
ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

**United States Court of Appeals
for the District of Columbia Circuit**

No. 22-5277

END CITIZENS UNITED PAC,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee,

NEW REPUBLICAN PAC,

Intervenor-Appellee.

*On Appeal from the United States District Court for the District of Columbia in
No. 1:21-cv-02128-RJL, Honorable Richard J. Leon, U.S. Senior District Judge.*

**BRIEF OF AMICUS CURIAE CITIZENS FOR
RESPONSIBILITY AND ETHICS IN WASHINGTON IN
SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, and D.C. Circuit Rule 26.1, Citizens for Responsibility and Ethics in Washington (“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 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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AMICUS'S INTEREST¹

Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonpartisan, Section 501(c)(3) nonprofit corporation that seeks to combat corrupting influences in government and protect citizens’ right to know the source of campaign contributions. CREW monitors Federal Election Commission (“FEC”) filings to ensure proper and complete disclosure as required by law and utilizes those filings to craft reports for public consumption. Where necessary, CREW seeks administrative and judicial relief for violations of the Federal Election Campaign Act (“FECA”). CREW, moreover, was the litigant in the erroneous decisions applied below.

ARGUMENT

In violation of the Federal Election Campaign Act (“FECA”), a candidate for the U.S. Senate, Rick Scott, was alleged to have taken and failed to timely disclose excessive funds from prohibited sources prior to declaring his run, amassing a war chest of unlawful funds to support his intended candidacy.

Complaint, MUR 7370 (New Republican PAC), Apr. 23, 2018,

¹ All parties to this appeal have consented to the filing of this amicus. CREW affirms that no counsel for a party authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and that no person other than CREW or its counsel contributed money that was intended to fund the preparation or submission of this brief.

https://www.fec.gov/files/legal/murs/7370/7370_01.pdf. As contemplated by Congress in the enforcement of FECA’s provisions, a private complainant, End Citizens United, deprived of timely information, JA105–06, filed a complaint with the FEC for preliminary adjudication. The Commission, comprising an evenly-split slate of partisan-aligned commissioners, deadlocked three-to-three on whether the complaint raised a “reason to believe” a violation had occurred. *Certification*, MURs 7370 & 7496 (New Republican PAC), May 28, 2021, https://www.fec.gov/files/legal/murs/7370/7370_15.pdf. A majority would eventually dismiss the complaint in light of that merits deadlock, with the apparent disagreement over the weight of the evidence proving intractable. *Certification*, MURs 7370 & 7496 (New Republican PAC), June 14, 2021, https://www.fec.gov/files/legal/murs/7370/7370_16.pdf; *compare Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor III* 7–9, MURs 7370 & 7496 (New Republican PAC), July 21, 2021, https://www.fec.gov/files/legal/murs/7370/7370_21.pdf *with Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub*, MURs 7370 & 7496 (New Republican PAC), July 15, 2021,

https://www.fec.gov/files/legal/murs/7370/7370_20.pdf.² In accord with

Congress's plan for exhausting its claim, End Citizens United then sought judicial review in the hopes that a court could resolve the disagreement and permit either the FEC or the private complainant to seek a remedy if the complaint proved meritorious.

But that did not happen. Rather, the three commissioners who blocked proceedings by voting against the merits of the complaint invoked a “superpower” created *sua sponte* by a divided panel of this Court “to kill any FEC enforcement matter,” and indeed any private claim arising under the FECA, “wholly immune from judicial review,” *CREW v. FEC*, 923 F.3d 1141, 1150 (D.C. Cir. 2019) (“*CHGO IP*”) (Pillard, J., dissenting) (quoting *Statement of Vice Chair Ellen L. Weintraub on the D.C. Circuit’s Decision in CREW v. FEC 1*, June 22, 2018, <https://go.usa.gov/xmWC2>)), merely be invoking “prudential considerations,” *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1178–79 (D.C. Cir. 2024), *reh’g en banc granted* No. 22-5277, 2024 WL 4524248 (D.C. Cir. 2024), with no rational connection to their reason-to-believe vote. Based on that invocation, the

² There is no contemporaneous record about the substance of the disagreement, only “post-hoc rationalizations” offered that may be “convenient litigating positions” rather than credible memorialization of the agency’s deliberations. *End Citizens United PAC v. FEC*, 69 F.4th 916, 922–23 (D.C. Cir. 2023).

courthouse doors were closed to the private complainant whose injury would remain unremedied.

