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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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GLOSSARY

AAN	American Action Network
CHGO	Commission on Hope, Growth and Opportunity
CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
ECU	End Citizens United
FEC	Federal Election Commission (or "Commission")
FECA	Federal Election Campaign Act
JA	Joint Appendix
MUR	Matter Under Review

SUMMARY OF THE ARGUMENT

Over the past thirteen years, AAN has spent more than $150 million to influence federal elections while depriving Americans of knowledge about "[t]he sources of [their] candidate's financial support," *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), and about "who is speaking about a candidate" through funding AAN, *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). AAN's patronage, which only grows, has placed benefitted officials "in the pocket" of the "moneyed interests" that they know fund AAN while evading public accountability. *Id.* at 370.

CREW has sought the disclosures required of AAN so that CREW may carry out its work to promote ethics and combat corruption, twice by seeking relief from the FEC and, when those efforts were exhausted because of partisan deadlock, bringing this action directly against AAN. AAN insists, however, that because a partisan aligned non-majority of FEC Commissioners mentioned "prosecutorial discretion" in a post-hoc rationalization for a superseded 2014 deadlocked vote on the merits of CREW's complaint, CREW may not vindicate its rights under the FECA. But AAN is wrong.

This action arose when the FEC failed to conform with a district court's judgment that the Commission's 2016 dismissal of CREW's administrative complaint was contrary to law: the prerequisite for a private lawsuit under the

FECA. The statement of reasons for that dismissal in 2016—another post-hoc rationalization from the agency's non-majority—"nowhere mentioned" AAN's magic words. JA110. The statement's incorporation as "Background" of the earlier 2014 statement explaining the earlier dismissal does not change that fact. JA344. The earlier 2014 statement also never invoked factors beyond a court's comprehension to review and, in any event, it was rendered a dead letter by the Commission's reconsideration of CREW's complaint and decision to take new action on it.

Moreover, the absurdity of this search for magic words underscores the conflict between the recent divided authority on which AAN relies and the long-standing precedent from this Circuit and the U.S. Supreme Court, which recognizes that groups like CREW may vindicate their own rights when the FEC proves "unable" or "unwilling" to do so. This Court must follow that earlier binding authority, even if it means leaving AAN's authority to the side, to return this action to the district court so that CREW may finally obtain information that AAN has unlawfully withheld and use it to communicate what AAN has censored for more than a decade.

Finally, there is no serious dispute about the court's jurisdiction as even AAN concedes CREW will analyze and communicate AAN's disclosures to

others. CREW's supplementary submissions, which CREW could not present below, confirm beyond doubt that AAN's information is precisely the type the FECA requires to be disclosed.

ARGUMENT

I. The 2016 Statement Did Not Preclude Review of the 2016 Dismissal

CREW obtained the right to seek relief against AAN when a district court reviewed the non-majority's 2016 statement of reasons for the FEC's 2016 dismissal of CREW's complaint, judged the dismissal was "contrary to law," and the FEC thereafter failed to exercise its right of "first refusal" by conforming with that judgment within thirty days. *CREW v. FEC*, 55 F.4th 918, 929 (D.C. Cir. 2022) (en banc) ("*New Models II*") (Millett, J., dissenting); *see* JA132–61; *see also* JA343–61 (the "2016 Statement"). Thereafter, in CREW's subsequent suit against AAN, the court reversed course, finding that intervening authority in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models I*") precluded that earlier judgment because the 2016 Statement incorporated a "wink" at prosecutorial discretion from an earlier 2014 statement explaining an earlier 2014 dismissal, depriving CREW of its right to seek relief against AAN. JA122. The court's first decision, which it still "stands by," JA107, was correct, however, and AAN fails to demonstrate otherwise.

First, the 2016 Statement, authored by the partisan-aligned non-majority bloc of three Commissioners who voted that CREW's complaint lacked merit and thus deadlocked the agency, did not include a "passing reference to prosecutorial discretion" that might insulate the FEC's dismissal from judicial review under *New Models I*, *see* 993 F.3d at 886; rather, it "nowhere mentioned prosecutorial discretion." JA42. Indeed, notwithstanding the dismissal below, the court reaffirmed that it still reads the 2016 Statement to "nowhere" mention it. JA110. That reading is confirmed by the contemporary statement of the other Commissioners who provided the majority vote to close: they stated dismissal resulted from their colleagues "ignor[ing] the court's ruling and the plain language of the ads that objectively criticized candidates" when assessing AAN's political committee status. *See* JA363. They did not, however, discuss any discretionary justification, because their colleagues offered none to justify dismissal. *See generally* JA362–67.

