ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

No. 22-5277

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

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, No. 1:21-cv-02128-RJL

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND ELECTION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

To counsel's knowledge, the parties, intervenors, and *amici* appearing before this Court are listed in the Appellant's Certificate as to Parties, Rulings, and Related Cases. Counsel understands additional *amici curiae* may appear in this matter.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in the Appellant's Certificate as to Parties, Rulings, and Related Cases.

C. Related Cases

The case on review was not previously before this Court or any other court. A related case is pending before this Court. *See* No. 22-5339, *Campaign Legal Center v. FEC*. On October 15, 2024, the Court held No. 22-5339 in abeyance pending the en banc Court's disposition of this case. Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C) currently pending in this Court.

/s/ Daniel I. Weiner
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STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary because *amici* have unique perspectives as a not-for-profit, non-partisan law and public policy institute and election law scholars who study the systems and structures of election administration, which may be of significant value to the Court's en banc reconsideration of the panel decision. No other *amicus* is capable of providing this unique perspective.[1]

[1] No party's counsel authored this brief in whole or part, or contributed money that was intended to fund preparing or submitting the brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

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INTEREST OF AMICI CURIAE

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a not-for-profit, non-partisan law and public policy institute that focuses on fundamental issues of democracy and justice.[2] Through its Elections and Government Program, the Brennan Center studies the systems and structures of election administration and advances solutions to ensure these systems can properly carry out their responsibilities. This work includes documenting how partisan gridlock and other structural barriers have increasingly prevented the Federal Election Commission ("FEC" or "Commission") from fulfilling its duty to enforce federal campaign finance laws, as well as working with state and local election officials across the country on various campaign finance and election administration issues.

Amici election law scholars are leading scholars whose research and academic interests include campaign finance, election law and administration, and the FEC. *Amici* scholars have an interest in the proper interpretation and application of federal election law. They have

[2] This brief does not purport to convey the position, if any, of the New York University School of Law.

a range of views about the appropriateness of the FEC's decision to dismiss End Citizen United PAC's administrative complaint at issue here. However, they share the view that the panel decision, holding that the district court lacked authority to review the controlling commissioners' statement of reasons, improperly insulates the agency's statutory interpretation from judicial scrutiny. These professors join this brief as *amici curiae*: [3]

Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School;

Michael S. Kang, Class of 1940 Professor of Law, Northwestern Pritzker School of Law;

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Nicholas Stephanopoulos, Kirkland & Ellis Professor of Law, Harvard Law School;

[3] These professors' titles and university affiliations are provided for identification purposes only.

Ciara Torres-Spelliscy, Professor of Law, Stetson University College of Law;

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SUMMARY OF ARGUMENT

This Court should reverse the district court decision, overrule the recent precedents on which it relies, and return to the previous approach of reviewing all FEC enforcement dismissals for consistency with the law. This Court's current approach, under which a controlling group of commissioners need only say the words "prosecutorial discretion" to render dismissal of a complaint wholly unreviewable, allows for easy circumvention of judicial review in cases where the FEC has failed to enforce campaign finance laws, contravening the text of the Federal Election Campaign Act ("FECA") and governing precedents of the Supreme Court and this Court. *See generally* Petition for Rehearing En Banc, *End Citizens United PAC v. FEC*, No. 22-5277 (D.C. Cir. Feb. 20, 2024).

When it created the FEC, Congress provided for expanded judicial review of enforcement decisions precisely because it recognized the evenly divided agency's unique vulnerability to political manipulation. Today what Congress feared has come to pass: the FEC systematically fails to enforce campaign finance laws, often deadlocking in high-profile cases. This Court's decisions abdicating judicial review, even when the

Commission deadlocks, have eviscerated a key judicial check on commissioners, allowing erroneous legal interpretations to persist, encouraging escalating procedural gambits on both sides, and, over the long term, sowing ever greater confusion and disrespect for the law. This Court cannot fix all of the FEC's challenges, but it can and should undo its own error exacerbating them.

