, CREW defeated AAN's motion to dismiss and conducted narrow and targeted discovery. On the eve of dispositive motions, however, AAN moved to reconsider dismissal under *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models I*"), premised on a passing reference to "prosecutorial discretion" by the non-majority bloc of the FEC in their superseded statement of reasons explaining their earlier abandoned attempt to block enforcement.

With apparent reluctance, the district court granted AAN's motion, finding the 2016 Statement incorporated that earlier passing remark, and that *New Models I* therefore precluded the review that gave rise to this private suit. *See* JA121 (dismissing despite "stand[ing] by its prior reasoning" to deny dismissal). The district court recognized that *New Models I* and other recent decisions must be "reconciled" with earlier precedent that permitted review in cases like this. JA112. The district court also recognized dismissal here would "gut" the FECA and run afoul of Supreme Court precedent that makes review dependent on the agency's *action*, not its choice of words. JA113, JA118-JA119. Nevertheless, the district

court held that *New Models I* prohibits review of FEC dismissals where there is even "just a rhetorical wink to prosecutorial discretion." JA122 (quoting *New Models I*, 993 F.3d at 896 (Millett, J., dissenting)). "The wink here was even quicker," the district court said, but found it "no less fatal to CREW's claim." *Id.*

The district court explained that it dismissed this action to provide "another Circuit panel … an opportunity to evaluate whether *New Models I* is indeed controlling in this case." JA123. It is not. As Judge Cooper recognized, this case arises from review of a statement that "does not mention prosecutorial discretion at all." JA118. Accordingly, there is no reference to prosecutorial discretion that could preclude review, as the FEC has further confirmed by disclaiming prosecutorial discretion in its most recent statement on its proceedings involving AAN. Nor can AAN invoke the earlier superseded statement and its "wink," as it is a dead letter that did not give rise to this proceeding. Finally, even if those authorities were applicable here, *New Models I*, and its predecessor, *CHGO I*, cannot prevent review because they clash with earlier case law of this Circuit and the Supreme Court, *CREW v. FEC*, 923 F.3d 1141, 1145 (D.C. Cir. 2019) ("*CHGO II*") (Pillard, J., dissenting) (criticizing *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO I*")), as the district court recognized, JA112, JA118-JA119.

This case should return to the district court for further proceedings. AAN has evaded its legal obligations for too long, spending millions on elections without disclosure, shielded from accountability by its agency allies. Congress provided private relief for just this situation and did not condition it on the magic words of the defendant's co-partisans.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this timely appeal from a final judgment in the United States District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court's jurisdiction was based upon 52 U.S.C. § 30109(a)(8)(A). Appeal was timely taken on March 30, 2022, within sixty days of the district court's March 2, 2022, decision under review. CREW's standing is addressed below.

STATEMENT OF ISSUES PRESENTED

(1) Whether the district court correctly interpreted a statement of reasons issued by a non-majority bloc of the FEC to explain the dismissal—the adjudication of which gave rise to this suit—to reference prosecutorial discretion and thus immunize the statement from review, where the statement "nowhere mentioned prosecutorial discretion." JA110.

(2) Whether a defendant may extinguish a private right of action that Congress expressly created in 52 U.S.C. § 30109(a)(8)(C) by identifying a passing reference to prosecutorial discretion in a superseded statement of a non-majority of the FEC issued in an earlier administrative proceeding and that was abandoned after the matter was remanded to the agency, *CREW*, 209 F. Supp. 3d at 81. In particular, may a defendant do so where that remand was not appealed by the FEC, and where the statement has since been explicitly disclaimed by the agency, which now rejects prosecutorial discretion as a basis to dismiss CREW's administrative challenge.

(3) Whether the district court correctly relied on *New Models I* which suggests that an electorally unaccountable non-majority bloc of the defendant's political allies at the FEC may immunize from judicial review their legal interpretations, notwithstanding the judicial review provisions in 52 U.S.C. § 30109(a)(8), and the decision's conflict with prior binding decisions of the D.C. Circuit and Supreme Court, to prevent CREW's suit here.

(4) Whether the electorally unaccountable non-majority bloc of the FEC, through a legal analysis that "blinks reality," *CREW*, 209 F. Supp. 3d. at 93, prevent CREW from bringing its private claim against AAN, by mislabeling their analysis "prosecutorial discretion" and not otherwise relying on or discussing any

prudential factor "peculiarly within [the agency's] expertise." *Heckler v Chaney*, 470 U.S. 821, 831 (1985).

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Political Committee Disclosure

To ensure the public is "fully informed" about "[t]he sources of a candidate's financial support," *Buckley v. Valeo*, 424 U.S. 1, 67, 76 (1976), and about "who is speaking about a candidate" and may have officials "in [their] pocket," *Citizens United v. FEC*, 558 U.S. 310, 369, 370 (2010), the FECA imposes several disclosure obligations. Relevant here, the statute obliges political committees to register and continually disclose information about their finances, including the identity of any donors of more than $200 a year. 52 U.S.C. §§ 30103(a), 30104(b), (f)(2); 11 C.F.R. §§ 102.1, 104.3, 104.4, 104.20. Political committee obligations continue until either the group or the FEC terminates its status as permitted by the FECA. 52 U.S.C. § 30103(d) (group must cease accepting contributions or making expenditures to influence elections before it may terminate).

The FECA defines a political committee as any group that makes expenditures or accepts contributions to influence federal elections over $1,000 per calendar year. 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Supreme Court has, however, carved out from that test and excused from political committee

disclosure those groups neither controlled by a candidate nor having a "major purpose" to nominate or elect federal candidates. *See Buckley*, 424 U.S. at 79. Determination of a group's "major purpose" is fact intensive. FEC, *Political Committee Status, Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5601–02 (Feb. 7, 2007) ("FEC, Suppl. E&J"). A group may demonstrate its "major purpose" by spending significant sums to influence federal elections, *see FEC v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 262 (1986), including through express advocacy, electioneering communications, other public communications promoting or attacking candidates, polling, contributions, and any other "federal campaign activity," FEC, Suppl. E&J, 72 Fed. Reg. at 5604–05. Additionally, a group's internal documents and solicitations may demonstrate its "major purpose" to influence elections. FEC, Suppl. E&J, 72 Fed Reg. at 5605.

The "major purpose" test compares a group's electoral and nonelectoral activities in a calendar year. *See* 52 U.S.C. § 30101(4)(A); *CREW*, 209 F. Supp. 3d at 94 (test must account for fact that group's "purpose can *change*" (citing *Mass. Citizens for Life, Inc*., 479 U.S. at 262)); *FEC v. Malenick*, 310 F. Supp. 2d 230, 235–37 (D.D.C. 2004) (evaluating group's major purpose "in 1996"). The group may be excused from reporting only if it devotes more than half of its funds to activities so unrelated to influencing federal elections that disclosure would no

longer "fulfill the purposes of the Act." *Buckley*, 424 U.S. at 79; *see* FEC, Suppl. E&J, 72 Fed. Reg. at 5605 (group spending "50-75%" on campaign activity not excused from reporting as political committee). Even then, a group will not be excused from reporting if its internal documents, like donor communications, demonstrate that it possesses a "major purpose" to influence elections. FEC, Suppl. E&J, 72 Fed. Reg. at 5601, 5605.

Notably, too, "the law does not require a committee to register as a [political committee] in order to be one." *Statement of Reasons of Chairman Allen Dickerson*, MUR 7920 (Oklahomans for T.R.U.M.P.) (June 29, 2022), https://perma.cc/6Q2C-PDY8. Any qualifying group is a political committee with disclosure obligations, regardless of their registration status or self-recognition as such.

B. The FECA's Private Right of Action and the FEC's Gatekeeping Adjudicatory Role

The FECA includes "a feature of many modern legislative programs," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990): civil enforcement through a government agency paired with private litigation. *See* 52 U.S.C. § 30107(e) (FEC's "exclusive" civil enforcement power subject to "[e]xcept[ion]" of private suits "in section 30109(a)(8)").