To avoid this fact, AAN urges that the 2016 Statement's reference in "Background" to an earlier statement from 2014 explaining a different dismissal, *see* JA344 (citing JA178 (the "2014 Statement")), "reaffirmed [the non-majority's] exercise of prosecutorial discretion" to explain the 2016 vote, AAN Br. 33. But not so. In the 2016 Statement, the non-majority nowhere stated they "reaffirm"

prosecutorial discretion, *cf. id.*, or attempt to invoke it with respect to the 2016 vote. Rather, the non-majority simply recognized the earlier 2014 Statement existed, and that, except for their analysis on the spending threshold, the 2014 Statement was ruled to be contrary to law. *See* JA344.[1] The 2016 Statement, moreover, lays out the analysis from the 2014 Statement, the analysis that is "incorporate[d]," *id.*, but omits any reference to prosecutorial discretion or claim that the 2014 dismissal was based on any factor other than law. JA345–47 & n.13; *see also* FEC Br. 5, *CREW v. AAN*, No. 14-cv-1419-CRC (D.D.C. Dec. 12, 2016) (stating the 2016 Statement "summarize[d] the previous dismissal of plaintiff's administrative complaint and the Court's opinion (Statement 1-5)" and then "reexamined AAN's spending," but omitting any claim the new statement reaffirmed prosecutorial discretion). The omission not only reveals the reference to "prosecutorial discretion" was not, as AAN now posits, an independent explanation in the 2014 Statement, but reflects the basic fact that one cannot

[1] The court's decisions and Commissioners' statements predate the new bar on review from *New Models I* and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO I*"), *see* JA132; *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) ("*CREW I*"), so neither the district court nor the Commissioners believed the reference was beyond the court's reach. *Cf.* AAN Br. 33 (asserting court could not review "prosecutorial discretion" under *New Models I*). Rather, the district court understood the non-majority's reference to "prosecutorial discretion" was "part-and-parcel of the Commissioners' reviewable legal interpretations," which the court ruled were contrary to law. JA56–57.

simply "incorporate" prosecutorial discretion for one act to support another, different act.

This point is all the more relevant here because the 2016 dismissal occurred in a new context. In 2014, the Commissioners believed the First Amendment excused AAN from disclosure because, for example, AAN attacked candidates by falsely alleging they gave Viagra to rapists. *See* JA210 n.137 (citing "constitutional doubts" as basis for reference to "prosecutorial discretion"). *CREW I* disabused them of that error. *See* 209 F. Supp. 3d at 91. Accordingly, one cannot assume, as AAN does, that the non-majority had some new unarticulated basis for prosecutorial discretion for their new vote simply because they incorporated "Background." Perhaps that is why AAN speaks of "reaffirm[ation]," *see* AAN Br. 31–34, despite the notable absence of such language from the 2016 Statement's discussion of the 2014 Statement. *Cf. DHS v. Regents of U. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (review is limited "to the grounds the agency invoked when it took the action"). The 2016 Statement "does not mention prosecutorial discretion at all," JA57, and AAN cannot invent such a mention now.

Second, even if the 2016 Statement could be read to "reaffirm" the 2014 Statement's "wink" to prosecutorial discretion as an explanation for the 2016 dismissal, that wink still would not preclude review because the non-majority only

"reference[d] their merits analysis as a ground for exercising prosecutorial discretion." *New Models II*, 55 F.4th at 920 (Rao, J., concurring); *CREW v. FEC*, 316 F. Supp. 3d 349, 421–22 (D.D.C. 2018) *aff'd* 971 F.3d 340 (D.C. Cir. 2020); *see* JA118 (non-majority's reference to prosecutorial discretion was "rooted entirely in [their] legal misgivings"). Indeed, the Commissioners who provided the majority vote to close in 2014 state at the time that they understood their colleagues' justification for dismissal was due to an "impasse" on applying "the analytic approach enunciated" in the agency's "written policy" on political committee qualification, JA178–79, JA182, not on analysis of prudential factors.

AAN argues that legal analysis is immune from review if it is labeled "prosecutorial discretion," but that misreads *New Models I*. When *New Models I* barred review of dismissals that rely "in part" on discretion, *cf.* AAN Br. 25, *New Models I* was addressing a case where dismissal "rested on two *distinct* grounds": the Commissioners' "interpretation of FECA and [their] exercise of … prosecutorial discretion." *New Models I*, 993 F.3d at 884 (emphasis added). The claim of discretion in *New Models I* rested on "concerns about resource allocation" and "evidentiary and statute of limitations hurdles" for a "defunct" defendant, *id.* at 885: the type of "prudential and discretionary considerations" courts are incapable of reviewing, *id.* at 885–86 ("FECA provides 'no "law" to apply' in reviewing

[Commissioners'] weighing of practical enforcement considerations."). Rather than the "exact same language that precluded review," AAN Br. 26, the 2014 Statement contains no comparable discussion. Nor, indeed, could it: far from being "defunct," *New Models I*, 993 F.3d at 885, AAN is spending millions each election cycle to influence elections.