ARGUMENT

I. The FEC's Unique Structure Necessitates Robust Judicial Review of Non-Enforcement Decisions

Congress intended the FEC to be "an active watchdog" in ensuring "[t]he restoration of public confidence in the election process."[4] Recognizing that the agency could become a political weapon, however, Congress created a structure virtually unique among federal agencies: the FEC is evenly divided, with no more than half its seats held by

[4] *Federal Election Campaign Act Amendments, 1976: Hearing on S. 2911, S. 2911 – Amdt. No. 1396, S. 2912, S. 2918, S. 2953, and S. 2987 Before the Subcomm. On Privileges and Elections of the S. Comm. On Rules and Admin.*, 94th Cong. 69 (1976) (statement of Sen. Hugh Scott, Member, S. Comm. on Rules and Admin.); *see also* Federal Election Campaign Act Amendments, 1976, Subcomm. on Privileges and Elections of the Comm. on Rules and Administration (Feb. 18, 1976), Statement of Pres. Ford at 133 ("If [the FEC] becomes an empty shell, public confidence in our political process will be further eroded and the door will be opened to possible abuses in the coming elections.").

appointees from either major party.[5] These partisan appointees exert greater authority than members of comparable bodies. For example, while non-partisan career staff at most agencies have discretion to undertake initial investigations into potential violations,[6] FEC staff cannot conduct even a preliminary investigation without a formal Commission vote finding "reason to believe" a violation occurred. 52 U.S.C. §§ 30106(c), 30107(a), 30109(a).

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[5] Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Ctr. for Just., 1 (2016) (hereinafter "Brennan Report"), https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1137 (2000) ("[Multimember agencies] usually have an odd number of members, with no more than a bare majority from the same political party."). One other federal agency, the Election Assistance Commission (EAC), is similarly organized, but its role is largely advisory. Karen L. Shanton, Cong. Rsch. Serv., IF10981, *The U.S. Election Assistance Commission: An Overview* 1 (2019).

[6] *See, e.g.*, SEC, Enforcement Manual, § 2.3.1 (2017) (encouraging staff to "use their discretion and judgment in making the preliminary determination of whether it is appropriate to open a [Matter Under Inquiry]"); 16 C.F.R. § 2.1 (2000) (delegating limited authority to initiate investigations to Directors, Deputy Directors, and Associate Directors of FTC Bureaus and regional offices); EEOC, Regional Attorneys' Manual, pt. 2, § 3(B) (2005) (delegating limited authority to Regional Attorneys to file and settle suits brought under certain anti-discrimination statutes).

To resolve the obvious tension between the FEC's structure and its mission to protect the integrity of our political process, Congress granted courts an expanded role in ensuring that the Commission diligently enforces the law. *See CREW v. FEC*, 923 F.3d 1141, 1144 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of rehearing en banc) ("Congress acknowledged that the FEC's politically balanced composition . . . created a risk of political deadlock and non-enforcement of the law."). Importantly, this role includes the unusual power to review dismissals of administrative complaints. *See* 52 U.S.C. § 30109(a)(8)(A) & (C); *FEC v. Akins*, 524 U.S. 11, 26 (1998) (noting that Congress intended to "alter tradition" and subject the FEC to higher judicial scrutiny than other agencies). FECA's carefully crafted grant of judicial authority thus "reflect[s] Congress's judgment that judicial review is required, in part, 'to assure . . . that the Commission does not shirk its responsibility' to pass on the merits of complaints." *CREW v. FEC*, 892 F.3d 434, 451-52 (D.C. Cir. 2018) (Pillard, J., dissenting) ("*Commission on Hope*") (quoting *DCCC v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) (other quotations omitted)).

As Appellant correctly explains, the plain text of FECA, its structure, and relevant precedents from the Supreme Court and this Court confirm that courts have authority to review any FEC dismissal of an administrative complaint for legal errors, even those purportedly based on prosecutorial discretion.[7] This was the rule in this Circuit for decades after FECA was passed. *See End Citizens United PAC v. FEC*, 90 F.4th 1172, 1184 (D.C. Cir. 2024) (Pillard, J., concurring in part) (listing Circuit precedent supporting reviewability of FEC enforcement decisions). It was correct then, and it is correct now.

