NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5239

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER AND DEMOCRACY 21,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

F8, ELI PUBLISHING, AND STEVEN J. LUND,
Intervenor-Appellees,

On Appeal from the United States District Court
for the District of Columbia, Case No. 1:16-cv-00752-TNM

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Citizens for Responsibility and Ethics in Washington hereby certify as follows:

I. Parties and Amici

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief of Appellant.

II. Rulings Under Review

References to the ruling at issue appears in the Brief for Appellant.

III. Related Cases

References to any related cases appear in the Brief for Appellant. This case was not previously before this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules 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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STATEMENT OF INTEREST[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonpartisan, nonprofit 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 combat corrupting influences in government and protect citizens' right to be informed about the source of contributions used to fund campaign expenditures. Among its principal activities, CREW monitors FEC filings to ensure proper and complete disclosure as required by law and utilizes those filings to craft reports for public consumption. If CREW observes a violation of federal ethics or campaign finance laws, CREW files complaints with the FEC under 52 U.S.C. § 30109(a). When necessary, CREW seeks judicial review of complaints unlawfully dismissed by the FEC pursuant to 52 U.S.C. § 30109(a)(8)(A) and engages in citizen suits directly against the respondents pursuant to 52 U.S.C. § 30109(a)(8)(C). CREW was the plaintiff in the case relied on by the district court below, *CREW v. FEC*, 236 F. Supp. 3d 378,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state all parties have consented to the filing of this brief. Further, Pursuant to Rule 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

390 (D.D.C. 2017), and the panel decision on which the FEC relies on appeal, *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).

GLOSSARY

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

SUMMARY OF ARGUMENT

Congress provided the FEC with preliminary authority to enforce the Nation's campaign finance laws: laws that exist to protect "the free functioning of our national institutions." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (internal quotations marks omitted). "To avoid agency capture, it made the Commission partisan balanced, allowing no more than three of the six Commissions to belong to the same political party." *CREW v. FEC*, 923 F.3d 1141, 1143 (D.C. Cir. 2019) (en banc) (Pillard, J., dissenting). "The balance created a risk of partisan reluctance to apply the law [however], so Congress," aware of the vital importance of campaign finance law to our democracy and to individuals in it, "provided for judicial review of non-enforcement, and citizen suits to press plausible claims the Commission abandons." *Id.* at 1143–44.

A decision relied upon below, *CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017), eviscerated this congressional check by finding that a partisan bloc of commissioners could veto enforcement by both the agency and private parties merely by providing a "rational basis" for declining enforcement, even if that basis simply repackaged the block's erroneous legal interpretations. *CLC v. FEC*, 312 F. Supp. 3d 153, 161 (D.D.C. 2018). On appeal, the FEC compounds this error, relying on the intervening authority in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir.

2018), to argue that the bloc's mere incantation of prosecutorial discretion renders their partisan veto entirely beyond the reach of the judiciary, notwithstanding Congress's express legislation to the contrary. *See* FEC Mot. for Summ. Aff., Doc. #1752338. Both the FEC here and the district court below erred, however. First, as outlined by appellants, it is questionable whether the *CREW* cases are even applicable here. Second and more fundamentally, the authorities are not good law as they contravene binding Supreme Court and Circuit authority that explicitly provide that the FEC's "unwillingness to enforce its own rule" is subject to judicial review and presents a case where it "would be easy to establish that [the dismissal] was contrary to law." *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995).

The *CREW* cases' errors are not limited to conflict with prior binding authority. First, they misread the case on which their entire analysis rests, *Heckler v. Chaney*, 470 U.S. 821 (1985). Second, by affording a partisan bloc of the Commission an unreviewable veto on enforcement, the *CREW* cases upset the FECA's careful balance which "requires that all [enforcement] actions by the Commission occur on a bipartisan basis." *CREW*, 923 F.3d at 1142 (Griffith, J., concurring). Third, the *CREW* cases impermissibly nullified the FECA's citizen suit provision by rendering a precondition to those suits—a judicial finding that

dismissal was contrary to law—entirely subject to the partisan bloc's whim. Fourth, the *CREW* cases' provision of unreviewable and "unbridled discretion" to a partisan bloc of commissioners to choose when and when not to enforce the FECA, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), and to decide which complainants may "receiv[e] information" that Congress mandated to be provided to them, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986), raises significant First Amendment concerns that counsel against interpreting the FECA as the *CREW* cases do. This Court's and the Supreme Court's prior precedent do not commit these errors.