That “superpower” deployed by three partisan-aligned commissioners, however, contravenes the FECA’s “delicate balance,” *CREW v. FEC*, 363 F. Supp. 3d 33, 43 (D.D.C. 2018) (quoting FEC, *Legislative History of FECA Amendments of 1976* at 804, H.R. Rep. No. 94-917, 94th Cong. 2d Sess. 4 (1976), <https://perma.cc/G23G-SQ7T> (“*Legislative History*”)), that permits private parties to pursue their meritorious claims if the FEC proves “unable or unwilling” to do so, *Democratic Cong. Campaign Comm. (“DCCC”) v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987). It has been used to hide the sources of millions in dark money used to support the political allies of the invoking commissioners, *see, e.g., CREW v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) (“*New Models I*”); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (“*CHGO I*”), based on contrived rationales that are put beyond the reach of the judiciary.

That was not Congress’s plan. That is not what the FECA requires. That is not what decades of precedent regarding both the FEC and administrative agencies in general have recognized. Rather, that has rendered the commissioners a “law unto [them]sel[ves],” *CREW v. FEC*, 55 F.4th 918, 922 (D.C. Cir. 2022) (“*New*

Models II) (Millet, J., dissenting), which they have used to ignore the courts, reward their friends, and silence their perceived opponents.

Thankfully this Court may now remedy this error and restore the law. It remains to be seen whether End Citizens United will prevail in its challenge against Rick Scott, but End Citizens United has the right to its day in court.

I. The FEC’s Adjudicatory Role Requires Judicial Review

The FECA includes “a feature of many modern legislative programs,” *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990): paired civil enforcement through a government agency 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 subjected both mechanisms to significant safeguards. “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 requiring a majority vote for any enforcement decision, *id.* at 1142 (Griffith, J., concurring) (“FECA thus requires that all actions by the Commission occur on a bipartisan basis.”); *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (FEC “designed ... to ensure that every important action it takes is bipartisan”); 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); *cf. also Legislative History 72* (Statement of Sen. Clark) (expressing concern that, beyond the risk of deadlock, FECA enforcement “cannot be left to a commission that is under the thumb of those who are to be regulated”)³, while placing the agency outside the check of “electoral accountability,” *Collins v. Yellen*, 594 U.S. 220, 252 (2021).

Accordingly, rather than rely solely on the agency, Congress provided private litigants with an avenue to protect the private rights to which the FECA entitles them, *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 filed without first presenting claim to the FEC and obtaining judgment); *In re Fed. Election Campaign Act. Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979) (“This statutory scheme creates the exclusive method for determining the role which private individuals may play in the civil enforcement of the federal election laws.”);

³ See *id.* at 75 (Statement of Sen. Scott) (warning of a “toothless lapdog” when the country needed an “active watchdog” to “restor[e] [] public confidence in the election process”); *id.* at 92 (Statement of Sen. Mondale) (expressing concerns of a “history of weak enforcement of campaign financing laws”).

Legislative History at 804 (“complaints alleging on any theory, that a person is entitled to relief, because of conduct regulated by th[e] Act” would be “channel[ed]” to the Commission for review). The agency could then “winnow out, short of litigation, insubstantial complaints,” *Legislative History* at 804, acting as “first arbiter” to block meritless complaints while ensuring “plausible claims” are pursued either by the agency or by the private litigant. *CHGO II*, 923 F.3d at 1143–44, 1149 (Pillard, J., dissenting).

To ensure this system “does not offend the separation of powers,” the FECA provided “Article III courts [would] retain supervisory authority over the [FEC’s adjudicatory] process.” *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015). Complainants who have suffered injury as result of the alleged acts, *see Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997), but who have had their challenges winnowed out may seek judicial review of the agency’s decision, *see* 52 U.S.C. § 30109(a)(8)(A). If a court determines the agency erred in adjudicating the complaint, it declares the dismissal “contrary to law” and remands. *Id.* at § 30109(A)(8)(C). The agency then has thirty days to correct its error, take up the case itself, or choose to stand aside. If it chooses the latter, the complainant cannot force the agency to take up the matter. *See DCCC*, 831 F.2d at 1135. Rather, the complainant will merely have established that it has exhausted its

attempts at administrative relief and proven its claim was not lawfully dismissed, and thus satisfied the conditions in the law to bring its own civil action to protect itself against the alleged violators. 52 U.S.C. § 30109(a)(8)(C).