II. This Court's More Recent Precedents Have Frustrated Congress's Objectives and Exacerbated the Consequences of FEC Dysfunction

Insulating the FEC's prosecutorial discretion dismissals from judicial review frustrates Congress's intent that courts serve as a backstop to vindicate the goals of FECA. The Commission today systematically fails to enforce campaign finance law in many areas.

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[7] *See* Appellant's En Banc Brief at 3, 21–26; *see also* 52 U.S.C. § 30109(a)(8)(A) ("*Any* party aggrieved by an order of the Commission dismissing a complaint" may file a petition seeking review of the FEC's order in the United States District Court for the District of Columbia. (emphasis added)); *Akins*, 524 U.S. at 26 (rejecting Commission's argument that *Heckler v. Chaney*, 470 U.S. 821 (1985), precluded review under FECA).

This Court's rulings abandoning its crucial oversight function aggravate this problem, allowing erroneous legal interpretations and confusion to reign.

A. The FEC systematically fails to enforce federal campaign finance laws.

Notwithstanding Congress's desire for the FEC to be an "active watchdog," the Commission has failed to enforce large swaths of campaign finance law, routinely declining even to investigate allegations of misconduct and overruling the recommendations of its own career staff.

This retreat from enforcing federal campaign finance laws has defined the entire 15-year period since the Supreme Court decided *Citizens United v. Federal Election Commission*, which invalidated certain campaign rules but expressly reaffirmed the constitutionality of others. 558 U.S. 310 (2010). Most notably, the Commission has done virtually nothing to enforce restrictions on coordination between candidates and outside groups like super PACs. The *Citizens United* Court grounded its holding that certain groups should be allowed to spend (and by implication raise) unlimited funds on the basis that those groups would be independent from—i.e., they would not "coordinate"

with—candidates. *See Citizens United*, 558 U.S. at 356–57; *see also SpeechNow.org v. FEC.*, 599 F.3d 686, 693-94 (D.C. Cir. 2010) (en banc). But that has not been borne out in practice, thanks in part to the Commission's persistent failure to enforce even the relatively lenient requirements it has on the books.[8]

Data the FEC produced last year in response to congressional oversight requests confirm that the Commission almost never enforces restrictions on coordination, despite widespread evidence of violations.[9]

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[8] The Commission has interpreted existing rules in ways that increasingly permit expansive coordination between campaigns and outside groups. Earlier this year, for example, the Commission held that there are virtually no restrictions on coordination with respect to canvassing activities, allowing campaigns to effectively outsource get out the vote efforts and other "ground game" activities to super PACs. *See* FEC AO 2024-01 (Texas Majority PAC)

[9] *See generally* FEC, Responses to Questions From the Minority Members of the Committee on House Administration (June 16, 2023), https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-response-2023.pdf (hereinafter "FEC June 2023 Responses"); FEC, Responses to Supplemental Questions from the Minority Members of the Committee on House Administration (Sept. 11, 2023, https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-response-sept-11-2023.pdf (hereinafter "FEC Sept. 2023 Supplemental Responses"); Saurav Ghosh, et al., *The Illusion of Independence How Unregulated Coordination is Undermining Our Democracy, and What Can Be Done to Stop It*, Campaign Legal Ctr. (2023), https://campaignlegal.org/sites/default/files/2023-11/Coordination%20Report%20%28Final%20POST%20Proofing%29.pdf.

Between 2010 and 2023, the Commission authorized only a handful of investigations into potential unlawful coordination and ultimately failed to pursue *any* of the alleged wrongdoing.[10] The FEC's refusal to so much as investigate—let alone seek penalties for—even blatant instances of coordination recently drew a rebuke from this Court. *See Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1190–94 (D.C. Cir. 2024) (holding that the FEC acted contrary to law by failing to investigate detailed allegations of coordinated expenditures).

