



April 12, 2019

Mark Langer  
Clerk of Court  
U.S. Court of Appeals for the D.C. Circuit  
333 Constitution Avenue, N.W.  
Washington, DC 20001

Re: *Citizens for Responsibility and Ethics in Washington* (“CREW”) v. *Federal Election Commission* (“FEC”) (D.C. Circuit Case No. 17-5049) on petition for rehearing en banc

Dear Mr. Langer,

Appellant and en banc petitioner CREW respectfully submits this letter pursuant to Rule 28(j) to inform the Court of the attached statement of the Chair of the Federal Election Commission, issued after CREW’s previous Rule 28(j) letter.

Federal Election Commission Chair Ellen L. Weintraub issued a statement on April 5, 2019, reiterating the “urgent[] need[]” for en banc review of the panel decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (“*CREW/CHGO*”).

Statement of Chair Ellen L. Weintraub, Re: D.C. District Court decision in *CREW v. FEC (New Models)*, 2 (April 5, 2019), [https://www.fec.gov/resources/cms-content/documents/2019-04-05\\_ELW\\_Statement\\_-\\_DDC\\_decision\\_in](https://www.fec.gov/resources/cms-content/documents/2019-04-05_ELW_Statement_-_DDC_decision_in)

[New\\_Models.pdf](#). CREW shares the FEC Chair’s view about the need for en banc review here.

The FEC Chair stated the *CREW/CHGO* decision “eviscerates the right that Congress gave the American public to review this agency’s decisions.” Statement

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at 2. In particular, the FEC Chair recognized that the recent district court decision, *CREW v. FEC*, No. 1:18-cv-0076-RC (D.D.C. Mar. 29, 2019)—the subject of CREW’s earlier Rule 28(j) letter— “vividly shows how a few magic words sprinkled onto the end of a statement by less than a majority of the commissioners, suggesting what they *could* have done—but didn’t—in a case, can paper over even thoroughly debunked legal reasoning and protect even the most outrageous dismissals from any review whatsoever.” *Id.*

The FEC Chair agreed with CREW that the recent district court decision read *CREW/CHGO* to immunize from further judicial review an FEC analysis that “blithely ignor[ed] a directly on-point D.C. District Court opinion issued just a year before.” Statement 5. *CREW/CHGO* “invi[te]d blanket use of the prosecutorial-discretion ‘magic words’ to protect against any possible inquiry into arbitrary legal reasoning,” including commissioners’ willful disregard of the decisions of the courts of this Circuit. *Id.*

FEC Chair Weintraub further averred that certain commissioners have “consciously and avidly pursued a policy of seeking any excuse to avoid finding that dark-money groups should register as political committees and disclose their donors to the American people.” *Id.* at 6. En banc review is necessary to restore the congressionally designed mechanism to protect from such usurpations of federal law.

Respectfully submitted,

/s/ Stuart McPhail

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Encl.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2019, 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 McPhail  
Stuart C. McPhail



**Statement**  
**Chair Ellen L. Weintraub**  
**Federal Election Commission**

**Re: D.C. District Court decision in *CREW v. FEC (New Models)***

April 5, 2019

Last June, when a D.C. Circuit panel ruled that no court had the jurisdiction to review any FEC dismissal invoking a few magic words of “prosecutorial discretion,”<sup>1</sup> I warned that this conferred upon the FEC an unfortunate superpower “to kill any FEC enforcement matter, wholly immune from judicial review.”<sup>2</sup> It was one of those moments when you are pretty sure you are right, but really *hope* you are wrong.

Sadly, it is now clear how right I was. The decision released last Friday in *CREW v. FEC (New Models)*<sup>3</sup> provides a striking display of exactly how potent this new superpower is. The 23-page decision explains over and over why this power renders the court helpless to act.<sup>4</sup>

The *New Models* case confirms my concern that the FEC’s able litigators, charged with defending the position of the Controlling Commissioners, would zealously embrace the *CHGO* decision in attempting to vanquish lawsuits against the agency. “This recent D.C. Circuit decision is dispositive here,” the agency’s lawyers write in their primary argument for dismissal

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<sup>1</sup> *Citizens for Responsibility & Ethics in Washington (“CREW”) v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018), petition for reh’g en banc filed, No. 17-5049 (D.C. Cir. July 27, 2018) (“*CHGO*”).

<sup>2</sup> Statement of Vice Chair Ellen L. Weintraub On the D.C. Circuit’s Decision in *CREW v. FEC* (June 22, 2018), at 1, found at [https://www.fec.gov/resources/cms-content/documents/2018-06-22\\_ELW\\_statement\\_re\\_CREWvFEC-CHGO.pdf](https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf).