Properly understood then, what may appear to be “an unusual statutory provision which permits a complainant to bring to federal court an agency’s refusal to institute enforcement proceedings,” is, in fact, not so strange. *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), *vacated by Akins*, 524 U.S. 11. The FEC may always choose, after a contrary-to-law judgment and remand, to “reach the same result” of declining to take up the case by “exercising its discretionary powers lawfully,” *Akins*, 524 U.S. at 25, and “[i]f the Commission remains unwilling to move forward with the complaint, no court will require it do so.” *Campaign Legal Cntr. v. FEC*, 106 F.4th 1175, 1182 (D.C. Cir. 2024); *accord. New Models II*, 55 F.4th at 923 (Millett, J., dissenting) (the FECA “never requires the agency to bring an enforcement action that it does not want to bring”). Rather, the FECA “just opens the door to private enforcement by an aggrieved party.” *New Models II*, 55 F.4th at 923 (Millet, J., dissenting); *cf. United States v. Texas*, 599 U.S. 670, 677, 682 (2023) (favorably citing *Akins*, 524 U.S. at 20, because FECA does not permit a challenge to an agency’s “exercise of enforcement discretion” to

“require[e] additional arrests or prosecutions” but rather permits it to establish exhaustion and authorize a private suit).

A. A Reviewable Rationale for the FEC’s Judgment

To permit a reviewing court to carry out its constitutionally mandated oversight and “intelligently determine whether the Commission is acting ‘contrary to law,’” and in accord with the commissioners’ role as first arbiters over private claims, the commissioners must “state their reasons why” if they dismiss a case. *DCCC*, 831 F.2d at 1132. The statement must issue from the agency’s “decisionmakers,” *Local 814, Int’l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976): the commissioners who constituted the majority in the vote to close the case, *see* 52 U.S.C. § 30106(c), *see also e.g.*, Certification, MUR 8122 (Lafazan for Congress), Feb. 6, 2024, https://eqs.fec.gov/eqsdocsMUR/8122_13.pdf (approving 5-0, prior to vote to close the file, explanation for dismissal in “the Factual and Legal Analysis ... subject to the revisions circulated by Chairman Cooksey’s Office ...”).

The statement is not the act itself, but rather an explanation for an act which Congress subjected to review. *Compare ICC v. Bhd. Of Locomotive Eng’rs*, 482 U.S. 270, 281 (1987) (availability of judicial review depends on “formal action, rather than its discussion”); *compare Akins*, 524 U.S. at 26 (stating FECA

“explicitly indicates” that “decision[s] not to undertake an enforcement action” are subject to judicial review); *and DCCC*, 831 F.2d at 1134 (FECA “resist[s] confining the judicial check” to certain dismissals) *with New Models I*, 993 F.3d at 887, 894 (rendering review dependent on commissioners’ “prose composition”). The statement is thus constrained by the act and must be “rational[ly] connect[ed] [to] ... the choice made” to terminate a private claim. *Ohio v. EPA*, 603 U.S. 279, 292 (2024); *see also Akins*, 524 U.S. at 16 (the FECA procedures “asks the FEC to find [whether are respondent] ... had violated the Act”). Because the decision “cancel[s] or release[s] [private] parties’ own private claims,” “the Commission exercise[s] authority beyond that of a prosecutor and more akin to that of a court.” *Burlington Resource Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008).

Accordingly, unreviewable justifications like “prosecutorial discretion,” JA290, are insufficient because “[a]t most, the Commission may employ prosecutorial discretion in settling its *own* claims.” *Id.*; *DCCC*, 831 F.2d at 1134 (stating FECA ensured Commission could not “shirk its responsibility to decide” whether a violation occurred). Rather, the commissioners must “give reasons for [their] action that are subject to judicial review.” *CHGO I*, 892 F.3d at 445 (Pillard, J., dissenting); *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (Commission’s “refusal to enforce ... based ... on ... Commission’s

unwillingness to enforce its own rule” is an “easy” case for “contrary to law” reversal). For example, they, like a district court judge granting a motion to dismiss, must justify their decision by showing the complaint is wrong on the law or its allegations fail to state a claim, *see generally, e.g., CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016), or that the evidence is insufficient to raise a reason to believe, the threshold for an investigation, *see, e.g., Campaign Legal Cntr.*, 106 F.4th at 1193–94 (criticizing commissioners for “dismiss[ing] [] evidence wholesale”).⁴

Further, to ensure the explanation reflects the actual reasoning of all of the commissioners voting to close at the time of the vote, the explanation must be a “contemporaneous statement” with the vote and not a “post hoc rationalization,” *End Citizens United PAC*, 69 F.4th at 921–22, one that is part of the record that is

⁴ A Commission that does not dispute a complaint has merit but simply does not wish to take it up may still dismiss. The dismissal would be contrary to law because the Commission will not have offered an adequate explanation to deprive the private party of their ability to seek their own relief, and the dismissal would be contrary to the provisions providing that the FEC shall investigate or attempt to enforce if a majority agrees a complaint has merit, *see* 52 U.S.C. § 30109(2), (4). At the very least, the dismissal could constitute an abuse of discretion if a court determines the alleged matters are not insubstantial. The FEC could simply then concede to judgment in a subsequent challenge, then exercise discretion and let the thirty-day period expire, thereby allowing the private complainant to sue without taxing the Commission’s resources.