Disclosure is another area characterized by pervasive under-enforcement. The *Citizen United* Court, even as it struck down certain expenditure limits, reaffirmed by an 8–1 vote that robust transparency requirements are constitutional. *Citizens United*, 558 U.S. at 368–71; *see also McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (plurality opinion) ("[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system."). Indeed, the *Citizens United* Court's reasoning appeared to assume that all the new campaign

[10] *See* FEC Sept. 2023 Supplemental Responses, *supra*, at 1–2; *see also* Daniel I. Weiner & Owen Bacskai, *The FEC, Still Failing to Enforce Campaign Laws, Heads to Capitol Hill*, Brennan Ctr. for Just. (Sept. 15, 2023), https://www.brennancenter.org/our-work/analysis-opinion/fec-still-failing-enforce-campaign-laws-heads-capitol-hill.

spending it was permitting would come from transparent sources. *See Citizens United*, 558 U.S. at 370–71 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."). Thanks in significant part to FEC inaction, however, billions of dollars in "dark money" from undisclosed sources have flooded into federal elections.[11] In particular, the Commission has failed to act on numerous complaints about dark money groups that should have been required to register as PACs, which would require disclosure of all donors above $250.[12] It has also repeatedly failed to curb the use of pass-through corporations to disguise donor identities (despite conceding that this practice is illegal).[13] Not only have these failings eroded safeguards that allow

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[11] *See* Anna Massoglia, *Outside Spending on 2024 Elections Shatters Records, Fueled by Billion-Dollar 'Dark Money' Infusion*, OpenSecrets (Nov. 5, 2024), https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion.

[12] *See* FEC June 2023 Responses, *supra*, at 24–25.

[13] *See, e.g.*, FEC, Certification for MUR 8058 (SQI Limited, Inc.) (Mar. 4, 2024), https://www.fec.gov/files/legal/murs/8058/8058_16.pdf; FEC, MUR 6485 (W Spann LLC, et al.), https://www.fec.gov/data/legal/matter-under-review/6485.

voters to know who is trying to influence them, they have also created potential avenues for prohibited foreign spending in federal elections.[14]

Coordination and disclosure rules are far from the only areas of campaign finance law characterized by systematic under-enforcement. Recently, for example, the Commission deadlocked on the question of whether joint fundraising committees (through which dozens or even hundreds of committees can band together to raise money) can be used to circumvent candidate contribution limits. *See infra* at 16–17.[15] And the data supplied to Congress reflect the FEC's repeated failures to investigate many other types of allegations, including prohibited

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[14] *See* Miriam Galston, *Outing Outside Group Spending and the Crisis of Nonenforcement*, 32 Stan. L. & Pol'y Rev. 253, 292–93, 298–99 (2021); Norman I. Silber, *Foreign Corruption of the Political Process Through Social Welfare Organizations*, 114 Nw. U. L. Rev. Online 104, 105–06 n.2 (2019)

[15] In *McCutcheon*, the Supreme Court plurality cited the existence of strong joint fundraising rules as a justification for striking down aggregate limits on how much individuals could give in total to candidates, parties, and PACs, which it deemed unnecessary to prevent circumvention of the core limits on how much an individual may give to any one recipient. *McCutcheon*, 572 U.S. at 200–02. Much like the assumptions underlying *Citizens United*, the assumptions underlying *McCutcheon* have also not been borne out in practice thanks in significant part to the FEC's failure to enforce longstanding safeguards.

corporate donations to candidates, foreign spending in U.S. elections, and misappropriation of campaign funds for personal use.[16]

What is especially striking in examining the Commission's failures to even investigate many alleged violations is how often they go against the recommendations of the Commission's own non-partisan staff. The FEC's congressional oversight responses show that, from *Citizens United* in January 2010 through mid-2023, the Commission followed staff recommendations to simply *open a preliminary investigation* in just 12 percent of complaints alleging illegal coordination, 21 percent of complaints alleging failure to register as a PAC, 40 percent of complaints alleging illegal corporate contributions, and 52 percent of complaints alleging illegal foreign contributions.[17] And in just the last few months, in the midst of the federal general election, the Commission rejected staff recommendations to proceed on administrative complaints alleging, among other things, inadequate financial reporting by candidates and super PACs, schemes to use

[16] *See* FEC June 2023 Responses, *supra*, at 24–25; FEC Sept. 2023 Supplemental Responses, *supra*, at 2–4.