Congress created the paired mechanisms to compensate for the significant safeguards it placed on both: ensuring pursuit of meritorious claims while guarding against partisan abuses. "To avoid agency capture, [Congress] made the Commission partisan balanced, allowing no more than three of the six Commissioners to belong to the same political party," *CHGO II*, 923 F.3d at 1143 (Pillard, J., dissenting), while "requir[ing] that all actions by the Commission occur on a bipartisan [majority] basis," *id.* at 1142 (Griffith, J., concurring); 52 U.S.C. § 30106(c). "That balance created a risk of partisan reluctance to apply the law," however. *CHGO II*, 923 F.3d at 1143–44 (Pillard, J., dissenting).

Even apart from partisan deadlock, Congress worried that enforcement "cannot be left to a commission that is under the thumb of those who are to be regulated." FEC, Legislative History of FECA Amendments of 1976 at 72, *Statement of Hon. Dick Clark, Member, Subcomm. on Privileges and Elections* (Aug. 1977), https://perma.cc/G23G-SQ7T ("Legislative History"). Capture of the FEC was all but guaranteed, as the commissioners are appointed and overseen by the very people the agency regulates and their patrons. Indeed, while the FEC's structure protects against partisan witch-hunts—a risk already guarded by the need to appeal to an independent judiciary, *see* 52 U.S.C. § 30109(a)(6)—it compounded the risk that it would become a "toothless lapdog" rather than the

"active watchdog" required to "restor[e] [] public confidence in the election process." Legislative History at 75, *Statement of Senator Scott*.[1] Unlike other agencies where underenforcement is subject to democratic correction through the appointment of new leadership, an FEC that fails to faithfully enforce the law would be subject to no such correction, as even a newly-elected pro-enforcement President cannot appoint a majority of similarly minded commissioners. *See* 52 U.S.C. § 30106.

Accordingly, rather than rely solely on the agency, Congress provided private litigants with means to protect their private rights, *FEC v. Akins*, 524 U.S. 11, 22 (1998), subject to the safeguard obliging any plaintiff to obtain preliminary adjudication by the FEC, *Stockman v. FEC*, 138 F.3d 144,153 (5th Cir. 1998) (dismissing lawsuit for failure to exhaust with FEC); *see also Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("[T]he procedures [the FECA] sets forth … must be followed before a court may intervene."). The agency then acts as "first arbiter," screening out meritless complaints, while the FECA assures "plausible claims" are pursued either by the agency or by the private litigant in federal district court. *CHGO II*, 923 F.3d at 1143–44, 1149 (Pillar, J., dissenting); *accord* Caroline

[1] *See also* Legislative History at 92, *Statement of Senator Walter F. Mondale* (expressing concerns of "history of weak enforcement of campaign financing laws").

Hunter, How My FEC Colleague Is Damaging the Agency and Misleading the Public, *Politico* (Oct. 22, 2019) https://perma.cc/AW3K-KF6M ("In enforcement actions, commissioners are like judges.").

This two-part process begins with what is essentially an automatic motion-to-dismiss for a failure to state a claim: adjudicating whether a citizen complaint raises a "reason-to-believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). If a majority of the FEC concludes it does, then "the Commission shall make an investigation." *Id.*; *CREW v. FEC*, 55 F.4th 918, 923 (D.C. Cir. 2022) (en banc) ("*New Models II*") (Millett, J., dissenting) ("If at least four of the six commissioners determine there is reason to believe a violation occurred, the Commission must go forward with an investigation."); *accord CHGO II*, 923 F.3d at 1144 (Pillard, J., dissenting).[2]

[2] Notwithstanding this mandate, the Commission still retains discretion whether to investigate. In the event that four or more commissioners conclude that a complaint has merit, but still wish to exercise discretion to decline agency enforcement, the four may vote to "dismiss with admonishment," FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed Reg. 12545, 12546 (Mar. 16, 2007) (discretionary dismissal "requires the vote of at least four commissioners," and "Commission may also dismiss when … [it] concludes that a violation of the Act did or very probably did occur, but … [does not] warrant further pursuit by the Commission"); or vote to find reason to believe "but take no further action," *Certification*, MUR 5690 (Gerlach for Congress) (Sept. 12, 2006), https://perma.cc/H54W-JJ5L. The dismissal would be "contrary to law" due to the mandate, but that only means a

If fewer than four commissioners conclude the complaint has merit, the Commission may vote to close the file. *See* FEC, *Statement of Policy*, 72 Fed. Reg. at 12546 ("[D]ismissal of a matter requires the vote of at least four Commissioners."). The complainant may then challenge that dismissal in federal district court as "contrary to law." 52 U.S.C. §30109(a)(8).[3] To permit a court to "intelligently determine whether the Commission is acting 'contrary to law,'" the commissioners must "state their reasons why" they judged the complaint to lack merit and to not furnish reason to believe a violation may have occurred. *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). Because the FEC is called upon to justify its judgment on the merits of the complaint, "[w]hen the agency votes on whether there is a 'reason to believe' that a violation of FECA has occurred, it

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complainant may bring their own claim in federal court, without burdening the FEC.

[3] The "contrary to law" standard is not based on the APA, *cf. New Models I*, 993 F.3d at 889–90, but rather stems from the National Labor Relations Act, from which FECA procedures derive, *see* Legislative History at 804, where parties may challenge the agency's nonenforcement as "contrary to law," *Dunlop v. Bachowski*, 421 U.S. 560, 574 (1975); *see also Heckler*, 470 US. at 833 (recognizing NLRB nonenforcement reviewable under *Dunlop*). That standard does not require evaluating an agency's discretion because the agency has a "duty to decide complaints properly brought before it." *Int'l Union, UAW v. NLRB*, 427 F.2d 1330, 1332 (6th Cir. 1970); *see also Oil, Chem. & Atomic Workers Loc. Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983) (NLRB may not "refus[e] to determine" complaint on merits); *cf. CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting) (FEC is "oblig[ed] to pass on the merits of a complaint").

must give reasons for that action that are subject to judicial review" for the dismissal to not be deemed contrary to law. *CHGO I*, 892 F.3d at 445 (Pillard, J., dissenting).

If subsequent judicial review demonstrates the commissioners' analysis was correct, the FEC has lawfully performed its gatekeeping adjudicatory function and the case is at an end. If a court concludes the commissioners' analysis was erroneous, however, then the court declares the error and remands to the agency for an opportunity to reconsider and conform to the judgment. "[T]he Commission is [then] given the right of first refusal on enforcement," and "[i]f the agency is still opposed or unable to bring an enforcement action, no court will force it to do so; all that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting).

Thus, while the FEC has "discretion," *see Akins*, 524 U.S. at 26, "prosecutorial discretion" only "settle[s] [the FEC's] own claims," and has no bearing in the FEC's adjudication of a private plaintiff's claims and their viability in federal court, *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008). "The statute, in other words, never requires the agency to bring an enforcement action that it does not want to bring." *New Models II*, 55 F.4th at 923 (Millett, J.,

dissenting). "It just opens the door to private enforcement by an aggrieved party." *Id.* That door may only be shut by a federal court's agreement with the commissioners that a complaint does not furnish a reason to believe a violation may have occurred.

II. Factual Background and Proceedings Below

A. AAN Publicly Exhibits a "Major Purpose" to Influence Federal Elections

AAN was founded in mid-2009. JA22.[4] Shortly thereafter, the Supreme Court issued *Citizens United*, and AAN took immediate advantage to engage in electioneering, spending heavily to influence the 2010 federal elections.