“before the agency at the time the decision was made,” *James Madison Ltd. v.*

Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

B. Court’s Reviewing Dismissals Decide Whether Action is Arbitrary, Capricious, an Abuse of Discretion, or Not in Accordance With Law

In reviewing the FEC’s adjudication, the FECA provides that courts may declare the FEC’s dismissal to be “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). This language, as well as the ability of complainants to seek judicial review and to eventually bring their own claims, was added as part of the 1976 amendments to the FECA adopted to address *Buckley v. Valeo*, 424 U.S. (1976), *see* Pub. L. No. 94-283 §109, 90 Stat. 475 (1976).⁵ The history of that amendment demonstrates

⁵ Prior to the amendment, the Commission enjoyed the “sole discretionary power ‘to determine’ whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued.” *Buckley*, 424 U.S. at 111 n.153. The Supreme Court repeated this characterization a few years later after the amendments in an appeal of an FEC enforcement action and, although the newly added procedures for exhausting private claims had no relevancy to the issue before the Court, it added that the FEC’s determination was no longer final, but only one of “the first instance.” *See FEC v. Dem. Senatorial Campaign Comm. (“DSCC”)*, 454 U.S. 27, 37 (1981). Nevertheless, that observation was part of *DSCC*’s justification for affording interpretive deference to the agency. *See id.* (concluding FEC “is precisely the type of agency to which deference should presumptively be afforded”); *see also Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 nn.9, 11 (1984) (citing *DSCC* for basis of rule that “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction”). The Supreme Court recently overruled, however, the deference *DSCC* contemplated. *See Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

that the language accords with a holistic understanding of the FEC's adjudicatory role.

Congress was legislating against a background whereby the Court had used the language "contrary to law" to evaluate the propriety of adjudications by the National Labor Relations Board. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 574 (1975) (stating courts reviewing the National Labor Relations Board's Secretary's decision to dismiss a union's complaint must be reviewed to determine if it was "contrary to law"). Indeed, Congress crafted the FECA and its review provisions based on the similar provisions in the National Labor Relations Act ("NLRA"). *See Legislative History* 804 (describing the "essence not only of the NLRA's administrative enforcement scheme, but of this Act's enforcement procedures as well"). That statute "obligated [the agency] to examine [the matters] and determine if they fall foul of the Act's dictates." *Shelley v. Brock*, 793 F.2d 1368, 1374 (D.C. Cir. 1986).

There are notable parallels in the wording of the FECA and the NLRA. For example, both provisions provide that the agency "shall" take enforcement action "if" a threshold is met. *Compare* 52 U.S.C. § 30109(a)(2) ("If ... it has reason to believe that a person has committed, or is about to commit, a violation of th[e] Act ..., [t]he Commission shall make an investigation") *and id.* at § 30109(a)(4)(A)(i)

“if ... there is probable cause to believe that any person committed, or is about to commit, a violation of th[e] Act ... the Commission shall attempt ... to correct or prevent such violation”) with 29 U.S.C. § 482(b) (“if ... probable cause to believe that a violation of this subchapter has occurred ... he shall ... bring a civil action”); *see also New Models II*, 55 F.4th at 923 (Millett, J., dissenting) (interpreting mandatory language in FECA; concluding that “[i]f 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). The Court, shortly after the FECA amendments were adopted, found such “statutory language ... supplied sufficient standards to rebut the presumption of unreviewability” because it provided “meaningful standards for defining the limits of [the agency’s] discretion.” *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985).

The NLRA also permits complainants to challenge dismissals. *See, e.g.*, 29 U.S.C. § 482(d). It was in carrying out such review of the Secretary’s decision to not act on a private complaint that the Supreme Court stated the question before the courts was whether the Secretary’s “decision not to sue is ... contrary to law.” *Dunlop*, 421 U.S. at 574. Spelling out what it meant by such examination, *Dunlop* explained that it understood the process to be the equivalent of that applied using

“the standard specified in [5 U.S.C.] § 706(2)(A)” of the Administrative Procedure Act. 421 U.S. at 566; *see also id.* at 577 (stating lower court must determine whether the agency’s explanation was “adequa[te] to support a conclusion whether [its] decision was rationally based or was arbitrary and capricious”).

