No. 17-5049

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON & MELANIE SLOAN,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:15-vc-02038-RC

PETITION FOR REHEARING EN BANC

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STATEMENT REGARDING NECESSITY OF EN BANC REHEARING

Rehearing is necessary to correct a decision that will eviscerate federal campaign finance law if left uncorrected and leave voters without remedy to ensure access to information they need for the "free functioning of our national institutions." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). A divided panel, contravening binding authority, held that the FEC's discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), nullifies the FECA's provision for judicial review of legal error in the FEC's finding no "reason to believe" a violation occurred, a finding that resulted in dismissal of CREW's complaint below. Specifically, the panel took a position—not even advanced by the FEC—that such decisions are committed to the agency's "unreviewable prosecutorial discretion" so long as the commissioners choose to include prosecutorial discretion among their reasons to dismiss. *CREW v. FEC*, 892 F.3d 434, 439 (D.C. Cir. 2018). As discussed below, however, the commissioners now cite prosecutorial discretion in *every* statement finding no reason to believe. The panel decision could thus block all judicial review, removing the only check on FEC legal error and inaction by any branch of government. Indeed, the FEC's own commissioner recognizes the panel's decision "destroys not just the right that Congress gave the American people to challenge the FEC's enforcement decisions, but the FEC's entire enforcement mechanism." Statement of Vice Chair Ellen L. Weintraub on the D.C. Circuit's Decision in

CREW v. FEC (June 22, 2018) ("Weintraub Statement"), https://bit.ly/2zmAKz5. "The panel's decision," she stated, "flies in the face of what Congress intended and urgently needs to be reconsidered by the *en banc* D.C. Circuit." *Id*.

The panel decision contravenes binding authority of the Supreme Court and this Circuit. The panel decision conflicts with the Supreme Court decision in *FEC v. Akins*, 524 U.S. 11 (1998), which held that the FECA "explicitly indicates" that the FEC's "decision not to undertake an enforcement action" is subject to review, notwithstanding *Heckler*. *Akins*, 524 U.S. at 26. The panel decision is also in conflict with this Court's decision in *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987), which held that FECA review extends beyond decisions not to enforce "on the merits," to cover decisions not to enforce based on the "prosecutorial discretion" of an "unwilling" agency, *id*. at 1133–34 & n.5. The panel decision further conflicts with *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), which held a dismissal based on the "Commission's unwillingness to enforce its own rule" based on its discretion alone is not only reviewable under the FECA, but in fact was an "easy" case of a "contrary to law" dismissal subject to judicial reversal, *id*. at 603. Accordingly, CREW respectfully requests this Court grant rehearing *en banc*.

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GLOSSARY

CHGO	Commission on Hope, Growth and Opportunity
CREW	Citizens for Responsibility and Ethics in Washington and Melanie Sloan
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
OGC	Federal Election Commission's Office of General Counsel

BACKGROUND

To guard against agency inaction and to promote compliance with federal campaign finance law, the FECA allows individuals to file complaints with the FEC alleging violations of law. 52 U.S.C. § 30109(a)(1). The FECA further permits judicial review of "[a]ny" decision by the FEC declining enforcement of the complaint. 52 U.S.C. § 30109(a)(8)(A) ("*Any* party aggrieved by an order of the Commission dismissing a complaint . . . may file a petition with the United States District Court for the District of Columbia." (emphasis added)). Ultimately, the result of that review is the authorization of a civil suit by the complainant to enforce the law in the FEC's stead. 52 U.S.C. § 30109(a)(8)(C).

CREW filed a complaint with the FEC alleging that CHGO failed to register and report as required for political committees, and also failed to make other disclosures. JA 249–64, 392–424. The OGC recommended finding reason to believe CHGO violated its disclosure obligations and that CHGO was a political committee. JA 438–70. The Commission thereafter unanimously agreed there was "reason to believe" CHGO failed to file requisite reports, but three commissioners voted to find no "reason to believe" CHGO was a political committee, deadlocking the Commission on that claim. JA 473–77.