To try to cure this defect in its argument, AAN speculates about possible factors like "resources" that the 2014 Statement's reference, and the 2016 Statement's background incorporation, might "reflect[]." AAN Br. 28. But courts are "limited to the grounds that the agency invoked when it took the action." *Regents*, 140 S. Ct. at 1907, and AAN cannot now suggest new grounds absent from the explanation the agency provided.[2]

Third, regardless of the 2016 Statement's content, it cannot obstruct judicial review because it is a "post-hoc rationalization[]," as CREW asserted in its opening brief. CREW Br. 44. The 2016 Statement was not "issued 'at the time

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[2] AAN claims, despite not doing so below, that the 2016 Statement's reference to the Commissioners' "expertise and experience" and balance of "the public's need and right to understand" are such prudential factors, AAN Br. 28–29, but notably the Statement does not connect these to prosecutorial discretion or *Heckler v. Chaney*, 470 U.S. 821 (1985). Rather, the appeal to "expertise" was an appeal for deferential review under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). *See, e.g.*, FEC Br. 11, *CREW v. FEC*, 14-cv-1419-CRC (D.D.C. Dec. 12, 2016) (citing *Chevron*, but not *Chaney*, to defend 2016 Statement).

when a deadlock vote result[ed] in … dismissal.'" *ECU v. FEC*, 69 F.4th 916, 920 (D.C. Cir. 2023); *see* JA342 (vote on October 18, 2016), JA361 (statement issued October 19, 2016). It is a "'foundational principle of administrative law,'" however, "that judicial review of agency action is limited to 'the grounds that the agency invoked when it took its action.'" *ECU*, 69 F.4th at 921–22 (quoting *Regents*, 140 S. Ct. at 1907). There was no explanation at the time of the 2016 vote—nothing the 2016 Statement could "amplif[y]," *id.* at 922—and thus no contemporary explanation that could preclude judicial review, *see id.* at 924.

The issuance of the 2016 Statement after the vote to close the case deprived the agency—that is, the full Commission—of any opportunity to consider the grounds offered to explain the vote and engage in "self-correction." *Id.* at 923; *see also Doe, 1 v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) (the vote to "clos[e] the file … terminat[es] [the FEC's] proceedings"). Indeed, the Commissioners who provided the majority vote to close were unaware of any justification grounded in prosecutorial discretion. *See* JA178–84, JA362–67. Thus, it is irrelevant under *ECU* that the statements were issued before "the commencement of litigation" over the respective dismissals, *cf.* AAN Br. 35, because the opportunity for self-correction terminates at the moment of the vote to close, not when the FEC is sued. 69 F.4th at 920. CREW could sue the FEC at the moment of dismissal, moreover,

and *ECU* does not create a race-to-the-courthouse to beat an untimely statement. Rather, the decision, in line with black-letter administrative law, closes the administrative record "at the time" of action: here, the vote to close.

"[I]mpermissible *post hoc* rationalization[s]" like the 2016 Statement may not render dismissals unreviewable or satisfy the Commissioners' obligation to explain their dismissal. *Id.* at 922 (quoting *Regents*, 140 S. Ct. at 1909).[3] Accordingly, as the "after-the-fact" 2016 Statement could not preclude review regardless of what it incorporated, it could not preclude the court's judgment that the 2016 dismissal was contrary to law, and thus cannot undermine CREW's exhaustion of its remedies that gave rise to this suit.[4]

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[3] *ECU* departed from prior practice—included in *New Models I*—of reviewing Commissioners' statements issued after the vote to close the file. *See ECU*, 69 F.4th at 923 (recognizing prior practice, but noting no court reviewed a post-hoc statement "over the complainant's challenge"). *ECU* thus recognizes the conflict between *New Models I*—and the dismissal below—and black-letter administrative law, CREW Br. 40–50, and demonstrates statements like the 2014 Statement and the 2016 Statement may not preclude review. In any event, as AAN "rais[ed] [the] argument" in its opposition, *see* AAN Br. 35, CREW "may reply." *United States v. Van Smith*, 530 F.3d 967, 970 n.2 (D.C. Cir. 2008) (citations omitted).

[4] Given the posture of *ECU*, the D.C. Circuit remanded the case to the agency for "further action," 69 F.4th at 924: the next step in the FECA's exhaustion process, *see* 52 U.S.C. § 30109(a)(8)(C). CREW's suit has already progressed past that step, the FEC has already failed to conform, and CREW exhausted all administrative remedies, giving rise to its ability to bring this suit.