The Court should take the opportunity to confirm that the *CREW* line of cases is contrary to decades-old holdings of this Court and the Supreme Court. In line with that prior authority, the Court should reaffirm that the FEC's discretionary dismissals are subject to judicial review to correct any legal error on which that dismissal was based. Further, the Court should reaffirm that discretionary dismissals of meritorious complaints are the very sort of dismissals that Congress intended to lead to citizen suits, particularly where the discretionary dismissal is the result of a partisan bloc of commissioners' decision to stymie enforcement.

Congress carefully designed the FEC to avoid partisan weaponization and partisan shirking by creating the safeguards of judicial review and private enforcement in the absence of agency enforcement. The *CREW* line of cases is "contrary to Congress's intent." *CREW*, 923 F.3d at 1143 (Griffith, J., concurring). They "eliminat[e] those legal checks against enforcement-shirking" and "empower[r] any partisan bloc of the Commission to cut off investigation and stymie review of even the most serious violations of federal campaign finance law by uttering 'magic words' of enforcement discretion." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting). This Court should correct that error, reinstate Congress's design, and safeguard the free functioning of our national institutions.

ARGUMENT

The FEC here and the district court below relied on an erroneous line of cases that found the FEC's discretionary dismissals—even those caused by a partisan bloc of commissioners—are not subject to judicial review or are subject to only the most deferential review, respectively. The authority on which the FEC and the district court relied, however, contravenes binding Supreme Court and Circuit authority which expressly hold that such dismissals are both subject to non-deferential judicial review for legal error, and are in fact "easy" cases for reversal. *Chamber*, 69 F.3d at 603. The erroneous precedent also errs in its reading of case

law, conflicts with the bipartisan structure of the FECA and the Act's judicial review and citizen suits provisions, and raises significant First Amendment concerns. The earlier precedent conforms with the statutory design, avoids these constitutional pitfalls, and binds this Court and requires it to ignore the erroneous line of authority here.

I. Supreme Court and Prior Circuit Authority Require Judicial Review and Reversal of Partisan Discretionary Dismissals

The district court below relied in part on a 2017 district court opinion to hold that, notwithstanding any legal errors committed by the partisan controlling bloc of commissioners, the dismissal here was not contrary to law because the bloc provided a "rational"—even if legally erroneous—"basis" for dismissal. *CLC*, 312 F. Supp. 3d at 161. On appeal, the FEC relies on a 2018 divided panel decision of this Circuit to argue that the partisan bloc's mere incantation of "prosecutorial discretion" rendered the dismissal, and all legal errors contained therein, entirely beyond judicial reach. FEC Mot. for Summ. Aff. (citing *CREW*, 892 F.3d 434). These decisions, however, "conflict[] with . . . the Supreme Court's decision in *FEC v. Akins*, 524 U.S. 11 (1998)[,] and with [this Court's] decisions in *Chamber*[, 69 F.3d 600], *Democratic Congressional Campaign Committee v. FEC (DCCC)*, 831 F.2d 1131 (D.C. Cir. 1987), and *Orloski* [*v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)]." *CREW*, 923 F.3d at 1145 (Pillard, J., dissenting). As the *CREW* line of

cases conflict with earlier binding panel decisions—not to mention a Supreme Court decision—they must be disregarded. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, . . . the later decision, being in violation of that fixed law, cannot prevail.").[2]

In *Akins*, the Supreme Court held that the FECA "explicitly indicates" that FEC "decision[s] not to undertake an enforcement action" are subject to judicial review, notwithstanding *Heckler*'s presumption against such review. 524 U.S. at 26. Unlike the general agency review provisions in the APA that *Heckler* found do not provide for review of agency nonenforcement, the FECA expressly includes "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings." *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11. Rejecting the FEC's argument that the dismissal below was based on the agency's

[2] Although the en banc court declined to review the panel decision in *CREW* for inconsistency with this prior precedence, "deny[ing] rehearing en banc does not necessarily connote agreement with the decision as rendered," *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 129 (D.C. Cir. 1977) (en banc) (Leventhal, J., concurring), particularly where, as here, every judge who wrote—both concurring and dissenting from denial of en banc review—expressed disagreement with the panel decision.

discretion and was thus unreviewable, Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8, the Supreme Court held that plaintiffs could seek review of even a "discretionary agency action" to obtain correction of any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25.[3]