<sup>3</sup> *CREW v. FEC*, 1:18-cv-00076-RC (Mar. 29, 2019) (“*New Models*”), found at [https://www.fec.gov/resources/cms-content/documents/crew\\_180076\\_dc\\_mem\\_opinion\\_03-29-19.pdf](https://www.fec.gov/resources/cms-content/documents/crew_180076_dc_mem_opinion_03-29-19.pdf).

<sup>4</sup> Kenneth P. Doyle, Bloomberg News, “Courts Have No Say When FEC Wants To Ignore Alleged Wrongdoing”(April 5, 2019), found at <https://about.bgov.com/news/courts-have-no-say-when-fec-wants-to-ignore-alleged-wrongdoing/>.

of the case. “The controlling statement expressly invoked prosecutorial discretion as a basis for the dismissal.”<sup>5</sup>

The court felt bound to accept these arguments. “Plaintiffs raise valid reasons why *CREW/CHGO* may allow the FEC to avoid judicial review of its actions,” it wrote, “but they fail to demonstrate that the Circuit’s decision should not govern the result here.”<sup>6</sup>

In its unrelenting futility, the *New Models* decision stands as Exhibit A for why the *en banc* D.C. Circuit urgently needs to rehear (and reverse) the D.C. Circuit panel’s decision in *CHGO*. It vividly shows how a few magic words sprinkled onto the end of a statement by less than a majority of commissioners, suggesting what they *could* have done – but didn’t – in a case,<sup>7</sup> can paper over even thoroughly debunked legal reasoning and protect even the most outrageous dismissals from any review whatsoever. The power the D.C. Circuit panel granted to these magic words eviscerates the right that Congress gave the American public to review this agency’s decisions.<sup>8</sup>

To recap: In the first case, *CHGO*, the Republican commissioners fairly prominently based their reasoning on “prosecutorial discretion,” writing in their second paragraph that they concluded that “this case did not warrant the further use of Commission resources”<sup>9</sup> and spending five pages explaining why they applied that discretion. The court evaluated the Republican commissioners’ legal arguments and found their use of discretion to be within the law.<sup>10</sup> On appeal, a D.C. Circuit panel ruled that the district court had erred by even *looking* at the legal reasoning behind the invocation of prosecutorial discretion, because even if they had abused their discretion, it was unreviewable by any court.<sup>11</sup>

In the *New Models* case, the Republican commissioners spent 32 pages and 138 footnotes<sup>12</sup> explaining their legal reasoning for why the respondent, New Models, should not be considered a

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<sup>5</sup> Federal Election Commission’s Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment (Aug. 24, 2018), at 22, found at [https://www.fec.gov/resources/cms-content/documents/crewvfec18-76\\_FEC\\_mem\\_supp\\_msj\\_8-24-18.pdf](https://www.fec.gov/resources/cms-content/documents/crewvfec18-76_FEC_mem_supp_msj_8-24-18.pdf).

<sup>6</sup> *New Models* (Mar. 29, 2019), at 13 (internal citations and quotations removed).

<sup>7</sup> The Republican commissioners could have moved to dismiss the case based on prosecutorial discretion but, in fact, made no such motion.

<sup>8</sup> 52 U.S.C. § 30109(a)(8)(A).

<sup>9</sup> Statement of Vice Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman (Nov. 6, 2015), at 1, found at <http://eqs.fec.gov/eqsdocsMUR/15044381253.pdf>.

<sup>10</sup> As it happens, the same district judge decided *New Models* and *CHGO*.

<sup>11</sup> *CHGO*, 892 F.3d 434 (June 15, 2018), found at [https://www.fec.gov/resources/cms-content/documents/crew152038\\_ac\\_opinion\\_and\\_dissent.pdf](https://www.fec.gov/resources/cms-content/documents/crew152038_ac_opinion_and_dissent.pdf).