II. The 2014 Statement is a "Dead Letter"

Recognizing the 2016 Statement omits the language AAN needs, AAN's argument principally focuses on the 2014 Statement. But the 2014 Statement, which, as explained above, cannot block review, is also a "dead letter" that may not be revived by AAN. *Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161, 1165 (D.C. Cir. 1984).

Contrary to AAN's telling, *CREW I* did not remand for only "additional … explanation" to supplement the 2014 Statement. *Compare* AAN Br. 32 *with CREW I*, 209 F. Supp. 3d at 95 (deeming 2014 dismissal "contrary to law" and remanding to "conform"; in citation parenthetical, quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006), for authority to "remand to the agency for *additional investigation* or explanation"); *see also CREW v. FEC*, No. 14-cv-1419-CRC, 2017 WL 11810872, at *1, *3 (D.D.C. Apr. 6, 2017) (stating *CREW I* "direct[ed] the FEC to reevaluate its decisions not to investigate" AAN; noting FEC "reopened" matter on remand, "reconsidered the record in light of the Court's Order," "developed a new framework" and "applied that new framework to AAN's ads"). Following *CREW I*, the FEC took "new agency action" on remand. *Fisher v. Pension Benefit Guar. Corp.*, 994 F.3d 665, 669–70 (D.C. Cir. 2021); *see also Regents*, 140 S. Ct. at 1907–08 (agency may offer "a fuller explanation of the agency's reasoning at the

time of the agency's action" or, "[a]lternatively, the agency can 'deal with the problem afresh' by taking *new* agency action"). Specifically, the Commission "reconsidered" the case "[c]onsistent with the court's instructions and guidance," JA344, "examin[ing] in detail each of AAN's electioneering communications," *id.*, and took a new reason-to-believe vote on CREW's complaint, resulting in a new deadlock and a new dismissal, JA342; *see also* FEC Br. 4, *CREW v. FEC*, 14-cv-1419-CRC (D.D.C. Dec. 12, 2016) ("Following the Court's decision" in *CREW I*, "the Commission considered the AAN matter anew"); AAN Opp. 1, 9, 14-cv-1419-CRC (D.D.C. Dec. 12, 2016) (asserting, after *CREW I*, FEC "reopened the matter," "reconsidered [it] in full by reviewing the record anew," and "again dismissed and, for different articulated reasons concluded again that AAN was not a political committee," but mentioning no exercise of discretion). It is thus irrelevant whether the Commission "alter[ed] or withdr[e]w its previously expressed position," AAN Br. 32 (though the Commission has, in fact, now done so, *see* JA374–87)[5], because the FEC instead took new action, and it was obligated to provide a new contemporaneous explanation for that action.

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[5] AAN claims to "describe CREW's argument" that a statement by a non-majority of Commissioners is controlling simply because they voted against reason-to-believe "is to refute it," AAN Br. 35, when what AAN in fact describes is the holding of *New Models I*.

That the FEC acted only "but for" the court's review of the 2014 dismissal, AAN Br. 24, does not alter the fact it did act, and thus rendered the prior dismissal and its explanation a dead letter. In *Regan*, "but for" the district court's initial judgment, the agency would not have revised its rule and explanation, but that did not permit the parties to "revive" the earlier rule, 727 F.2d at 1162–63, 65–66, and AAN may not revive the 2014 Statement here.[6]

In any event, the 2014 Statement, like the 2016 Statement, is a "post-hoc rationalization" that is without legal effect. *ECU*, 69 F.4th at 922. The 2014 Statement issued more than a month after the dismissal, did not amplify a timely explanation, deprived the agency of an opportunity for self-correction, and could not have precluded judicial review in *CREW I*. *See* JA185, JA214. If the 2014 Statement is not dead now, it is only because it was never alive to begin with.

III. The Court Must Disregard *New Models* Because It May Not Disregard Earlier Precedent and Supreme Court Authority

Judges of this Circuit have already recognized that *CHGO* and *New Models I* irreconcilably conflict with earlier case law from this Circuit and the Supreme

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[6] AAN's "defendant" exception, AAN Br. 34, is both unsupported by authority and invites judicial chaos: every defendant in any agency proceeding could reopen every prior judicial decision in the hope that "but for" some prior legal error, the defendant would escape accountability. Further, AAN is only a defendant here: it was an intervenor in the cases it now seeks to challenge, *see* JA132; *CREW I*, 209 F. Supp. 3d at 77, the same as the party in *Regan*, *see* 727 F.2d at 1165.