[17] *See* FEC June 2023 Responses, *supra*, at 24–25; FEC Sept. 2023 Supplemental Responses, *supra*, at 2–4.

corporate entities to mask the identity of donors and skirt contribution limits, and failures by candidates and political groups to properly register with the FEC.[18]

Facing no meaningful threat of FEC enforcement, candidates, super PACs, and other political actors continue to push the limits of the law with more aggressive fundraising and spending strategies.[19] Without effective guardrails to ensure the Commission enforces the rules on the books and provides guidance to regulated actors, the cycle of evading legal requirements is almost certain to continue.

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[18] *See, e.g.*, FEC, First General Counsel's Report for MUR 8216 (Last Best Place PAC) (May 17, 2024), https://www.fec.gov/files/legal/murs/8216/8216_06.pdf; FEC, First General Counsel's Report for MUR 8149 (Tim Sheehy for Montana) (Apr. 5, 2024), https://www.fec.gov/files/legal/murs/8149/8149_08.pdf; FEC, First General Counsel's Report for MUR 8058 (SQI Limited, LLC) (Dec. 6, 2023), https://www.fec.gov/files/legal/murs/8058/8058_15.pdf; FEC, First General Counsel's Report for MUR 8168 (Donald J. Trump, et al.) (May 24, 2024), https://www.fec.gov/files/legal/murs/8168/8168_10.pdf.

[19] *See* Marina Pino, *George Santos, Sam Bankman-Fried, and Citizens United*, Brennan Ctr. for Just. (Jan. 24, 2023), https://www.brennancenter.org/our-work/analysis-opinion/george-santos-sam-bankman-fried-and-citizens-united; Jessica Piper, *Super PACs Keep Testing the Limits of Campaign Finance Law*, Politico (Apr. 8, 2024), https://www.politico.com/news/2024/04/08/super-pac-fec-limits-00150672.

B. Partisan deadlocks continue to be a particular challenge at the FEC.

One of the most troubling aspects of the current rule barring judicial review of FEC prosecutorial discretion decisions is that it grants absolute deference not only to majority decisions by the Commission but even to non-majority blocs of commissioners who force deadlocks. *See CREW v. FEC*, 993 F.3d 880, 904–05 (D.C. Cir. 2021) (Millett, J., dissenting) ("*New Models*") (noting the potential for "easy evasion of judicial review" in virtually every enforcement action, even when there was no majority determination). While FECA's text and structure provide that all FEC dismissals are reviewable, insulating non-majority outcomes from judicial review is especially offensive to the statutory regime because it allows half the Commission to block actions based on dubious rationales without any meaningful check. *See* Part I, *supra*. And although the rate of gridlock at the FEC has decreased somewhat in the last few years, it remains a crucial problem causing dysfunction.[20]

[20] *See* FEC June 2023 Responses, *supra*, at 16, 20–23; *see also* Brennan Report at 3.

Partisan deadlocks were relatively rare for much of the Commission's history. In 2006, for instance, the Commission deadlocked in approximately 4.5 percent of enforcement cases.[21] Starting in 2008, however, newly appointed commissioners had much sharper disagreements. Between 2012 and the first quarter of 2019, the deadlock ratio increased to over half of all enforcement matters, with commissioners typically reaching consensus only in cases involving minor violations, housekeeping matters, or frivolous complaints.[22]

Deadlocks have decreased in recent years, but the Commission continues to stalemate on many important questions. For example, commissioners deadlocked just last month on a request for an advisory opinion addressing how candidate committees and other entities can allocate the costs of political ads. *See* FEC AO 2024-13 (DSCC,

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[21] *See* Off. of FEC Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 8 (Feb. 2017), https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf. Before deadlocking, most high-profile cases languish at the FEC for years. *Id.* at 1; Brennan Report, at 9.