Accordingly, shortly after the adoption of the FECA, adverse parties, including the FEC, were in unsurprising agreement that the APA’s standards would apply to a court’s review of the FEC’s dismissal of a complaint. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 542 (D.C. Cir. 1980) (noting that “all parties agreed that the standard of review was whether the FEC has acted arbitrarily, capriciously, or contrary to law”); *see also Walther v. FEC*, 468 F. Supp. 1235, 1242 (D.D.C. 1979) (concluding complaint stated claim that dismissal was “contrary to law” because it relied on erroneous legal interpretation). Indeed, in a contemporaneous case in which a district court reviewing an FEC dismissal asked whether the dismissal was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” the D.C. Circuit did not suggest error but rather reversed because it believed the court had afforded too much discretion. *DSCC v. FEC*, 660 F.2d 773, 776–78 & n.26 (D.C. Cir. 1980) (“When Congress expressly provides litigants with a right of judicial review, it is not open to the court to shirk its responsibility by invoking an intervenor’s reliance

on a short course of unreviewed agency actions.”). Though the Supreme Court would later reverse, it did not cite error in utilizing the APA’s standard, but rather relied on deference to an agency’s legal interpretations. *See DSCC*, 454 U.S. at 39 (“[I]n determining whether the Commission’s action was ‘contrary to law,’ the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission’s construction was ‘sufficiently reasonable’ to be accepted by a reviewing court.”). The Supreme Court recently eliminated any such deference. *See Loper Bright Enter.*, 144 S. Ct. at 2273. Regardless, amici is aware of no contemporary precedent suggesting a different standard would apply.

This standard is also consistent with the general practice of courts reviewing agency adjudications. *See Neustar, Inc. v. Fed. Comm’n’s Comm’n*, 857 F.3d 886, 893 (D.C. Cir. 2017) (agency adjudication “must comply with the familiar APA standard banning arbitrary and capricious actions.”); *see also Dep’t of Commerce v. New York*, 588 U.S. 752, 773 (2019) (in examining whether agency abused its discretion, “we determine only whether the Secretary examined the relevant data and articulated a satisfactory explanation for his decision, including a rational connection between the facts found and choice made” (internal quotation marks

omitted); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)⁶ (“[N]ecessarily [an] abuse [of] discretion” to “base[] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence”). That was also the common understanding at the time of the FECA’s adoption of judicial review of agency adjudications. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“The appropriate standard for review was ... whether the Comptroller’s adjudication was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ as specified in 5 U.S.C. § 706(2)(A).”). There is no indication Congress intended to depart from this standard in the FECA.

C. Deadlocks Cannot Render Dismissals Unreviewable

The FEC is fairly unique among government agencies, of course, in that it has an even numbered Commission wherein commissioners associated with a single political party may not hold a majority of the seats. 52 U.S.C. § 30106(a)(1).

⁶ The review for “abuse of discretion” does not imply the Commission has some unreviewable prosecutorial discretion by which to dispose of cases. *See, e.g., Dunlop*, 421 U.S. at 567 n.7 (conducting APA style review and concluding “there [wa]s no merit in the [agency’s] contention that his decision” not to move forward with a complaint “is an unreviewable exercise of prosecutorial discretion”). Rather, similar to its application to district court decisions, “abuse of discretion” could be the appropriate standard in reviewing, for example, the Commission’s choice to extend the response deadline. *See, e.g., Banner Health v. Price*, 867 F.3d 1323, 1335 (D.C. Cir. 2017) (“The court reviews ... docket management decisions for abuse of discretion.”).

This has resulted in “predictable deadlock,” *End Citizens United PAC*, 90 F.4th at 1187 (Pillard, J., concurring in part), like the deadlock that led to dismissal here, JA270–73. Nevertheless, deadlocks do not alter the courts’ practices in reviewing the agency’s dismissal. If anything, the FECA even more expressly limits the types of justifications by which the FEC may defend its action.