An OGC investigation thereafter revealed extensive evidence CHGO was illegally operating as a political committee while shirking its registration and

reporting obligations. JA 514–78. The investigation revealed that, according to CHGO's internal planning documents, the organization's goal was to "make a measurable impact on the election outcome in selectively identified Senate races," JA 520, "using express advocacy in targeted Senate races," JA 514, and "focus[ing] on . . . key districts to support the election of Republican candidates." JA 578. The investigation further revealed CHGO's attempts to hide its true purpose and to obstruct the OGC's investigation. *See, e.g.*, JA 246, 389, 428, 502, 644 & n.9 (destruction of documents); JA 493–94, 546–52, 808–09 (use of straw officials on government filings); JA 505 (obstructing service of subpoena); JA 792–93, 803–17 (false statements under oath); JA 634–36 (closing operation "ASAP" to avoid "outstanding matter at the [FEC]"); JA 716–17 (theft of organization assets).

Based on this extensive evidence, the OGC again recommended finding reason to believe CHGO operated as a political committee. JA 736–40. The same three commissioners, however, again voted to find no "reason to believe" CHGO was a political committee. JA 757–58. They also now found no "reason to believe" CHGO violated its reporting obligations, deadlocking the Commission on all points, leading to the dismissal of CREW's complaint. *Id.*

The three commissioners later issued a statement of reasons explaining their decision that there was no reason to believe CHGO violated the FECA. JA 766–

70. They first asserted that the OGC "failed to build a sufficiently detailed record of CHGO's activities" to establish CHGO was a political committee, based on their interpretation of the law. JA 766, 768 ("In our view . . . the information available at the time did not support a finding of reason to believe that CHGO had failed to organize, register, and report as a political committee."); JA 768–69 (stating information OGC discovered "did not definitively resolve whether there was reason to believe CHGO was a political committee"). They then stated they blocked any further investigation into all matters because they thought "conciliation . . . would be futile, and the most prudent course was to close the file consistent with the Commission's exercise of its discretion." JA 769.

Pursuant to 52 U.S.C. § 30109(a)(8)(A), CREW sought judicial review of the dismissal. The District Court granted summary judgment to the FEC. *CREW v. FEC*, 236 F. Supp. 3d 378, 397 (D.D.C. 2017). The District Court conceded that there were "strong grounds to prosecute [CHGO] under the [FECA]," but found that "the FEC rationally dismissed Plaintiffs' complaint as an exercise of prosecutorial discretion." *Id.* at 382.

In a divided decision, the panel affirmed the District Court. *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (Randolph, J.). The panel went further, however, adopting a position advanced by no party that the FEC "ha[s] unreviewable prosecutorial discretion to determine" whether there is reason to believe a violation

may have occurred. *Id.* at 438; *see also id.* at 440 (recognizing decision adopted was advanced by no party and was not the reasoning of the court below). The panel held that the presumption under *Heckler v. Chaney*, 470 U.S. 821 (1985), that, absent statutory indication otherwise, nonenforcement decisions are committed to agency discretion and are unreviewable, "controls this case." *CREW*, 892 F.3d at 439. In a footnote, the panel recognized that the Supreme Court has permitted review of FEC nonenforcement decisions, but limited that decision to its purported facts to permit review only where the FEC volunteers by basing its dismissal "entirely" on its "interpretation of FECA" without mentioning its discretion. *Id.* at 441 n. 11.

Judge Pillard dissented. *Id.* at 442. Judge Pillard would have held that "any FEC dismissal based on a no 'reason to believe' vote is reviewable to the extent that such determination was contrary to law." *Id.* at 444.