In *DCCC*, this Court similarly recognized that discretionary dismissals—particularly those resulting from partisan splits of the commissioners—are subject to judicial review. 812 F.2d at 1133–34. Rejecting the FEC's suggestion that a 3-3 split was an unreviewable exercise of prosecutorial discretion, the Court recognized that "a 6-0 decision not to initiate an enforcement action presumably would be reviewable under the words of § [30109](a)(8)(C), although a unanimous vote might represent a firmer exercise of prosecutorial discretion than a 3-2-1 division." *Id.* The Court "resist[ed] confining the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits," rather

[3] The panel decision in *CREW* attempted to sidestep *Akins* by limiting its facts to a case that considered a dismissal "based entirely on [the FEC's] interpretation of the statute." *CREW*, 892 F.3d at 441 n.11. Nevertheless, the *CREW* panel decision also fails on its own interpretation of *Akins*, as the Court found plaintiffs' injury was redressable notwithstanding any invocation of discretion. *See CREW*, 923 F.3d at 1146 (Pillard, J., dissenting).

holding "judicial intervention serves as a necessary check" where the agency was "unable or *unwilling* to apply 'settled law to clear facts.'" *Id.* at 1134, 1135 n.5 (emphasis added).[4]

Similarly, this Court held in *Chamber* that the FEC's "unwillingness" to proceed was not only subject to judicial review, but in fact that "it would be easy to establish that such agency action was contrary to law" because "the Commission's refusal to enforce would be based not on a dispute over the meaning of the applicability of the rule's clear terms." 69 F.3d at 603. In the case, two groups sought judicial review of a FEC regulation, and the FEC challenged the plaintiffs' standing because three commissioners had already committed to exercising their discretion to block enforcement. *Id.* This Court found standing despite this discretionary commitment to nonenforcement, recognizing that the FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce" and thus that enforcement is not left to the discretionary choice of the

[4] Both the Circuit Court and district court *CREW* decisions ignored this authority, likely because the FEC did not dispute before either court that its discretionary dismissals were in fact subject to judicial review. *CREW*, 923 F.3d at 1143 (Pillard, J., dissenting).

commissioners. *Id.*[5] Rather, it found that if the plaintiffs later violated the challenged regulation, a complainant could seek judicial review of the controlling bloc's discretionary dismissal of a complaint against the plaintiffs and "eas[ily]" establish the dismissal was contrary to law because the agency's "unwillingness" to enforce was *per se* "contrary to law." *Id.* The complainant could then either obtain reversal of the discretionary decision from the Commission or else be permitted to bring its own suit against the plaintiffs. *Id.* Therefore "even without a Commission enforcement decision, [plaintiffs] [were] subject to litigation challenging . . . their actions if contrary to the Commission's rule." *Id.*[6]

Finally, in *Orloski*, this Court recognized that all FEC dismissals are subject to review to determine whether they are contrary to law. 795 F.2d at 161. *Orloski* recognized dismissals could be contrary to law *either* because they contained legal error *or* because they were otherwise arbitrary, capricious, or an abuse of discretion. *Id.* Indeed, it recognized that the latter review was only appropriate

[5] Though related only to standing and not the merits, the conclusion that the FEC could not prevent enforcement through its discretionary enforcement choice was "necessary to [the opinion's] result" and thus part of its holding. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 67 (1996). If the commissioners' decision was indeed unreviewable, as the *CREW* decisions held, then the plaintiffs faced no realistic threat of enforcement and would not have had standing.

[6] As with *DCCC*, both of the *CREW* decisions ignored this authority.

where a court confirmed that the dismissal rested on "permissible interpretation[s] of the statute." *Id.* In other words, *Orloski* requires the FEC to show *no* legal error in the controlling commissioners' analysis before a court moves to the more deferential review.

The *CREW* cases are wholly inconsistent with *Akins*, *DCCC*, *Chamber*, and *Orloski*. Contrary to *Akins*' command that *Heckler* was "explicitly" inapplicable and that plaintiffs may obtain correction of legal error contained in discretionary FEC actions, both the district court and the divided Circuit panel *CREW* decisions relied on *Heckler* to ignore the FEC's legal error in dismissal or even to render the FEC's discretion "unreviewable." *See CREW*, 892 F.3d at 438, 439 (holding *Heckler* "controls this case"); *CREW*, 236 F. Supp. 3d at 390 (relying on *Heckler* to find that "the Court will not meddle with that decision [to dismiss]"). Contrary to *DCCC*'s holding that three commissioners' exercise of prosecutorial discretion was subject to judicial review, the *CREW* cases rendered the dismissal entirely beyond judicial review, *CREW*, 892 F.3d at 438, or subject to such deference as to be effectively beyond judicial review, *CREW*, 236 F. Supp. 3d at 390. Contrary to *Chamber*'s command that dismissals of complaints "based not on a dispute over the meaning of the applicability of the rule's clear terms" but solely on the Commission's "unwillingness to enforce" are *per se* contrary to law, 69 F.3d at