<sup>12</sup> Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman (Dec. 20, 2017), found at <https://eqs.fec.gov/eqsdocsMUR/17044435569.pdf>.

political committee. Much of the verbiage put forward an argument about why one can determine the political-committee status of an organization only by looking at the group's spending over its entire lifetime. It was a pretty nery and obdurate argument, given that the *exact* same analysis had been deemed "arbitrary" and "contrary to law" in another D.C. District Court opinion just one year before.<sup>13</sup>

But on the next-to-last page of their Statement of Reasons, in the very last, *the 139<sup>th</sup>*, footnote, the Republican commissioners wrote: "Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources."<sup>14</sup>

And that 139<sup>th</sup> footnote was all that mattered. They literally could have skipped everything before and after it and the statement would be equally bulletproof under *CHGO*. Much of the *New Models* decision consists of repeating how thoroughly the *CHGO* decision absolutely ties the court's hands when such "magic words" are used:

- "Plaintiffs resist the application of that 'magic words' standard, and the Court is sympathetic to Plaintiffs' concerns,"<sup>15</sup> but the court concludes that it "cannot review the FEC's invocation of its unreviewable discretion."<sup>16</sup>
- It notes that *CHGO* prevented it from reaching the merits of CREW's "contrary to law" arguments.<sup>17</sup>
- "[T]his case begins and ends with the Controlling Commissioners' prosecutorial discretion."<sup>18</sup>
- "[H]ow closely may a court scrutinize the FEC's exercise of prosecutorial discretion in dismissing an administrative complaint? The Circuit's answer: not at all."<sup>19</sup>
- "*CREW/CHGO* is directly on point here."<sup>20</sup>

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<sup>13</sup> *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016) (concluding that Controlling Commissioners' decision to dismiss was contrary to law).

<sup>14</sup> Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman (Dec. 20, 2017), at 31, found at <http://eqs.fec.gov/eqsdocsMUR/17044435569.pdf>.

<sup>15</sup> *New Models* (Mar. 29, 2019), at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 12, n. 8.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.*

- “Under binding Circuit law, that conclusion is not subject to judicial review.”<sup>21</sup>
- “Thus, because the Controlling Commissioners here invoked prosecutorial discretion in dismissing Plaintiffs’ administrative complaint – a ‘non-reviewable’ action under *CREW/CHGO* – this Court cannot evaluate the ‘reviewable legal rulings’ contained in the Controlling Commissioners’ statement of reasons.”<sup>22</sup>
- “Plaintiffs ask this Court to review, and reject, the Controlling Commissioners’ reasons for exercising their prosecutorial discretion. But again, *CREW/CHGO* dictates the Court’s response.”<sup>23</sup>
- “This Court cannot evaluate, then, the ‘individual considerations the [C]ontrolling Commissioners gave’ in invoking prosecutorial discretion here, terse as they may be.”<sup>24</sup>
- “That invocation, brief as it was, thus insulated the Controlling Commissioners’ decision from reviewability under *CREW/CHGO*.”<sup>25</sup>
- “Here, the Controlling Commissioners declined to move forward with Plaintiffs’ administrative complaint, at least in part, on the basis of prosecutorial discretion. That decision is ‘unreviewable.’”<sup>26</sup>
- “[B]ecause the Controlling Commissioners invoked prosecutorial discretion, the Court is also foreclosed from evaluating the Controlling Commissioners’ otherwise reviewable interpretations of statutory text and case law.”<sup>27</sup>

The court notes that a “perceptive reader” might point out that in *CHGO*, the Republican commissioners’ decision rested primarily, if not solely, on prosecutorial discretion, while in *New Models*, their decision “involved a robust interpretation of statutory text and case law, with a brief mention of prosecutorial discretion sprinkled in. Surely, the reader may protest, a one-paragraph discussion of prosecutorial discretion cannot prevent a court from addressing thirty pages of seemingly reviewable legal analysis.”<sup>28</sup> That reader would be wrong, writes the court. “*CREW/CHGO* appears... to squash this approach.”<sup>29</sup>

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<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 17.

<sup>25</sup> *Id.* at 18.

<sup>26</sup> *Id.* at 22 (internal citations removed).

<sup>27</sup> *Id.* at 22-23.

<sup>28</sup> *Id.* at 15-16.

<sup>29</sup> *Id.* at 16.



The only glimmer of hope the court can suggest is this: “Had the Controlling Commissioners invoked prosecutorial discretion based on their legal analysis – for instance by concluding that the FEC’s resources should be deployed elsewhere because the agency’s action was unlikely to succeed, or that CREW’s administrative complaint raised fair notice or due process concerns, given the agency’s previous interpretations of the political committee rules – the Court, perhaps, could undertake a more piercing review.”<sup>30</sup> Perhaps. But because they did not, their invocation of discretion cannot be challenged.<sup>31</sup>

The court explained how the *CHGO* decision has sharply reduced the role of the courts in protecting the public from arbitrary FEC dismissals. “[C]ourts must balance, on the one hand, the Commission’s non-reviewable judgment of how to best allocate its resources to pursue FECA violations, and on the other hand, the courts’ role as ‘a necessary check against arbitrariness’ when the ‘Commission is unable or unwilling to apply settled law to clear facts.’ *CREW/CHGO* appears to shift the balance decidedly towards the Commission.”<sup>32</sup>

This balance should not rest with the Commission. Substantive judicial review of our decisions is essential. This Commission, blocked by a handful of Commissioners, has largely been ‘unable’ and ‘unwilling’ to ‘apply settled law to clear facts’ for more than a decade. This particular matter demonstrates this unwillingness better than most. The legal argument my colleagues put forward ignored clear facts to misapply settled law, blithely ignoring a directly on-point D.C. District Court opinion issued just a year before.<sup>33</sup> It makes no sense to insulate this sort of behavior from review.