[22] *See* FEC, Responses to Questions from the Committee on House Administration 20 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf; Brennan Report, at 3.

Montanans for Tester, and Gallego for Arizona). The request arose from concerns that the National Republican Senatorial Committee was skirting campaign finance laws by reclassifying advertisements advocating for a single candidate, which are subject to strict contribution limits, as fund-raising appeals, which are not.[23] The Commission failed to reach an agreement and dismissed the matter without issuing an advisory opinion. The resulting void effectively leaves joint fundraising committees free to massively expand their expenditures on candidate advocacy because the Commission almost certainly would not vote to pursue an investigation in the event an enforcement action arises implicating this issue.[24] Under the Court's current precedents, such a dismissal could easily be insulated from judicial review.

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[23] *See* Luke Broadwater, *Judge Allows Unusual G.O.P. Strategy to Pump Money into Senate Races*, N.Y. Times (Nov. 1, 2024), https://www.nytimes.com/2024/11/01/us/politics/senate-republicans-ads-money.html.

[24] *See* Ally Mutnick, et al., *Senate Republicans to Save Millions of Dollars on Ads — Thanks to the FEC*, Politico (Oct. 10, 2024), https://www.politico.com/news/2024/10/10/fec-joint-fundraising-committee-ads-00183356.

C. Insulating Commission decisions from congressionally mandated judicial review exacerbates FEC dysfunction.

The panel decision and this Court's prior erroneous rulings in *Commission on Hope* and *New Models* have hobbled Congress's design and removed a key check on FEC inaction. *See End Citizens United PAC*, 90 F.4th at 1187 (Pillard, J., concurring in part) (explaining that Congress intended for courts "to detect statutory misreading and thereby prod a reluctant FEC to act"); *see also, e.g.*, *New Models*, 993 F.3d at 904–05 (Millett, J., dissenting); *Commission on Hope*, 892 F.3d at 443 (Pillard, J., dissenting). Indeed, since this Court announced the rule limiting judicial review in *Commission on Hope*, the FEC, or controlling blocs of commissioners in deadlocks, have invoked prosecutorial discretion in approximately two-thirds of decisions rejecting career staff recommendations. *End Citizens United PAC*, 90 F.4th at 1184 (Pillard, J., concurring in part).

The refusal to review many deadlock dismissals creates especially perverse incentives, as Judge Millett explained in her dissent in *New Models*. All that commissioners opposed to enforcement need do to block judicial review is cursorily invoke "prosecutorial discretion" in their

statement of reasons, no matter how erroneous their other stated justifications for blocking enforcement. *New Models*, 993 F.3d at 904–05 (Millett, J., dissenting).[25] This "get out of judicial review free card" leaves commissioners opposed to enforcement with little incentive to even attempt to conform their reasoning to governing law. *Id.* at 895.

Meanwhile, this Court's extreme deference to non-enforcement decisions has periodically led commissioners who favor stronger enforcement to adopt their own procedural gambits. Most notably, for several years commissioners who pushed for stronger enforcement adopted a strategy of holding matters open indefinitely and then refusing to authorize FEC lawyers to defend against the ensuing private lawsuits challenging the Commission's delay—resulting in default judgments that allowed complainants themselves to sue alleged violators. *See* 52 U.S.C. §§ 30109(a)(8)(A), (C). In response to their

[25] This is especially ironic given that the entire purpose of requiring a Statement of Reasons from the controlling commissioners is to *facilitate*—not prevent—judicial oversight of Commission dismissals. *See DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987).

colleagues' protests, these commissioners explained that this avenue was the only way to obtain enforcement of the law.[26]