603, the *CREW* cases treat such dismissals as *per se* consistent with law. Finally, contrary to *Orloski*'s command to only proceed to a discretionary "abuse of discretion" review after a court has confirmed the dismissal was based entirely on "permissible interpretation[s] of the [law]," 795 F.2d at 115, the *CREW* cases render the commissioners' interpretations beyond judicial review if the commissioners elect to include two magic words—"prosecutorial discretion"—in their statement of reasons.

The *CREW* cases conflict with binding Supreme Court and Circuit precedent. This Court is bound to follow the precedent of the Supreme Court and the prior decisions of this Circuit. As such, the Court should declare the *CREW* cases are in conflict and thus will not be followed here, were erroneously followed below, and are not binding on any future court.

II. The *CREW* Cases Misread *Heckler*

Though the *CREW* cases' conflict with binding precedent is sufficient to render them inapplicable, the *CREW* cases also rest on fundamental misreading of *Heckler*. In both the divided circuit panel and the district court decision in *CREW*, the courts read *Heckler* to immunize agency legal error from judicial review whenever controlling commissioners voluntarily elect to invoke prosecutorial discretion. *See CREW*, 892 F.3d at 439 (relying on ground on which controlling

bloc "placed their judgment"); *CREW*, 236 F. Supp. 3d at 391. As such, they read *Heckler* to provide a discretionary partisan veto on judicial review. That is not, however, what *Heckler* provides.

In *Heckler v. Chaney*, the Supreme Court held that the APA and the Federal Food, Drug, and Cosmetic Act did not provide for judicial review of the Food and Drug Administration's decision to decline an enforcement action. 470 U.S. at 836–37. In explaining its decision to treat, as a category, all nonenforcement actions as unreviewable under these statutes, the Court recognized that nonenforcement actions often involve "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831. Nonetheless, *Heckler* was interpreting two statutes to exclude a whole class of agency action from review; *Heckler* did not condition judicial scrutiny of otherwise reviewable action on the agency's expressed justification. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987) (the agency's "formal action, rather than its discussion," was "dispositive" on the availability of review). In so holding, *Heckler* recognized the question of whether certain action was subject to review was one for Congress to make in drafting the statute. *See Heckler*, 470 U.S. at 837.

Accordingly, *Heckler* also recognized that this exception to judicial review was merely a "presumption" that would be "rebutted" where Congress subjected

nonenforcement to review. *Id.* at 833. In doing so, *Heckler* relied on *Dunlop v. Bachowski*, 421 U.S. 560 (1975), a decision which found an agency nonenforcement action was reviewable under the terms of a different statute, *see Heckler*, 470 U.S. at 833.[7]

Thus, *Heckler* is a decision about statutory interpretation: i.e., which statutes provided for judicial review of agency nonenforcement actions. As a matter of statutory interpretation, the FECA "explicitly indicates" that the FEC's nonenforcement actions *are* subject to judicial review. *Akins*, 524 U.S. at 26. *Heckler* did not empower a partisan bloc of commissioners to contravene Congress's legislative decree whenever they liked simply by invoking discretionary rationales. The *CREW* cases misread *Heckler*; an error not committed by the Supreme Court in *Akins* or by this Circuit in *DCCC*, *Chamber*, or *Orloski.*

[7] *Heckler* noted that in *Dunlop*, Congress had provided for judicial review of agency nonenforcement by commanding the agency "shall investigate [a] complaint and, if [it] finds probable cause to believe that a violation occurred . . . shall . . . bring a civil action." *Heckler*, 470 U.S. at 833 (quoting *Dunlop*, 421 U.S. at 567, n.7).That is remarkably similar to the language in the FECA, which provides that the commissioners "shall make an investigation" of a complaint raising a "reason to believe" a violation occurred and "shall attempt . . . to correct or prevent [a] violation" of the FECA if there is "probable cause" to believe a violation occurred. 52 U.S.C. § 30109(a)(2), (4).