Court. *New Models I*, 993 F.3d at 900–01 (Millet, J., dissenting); *CLC v. FEC*, 952 F.3d 352, 358–59 (D.C. Cir. 2020) (Edwards, J., concurring); *CREW v. FEC*, 923 F.3d 1141, 1145 (D.C. Cir. 2019) (en banc) (Pillard, J., dissenting). AAN, in apparent agreement, does not attempt to reconcile them. It simply notes, "*New Models* … adhered to *CHGO*, which adhered to *Chaney*." AAN Br. 39. But the Supreme Court held, and every precedent prior to *CHGO I* recognized, *Chaney*'s "limit on review … explicitly" does not apply to FECA review. *FEC v. Akins*, 524 U.S. 11, 26 (1998). AAN's syllogism simply restates the conflict.

Were there any doubt, the Supreme Court has reaffirmed that *Chaney*'s limit on the review of "exercise[s] of enforcement discretion" do not apply to FECA review. *United States v. Texas*, 143 S. Ct. 1964, 1971, 1973 (2023) (citing *Akins*, 524 U.S. at 20 as example of permissible challenge to enforcement discretion). That follows from the fact that FECA review does not permit a Court to "require[] additional arrests or prosecutions." *Id.* Rather, the FECA "never requires the agency to bring an enforcement action." *New Models II*, 55 F.4th at 923 (Millet, J., dissenting). "[A]ll that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *Id.* at 929.[7]

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[7] In contrast to additional arrests, authorizing suit is "redress[] [available from] a federal court." *Texas*, 143 S. Ct. at 1973; 52 U.S.C. 30109(a)(8).

Indeed, AAN's attempts to defend *New Models I* simply prove its conflict with precedent. AAN claims that, under *New Models I*, the non-majority's silence on prudential factors cannot impact review because "what matters in every case is not *the reason* the FEC gives" to dismiss. AAN Br. 24–25 (citing *ICC v. Bhd. Of Locomotive Eng'rs*, 482 U.S. 270, 282–83 (1987)). In other words, it is "formal action, rather than its discussion, that is dispositive." *ICC*, 482 U.S. at 281. Yet, AAN claims *New Models I* precludes review because the "reasons" in the 2016 "Statement of *Reasons*," JA343 (emphasis added), incorporated the "discussion" of prosecutorial discretion in the 2014 "Statement of Reasons." AAN Br. 31; *see also* JA343 ("This Statement of Reasons sets forth our reasons for voting."). AAN apparently agrees then, at the very least, that *New Models I*'s conditioning review on "the *reasons* the [non-majority] gives" conflicts with *ICC* (and thus also *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *see* CREW Br. 40), which alone means *New Models I*, "being in violation of that fixed law, cannot prevail," *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).[8]

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[8] *New Models I* did not attempt to reconcile itself with *ICC* or *Abbott Labs*, *see New Models I*, 993 F.3d at 893 (addressing only "*Akins, DCC, Chamber of Commerce*, and *Orloski*"), two of many cases from CREW's brief. Nor does AAN cite anything for its proposition that a panel is free to "violat[e] [] fixed law" if it denies it's doing so. *Cf. Sierra Club*, 648 F.3d at 854.

AAN attempts to evade this conflict by conflating the Commission's majority vote to "invoke[] its discretion," with a non-majority's explanation for its vote on the merits, AAN Br. 27. By law, the FEC may only exercise its discretion through a majority vote of the Commission. 52 U.S.C. § 30106(c) ("All decisions … shall be made by a majority vote"); *FEC, Statement of Policy*, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (exercising discretion requires four votes); *see also, e.g.*, Certification, MUR7591R (Mar. 24, 2022), https://perma.cc/742P-4CPM (6-0 vote to "[d]ismiss the allegations pursuant to *Heckler*"); *cf. ECU*, 69 F.4th at 921 (Commission did not invoke discretion because it "failed to get the requisite four votes" to do so). In contrast, the "invo[cation]" here is only a reference in the non-majority's statement to explain their vote on the merits. AAN Br. 27 (stating "[h]ere, the FEC invoked its discretion like this:" and then quoting discussion in the 2014 Statement). That is insufficient to invoke the Commission's powers.

Attempting to minimize *New Models I*'s revolution, AAN ignores the impacts of *New Models I*'s departure from precedent. AAN's proof of the judicious use of *New Models I*'s powers isn't even from the non-majority, *compare* AAN Br. 30–31 *with* Factual And Legal Analysis, MUR Nos. 7309, 7399 (Crowdpac, Inc.) (June 7, 2019), https://perma.cc/7AS7-PXZ5 (General Counsel's analysis unanimously approved by Commission). Rather, when the non-majority seeks to