First, it is important to be exact in understanding the processes by which a deadlock results in dismissal. “Because a reason-to-believe vote resulting in a deadlock will give rise to a dismissal only if a majority of Commissioners separately votes to dismiss the complaint, the phrase [courts] sometimes use—‘deadlock dismissal’—is perhaps a convenient shorthand but should not be misunderstood to mean a deadlocked vote constitutes or automatically occasions a dismissal.” *Campaign Legal Cntr. v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024) (citations omitted). Rather, “[i]f the Commission does not dismiss the complaint after a failed reason-to-believe vote, the case remains open” and “the Commission may hold further reason-to-believe votes” *Id.* at 378; *see also*, *e.g.*, *Certification*, MUR 6920 (ACU). Oct. 24, 2017, <https://perma.cc/T9YE-H587> (approving conciliation with party after reconsidering earlier deadlock); *Certification*, MUR 6920 (ACU), Dec. 6, 2016, <https://perma.cc/T982-YLDF> (earlier deadlock on all matters).

Thus, even where a dismissal follows a deadlock, the court is reviewing the justification of the majority to close the file. *See* 52 U.S.C. 30109(8)(C) (courts decide whether the “dismissal,” not the deadlock, is “contrary to law”). Of course, where that justification is apparent on the face of the voting record—where it happens shortly after a deadlock—courts have reasonably understood the majority would point to the deadlock to explain their vote. Courts have therefore focused on the rationale of the “declining-to-go-ahead Commissioners” to confirm whether their analysis is faulty. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). But, in conformity with black letter administrative law, it would be error to assume those deadlocking commissioners are thereby the “decisionmakers” for purposes of the dismissal. *Local 814, Int’l Bhd. of Teamsters*, 546 F.2d at 992; *End Citizens United*, 90 F.4th at 1188 (Pillard, J., concurring in part) (courts “do not—and cannot—treat the controlling commissioners’ rationales or votes as an ‘exercise’ of the Commission’s ‘duties and powers’”). The commissioners did not dismiss the case unilaterally and are not given a free hand to justify the dismissal on any basis. Rather, the commissioners are limited to explaining the disagreement over the merits that occurred during the Commission’s deliberation that proved so intractable that it in fact motivated the decision-making majority to close.

This heuristic only works, moreover, if the commissioners are explaining a deadlock that could in fact motivate a vote to close. The only deadlocks that could motivate a vote to close are those that actually prevent the agency from moving forward. The FECA provides only two such gate-keeping votes: the “reason to believe” vote taken before an investigation opens, and the “probable cause” vote taken after the investigation but before attempts at enforcement. 52 U.S.C. § 30109(a)(2), (4). A deadlock on another matter—for example, a vote to dismiss the case or a vote to exercise prosecutorial discretion—does not prevent the agency from moving forward. *See, e.g., Certification*, MUR 7927 (Kennedy for Mass.), Oct. 19, 2021, https://www.fec.gov/files/legal/murs/7927/7927_06.pdf (approving conciliation after earlier deadlocked vote on exercising prosecutorial discretion to dismiss); *Certification*, MUR 7927 (Kennedy for Mass.), Sept. 12, 2021, https://www.fec.gov/files/legal/murs/7927/7927_03.pdf (deadlock over motion to “[d]ismiss with admonishment pursuant to *Heckler v. Chaney*”). Accordingly, such deadlocks, and the commissioners’ views with regards to those issues, could not serve to explain a subsequent vote to close. Any commissioner who wished to proceed with an investigation could simply ignore the non-majority’s views on such matters, push for a reason-to-believe or probable-cause vote, and securing a majority on those matters, would see their desired outcome achieved.

Because only a reason-to-believe or probable-cause deadlock can motivate a vote to close, only a disagreement on the merits that are “rational[ly] connect[ed],” *Ohio*, 603 U.S. at 292, to the conclusion that a complaint fails to raise a “reason to believe,” or that an investigation failed to raise “probable cause” to believe, a violation may have occurred, 52 U.S.C. § 30109(a)(2), (4), would be adequate. The explanation for that vote “is intended to explain why those commissioners saw no reason to believe,” or probable cause to believe, “a violation occurred.” *Campaign Legal Cntr.*, 106 F.4th at 1183. An explanation from the deadlocking commissioners that offers grounds that are not rationally connected to their decision—for example, their belief that agency resources are not best utilized pursuing this matter—are simply non sequiturs that fail to meet the agency’s obligation to “reasonably explain[]” the dismissal. *Ohio*, 603 U.S. at 292; *see also Campaign Legal Cntr.*, 106 F.4th at 1193 (explanation that fails to “meaningfully account for the complaint’s allegations” is inadequate). Rather, “if a three-member ‘no’ vote cannot be justified on the merits, a court can call the Commission to either move forward with its investigation or cede enforcement to a private party.” *CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting) .