III. The *CREW* Cases Conflict with the FECA

As noted above, in the FECA Congress both created a significant check against partisan abuse of the FEC and created significant safeguards against partisan gridlock by permitting judicial review of nonenforcement and civil suits where the FEC is disinclined to proceed with a meritorious complaint. The *CREW* decisions, however, conflict with that structure. First, they empower a partisan bloc of commissioners to veto enforcement by either the agency or civil plaintiffs, upending Congress's requirement of bipartisan consent for any FEC decision. Second, the *CREW* cases nullify the citizen suit provision by rendering the prerequisite for exhaustion—a judicial finding the dismissal was contrary to law—impossible. Third, the *CREW* cases impermissibly burden First Amendment rights by providing commissioners unbridled discretion to determine what speakers are subject to the FECA and what listeners may receive information Congress mandated.

A. The *CREW* Decisions Upend the FEC's Bipartisan Structure

The FECA "requires that all [enforcement] actions by the Commission occur on a bipartisan basis." *CREW*, 923 F.3d at 1142 (Griffith, J., concurring). The statute provides that FEC enforcement actions require the consent of four commissioners, while prohibiting any more than three commissioners from sharing

a political party. 52 U.S.C. § 30106(a)(1), (c). That is true both for decisions to enforce and decisions *not* to enforce.[8]

The bipartisan structure creates a serious risk of gridlock where four votes are unavailable for any option. In that situation, *nothing* happens—neither an investigation nor a dismissal—until four commissioners can come to an agreement. Typically, the commissioners who wish to go forward agree to dismiss the case for the limited purpose of obtaining judicial review and reversal of the blocking commissioners' interpretations of law. *See, e.g.*, JA 163–67. In the absence of these concurring votes, there would be no dismissal and no decision for a court to review.[9] Thus in the event of deadlock, the catalyst for the agency action under review is not, in fact, the so-called "controlling" commissioners who blocked enforcement, but rather the concurring commissioners who want a court to review

[8] 52 U.S.C. § 30106(c) ("*All* decisions of the Commission . . . shall be made by a majority vote." (emphasis added)). Although the Commission may deadlock on a "reason to believe" vote, the deadlock does not itself dismiss the case. Rather, a fourth commissioner (or in the case of a 2-2 split, all the commissioners) must agree to dismiss the case in the face of the deadlock. *See, e.g.*, JA 138–39 (splitting 3-3 on reason to believe votes, then voting 6-0 to "close the file").

[9] A complainant could nonetheless sue for the FEC's failure to act if no final action were taken. 52 U.S.C. § 30109(a)(8)(C). A court could then find the persistent deadlock contrary to law, and the concurring commissioners could block the agency's conforming to the declaration, thereby authorizing a citizen suit to proceed.

and correct their colleagues' errors. *Cf. Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (recognizing the legal interpretations to be evaluated are stated in the declining-to-go-ahead commissioners' statement of reasons). In that case, the only bipartisan question adopted by the agency and put to the court is whether the blocking commissioners' idiosyncratic interpretations of law are permissible.[10] The personal belief of three commissioners that resources are better spent elsewhere (or

[10] For this reason, *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000), was also wrong to conclude that the analysis of three commissioners could ever deserve deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Three commissioners may never speak on behalf of the Commission and a statement adopted by three commissioners never bears force of law. *Common Cause*, 842 F.2d at 449 n.32, a prerequisite for *Chevron* deference, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (deference appropriate only for "agency's 'authoritative' or 'official position'"); *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (*Chevron* not available when agency's authority to make rules with "force of law . . . was not invoked"); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* applies only to agency statements with "force of law" with "binding" effect); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) (lack of statement's binding effect on third parties "conclusively confirms" *Chevron* deference was unavailable); Daniel Tokaji, Beyond Repair: FEC Reform and Deadlock Deference at 3 (Mar. 28, 2018), https://bit.ly/2MCDZ88 (FEC deadlocks do not deserve *Chevron* deference). In remanding this action to the court for review, this Court should clarify that *In re Sealed Case* is no longer good law and that courts owe no deference to interpretations endorsed by fewer than four FEC commissioners.

not spent at all) or that there are other agency priorities (or none at all) is simply irrelevant.[11]