insulate erroneous legal conclusions from challenge, they now cite prosecutorial discretion every time. *See, e.g.*, Statement of Reasons 2, MUR7464 (LZP, LLC) (July 7, 2023), https://perma.cc/7FDV-68UY; Statement of Reasons 5 n.3, MUR8038 (Angel Staffing, Inc.) (July 3, 2023), https://perma.cc/9393-ZUHF; Statement of Reasons 1, MUR7912 (Senate Leadership Fund) (Mar. 1, 2023), https://perma.cc/E3EE-27WR. That is why *New Models I* has proven fatal to every challenge to the FEC's dismissals since it issued, *see CLC v. FEC*, No. 22-cv-1976(JEB), 2022 WL 17496211, at *7 (D.D.C. Dec. 8, 2022); *ECU v. FEC*, No. 21-cv-2128(RJL), 2022 WL 4289654, at *5 (D.D.C. Sept. 16, 2022); at least until this Court recently concluded that post-hoc statements like the 2014 and 2016 Statements cannot preclude review, *ECU*, 69 F.4th at 923 (overruling *ECU v. FEC*, No. 21-cv-1665(TKJ), 2022 WL 1136062 (D.D.C. Apr. 18, 2022)).

"[P]anels of this court [] are obligated to follow controlling circuit precedent until either [this Court], sitting en banc, or the Supreme Court, overrule it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). That is why this Court must follow *Akins*, 524 U.S. 11, *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), *DCCC v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987), *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), *ICC*, 482 U.S. 270, *Abbott Laboratories*, 387 U.S. 136, as well as *Common Cause v. FEC*, 842 F.2d 435 (D.C. Cir. 1988), *Motor Vehicles*

Manufactures Ass'n of the U.S. Inc. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983), *International Union, United Mine Workers v. Department of Labor*, 358 F.3d 40 (D.C. Cir. 2004), and the myriad other earlier authorities cited in CREW's opening brief, and now *Texas*, 143 S. Ct. 1964, despite AAN's and *New Models I's* treatment of those authorities.

IV. AAN's Attempt to Silence Its Perceived "Ideological Opponent" Injures CREW

AAN wields the FEC non-majority's statement to silence its perceived "ideological opponent," AAN Br. 1, and prevent CREW from discussing AAN's "donors" with "the public," *id.* at 50–51. But AAN's assertion that CREW has no standing to contest that censorship and to obtain lawful disclosures for CREW's work is baseless.

Withholding FECA disclosures injures CREW because there is "'no reason to doubt' that the disclosures [it] seek[s] would further [its] efforts to defend and implement campaign finance reform." *CLC*, 952 F.3d at 356. The *CLC* plaintiffs' representations, sufficient to confer standing, that they "participated in 'public education, litigation, regulatory practice, and legislative policy,'" or "'conduct[ed] public education efforts, participate[ed] in litigation' and undert[ook] 'advocacy efforts,'" *id.*, are indistinguishable from CREW's allegations here, *see* JA14 ¶¶10–11 ("CREW is committed to protecting our political system against corruption and

reducing the influence of money in politics" through "a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions, and the outside influence that have been brought to bear" including "examining and exposing the special interest that have influenced our elections and elected officials and using that information to educate voters"); *see also* JA15 ¶¶12–15 ("CREW monitors the activities of … those groups financially supporting candidates for office or advocating for or against their election" and "regularly reviews campaign finance reports" and "us[es] the information in those reports" to "publiciz[e] the role of these individuals and entities in the electoral process" like exposing "'pay-to–play schemes'"); *see also CREW*, 316 F. Supp. 3d at 383 (CREW has standing to pursue failure to disclose FECA information) *aff'd* 971 F.3d 340.

More than "general description[s]," AAN Br. 42, CREW's work, for example, to expose "pay-to-play schemes" is obviously "hindered when" AAN, a group receiving and spending millions each election cycle, "does not file disclosure reports" revealing who is paying millions of dollars to play. *Id.* (quoting JA15 ¶15); *see also Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (the "nature of the information allegedly withheld is critical to the standing analysis"). In any event, at the pleading stage (which AAN concedes is the

procedural juncture for this appeal, AAN Br. 48), "'general factual allegations of injury'" suffice as courts "'presume[e] that general allegations embrace the specific facts that are necessary to support the claim,'" *Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2000) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)).

The impact on CREW's work is a "downstream consequence" of AAN's nondisclosure. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (recognizing failures to disclose under FECA always have downstream consequences); *see also* JA46 ("There is no reason to doubt CREW's claim that the information sought would help it in its activities").[9] Moreover, even apart from the downstream effect, the "informational injury" CREW alleges is the

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[9] If more were needed—and more is not—the court's dockets and the FEC's website confirm CREW's allegations. *See, e.g.*, *New Models I*, 993 F.3d at 882–83 (discussing CREW's complaint using information in disclosures); *CREW*, 971 F.3d at 343 (same); *CHGO I*, 892 F.3d at 447–48 (Pillard, J. dissenting) (same), *CREW I*, 209 F. Supp. 3d at 82–83 (same); FEC, Closed Matters Under Review, searching "Citizens for Responsibility and Ethics in Washington" (last visited July 28, 2023), https://perma.cc/ZZ5E-TNY3 (showing 47 CREW complaints); *see also* Fed. R. Evid. 201 ("Judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal."); *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (permitting judicial notice of official government websites). CREW's website exhibits additional uses. *See* CREW, www.citizensforethics.org; *Mundo Verde Pub. Charter Sch. v. Sokolov*, 315 F. Supp. 3d 374, 381 n.3 (D.D.C. 2018) ("The court may take judicial notice of representations made on Plaintiff's website."); *see also* Standing Add. Ex. D, ADD231–244.