The court hinted that it found the legal reasoning here unworthy of deference. While the court had found the Republican commissioners’ invocation of prosecutorial discretion in *CHGO* to be reasonable, “If this Court were to apply that same degree of scrutiny here, it may, perhaps, reach a different result, given that the Controlling Commissioners relied so heavily on their legal analysis.”<sup>34</sup> And it’s a sign of how upside-down this agency has become that this legal win for the FEC is a legal loss for public accountability.

It is unwise for the D.C. Circuit to hand an invincible shield to a small group whose legal reasoning has rightfully taken so many arrows from so many critics and plaintiffs. The court is inviting blanket use of the prosecutorial-discretion “magic words” to protect against any possible inquiry into arbitrary legal reasoning. This renders the public’s right to challenge the Commission’s dismissals meaningless.

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<sup>30</sup> *Id.* at 18 n. 12.

<sup>31</sup> *Id.* at 17, n. 11 (“Commissioners’ factual bases for their decision are generally considered rational”).

<sup>32</sup> *Id.* at 22 (internal citations removed).

<sup>33</sup> *CREW v. FEC*, 209 F. Supp. 3d 77, 95. See also *CREW v. FEC*, 299 F. Supp. 3d 83, 101 (D.D.C. 2018) (finding legal error in controlling Commissioners’ rationale for dismissing an enforcement action), *appeal dismissed*, No. 18-5136 (D.C. Cir. Sept. 19, 2018).

<sup>34</sup> *New Models* (Mar. 29, 2019) at 15, n. 10.

Separately, the district court opinion in *New Models*, in shooting down one of CREW's challenges to the dismissal, illustrates one more way that deadlock deference undermines enforcement of the law: Because the FEC had not *consciously* or *expressly* adopted a general policy of refusing to pursue complaints against alleged unregistered political committees, the court would not find that the Commission was abdicating its duty to enforce the law.<sup>35</sup>

So three commissioners can consistently vote to refuse to enforce the law, and those three votes will win the day, *every day*. But that cannot be challenged as an abdication of the Commission's duty because *four* commissioners did not vote to "consciously" or "expressly" adopt such a policy. As long as courts unwisely defer to the legal reasoning of less than a majority of commissioners on any given dismissal, they should also recognize that fewer than four commissioners can effectively establish an unwavering course of non-enforcement for this agency without the Commission ever formally setting a policy.

In my experience, for more than a decade, Republican commissioners have quite consciously and avidly pursued a policy of seeking any excuse to avoid finding that dark-money groups should register as political committees and disclose their donors to the American people. Dark-money groups have spent a billion dark dollars on our elections since *Citizens United*.<sup>36</sup> Judicial deference to my colleagues' refusal to enforce the law will only embolden such groups to spend ever more aggressively, making a mockery of *Citizens United's* promised transparency,<sup>37</sup> in 2020 and beyond.

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<sup>35</sup> *Id.* at 20 ("This evidence indicates that the Commission may be less zealous in enforcing FECA than Plaintiffs would like, but it does not rise to the level of showing that the Commission has consciously or expressly adopted a policy of refusing to pursue complaints against alleged unregistered political committees."); at 22 ("Without stronger record evidence indicating that the FEC has adopted a general non-enforcement policy, the Court must assume that the Commission made each decision listed in Plaintiffs' chart on a case-by-case basis."); at 22 n. 16 ("Plaintiffs have failed to show that the alleged non-enforcement policy was "*consciously*" or "*expressly*" adopted. *Heckler*, 470 U.S. at 833 n.4 (emphasis added)").

<sup>36</sup> Anna Massoglia, Open Secrets, "State of Money in Politics: Billion-dollar 'dark money' spending is just the tip of the iceberg" (Feb. 21, 2019), found at <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

<sup>37</sup> *Citizens United v. FEC*, 558 130 S.Ct. 876, 916 (2010) ("A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters" (internal citations removed)).