The *CREW* decisions ignore this fact, and instead treat a partisan bloc of commissioners as if they are the entire Commission who may freely direct the agency without concurrence from their colleagues across the aisle. Worse, they give that bloc "unreviewable," *CREW*, 892 F.3d at 438, or effectively unreviewable, *CREW*, 236 F. Supp. 3d at 390, authority to interpret the FECA in ways that are clearly contrary to law. The blocking commissioners try to use the *CREW* cases in that way because they rarely dismiss a complaint based on discretionary factors alone. Rather, they announce an interpretation of the law that guts the FECA and permits the violation alleged, and then they shield that interpretation from judicial review by citing discretion as just another basis to dismiss: an evergreen option, as a dismissal can always be justified by a desire to preserve resources.[12] Regulated parties then know that if they violate the FECA,

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[11] Where four or more commissioners agree to dismiss on the basis of prosecutorial discretion, these concerns are not present. Nonetheless, for the reasons addressed below and as held in *Chamber*, the FECA still contemplates that citizen suits should be permitted, and the dismissal found contrary to law. This case, however, does not raise that specific situation.

[12] *See, e.g.*, Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen at 7, MUR 7135 (Trump for President) (Sept. 6, 2018),

but do not violate the blocking commissioners' idiosyncratic, overly narrow, and legally unsupported reading of the FECA, they are immune from enforcement. They also know that, under the FEC's interpretation of *CREW*, no court can step in to correct this underenforcement because the blocking commissioners will simply invoke their discretion in justifying dismissal, cutting off any judicial review that could set the law straight.

"Giving a non-majority of the [c]ommissioners enforcement discretion removes an institutional check on political deadlock that Congress wrote into FECA." *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting). "Non-majority discretion to block action is fatal to FECA if that enforcement discretion is—as [*CREW*] would have it—both judicially unreviewable, and effective in shielding all other grounds from review." *Id.* It is a "superpower . . . to kill any FEC enforcement matter, wholly immune from judicial review." *Id.* (quoting FEC, *Statement of Vice*

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https://www.fec.gov/files/legal/murs/7135/7135_2.pdf (interpreting "reason to believe" standard, then summarily stating "[f]or these reasons, *and in exercise of our prosecutorial discretion*, we voted against finding reason to believe and to close the file." (emphasis added)); Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman at 31, MUR 6872 (New Models) (Dec. 20, 2017) https://eqs.fec.gov/eqsdocsMUR/17044435569.pdf (providing thirty-plus pages of legal analysis and then footnote citing *Heckler*). Indeed, in every dismissal of an allegation of a straw donor violation of 52 U.S.C. § 30122 over the OGC's recommendation to pursue enforcement since the district court decision in *CREW*, the blocking commissioners have cited prosecutorial discretion among the reasons to dismiss.

Chair Ellen L. Weintraub on D.C. Circuit's Decision in CREW v. FEC 1 (June 22, 2018), https://go.usa.gov/xmWC2). It is a power Congress expressly denied, however, and the *CREW* cases erred in providing it.

B. The *CREW* Decisions Nullify the Statutory Citizen Suit Provision

The *CREW* decisions conflict with the FECA's structure in another way: they render the FECA's citizen suit provision superfluous. The FECA not only permits complainants to sue the FEC when it fails to enforce, but it also gives complainants a private right of action to seek a direct judicial remedy against the violator. 52 U.S.C. § 30109(a)(8)(C). Under the FECA, the FEC plays an important gatekeeping role to guard against frivolous complaints. *See id.* Yet the FECA also recognizes the concrete interest of private individuals and the vital importance of enforcement. So, it permits complainants to seek a civil remedy where they raise "plausible claims" and the FEC declines enforcement. *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting).

By creating a private right of action and not leaving enforcement solely to a government agency, Congress recognized that campaign finance law not only serves the common interest in guarding against a corrupt government, but also equally serves particular and concrete interests of individual persons. Campaign finance laws guarantee disclosure, providing each voter "with information as to

where political campaign money comes from . . . in order to aid th[at] vote[r] in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66–67 (internal quotation marks omitted). This information allows each voter to "place each candidate in the political spectrum more precisely," and "alert[s] the voter to the interests to which a candidate is most likely to be responsive." *Id.*; *see also Akins*, 524 U.S. at 21 (disclosure also serves all persons' First Amendment interests in sharing information with "others to whom they would communicate it"). The information also allows all persons—including nonvoters—"to detect any post-election special favors that may be given in return" for political support. *Buckley*, 424 U.S. at 67; *see also Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (information allows persons to see if "elected officials are 'in the pocket' of so-called moneyed interests"). Each of these interests, "though widely shared," is still "concrete." *Akins*, 524 U.S. at 24; *see also Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549 (2016) (recognizing deprivation of information is a concrete harm without need to show any additional harm (citing *Akins*, 524 U.S. at 20–25)).