AAN aired its first reported campaign ad on May 6, 2010. JA22. Between then and June 30, 2011, AAN reportedly spent about $4,096,909 on independent expenditures and $14,038,625 on electioneering communications. *Id.* AAN's electioneering communications aired days before the election, attacked specific candidates—including non-incumbents—even falsely accusing some of supporting "Viagra for rapists," and urged viewers to express their disagreement "in

[4] As this appeal stems from a decision reconsidering a motion to dismiss, CREW relies herein on materials in its complaint, and other publicly reported materials of which the Court may take judicial notice. As addressed in the argument on standing below, these materials are sufficient for the Court's purposes, but admissible evidence not only confirms these allegations but expands on them.

November." *See* JA23; JA356. When combined, AAN's reported independent expenditures and electioneering communications comprised no less than approximately 70.4% of AAN's 2010 fiscal year spending. JA26.

AAN's general activities similarly evidence its focus on elections. AAN's total expenditures before June 2010 were only $1,446,657. JA25. But they ballooned to $25,692,334 in AAN's 2010 fiscal year, running from July 1, 2010 to June 30, 2011 and including the 2010 election. *Id.* To pay for this electioneering, AAN took contributions that indicated donors intended funds to support AAN's electioneering. JA22. According to its tax filings, AAN received $2,750,351 in contributions before June 2010, JA231, with two sources contributing $1 million each, JA257. But AAN took in $27,479,380 in its next fiscal year, which covered the 2010 election, JA259, with two sources contributing $2.725 million, JA273-JA274, another contributing $3.5 million, JA276, another contributing $4 million, JA274, and another single source contributing $7 million, JA273.

AAN's electioneering did not end in 2011. AAN spent at least $26 million on independent expenditures since 2011. *See* FEC, *Independent Expenditures*, Am. Action Network, Inc. (last visited Mar. 29, 2023), https://perma.cc/44FP-7DHE. That spending, however, ignores AAN's primary role now, which is to act as a disclosure shield for contributions to its associated super PAC, CLF. To date, AAN

has funneled almost $113 million in contributions to CLF, dollars for which CLF would have had to identify their source but for the use of AAN as an intermediary. AAN is now CLF's largest donor, and its contributions continue to grow each year. AAN spent a significant amount of its remaining funds on ads supporting or opposing electorally "vulnerable" candidates. Alexandra Marquez, Conservative group spends more to blast Democrats on inflation, *NBC News* (July 27, 2022), https://perma.cc/6F65-GCHZ; Paul Steinhauser, Conservative advocacy group targets two House Democrats from Virginia in wake of Youngkin Victory, *FOXBusiness* (Nov. 16, 2021), https://perma.cc/APT6-GYQY; *see also* Anna Massoglia, 'Dark money' groups have poured billions into federal elections since the Supreme Court's 2010 Citizens united decision, *OpenSecrets* (Jan. 24, 2023), https://perma.cc/UU2X-PPDV (reporting AAN spent $30.7 million in TV and online ads boosting or attacking candidates); AAN, *2019 Form 990, Sched. C, Part IV*, Pro Publica (last visited Mar. 29, 2023), https://bit.ly/3QVYr5r ("The vast majority of [AAN's] expenditures were … contributions to … [CLF] … [and] work on political matters[.]"). AAN's President, Dan Conston, has also been hailed as part of the "nucleus of [newly elected House Speaker Kevin] McCarthy's political operation." Jake Sherman, The McCarthy Machine's 2022 total: $500

million, *Punchbowl News* (Nov. 7, 2022), https://perma.cc/PFH3-NNQA; AAN, *About AAN* (last visited March 29, 2023), https://perma.cc/ANZ7-ZQHW.

B. CREW's Pursuit of Remedy from AAN

Based on publicly available information demonstrating that AAN's major purpose was to influence elections, but AAN was not disclosing information to which CREW was entitled, CREW filed a complaint against AAN in 2012 with the FEC. JA221. The FEC's General Counsel found CREW's complaint had merit, JA320, but the three Republican commissioners judged there was no reason to believe that AAN may have violated the FECA, *see Certification*, MUR 6589 (AAN) (June 24, 2014), https://perma.cc/68BM-RBX3. The three commissioners explained that they judged the First Amendment and case law to require the FEC to treat the $14 million AAN spent on electioneering communications as spending on "genuine issue advocacy" because they used "legislative issues" to attack candidates, and thus as reason to excuse AAN from reporting, JA187–220 (the "2014 Statement"). In a passing footnote, the three commissioners also described that legal analysis as "militat[ing] in favor of a cautious exercise of our prosecutorial discretion." *Id.* at 24–25 n. 137. CREW challenged the subsequent dismissal in federal district court, and the district court found "it blinks reality to conclude that many of [AAN's] ads … were not designed to influence the

election or defeat of a particular candidate in an ongoing race." *CREW*, 209 F. Supp. 3d at 93. The district court declared the dismissal premised on the commissioners' "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure" was contrary to law. *Id.* The FEC did not appeal, choosing instead to reconsider its prior decision.

On remand, the Commission opened a new matter, reconsidered their decision, and took another vote on CREW's complaint, but again deadlocked, with the same three Republican commissioners again adjudicating CREW's complaint as meritless. JA342. They concluded again that nearly all of AAN's electioneering communications excused AAN from reporting because, while the ads "criticiz[ed] an officeholder's past positions," their specific call to action related to AAN's "issue agenda." JA348, JA352. This time, the commissioners made no reference to prosecutorial discretion. JA343–61. CREW again sought judicial review. On summary judgment, the district court found the analysis conformed with the prior judgment but that it was again erroneous and the dismissal was still contrary to law because it ignored Congress' determination that electioneering communications, by their very characteristics, are "specifically intended to affect election results." JA151 (quoting *McConnell v. FEC*, 540 U.S. 93, 94 (2003)); *see also id.* at JA156

(quoting *McConnell,* 540 U.S. at 127) (ads asking viewers to "call [candidate] Jane Doe and tell her what you think" and "vote against Jane Doe" had only an "illusory distinction").

The FEC failed to conform with the district court's judgment within thirty days, and CREW therefore exhausted its administrative remedies. *See* JA35, JA161. Accordingly, CREW brought this suit directly against AAN, as permitted by the FECA. *Id.*

AAN subsequently moved to dismiss CREW's suit on various grounds, but the district court denied the motion, holding that CREW had standing, CREW had exhausted its claims before the FEC, CREW's claims were not time barred, and the dismissals were reviewable. JA44–JA68. In particular, the district court found that the *CHGO I* decision did not render the 2016 Statement or even the superseded 2014 Statement unreviewable, because neither statement "mentions resource-based or other prudential considerations" that are peculiarly within the agency's expertise. JA54. The district court rejected AAN's request to certify an interlocutory appeal. JA76–JA77.

The parties completed discovery in 2021. JA120. Rather than proceed to dispositive motions, AAN sought reconsideration of the district court's decision about the impact of the mention of "prosecutorial discretion" (as it related to the

commissioners' legal analysis) in the superseded 2014 Statement. *See* JA107. The district court reversed course, finding the recent divided panel decision in *New Models I* now precluded review of the 2016 Statement because the Statement incorporated by reference the 2014 Statement's mention of prosecutorial discretion. JA122. In its dismissal opinion, the district court acknowledged that *New Models I* is in tension with earlier binding Circuit Court and Supreme Court caselaw and "gut[s]" the FECA's statutory mechanism to pursue private rights of action. JA112, JA118–JA119. CREW then filed this timely appeal.

After this appeal was filed, the FEC once again closed CREW's pending administrative action against AAN, which had been pending before the FEC since the district court had remanded proceedings to the agency. JA372. In doing so, the FEC revealed that shortly after the district court's second remand, the Commission again reconsidered whether CREW's complaint raised a reason to believe, and this time the remaining two Republican commissioners who previously voted to block enforcement (the third having left the Commission by this point) switched their vote and now judged CREW's complaint to be meritorious, joining another commissioner. JA369–71. No vote was proposed to exercise prosecutorial discretion. *See id*. Nonetheless, there were still not four votes to find reason to believe because Commissioner Ellen Weintraub declined to join her colleagues.