The straightforward application of these general rules of administrative law accords with the structure of the FECA exhaustion processes. The purpose of

judicial review of the FEC's dismissal is not to compel the agency to act, but to determine if the complainant has a meritorious claim for which they will not receive administrative relief, and thus should be permitted to bring their own suit. The view of less-than-majority of the Commission on any issue unrelated to the legal merit of that potential claim is not rationally related to a decision to dismiss a claim and prevent a private litigant from pursuing it.

While deadlocks on the merits may protect a respondent from the possibility of a government investigation and, where upheld, deprive a private litigant of their own right to seek relief, deadlocks of other matters both have no effect on the agency and have no connection to propriety of a private suit. The FECA's gate-keeping processes do not empower a non-majority of the Commission to unilaterally terminate proceedings or exercise any other powers of the Commission. Nor does the FECA render the availability of judicial review dependent on an explanation of the disagreement. Rather the non-majority is confined to offering the views on the merits that led to the merits deadlock that caused the majority vote to close: an explanation courts are well positioned to review.

II. Experience with Immunizing FEC Dismissals Demonstrates Need for Judicial Review

Recent Circuit precedent departed from the statutory text, general principles of law, and earlier binding precedent to confer a “superpower” on a non-majority of the Commission “to kill any FEC enforcement matter, wholly immune from judicial review.” *CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting). They have put that power to use by “routinely cit[ing] ‘prosecutorial discretion’ to stymie judicial scrutiny of apparently serious FECA violations.” *End Citizens United PAC*, 90 F.4th at 1184 (Pillard, J. concurring in part).⁷ They were so successful in invoking it that they prevented every attempt to submit their rationale for a deadlock to judicial review afterwards. They have abused, moreover, this power to ignore court orders and protect partisan allies. These abuses and loss of the straight-forward corrective measures the FECA contemplates forced their colleagues to take corrective measures.

For example, a non-majority of commissioners used the power conferred by *CHGO* and *New Models* to ignore a decision of this Circuit that declared the FECA “unambiguously require[d]” greater disclosure. *CREW v. FEC*, 971 F.3d 340, 345–

⁷ See Br. of Amicus Curiae Citizens for Responsibility and Ethics in Washington in Supp. of App.’s Pet. for Reh’g En Banc 9–10 & Add. A., *End Citizens United PAC v. FEC*, 22-5277 (D.C. Cir. Feb. 28, 2024), ECF No. 2042736 (“CREW En Banc Pet. Amicus”).

46, 354 (D.C. Cir. 2020). Instead, they declared the statute “fail[s] to provide a definitive standard” based on authority the courts found inapposite. *Compare id.* at 353, 354 and *CREW v. FEC*, 316 F. Supp. 3d 349, 401 n.43 (D.D.C. 2018) with *Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III Concerning the Application of 52 U.S.C. § 30104(c)* at 1, 5, June 8, 2022, <https://perma.cc/74ZB-HMTN> (“Policy Statement”). Similarly, they ignored a judicial decision about the FECA’s test for political committee status and insulated that choice from judicial correction by citing additional prudential grounds for non-enforcement. *Compare CREW*, 209 F. Supp. 3d at 94 with *New Models I*, 993 F.3d at 887; *see also New Models II*, 55 F.4th at 924 (Millet, J., dissenting).

This partisan-aligned non-majority also used this power to protect their partisan allies. For example, the republican commissioners have blocked any complaint-generated proceedings against President Trump and his associated organizations, routinely invoking the discretion that would prevent judicial review. Sara Wiatrak, *GOP commissioners have single-handedly blocked FEC action against Trump 29 times*, CREW, Mar. 14, 2024, <https://www.citizensforethics.org/reports-investigations/crew-investigations/gop-commissioners-have-single-handedly-blocked-fec-action-against-trump-29-times/>.

Their prudence did not extend to others across the political aisle, however.