In recognition of both the collective harm to the nation and the concrete and particularized harm inflicted on individuals by violations of campaign finance law, Congress split civil enforcement between a government agency and private individuals. *See* 52 U.S.C. § 30107(e) (providing, "[e]xcept" for citizen suits "in

section 30109(a)(8),” the FEC’s has “exclusive” civil enforcement power). In so doing, Congress was adopting “a feature of many modern legislative programs.” *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990); *see also, e.g.*, 15 U.S.C. §§ 15, 15f (splitting enforcement of antitrust laws between government agencies and private persons); 16 U.S.C. § 1540(g) (splitting enforcement of Endangered Species Act between government agencies and private persons); 42 U.S.C. § 2000e-5(f) (splitting enforcement of anti-discrimination employment statute between government agency and private persons); 42 U.S.C. § 4305 (splitting enforcement of energy statute between agency and private persons); 42 U.S.C. § 7604 (splitting enforcement of air pollution statute between government agency and private persons). The FECA presents a similar duality in enforcement, although with a significant gatekeeping role for the FEC appropriate in light of the potential First Amendment interests involved.

Before a private party can bring their own suit, it must file a complaint with the FEC. 52 U.S.C. § 30109(a). If the FEC chooses to enforce itself, the complainant can do nothing more. If the FEC chooses not to enforce, however, then the complainant can seek judicial review of the FEC’s actions. If a court agrees with the FEC that the complaint lacked merit, then the court would affirm the FEC’s judgment of dismissal and the complainant could not then file a private

suit. 52 U.S.C. § 30109(a). If, however, the court found the complaint had merit and the Commission committed legal error in its analysis, or acted unreasonably in its consideration of the facts, then a court would declare the FEC has acted "contrary to law" and remand to the FEC for reconsideration. 52 U.S.C. § 30109(a)(8)(C). The FEC then faces a choice: it can (1) choose to "conform" with the court's declaration and proceed with enforcement or a new lawful dismissal, or (2) choose not to conform, and thus step aside and allow the private plaintiff to file suit against the subject of the complaint to remedy the violation. *Id.* So structured, the FECA creates a sensible gatekeeping role for the FEC—one that permits "plausible claims" to proceed while protecting against partisan "enforcement-shirking." *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting).

The *CREW* cases, however, render the possibility of a contrary to law judgment essentially impossible. The divided D.C. Circuit panel decision would render the FEC's discretionary dismissals entirely "unreviewable" by courts, *CREW*, 892 F.3d at 438, while the lower court decision holds dismissals to a standard that a plaintiff could never meet, *CREW*, 236 F. Supp. 3d at 390 (requiring plaintiff to show, *e.g.*, preservation of resources is irrational). Moreover, they render private suits impossible in the exact situation private suits are most sensible: where the FEC recognizes a complaint has merit but still declines

enforcement simply as a matter of its own discretion. Indeed, it would be absurd to interpret the FECA to condition a private plaintiff's suit entirely on the FEC's decisions about "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requests best fits the agencies overall priorities," or "whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. None of those factors are implicated when a private person—rather than the FEC—brings suit.[13]

Recognizing the Commission's discretionary decision to decline enforcement is "contrary to [the] law" of the FECA, 52 U.S.C. § 30109(a)(8)(C), would not risk opening flood gates of private litigation or otherwise remove the FEC from its intended gatekeeping role. Rather, it would permit individuals to bring citizen suits when they allege "plausible claims," *CREW*, 923 F.3d at 1144 (Pillard, J., dissenting), even when the FEC believes its resources are best spent

[13] Further, since any dismissal not based on the merits of the complaint is "contrary to law" because it has no "rational connection" to the commissioners' decision to find no "reason to believe" a violation occurred, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 34 (1983); 52 U.S.C. § 30109(a), courts are not called on to second-guess the agency's "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831. Rather a court ignores them, looks at the law and the facts, and decides whether the FEC complied with its obligation to investigate complaints raising a reason to believe a violation may have occurred.

elsewhere. The *CREW* cases, however, block these suits when they are most useful and, by making judicial review contingent on the voluntary choice of a partisan bloc of commissioners, impermissibly renders the FECA's citizen suit provision "superfluous, void, [and] insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

C. *CREW*'s "Unreviewable" Discretion Raises Significant First Amendment Concerns

Finally, as this Court recognized en banc, affording the Commission enforcement discretion "raises First Amendment concerns." *Akins*, 101 F.3d at 744. Those concerns are at their highest where that discretion is entirely "unreviewable." *CREW*, 892 F.3d at 438.