See id. She explained in a statement issued before the vote that her colleagues had a "deep ideological commitment to impeding this country's campaign-finance laws" and were committed to "find[ing] a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us." JA368. It was apparently Commissioner Weintraub's understanding that her colleagues had switched their vote only to frustrate CREW's attempt to seek relief in court itself, and that they were incapable of pursuing a good faith investigation of AAN.

After the administrative proceeding closed, Commissioner Weintraub issued a statement that now serves as "the agency's reasons for acting as it did" in the AAN matter. *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Per her statement, the FEC now "disclaims" the prior statements of reason, states the agency "did *not* dismiss this matter pursuant to prosecutorial discretion," and "unequivocally disclaims prosecutorial discretion as a rationale for the Commission's dismissal of this matter." JA381–JA382.

SUMMARY OF THE ARGUMENT

The district court reluctantly dismissed this action against one of the largest dark-money groups in operation on the eve of dipositive motions because it

concluded that a "quick[]" "wink" to prosecutorial discretion in a long-superseded statement by a non-majority of commissioners adjudicating an earlier administrative proceeding—not the one that gave rise to this suit—extinguished this case under this Court's recent decision in *New Models I*. JA122. But it erred in doing so.

First, the district court erred in finding the relevant statement below, which adjudication gave rise to this suit, incorporated by reference an earlier "wink" to prosecutorial discretion in a separate statement and that the "wink" could preclude review. Second, AAN may not rely on the superseded 2014 Statement to preclude review as that Statement is now a dead letter. Third, assuming the 2014 Statement's brief wink is determinative, the court below still erred in dismissing this action because *New Models I* and its precursor, *CHGO I*, are "not binding" in this Circuit because of their conflict with prior binding authority of this Circuit and the Supreme Court. *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting). Finally, CREW has standing, notwithstanding AAN's continued contention otherwise.

ARGUMENT

I. Prosecutorial Discretion Cannot Preclude Review Because the FEC Never Exercised Prosecutorial Discretion and the Pertinent Dismissal Did Not Even Mention Prosecutorial Discretion

CREW's claim against AAN "accrue[d] [on] April 19, 2018," thirty days after the district court "remanded CREW's complaint to the FEC on March 20, 2018." JA64. The remand stemmed from the district court's March 20, 2018 judgment reviewing the 2016 Statement in MUR 6589R. JA42. That statement "does not mention prosecutorial discretion at all." JA57. Rather, it "exclusively examine[d]" the law, JA53, and concluded "AAN was not a political committee" using a framework that is "contrary to law." JA161, JA344.

Nonetheless, the district court still found prosecutorial discretion precludes this suit because it read the 2016 Statement to incorporate the 2014 Statement's extremely brief reference to prosecutorial discretion. JA122. Consequently, it dismissed this case pursuant to *New Models I*. *Id.* While the problems with *New Models I* are legion, *see infra*, the district court erred in concluding it blocked review here.

First, there is no dispute that the 2016 Statement, the one that gave rise to this suit, "explicitly [did not] rel[y] on prosecutorial discretion." *New Models I*,

993 F.3d at 885. Indeed, the district court recognized the statement on review "nowhere mentioned prosecutorial discretion." JA110.

Second, the district court therefore erred in finding the 2016 Statement incorporated a vague reference in the superseded 2014 Statement to prosecutorial discretion. One would expect that an invocation with such significant implications as is now conferred on these "magic words" would be stated clearly and unequivocally. *New Models II*, 55 F.4th at 926 (Millet, J., dissenting). But the pertinent portion in the 2016 Statement only says that "[t]he fuller treatment of the major purpose test and [the commissioners'] reasoning for [the commissioners'] original [2014] vote" is in the 2014 Statement, and the commissioners "incorporate by reference that analysis and discussion on all points except for aspects deemed contrary to law by the court." JA344. The 2016 Statement does not refer to prosecutorial discretion or state that it is incorporating any invocation of discretion in the 2014 Statement. Rather, as is clear from the context, the 2016 Statement incorporated discussion about the "major purpose" test, a legal analysis that would continue to apply across the votes and is subject to review. In contrast, an exercise of prosecutorial discretion is highly context dependent and its invocation in one case would not imply its invocation in another. Indeed, the 2016 Statement makes clear that the 2014 Statement expresses only the justification for the

commissioners' "original vote:" that is, their vote in 2014. By incorporating that background fact, the 2016 Statement nowhere expresses a conclusion that the new 2016 vote was also motivated by prosecutorial discretion.

Moreover, the 2016 Statement expressly excludes incorporation of any "aspect deemed contrary to law by the court." JA344. But the only aspect of the 2014 Statement found in conformity with law was the analysis requiring a group spend at least 40% of its funds on electioneering to satisfy the major purpose test. *See CREW*, 209 F. Supp. 3d at 94–95 (finding the threshold was not "arbitrary or capricious"); *see also* JA346–JA347 (recounting court's earlier decision and stating "court rejected CREW's argument" about the threshold). The 2014 Statement's footnote mentioning prosecutorial discretion, however, was part of the commissioners' analysis of electioneering communications, which analysis the district court concluded was contrary to law. *CREW*, 209 F. Supp. 3d at 93. Accordingly, by the express terms of the 2016 Statement, it did not incorporate that analysis and the commissioners' brief mention of prosecutorial discretion.

Third, even if the 2016 Statement were to incorporate the passing reference to prosecutorial discretion in the 2014 Statement, that alone is insufficient to preclude review here. That is because the brief reference "was rooted entirely in [the commissioners' erroneous] legal misgivings," and not "resource-based 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. The authoring judge of *New Models I* clarified in a subsequent opinion that judicial review is not precluded if commissioners only "reference their merits analysis as a ground for exercising prosecutorial discretion." *New Models II*, 55 F.4th at 920; *see also id.* at 922 ("When such discretion is invoked as an independent basis for a non-enforcement decision, it cannot be reviewed by this court."). That is precisely what occurred here. *See* JA122 ("[T]he controlling commissioners in *New Models* at least mentioned a few prudential considerations in connection with their cursory analysis of prosecutorial discretion. [] Here, they cited none." (citation omitted)).

This suit did not arise from an impermissible review of a discretionary decision by the FEC. It began when the 2016 Statement, which makes no reference to discretion, was ruled contrary to law. The 2016 Statement did not incorporate the 2014 Statement's brief reference to explain the 2016 vote, and even if it did, that alone would not preclude review because the reference was merely a description of the commissioners' reviewable legal analysis in the first place. Accordingly, the district court erred in dismissing this matter over an invocation of discretion that did not occur.

II. AAN May Not Revive a Dead-Letter Statement of Reasons

Below, AAN offered a second possibility to justify dismissal: "if the passing reference to prosecutorial discretion in the initial [2014] statement made the first dismissal unreviewable under *New Models I*, then the [c]ourt lacked the power to issue the remand order that resulted in the second [2016] statement." JA122. The district court did not credit that counter-factual speculation, finding "[i]n any event," the incorporation discussed above. *Id.* The district court was right to ignore this speculative rationale, and AAN has not asserted any error by cross-appealing.