Compare Conciliation Agreement 1, MURs 7291 & 7449 (DNC Serv. Corp.), Feb. 22, 2022, https://eqs.fec.gov/eqsdocsMUR/7449_64.pdf (fining democratic related groups) *with Certification*, MUR 7784 (MAGA PAC), May 10, 2022, https://eqs.fec.gov/eqsdocsMUR/7784_32.pdf (deadlocking nearly identical claim against Trump related group) *and Statement of Reasons of Chairman Allen J. Dickerson et al.*, 12, MUR 7784 (MAGA PAC), June 9, 2022, https://eqs.fec.gov/eqsdocsMUR/7784_42.pdf (invoking justification that could prevent judicial review).⁸

Conversely, the same non-majority use the “unbridled discretion,” *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), conferred by *CHGO* and *New Models* to deprive disfavored listeners and speakers of the “facts” that are “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), in order to “reduce[] the quantity of [their] expression,” *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). For example, they routinely characterize attempts by such entities to protect their rights under the FECA as “infring[ing] on privacy of association,” *see Statement of Reasons of Vice-Chair Caroline C.*

⁸ *See also* CREW En Banc Pet. Amicus 6–9 (providing additional examples).

Hunter et al. 9, MUR 6872 (New Models), Dec. 20, 2017, <https://www.fec.gov/files/legal/murs/6872/17044435569.pdf>; the same pejorative they apply to speech they disfavor, but were unable to prevent, that identifies and critiques donors, *see Statement of Commissioners Allen J. Dickerson and James E. “Trey” Trainor, III Regarding the Commission’s Newly Adopted Directive Concerning Investigations Conducted by the Office of General Counsel* 4, Nov. 2, 2023, <https://www.fec.gov/resources/cms-content/documents/statement-on-investigations-policy-2nov2023-redacted.pdf> (calling speech an “invasion of privacy”). These commissioners see their role and exercise their powers as partisan protectionism, censoring criticism of their allies, and have used the power to immunize their actions from review to that end. *See, e.g., Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III* 20, MURs 7672, 7674, and 7732 (Iowa Values), May 13, 2022, https://www.fec.gov/files/legal/murs/7732/7732_14.pdf (republican commissioners claiming “enforcement action could not proceed” without republican support); *see also* @SeanJCooksey, X, Nov. 13, 2022, <https://x.com/SeanJCooksey/status/1856826280211071236> (republican chair of FEC claiming enforcement of law against republican allies “illegal” and “election interference,” calling for “investigation”); *Letter from Noah Bookbinder to*

Commissioner Trey Trainor, July 26, 2024, <https://www.citizensforethics.org/wp-content/uploads/2024/07/Commissioner-Trainor-Recusal-Letter.pdf> (requesting commissioner Trainor recuse from Trump related matter over demonstrated bias).

These developments have placed the remaining commissioners in a terrible dilemma. Prior to *CHGO* and *New Models*, the half of commissioners who thought enforcement was justified could agree to dismiss “in hopes the complainant will sue the agency and obtain a judicial reversal.” *Statement of Commissioner Ellen L. Weintraub On the Opportunities Before the D.C. Circuit in the New Models Case to Re-Examine En Banc Its Precedents Regarding ‘Deadlock Deference’* 9, Mar. 2, 2022, https://www.fec.gov/resources/cms-content/documents/2022-03-02-ELW-New-Models-En_Banc.pdf. After *CHGO* and *New Models*, those same commissioners “know[] that [their] vote in favor of a motion to dismiss would empower the commissioners on the other side of the issue to determine the agency’s position in a way [they] thought was contrary to law” and “would halt enforcement of this particular complaint and could well do larger damage to the law.” *Id.* at 11.

Facing this dilemma, some commissioners began to withhold their vote to close rather than to hand over unilateral control of the agency to those with whom they disagree. This would at least permit complainants to challenge the agency’s

failure to act—a challenge that was not subject to *CHGO*'s and *New Models*'s “judicial-review kill switch.” *New Models II*, 55 F.4th at 922 (Millett, J., dissenting). But this also had the effect of limiting what the agency could disclose about such matters, including to courts, since the FECA commands that “until the Commission dismisses the complaint, the Commission cannot publicly disclose the complaint or any investigation or votes related to it (unless the target of the complaint consents to disclosure).” *45committee*, 118 F. 4th at 382; *see also* 52 U.S.C. § 30109(a)(12). That led to courts to rule without a complete picture of those proceedings at the FEC—an admittedly less than ideal result forced upon the commissioners and the courts by the dilemma imposed by *CHGO* and *New Models*.

CONCLUSION

CHGO and *New Models* upended Congress's “delicate balance,” *CREW*, 363 F. Supp. 3d at 43, to provide for preliminary adjudication before the Commission to weed out unsubstantiated complaints, while ensuring that either it, or the complainant, could move forward with plausible claims. *CREW* asks this Court to restore the statute as written and afford those injured by corrupt acts to have their day in court.

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Respectfully submitted,

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I hereby certify that on November 25, 2024, 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.

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