The FEC operates in a constitutionally sensitive area "charged with the dynamics of party politics." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Not only do its decisions implicate First Amendment rights to speak by deciding when the FECA applies, but it also makes equally constitutionally sensitive decisions affecting individuals' rights "in receiving information" by deciding what will be disclosed. *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (recognizing First Amendment protects both rights to speak and rights to receive); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) (recognizing "First Amendment rights of the public to

know the identity of those who seek to influence their vote"). In deciding whether to apply the FECA to a respondent, the Commission decides whether persons shall receive information to which Congress entitled them—if it chooses not to enforce, it censors the recipients' receipt of that information. *See Citizens United*, 558 U.S. at 333, 341 (finding unconstitutional FEC's claimed authority that could permit a "ban on books" or "pamphlets," stating "voters must be free to obtain information").

Given the constitutionally unique position of the FEC—impacting both speakers' and listeners' rights with its enforcement decisions—enforcement discretion is constitutionally problematic. The "liberty to communicate [cannot] . . . depen[d] upon the exercise of [a government official's] discretion." *Schneider v. New Jersey, Town of Irvington*, 308 U.S. 147, 164 (1939). Accordingly, the Constitution denies government officials "unbridled discretion" to decide if and when to apply rules that impact First Amendment rights—either a speaker's or a listener's rights. *Se. Promotions, Ltd.*, 420 U.S. at 553; *see also Lamont v. Postmaster Gen. of the United States*, 381 U.S. 301, 305 (1965) (official's discretion over plaintiff's receipt of mail violated First Amendment even if the government was not required to establish mail service in the first place).

The *CREW* cases, however, confer just such unbridled discretion on the FEC—and indeed on a non-majority of commissioners. Under the divided D.C. Circuit panel decision, commissioners are free to pick and choose enforcement on a whim—censoring a complainant's access to speech that Congress has constitutionally compelled—and to do so without any judicial oversight or legal guidance. This raises a very significant risk that discretion can and will be used to reward those (either respondents or complainants) with viewpoints supported by the blocking commissioners, and to impede those with viewpoints deemed disagreeable.[14] Of course, the First Amendment deprives officials of this discretion even in the absence of evidence of any viewpoint discrimination—the Constitution prohibits unbridled discretion in a First Amendment sensitive area regardless of how it is used. *See, e.g.*, *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (holding First Amendment barred "unbridled discretion" even in absence of viewpoint discrimination).

[14] At least one FEC commissioner has weighed the viewpoints of complainants and respondents in the context of enforcement. In a discussion about the Commission's discretion to delay consideration of enforcement matters, one commissioner defended that discretion by citing his analysis of the viewpoints of parties before the Commission and stating "discretion is important and has a partisan impact." FEC, Minutes of May 21, 2015 Meeting, https://www.fec.gov/resources/updates/agendas/2015/transcripts/Open_Meeting_Captions_2015_05_21.txt.

Given the "serious constitutional problems" inherent in interpreting the FECA to confer unreviewable enforcement discretion on the FEC, the Court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988). For reasons stated above, it is far from the plain intent of Congress to prohibit judicial review of nonenforcement actions—in fact, it is contrary to the very intent expressed in the statute. This Court sitting en banc recognized Congress's intent to afford fulsome judicial review in finding that "First Amendment concerns" counseled against affording the FEC any discretion that might shortchange that review. *Akins*, 101 F.3d at 744. The *CREW* line of cases never considered the serious constitutional problems they were creating in affording unbridled enforcement discretion to the FEC. This Court should avoid those problems by reinstating judicial review for discretionary dismissals of the FEC and bridling the FEC's discretion by directing review to the only issue that matters: the merit of the complaint.

* * *

In short, the *CREW* cases—the district court case relied on below and the divided panel relied on here—suffer significant infirmities. They misread the

authority on which they rely, upset Congress's careful bipartisan design for the Commission, void the FECA's private right of action, and create serious constitutional problems by affording a partisan bloc of commissioners an unreviewable veto on enforcement. That alone is enough reason to dispense with them, but they also contradict binding Supreme Court and Circuit precedent which this Court must follow. Accordingly, this Could should recognize that the *CREW* cases are an aberration and declare that they are not binding here or on any future decision.

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Respectfully submitted,

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I hereby certify that on July 22, 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.

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