The claim that AAN can defeat this suit by pointing to the superseded 2014 Statement runs headlong into binding precedent to the contrary. For example, in *Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984), after a district court struck an agency's rule due to a failure to "provide an adequate explanation," the agency revised the rule and explanation rather than appeal the adverse judgment, *id.* at 1162–63. An intervening party wished to defend the prior explanation as "adequate," and thus urged the appellate court to find the district court had erred. *Id.* at 1165. Nevertheless, this Court rejected the attempt because the prior explanation had been superseded by new agency action, rendering it a "dead letter [that] cannot be revived in favor of intervenors." *Id.* at 1165–66; *see also Fisher v. Pension Benefit Guar. Corp.*, 994 F.3d 664, 669–70 (D.C. Cir. 2021)

(agency's choice to "deal with the problem afresh" on remand requires it to "comply with the procedural requirements for new agency action," and new statement was the proper subject of review to evaluate that new action); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (agency's issuance of new explanation for action moots challenge relating to prior explanation).[5]

For purposes of this suit, the 2014 Statement is a "dead letter." *Regan*, 727 F.2d at 1165. Indeed, it died of willful abandonment. First, the FEC could have appealed its initial loss, but chose not to. Rather, like the agency in *Regan*, it reconsidered its decision, conducted a new vote, and sought to explain that vote in a new statement. *See also Dep't of Homeland Sec. v. Regent of U. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (agency "'deal[ing] with the problem afresh' by taking *new* agency action" must provide "new reasons"). Thus, whatever justifications might have existed for a different adjudication are inapposite in considering the legality of the 2016 adjudication—the adjudication deemed contrary to law, giving rise to this suit. Second, the commissioners could have referred to prosecutorial discretion in the 2016 Statement but chose not to. They also could have voted to exercise

[5] Any error in reviewing the 2014 Statement did not impact the court's jurisdiction to remand for reconsideration. *See CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020). For the same reason, an error in reviewing the 2016 Statement did not impact the court's jurisdiction to order the FEC to conform to that judgment, the failure of which was the trigger for this suit.

discretion but chose not to. JA342. The absence of any attempt to actually invoke the FEC's discretionary authority demonstrates any interest in using it was abandoned. Third, to remove any doubt, the FEC has clarified that it "disclaimed" prosecutorial discretion as the basis to dismiss CREW's complaint against AAN. JA381–JA382; JA369–JA371; *NRSC*, 966 F.2d at 1476 (commissioners who prevent reason-to-believe majority are "a controlling group for purposes of that decision" and their statement "states the agency's reasons for acting as it did"). Thus, even assuming three commissioners' initial reaction was to exercise prosecutorial discretion (which, for reasons covered above, it was not), it is "axiomatic that an agency is free to change its mind" and the FEC did so here. *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009).

The district court was correct in its initial assessment that it would "review only the Second [2016] Statement of Reasons, which as a formal matter superseded the first on remand." JA114. AAN's suggestion to do otherwise is belied by caselaw and cannot serve to justify the dismissal below.

III. *New Models I* Cannot Compel Dismissal Because *New Models I* Conflicts with Earlier Circuit and Supreme Court Authority

Notwithstanding the above, because the district court concluded the pertinent statement "wink[ed]" at prosecutorial discretion, it reluctantly dismissed this action because it found "*New Models [I]* preclude[d] review." JA121–JA122.

But the district court also recognized that recent Circuit decisions could not render unreviewable those nonenforcement determinations "based on an interpretation of FECA." JA112 (addressing *CHGO I*, of which *New Models I* claims to be a mere "straightforward application," *see New Models I*, 993 F.3d at 886). Rather, these new decisions must be "reconciled [with] competing precedents," and those precedents permitted review here. JA112 (citing *Akins*, 524 U.S. at 26; *DSCC*, 454 U.S. 27 (1987), and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)).

The district court did not explain its departure from that conclusion when it applied *New Models I* here to preclude the underlying review. It should have stuck with its initial conclusion because *New Models I* cannot be reconciled with those competing precedents. Rather, *New Models I* is "not binding" because it, and its precursor, *CHGO I*, "conflict[] with … the Supreme Court's decision in [*Akins*, 524 U.S. 11]; and with [this Court's] decisions in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); [*DCCC*], 831 F.2d 1131 [ ], and *Orloski*, 795 F.2d 156." *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting) (citing *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen 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.")); *accord New Models I*, 993 F.3d at 900–01 (Millett, J., dissenting); *CLC v. FEC*, 952 F.3d 352, 358–59 (D.C.

Cir. 2020) (Edwards, J., concurring). Further, the line of cases conflicts with settled administrative law precedent and places the FECA in serious tension with separation of powers principles and the First Amendment.[6]

A. New Models I Conflicts with FECA Precedent

Prior to *CHGO I*, every federal court to examine the issue recognized that any adjudication by the FEC of a private party's complaint was reviewable. Where a complainant could demonstrate that, notwithstanding the dismissal, their claim was plausible, a court would permit the complainant to bring a suit in their own name by finding the FEC's dismissal was contrary to law. *CHGO I*, however, *sua sponte* departed from that precedent without even mentioning it, and *New Models I* expanded on that departure. Neither case can be reconciled with precedent recognizing the purpose of judicial review under the FECA as envisioned by Congress: to permit complainants to pursue their own plausible claims if the FEC will not.[7]

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[6] Although divided en banc courts have declined to reconsider *New Models I*, *see New Models II*, 55 F.4th at 918–19, and, by an "evenly-split decision," its precursor, *CHGO I*, *id.* at 926 (Millett, J., dissenting); *see CHGO II*, 923 F.3d at 1141, "deny[ing] rehearing en banc does not necessarily connote agreement with the decision as rendered," *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 129 (D.C. Cir. 1977).

[7] *See also generally* Br. of Election Law Scholars as *Amici Curiae* in Supp. Of Appellants' Pet. For Rehearing En Banc, *CREW v. FEC*, No. 19-5161 (D.C. Cir.

First, *New Models I* conflicts with binding Supreme Court authority in *FEC v. Akins*. The majority in *New Models I* held that the "FECA cannot alter the APA's limitation on judicial review," *New Models I*, 993 F.3d at 889, and that, notwithstanding the plain language of 52 U.S.C. § 30109(a)(8)(A), "the [FEC's] decision not to bring an administrative enforcement action is 'committed to agency discretion by law' and therefore unreviewable," *New Models I*, 993 F.3d. at 888. *New Models I* found the FECA vested unreviewable discretion in the agency by conferring discretion over relief at the end of proceedings. 993 F.3d at 890 (quoting 52 U.S.C. § 30109(a)(6)(A)). In contrast, in a case in which the FEC enjoyed the same discretion, *Akins* recognized the APA's "traditiona[l]" limit on review but found that the FECA "explicitly indicates [] the contrary." *Id.* at 900 (Millett, J., dissenting) (quoting *Akins*, 524 U.S. at 26 (holding *Heckler*, 470 U.S. at 821, does not apply to review of FEC dismissals)); *accord CHGO II*, 923 F.3d at 1146 (Pillard, J., dissenting); *CLC*, 952 F.3d at 361 (Edwards, J., concurring). Rather, "as the Supreme Court has specifically held, 'reason-to-believe' assessments under the [FECA] are expressly excepted from the general

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June 30, 2021), https://perma.cc/S9GV-DVT8 (explaining "significant conflict in the rulings of this Court" with *New Models I*, that decision permits "one party [to] dominate the FEC's decision-making" and "threatens Congress's carefully crafted framework for the enforcement of campaign finance law").

presumption that decisions not to enforce the law are unreviewable." *New Models II*, 55 F.4th at 927 (Millett, J., dissenting); *accord Akins*, 524 U.S. at 26 (FEC's decision not to undertake an enforcement action reviewable).