The ultimate losers from the dysfunction exacerbated by this Court's precedents are not only candidates and other participants in the political process but the American people. Extended procedural wrangling and the lack of meaningful judicial review in so many cases makes it harder for candidates and others to understand their legal obligations under laws that may impact their constitutionally protected speech.[27] Dueling statements from commissioners advancing divergent legal theories in enforcement cases, while having no legal force, are likely to mislead regulated parties and the broader public. And uneven, haphazard enforcement helps foster a culture of impunity in which

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[26] *See* Nihal Krishan, *Elections Commission Chief Uses the 'Nuclear Option' to Rescue the Agency from Gridlock*, Mother Jones (Feb. 20, 2019), https://www.motherjones.com/politics/2019/02/elections-commission-chief-uses-the-nuclear-option-to-rescue-the-agency-from-gridlock/; Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock than Ever,* N.Y. Times (June 8, 2021), https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html. While commissioners appear to no longer be holding matters open with the same frequency, the incentive to resume doing so will remain as long as there is no other meaningful avenue for judicial review.

[27] *See* Brennan Report at 2, 5.

some candidates and donors appear to believe they are not beholden to any rules, increasing the risk of *quid pro quo* corruption.[28] Ultimately, the breakdown of the FEC's regulatory processes leaves voters less informed and more at risk, contrary to what Congress intended. *See Citizens United*, 558 U.S. at 371 (disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages"); *Akins*, 524 U.S. at 20 (discussing Congress's intent "to protect voters" who benefit from campaign disclosures through the judicial review provision).

III. Appropriate Judicial Review of FEC Dismissals Will Not Unduly Burden Court Resources or Upset the Separation of Powers

While all FEC enforcement dismissals are reviewable, *Amici* are aware that courts have neither the capacity nor the expertise to dictate to federal agencies how they should use their limited resources. But properly exercising judicial review of the FEC's decisions in accordance with the provisions of FECA does not require this Court to micromanage the FEC's enforcement docket.

[28] *See* Pino, *supra*; Piper, *supra*.

Review in such cases should be appropriately deferential, particularly where the FEC reaches a decision with a bipartisan majority vote. While judicial review of FEC enforcement decisions is governed by FECA rather than the APA, this Court has previously applied arbitrary and capricious and abuse-of-discretion review. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986 (holding that FECA's "contrary to law" standard encompasses impermissible legal interpretations and FEC enforcement decisions that are arbitrary or capricious or an abuse of discretion). We agree with Appellant that *Orloski* was correctly decided and that it applies to FEC dismissals that purport to invoke prosecutorial discretion. *See* Appellant's En Banc Brief at 27, 45–54. In addition to comporting with FECA's requirements, this standard affords appropriate respect for the Commission's expertise while ensuring that it does not encroach on "the province and duty of the judicial department to say what the law is." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)); *see also New Models*, 993 F.3d 880, 885 (discussing the FEC's expertise

weighing "discretionary considerations . . . such as concerns about resource allocation").

Past practice confirms that judicial review of FEC dismissals will neither undermine the Commission nor bog down this Court's docket. For decades before the erroneous decision in *Commission on Hope*, courts exercised their authority to review FEC dismissals, including those by controlling commissioners who blocked enforcement in deadlocked votes, without controversy.[29] Reversing the wrong turn in *Commission on Hope*, which this Court continued in *New Models* and the panel decision, will simply return to the pre-2018 status quo.

In short, practical and prudential considerations offer no justification for allowing commissioners to avoid judicial review of their substantive interpretations of FECA by inserting magic words invoking prosecutorial discretion after (or before or in the middle of) their statement of reasons. *See New Models*, 993 F.3d at 896 (Millett, J., dissenting). Federal courts should not routinely second guess agency

[29] *See*, *e.g.*, *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020); *CREW v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018); *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016); *see also* Appellant's En Banc Br. at 46–47, 51–54.

operations, but by shirking judicial review even in cases where it is clearly warranted, they allow curable problems to fester and exacerbate the Commission's partisan dysfunction.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to overrule *Commission on Hope* and *New Models* and reverse the district court's judgment.

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