"'quintessential' injury in fact" and is established when plaintiffs "'allege that they failed to recie[ve] … required information' under a disclosure statute." *Maloney v. Carnahan*, 45 F.4th 215, 218 (D.C. Cir. 2022) (Mem.) (Millet, J., and Tatel, J. concurring) (quoting *TransUnion*, 141 S. Ct. at 2214); *see also id.* ("[T]he requester's circumstances—why he wants the information, what he plans to do with it, what harms he suffered from the failure to disclose—are irrelevant to his standing" (quoting *Zivotofsky ex rel. Ari Z v. Sect'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006)); *see also Spokeo Inc. v. Robins*, 578 U.S. 330, 342 (2016) (plaintiffs "need not allege any additional harm beyond the one Congress has identified"). The "failure to obtain relevant information" required to be disclosed under the FECA "is injury of a kind that FECA seeks to address." *Akins*, 524 U.S. at 20.

Rather than specificity, AAN's real critique is about the nature of the consequences to CREW. Yet its arguments run headlong into precedent.

First, the frustration of a "watchdog group's" ability to gather "factual information" is a cognizable injury, even where that information is sought to fulfill a "generalized 'interest in enforcement of the law.'" *CLC v. FEC*, 31 F.4th 781, 786, 789 (D.C. Cir. 2022). The FECA contemplates disclosure to, in part, permit those like CREW to "gather[] the data necessary to detect violations" of the FECA.

Buckley, 424 U.S. at 68; *see also Spokeo*, 578 U.S. at 342 (plaintiffs need only allege harm of the type "Congress has identified"). The loss of that information, though "widely shared," is still particular to CREW. *Akins*, 524 U.S. at 25. CREW isn't merely seeking "monetary penalties," *Common Cause*, 108 F.3d at 418, or "legal conclusion[s]," *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). Rather, CREW's inability to gather facts to monitor for violations is a cognizable "downstream consequence."

Second, standing is not limited to those "deprived of information that will be used 'for [their own] personal voting or political participation.'" *See CLC*, 952 F.3d at 356. AAN's strategic ellipsis covers more than a mere aside. *Compare* AAN Br. 43 (quoting *Akins* as limiting standing to those who seek information that "'would help them … to evaluate candidates'") *with Akins*, 524 U.S. at 21 (standing for those denied information "that would help them (*and the others to whom they would communicate it*) to evaluate candidates" (emphasis added)). *Akins* rejected the limit on standing imposed by the D.C. Circuit, which limited standing to plaintiffs who "vote[d] in various federal elections." *Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc). The Supreme Court found standing is not so limited, but rather "widely shared," because, regardless of whether plaintiffs could use the information to exercise their own vote, "others to whom [the

plaintiffs] would communicate" might do so. *Akins*, 524 U.S. at 21, 25. The suppression of the plaintiffs' speech was thus the injury. CREW has suffered just that injury, which does not depend on CREW's ability to vote.

Nor is AAN's undisclosed information too old to be useful. *Cf.* AAN Br. 44. First, CREW's remedy is not simply "AAN's more-than-a-decade-old donor list," AAN Br. 44, but rather "everything [AAN] would have had to disclose had it complied with the law in the first instance" from 2009 to today and until such time as AAN lawfully terminates its political committee status, JA60. Second, beneficiaries of AAN's 2010 spending remain in office, and there is no serious assertion that AAN's success in "flip[ping] the House" had only transitory impacts on policy. AAN Br. 51. Third, even information from a decade ago is highly useful: for example, CREW recently used the disclosures it obtained through litigation of decade-old donor activity to trace the financial activities of Harlan Crow. *See* Harlan Crow's deep dark money connections, CREW, June 15, 2023, https://perma.cc/49PP-W2E5 (reporting Crow donated $50,000 to Americans for Job Security). In any event, "[s]tanding is assessed 'at the time the action commences,'" *Advanced Mgmt. Tech. Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000), so AAN cannot benefit from the years that AAN has delayed disclosure.