New Models I purported to revise *Akins* to limit its holding to dismissals premised on "only legal reasons." 993 F.3d at 889, n.8. Yet the FEC in *Akins* insisted the dismissal under review *was* discretionary. *Compare id. with* Reply Br. For Pet'r, *FEC v. Akins*, No. 96-1590, 1997 WL 675443, at *9 n.8 (U.S. Oct. 30, 1997) (invoking prosecutorial discretion). The Supreme Court did not reject that characterization, but rather explained that the FECA extends review to even "discretionary agency decision[s]" to correct any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25. Indeed, courts "cannot know that the FEC would have exercised its prosecutorial discretion" with a *correct* view of the law. *Id.*

In short, *Akins* recognizes the FECA provides "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings," *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), without exception. That provision is not so unusual when the statutory scheme is understood as a whole. The FECA does not "attempt to force the Commission itself to proceed in the face of an agency exercise of

constitutionally unreviewable prosecutorial discretion." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). Rather, it authorizes judicial review of the agency's adjudication of a private party's claim to permit that plaintiff to show exhaustion and "pursue its private right[s]." *Id.*

Second, *New Models I* conflicts with the Circuit's decision in *DCCC v. FEC*, which recognized all FEC discretionary dismissals, even those with unanimous backing, are reviewable. 831 F.2d at 1133–34 (recognizing both "6-0 decision" and "3-2-1 decision" to "exercise[s] of prosecutorial discretion" are reviewable). Rather than limit review to dismissals based "exclusively on an interpretation of the relevant statutory and regulatory standards," *New Models I*, 993 F.3d at 894, *DCCC* held the FECA did not "confin[e] the judicial check to cases in which … the Commission acts on the merits," 831 F.2d at 1134 (internal quotation marks omitted); *see also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (applying *DCCC* to discretionary rationales). Instead, review extends to commissioners' "unwilling[ness]" to enforce to ensure they do not "shirk [their] responsibility to decide" a matter on the merits. *DCCC*, 831 F.2d at 1134, 1135 n.5.

Third, *New Models I* conflicts with *Chamber of Commerce v. FEC*, which similarly held the Commission's "unwillingness" to proceed was reviewable, and

that it presented an "easy" case for reversal. 69 F.3d at 603. In *Chamber*, the court's jurisdiction depended on the fact that "even without a Commission enforcement action" due to prosecutorial discretion, "[plaintiffs] [were] subject to litigation challenging ... their actions" because "the Commission's refusal to enforce would be based not on a dispute over the meaning of the applicability of the rule's clear terms" and thus any discretionary dismissal would be contrary to law. *Id.*; *see also CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting) (Commission "oblig[ed] to pass on the merits of a complaint," and "[i]f three Commissioners could vote 'no' at the reason-to-believe stage on grounds of prosecutorial discretion, there would be little to check 'the Commission's unwillingness to enforce its own rule'" (quoting *Chamber*, 69 F.3d at 603)).

Fourth, *New Models I* conflicts with *Orloski v. FEC*, which held that all FEC dismissals are subject to review. 795 F.2d at 161. Indeed, it recognized that, as the first step in any review, the commissioners must demonstrate their analysis is based only on "permissible interpretation[s]" of law. *Id.* Moreover, "a decision dismissing a complaint 'is contrary to law' even 'under a permissible interpretation of the statute' if it involves 'an abuse of discretion.'" *CHGO II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Orloski*, 795 F.2d at 161).

Each of these decisions accords with the FECA's basic structure for review of private complaints: the FEC acts as a "first arbiter" to weed out unmeritorious complaints, subject to judicial review. *CHGO II*, 923 F.3d at 1149. But where nonenforcement is the result of the FEC's "unwilling[ness]," *DCCC*, 831 F.2d at 1135 n.5; *accord Chamber*, 69 F.3d at 603, review is not thwarted. Rather, that is an "easy" case because it demonstrates there is no dispute over the complaint's merit. *Chamber*, 69 F.3d at 603. The Court does not thereby compel the FEC to act; rather, it merely finds a plaintiff has exhausted their attempts to seek administrative relief and permits the plaintiff to bring a suit in its own name.

New Models I, however, threatens to corrupt this system and foreclose the private FECA remedy established by Congress. It conflates the FEC's prosecutorial discretion over the pursuit of its *own* claims with a power to veto claims private litigants wish to bring in another forum. Indeed, "[t]he harm worked by this decision is serious and recurring." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting) (citing evidence that, since the *CHGO I* decision, two-thirds of dismissals contrary to the agency's general counsel's recommendation have cited prosecutorial discretion). It comes at a time that lax enforcement has bred a culture of impunity with respect to campaign-finance laws. *See* Adam Ferrise, How prosecutors used a law meant to fight the mob to shine light on dark money in the

Householder corruption trial, *Cleveland.com* (Mar. 4, 2023), https://perma.cc/LTN3-W44K (quoting prosecutor noting nonprofits are "a perfect mechanism to launder money" due in part to fact law is "not enforced"); Chad Day & Paul Kiernan, Sam Bankman-Fried's Alleged Campaign Finance Violations Explained, *The Wall Street Journal* (Dec. 14, 2022), https://perma.cc/X4JF-PH2T; *see also* Alexandra Berzon & Grace Ashford, The Mysterious, Unregistered Fund That Raised Big Money for Santos, *The NY Times* (Jan. 12, 2023), https://perma.cc/Y5NE-YYSK. It comes at a time that the FEC has failed to enforce its political-committee provisions against any group except when their "hand [is] forced by a federal district court." *Statement of Reasons of Commissioner Caroline C. Hunter 1*, MUR 6538R (AJS) (July 2, 2020), https://perma.cc/WVV6-M4NN (discussing only case since *Citizens United* where FEC required de facto political committee to disclose information). Indeed, *New Models I* has, since its issuance, proven fatal to every private litigant trying to protect their rights under the FECA.

Courts in this Circuit are bound to follow the earlier line of cases that faithfully applied the FECA and to disregard *CHGO I* and *New Models I*. The district court erred in following these departures from precedent and the dismissal warrants reversal.

B. New Models I Conflicts with Settled Administrative Law

In addition to the FECA precedents discussed above, *New Models I* further conflicts with earlier settled authority on administrative law that leaves the FEC as an agency unlike any other: a "law unto itself." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting).[8]

First, *New Models I* conflicts with the rule that it is "formal action, rather than its discussion, that is dispositive" on reviewability. *ICC v. Bhd. Of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987). The question of "judicial review of a final agency action" is a matter "of Congress," *Abbott Labs v. Garder*, 387 U.S. 136, 140 (1967), rather than something commissioners can extinguish unilaterally, *cf. Heckler*, 470 U.S. at 837-38 (nonenforcement decisions categorically unreviewable under APA). "[T]he availability of judicial review [does not] turn[] on an agency's prose composition," *New Models I*, 993 F.3d at 887, and thus cannot depend on whether a "statement of reasons explain[ing] the dismissal turned in whole or in part on enforcement discretion," *id.* at 894; *cf. id.* at 883 (courts cannot "teas[e] out" reviewable reasons from unreviewable action).

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[8] *See also generally* Br. of Profs. of Admin. Law as *Amici Curiae* in Supp. of Pls.-Appellants, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 30, 2021) https://perma.cc/WUX7-Y4H6 (*New Models I* contravenes "clear statutory text (and an on-point Supreme Court case interpreting that text)" and "lacks support in the law").

Here, whether the pertinent dismissal or the superseded dismissal are considered, the agency action was to deadlock on a vote to find whether there was reason to believe a violation occurred and then close the case by a majority vote (5-1 or 6-0, respectively). JA342; JA363 (explaining vote to close because "the Commission deadlocked in another 3-3 vote when reevaluating the matter"). Accordingly, where there is a "dismissal due to a deadlock" on a reason to believe vote, courts reasonably look to review that "deadlock[ing]" action, *DCCC*, 831 F.2d at 1133, and Congress "explicitly" provided for review of such votes, *Akins*, 524 U.S. at 26; *see also* JA119 (noting that under Supreme Court authority, reviewability depends on action, not discussion, and the "underlying 'action' in cases under [§ 30109(a)(8)] is always the same," and "[t]he statute makes that action reviewable"). Consequently, the judgment here against reason-to-believe is reviewable, and the commissioners' attempt to "justify [that] reviewable action with a discretionary reason, … does not thereby [render that action] unreviewable," *CHGO II*, 923 F.3d at 1148 (Pillard, J., dissenting). Yet that is precisely what *New Models I* purports to do: it renders the reviewability of an agency action—which is identical to actions already found reviewable—dependent on the commissioners' "prose composition," *New Models I*, 993 F.3d at 887; *id.* at 894 (rendering review

contingent on whether "statement of reasons explain[ing] the dismissal turned in whole or in part on enforcement discretion").

Second, *New Models I* conflicts with the agency's obligation to provide an explanation "rational[ly] connect[ed] [to] the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mu. Auto. Insur. Co.*, 463 U.S. 29, 43 (1983). Here, the choice made was to close the file due to the Commission's "impasse" on the merits, as the statement of the commissioners who provided the majority vote to close the case explained. JA178; *accord* JA363 (vote to close because of "deadlock[] … when reevaluating the matter"). None of these commissioners, whose vote was necessary to close the file, expressed any desire to exercise prosecutorial discretion. They expressly stated that the FEC "should have investigated" AAN. JA179. Rather, there is only a "fleeting reference to prosecutorial discretion by a Commission minority—not by the Commission itself." *New Models II*, 55 F.4th at 926–27 (Millett, J., dissenting).

Notably, it was only the non-majority's decision to adjudicate the complaint on the merits that created an "impasse." A non-majority's desire to exercise discretion has no impact when expressed independently: three votes to exercise discretion does not prevent any further proceedings. *See, e.g.*, *Certification,* MUR 7437 (May 19, 2021), https://perma.cc/L6Y5-PVT6 (three commissioners' vote to

exercise prosecutorial discretion did not terminate proceedings, which continued and resulted in conciliation with defendant paying $6,000 fine). The decision to adjudicate a complaint as failing to raise a reason-to-believe, however, prevents further proceedings, except a vote to dismiss, until either the Commission reconsiders its vote, *see* 52 U.S.C. § 30109(a)(2), or a complainant challenges the FEC's failure to act and secures a right to pursue its own claim in federal court, *id.* § 30109(a)(8)(C).

Given the ability for a deadlocked merits vote to stymie further action, courts have thus reasonably presumed that a majority vote to close a file after a deadlock is a "dismissal due to a deadlock." *DCCC*, 831 F.2d at 1133. Courts have thus presumed a statement from that majority, as it does here, would identify the merits deadlock as the motivation. Accordingly, rather than require a statement of the obvious, they have instead required that deadlocking non-majority to "state their reasons why" they judged the complaint to lack merit and deadlocked the agency. *Id.* at 1132.

But in doing so, courts have not conferred on that non-majority a power to unilaterally exercise the agency's authority, or to offer explanations for dismissal untethered to the events as they occurred. That would violate the basic rule that the explanation must come from the "proper decisionmakers"—here, the majority that

decided to exercise agency power to dismiss a case. *Local 814, Int'l Broth. Of Teamster v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976) (explanations from anyone other than decisionmakers are impermissible post-hoc rationalizations). The only explanation with "majority-support" of the Commission is an explanation that the Commission dismissed because of the merits deadlock. *Oil, Chem. and Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 92–93 (D.C. Cir. 1995).

Accordingly, as the "choice made" by the majority was to close the case due to an impasse created by the non-majority's judgment that a complaint does not raise a reason to believe, that non-majority has a limited and specific task: to provide an explanation "rational[ly] connect[ed]" to their decision to deadlock the agency in its merits determination. *State Farm*, 463 U.S. at 43. Additionally, because that conclusion not only prevents the FEC from investigating, but also, if upheld by a court, prevents a plaintiff from pursuing their own claim, the non-majority explanation for their vote on the merits must also serve to explain why the *complainant* should not be permitted to bring the claim on their *own*.

A private complaint cannot be adjudicated on the basis of prosecutorial discretion, however, and thus prosecutorial discretion cannot explain such an adjudication. *Burlington*, 513 F.3d at 247 ("prosecutorial discretion" may only "settl[e] [agency's] own claims"); *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th

Cir. 2001) ("If [the] failure to [enforce] results from the desire of the [commissioners] to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense."); *cf. New Models II*, 55 F.4th at 919 (Rao, J., concurring) (only "an agency's refusal to institute" *its own* "proceedings falls within 'the special province of the Executive Branch'"). Where commissioners are deciding whether the FEC should pursue a case, they may act as prosecutors with concomitant discretion. In contrast, when performing their statutory obligation to adjudicate whether complaints raise a reason-to-believe and thus decide whether a private individual may pursue their own claims, the commissioners are acting as judges, not prosecutors. Judges do not have prosecutorial discretion.

Courts reviewing such adjudications then are not called upon to review the "unreviewable," *cf. New Models II*, 55 F.4th at 919 (Rao, J., concurring); rather, they disregard it as a *non-sequitur* and move on to the operative legal analysis. An adequate explanation must explain the decision on the merits—the decision to not only terminate agency proceedings but prevent a private party from seeking their own relief in federal court—and by necessity will turn on matters for which there is always "law to apply," rather than those "peculiarly within [the agency's] expertise." *Heckler,* 470 U.S. at 831, 836.

Given that prosecutorial discretion cannot "expla[in] [the Commission's] deadlock," *Common Cause*, 842 F.2d at 449, commissioners can only offer it as a "pretextual basis" for dismissal. *Dep't of Com. v. NY*, 139 S. Ct. 2551, 2573–75 (2019) (pretextual explanations that do not accord with the agency record but are raised to secure advantage in litigation "cannot [] adequately explain[]" agency action). Where a majority dismisses a case because of an impasse on the merits, a non-majority of commissioners references prosecutorial discretion only to secure a litigation benefit: to try to cut off judicial review and prevent a private complainant from seeking relief for their injury.

Yet *New Models I* treats the court's reasonable focus on the rationale of the non-majority to deadlock the agency as if it conferred on that non-majority the powers of the FEC. *See New Models I*, 993 F.3d at 887 (confusing non-majority's commissioners' statement with "an *agency*'s exercise of enforcement discretion" (emphasis added)). It permits that non-majority, in explaining the decision to deadlock the agency on the merits, to unilaterally offer explanations without any connection to that action, and instead to offer a pretextual reason only for the purpose of frustrating Congress' intent to subject dismissals to judicial review.

Third, *New Models I* ignores the rule that courts "are [not] free to guess … what the agency would have done had it realized that it could not justify its

decision" through the analyses provided. 993 F.3d at 902, n.5 (Millett, J., dissenting) (quoting *Int'l Union, United Mine Workers v. Dep't of Labor*, 358 F.3d 40, 44–45 (D.C. Cir. 2004)); *accord CHGO II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Akins*, 524 U.S. at 25). That three commissioners have mentioned prosecutorial discretion in service of their duty to explain their vote on the merits does not compel the agency—that is, a majority of the Commission—to exercise prosecutorial discretion on remand. Indeed, here, it did not. *See* JA369–JA371. Similarly, even if "the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason," *Akins*, 524 U.S. at 25, judicial review does not produce an "advisory opinion," *cf. New Models II*, 55 F.4th at 921 (Rao, J., concurring). "Even if the Commission were determined for reasons within its discretion not to pursue this case, a judicial decision on whether the complaint shows reason to believe the Act was violated has concrete consequences for the ability of private complainants to file suit." *New Models II*, 55 F.4th at 928–29 (Millett, J., dissenting). That is because a failure to secure four votes on remand to proceed or lawfully dismiss would be a failure to "conform" that triggers the complainant's right to bring their own private action, 52 U.S.C. § 30109(a)(8)(C), which is precisely what happened here. *See* JA369-JA371. *New Models I*, however, presumes not only that the non-majority commissioners'

"discretionary reasons [will be] undisturbed" on reconsideration, but that at least one more commissioner will change their mind to exercise discretion that they previously declined to exercise. *New Models I*, 993 F.3d at 889.