Ultimately, AAN recognizes that CREW intends to use its disclosures: something AAN hyperbolically but revealingly characterizes as a "crusade" to pierce AAN's "privacy of association" and place AAN's information "in the public domain" (beyond benefitted officeholders who already know AAN's donors). AAN Br. 1, 51. For these acknowledged efforts to expose corruption, AAN disparages CREW as its "ideological opponent." AAN Br. 50. AAN admits that it is withholding information from CREW and trying to thwart CREW's right to petition the courts so that it can benefit from the "downstream consequences": namely, silencing its perceived "opponent." AAN Br. 1, 41. Indeed, in contrast to AAN's speculated First Amendment injuries, AAN Br. 46, AAN wields the non-majority's statement to "reduce[] the quantity of [CREW's] expression" in definite violation of CREW's rights. *Citizens United*, 558 U.S. at 339; AAN Br. 1 (asserting silencing CREW has protected its "confidentiality of donors"); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569–70 (2011) ("restrict[ing] … access" to "facts," which are, "after all, … the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," to suppress speech violates First Amendment). "In the interim," CREW's "opportunities for speech are irretrievably lost." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) (recognizing plaintiff's standing). CREW

has standing to obtain this information and use it for the speech Congress contemplated, but that AAN and its Commission allies have so far censored, thereby subjecting AAN to the "sunlight [that is] the best of disinfectants," *Buckley*, 424 U.S. at 67.

V. CREW's Submissions Confirm CREW's Standing, and the Court May Consider Them

AAN effectively concedes this litigation is not yet "beyond the pleadings," and so CREW's allegations suffice to establish jurisdiction. *Sierra Club*, 292 F.3d at 899. Nevertheless, to the extent this Court disagrees, it may consider the materials in CREW's standing addendum and others subject to judicial notice.

AAN protests consideration of discovery materials, including in response to issues it first raised in its opposition brief here,[10] but it does not identify a single "opportunity [for CREW] to make a record of [its] standing in the district court." *Swanson Grp. Mfg., LLC v. Jewell*, 790 F.3d 235, 241 (D.C. Cir. 2015). CREW could not submit these materials in response to AAN's motion for reconsideration, which did not seek reconsideration of the district court's affirmance of CREW's standing. *See* JA107. Nor did any party have an opportunity to seek summary

[10] AAN claim its information is not useful because it is "not … a political committee" based on extra-record materials, AAN Br. 8 n.1, permits CREW to deploy evidence gathered in discovery. *See Van Smith*, 530 F.3d at 970 n.2.

judgment, whereby CREW could have converted its allegations into proven facts. Precedent simply does not support AAN's attempt to sandbag CREW and burden this Court with previously unraised concerns, *see* JA45 (CREW's standing challenged only on CREW's inability to vote), while depriving CREW of any opportunity to supplement its pleadings.

CREW's allegations are sufficient to establish standing at this stage, but the supplementary materials confirm (and expand on) what CREW alleged. More than establishing AAN's political committee status, the "nature of the information [] withheld" by AAN, *Common Cause*, 108 F.3d at 417, establishes beyond doubt AAN's disclosure would be "help[ful]," *CLC*, 952 F.3d at 356, and withholding them has "downstream consequences" on CREW, *TransUnion*, 141 S. Ct. at 2214. Those materials show that

[REDACTED]. AAN's actions show it, and its donors, are the quintessential "moneyed interests" of which the public has a right to know. *Citizens United*, 558 U.S. at 370.[11]

Revealing AAN's activities would do much to "further [CREW's] efforts to defend and implement campaign finance reform," *CLC*, 952 F.3d at 356, and AAN's activities demonstrate its information is precisely the type voters need to "evaluate candidates for public office … and evaluate the role that [AAN's] financial assistance might play." *CLC*, 31 F.4th at 784.

The Court may consider the materials if it deems them necessary to resolve jurisdiction, and AAN has demonstrated no cause to strike them.

CONCLUSION

CREW has a right to obtain information AAN has unlawfully withheld after the FEC has shown it is unwilling to enforce the law. A few magic words sprinkled in a post-hoc rationalization do not and cannot deprive CREW of that right. It is

[11] Though irrelevant, the submissions are not the "confidential internal materials" of an organization "cleared of wrongdoing," *AFL-CIO v. FEC*, 333 F.3d 168, 176–78 (D.C. Cir. 2003), or those of organizations engaging in no electioneering, *cf. Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). They are more circumspect than materials typically reviewed in suits assessing political committee status *on the public docket*, *see, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 235–36 (D.D.C. 2004) (publishing donor communications, financial receipts, brochures, etc.).

long past time to permit CREW to bring this case to final judgment and to speak on matters AAN has worked so many years to keep hidden, in violation of the FECA.

Dated: July 28, 2023

Respectfully submitted,

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Dated: July 28, 2023

/s/ Stuart McPhail
Counsel for Appellant

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I hereby certify that on July 28, 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
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