New Models I exempts the FEC from these general rules of administrative law. By sidestepping the FECA's structure and subjecting private complainants to an unreviewable veto by a non-neutral partisan block of commissioners, *New Models I* "impermissibly threatens the institutional integrity of the Judicial Branch." *CFTC v. Schor*, 478 U.S. 833, 851 (1986). By foreclosing judicial review, courts are not avoiding "order[ing] the Executive Branch to undertake an enforcement action it opposes," but rather empowering that branch to preclude private individuals from appealing to the judiciary by "bring[ing] a lawsuit in [their] own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). To avoid "offend[ing] the separation of powers," however, "Article I adjudicators" may only "decide claims submitted to them by consent" and only "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015); *see also Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 475 (D.C. Cir. 2020) (existence of "appellate review" that provides "adequate opportunity to secure judicial protection against arbitrary action" necessary for agency adjudication to satisfy due process); *CLC v.*

Iowa Values, 573 F. Supp. 3d 243, 256 (D.D.C. 2021) (complainant's § 30109 claims do not assert "public rights," but private ones).

New Models I violates all these conditions. No party consents to present their private right claims to the FEC; rather, they do so under mandate of the FECA. *Perot*, 97 F.3d at 559. Worse still, *New Models I* subjects an Article III court's supervisory authority to "a judicial-review kill switch" operated at the whim of executive officials not subject to any "degree of electoral accountability." *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); *see* 52 U.S.C. § 30106(a)(1) (President forbidden from appointing majority of like-minded commissioners). Not only do separation of power concerns "ha[ve] no purchase" here, *New Models II*, 55 F.4th at 929 (Millett, J., dissenting), *New Models I* violates those separation of powers.

New Models I's departure from precedent also offends the First Amendment by subjecting private parties' First Amendment rights to receive information and to speak to the "unbridled discretion" of an electorally unaccountable partisan-aligned non-majority, *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), who may censor access to "facts"—"the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011)—and thus "necessarily reduce[] the quantity of expression" by CREW and others, *Citizens United*, 558 U.S. at 339,

341 (FEC acts unconstitutionally when it blocks "voters [ability] to obtain information"); *Akins*, 101 F.3d at 744 (FEC's discretion "raises First Amendment concerns"); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) ("First Amendment rights … to know the identity of those who seek to influence their vote."). *New Models I* presents "serious constitutional problems" due to its complete departure from "the intent of Congress" and all precedent. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Under *New Models I*, not just the FEC, but a partisan-aligned non-majority bloc of FEC commissioners are "law unto [them]sel[ves]." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting). *New Models I* represents not only a departure from standard precedents in administrative law, but a revolution. But this Circuit does not permit such revolutions in precedent to issue from opinions of a divided panel, and thus *New Models I* must be disregarded.

IV. CREW Has Standing To Bring This Suit

The district court recognized CREW has standing to pursue this suit against AAN because AAN's failure to disclose "useful" information required by its political committee status injures CREW. JA45-JA46. AAN did not cross-appeal

but given this Court's ability to consider the issue *sua sponte*, and AAN's continued challenge to CREW's standing, CREW addresses its standing here.

The court below was correct to find CREW has standing because AAN has injured and continues to injure CREW by failing to disclose information CREW uses in its anti-corruption efforts and to which CREW is legally entitled because of AAN's extensive political activities. JA45–JA46 (CREW "pled that it regularly reviews disclosures reports required by FECA and uses [that] information" and pled facts to allege "the FECA required the disclosure [from AAN] CREW seeks"); JA14–JA16. The D.C. Circuit subsequently confirmed that conclusion, finding groups like CREW have standing where "they allege violations of FECA provisions that require accurate disclosure of contributor information" from groups required to report because there is "'no reason to doubt' that the disclosure they seek would further their efforts to defend and implement campaign finance reform." *CLC v.*, 952 F.3d at 356; *see also CLC v. FEC*, 31 F.4th 781, 783–84 (D.C. Cir. 2022) (confirming standing).

As this case comes to the Court on reconsideration of AAN's motion to dismiss, CREW's pleadings are sufficient to establish standing here. *See Sierra Club v. EPA*, 292 F.3d 895, 898–99 (D.C. Cir. 2002). Nevertheless, the dismissal occurred after the close of discovery but before CREW had an "opportunity to

make a record of [its] standing in the district court" through dispositive motions. *Swanson Grp. Mfg., LLC v. Jewell*, 790 F.3d 235, 241 (D.C. Cir. 2015). Once a case is "[b]eyond the pleading stage," petitioners must "submit additional evidence to the court of appeals." *Sierra Club*, 292 F.3d at 899. Accordingly, CREW submits evidence that not only confirms, but expands on CREW's allegations to the extent that CREW's standing is not "self-evident." *Id.* at 900, *Clean Wisc. v. EPA*, 964 F.3d 1145, 1159 (D.C. Cir. 2020) ("[L]itigants risk forfeiture" if they do not support standing through evidence in their "opening brief"); *Am. For Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013) ("A petitioner's burden of production in the court of appeals is accordingly the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing 'by affidavit or other evidence'" to "show a 'substantial probability'" of standing).

[redacted]

[9] CREW includes cited material in the Sealed Addendum to Brief for Plaintiff-Appellant ("Standing Add."), submitted concurrently under seal. CREW submits that the Court may review these materials, but, in an abundance of caution, CREW also files a motion to supplement the record to include them here. *Hearth, Patio, & Barbecue Ass'n v. EPA*, 11 F.4th 791, 802–03 (D.C. Cir. 2021) (rules concerning submission of jurisdictional evidence before appellate court are "hardly free from ambiguity").

MATERIAL UNDER SEAL DELETED

[redacted]

[10] AAN has continued to devote significant sums to electioneering, although AAN's 2010 actions alone are sufficient to entitle CREW to information from AAN from 2010 and continuing through to today. [redacted]

Given [redacted] CREW will undoubtedly use the information AAN must eventually disclose as a political committee. As CREW pled, and now supported in evidence, CREW published information on AAN when it managed to discover even a small subset of AAN's donors, *see, e.g.*, *id.* Ex. D at ADD231-ADD232, ADD236-ADD38, ADD242-ADD244. It similarly reported on another de facto political committee that was finally required to disclose its donors years after the fact, revealing problematic contributions. Matt Corley, Hensel Phelps donations to pro-Buck dark money group finally revealed, *CREW* (Nov. 19, 2019), https://perma.cc/J99A-ZU2X.

AAN's activities demonstrate not only that CREW is entitled to the information the FECA requires it to report as a political committee, but that such information would be immensely useful to CREW, and informative to the American public.

[redacted] AAN's publicly reported post-2010 activity demonstrates it could not legally cease reporting after 2010 because it could not legally terminate its political committee status. AAN's true electioneering is also likely even more extensive than AAN reported, [redacted]

CONCLUSION

The court below erred in dismissing CREW's case here. It was correct in the first instance where it concluded that the 2016 Statement never mentions prosecutorial discretion and that dismissing this case as unreviewable cannot be "reconciled" with earlier precedents, would "gut" the FECA, and is inconsistent with the rule that agency action, not discussion, determines reviewability. Rather, CREW may pursue its claim against AAN and bring an end to the group's decade-long violation of federal law to pour millions of dollars into federal elections without any disclosure as to its source.

Dated: March 29, 2023

Respectfully submitted,

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Dated: March 29, 2023

/s/*Stuart C. McPhail*
Stuart C. McPhail
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Stuart C. McPhail
Stuart C. McPhail

Statutory and Regulatory Addendum

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52 U.S.C. § 30101. DEFINITIONS

(4) The term "political committee" means-

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 30118(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

52 U.S.C. § 30109(A). ENFORCEMENT

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clauses [1] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall

attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(C)(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may-

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of-

(I) subsections [2] (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2023.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) Repealed. Pub. L. 98–620, title IV, §402(1)(A), Nov. 8, 1984, 98 Stat. 3357 .

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

11 C.F.R. § 100.5(A) POLITICAL COMMITTEE

a. Except as provided in 11 CFR 100.5 (b), (c) and (d), any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year is a political committee.

11 C.F.R. § 111.10 INVESTIGATIONS

a. An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred or is about to occur.

b. In its investigation, the Commission may utilize the provisions of 11 CFR 111.11 through 111.15. The investigation may include, but is not limited to, field investigations, audits, and other methods of information-gathering.