FEC Commissioner Ellen Weintraub issued a statement on June 22, 2018 stating the panel decision "urgently needs to be reconsidered by the *en banc* D.C. Circuit." Weintraub Statement 1. "Left in place," Commissioner Weintraub stated, "[the panel] decision destroys not just the right that Congress gave the American people to challenge the FEC's enforcement decisions, but the FEC's entire enforcement mechanism." *Id.* She noted the panel decision eliminated "[t]he public's only meaningful check on the unelected administrators . . . who run

the [FEC]" because "*every* future statement from [the FEC] . . . will *certainly* include verbiage stating that . . . 'this case did not warrant the further use of Commission resources.'" *Id.* at 1, 2–3.

REASONS FOR GRANTING RE HEARING EN BANC

In taking a position advanced by no party nor adopted below, the panel, lacking the assistance of any briefing on the question, rendered a decision on a question of exceptional importance in conflict with both Supreme Court authority and decisions of this Circuit. *En banc* rehearing is justified where it is "necessary to secure or maintain uniformity of the court's decisions," because the panel decision "conflicts with a decision of the United States Supreme Court" or this Circuit, or where the "proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a), (b). Rehearing is required for each of those reasons: to remedy a panel decision in conflict with both Supreme Court and Circuit authority, and to correct a decision that undermines the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66.

I. The Panel's Decision Conflicts with *FEC v. Akins*

In *FEC v. Akins*, the United States Supreme Court held that the FECA "explicitly indicates" that FEC "decision[s] not to undertake an enforcement action" are subject to judicial review. 524 U.S. at 26. The Court expressly rejected the FEC's argument that its prosecutorial discretion under *Heckler* could

render a dismissal unreviewable and its legal errors incurable. "In *Heckler*," the Court said, "this Court noted that agency enforcement decisions have traditionally been committed to agency discretion and concluded Congress did not intend to alter that tradition by enacting the APA." *Id.* (internal quotations omitted) Turning to the FECA, it said, "[w]e deal here with a statute that explicitly indicates the contrary." *Id.* Notwithstanding the Supreme Court's clear statement, the panel held that the FEC possesses "unreviewable prosecutorial discretion," because "[n]othing in the [FECA] overcomes the presumption against judicial review" found in *Heckler*. *CREW*, 892 F.3d at 438–39.

The reasoning in *CREW* is squarely at odds with the Supreme Court's holding that the FECA "explicitly" overcomes *Heckler*'s presumption against judicial review. *Akins*, 524 U.S. at 26. The panel attempted to side step this concern by confining *Akins* to its purported facts, finding that *Akins* only permitted review where "the Commission declines to bring an enforcement action on the basis of its interpretation of FECA." *CREW*, 892 F.3d at 441 n.11. But that reading is inconsistent with *Akins*, as Judge Pillard recognized in her dissent. *Id.* at 445, 449.

First, *Akins* drew no distinction between enforcement actions on the basis of the FEC's interpretation of the FECA and those based on *Heckler* discretion. *See* 524 U.S. at 26. Indeed, it expressly rejected, without limitation, the availability of

Heckler discretion when reviewing a FEC dismissal. The Supreme Court's conclusion was not limited to the facts before it, but rather extended to all FEC "decision[s] not to undertake an enforcement action." *Id.* Similarly, the decision below of this Court sitting *en banc* in *Akins* also recognized that the FECA is an "unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings," without indicating any exceptions. *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11. Notably, the *en banc* Court found the agency's "refusal" to enforce was subject to review, *id.*, expressly subjecting discretionary decisions not to enforce to review. Indeed, the *en banc* panel even recognized discretionary nonenforcement by the FEC "raises First Amendment concerns." *Id.* at 744.

Second, the panel ignored the clear command from *Akins* because it erroneously found that "[t]he only issue the Court decided in *Akins* dealt with standing." *CREW*, 892 F.3d at 438 n.6. Specifically, the panel said the "Court held only that the complainants had standing even though, on remand, the Commission might invoke its prosecutorial discretion to dismiss." *Id.* But *Akins* did not simply reject the FEC's argument that a discretionary dismissal on remand deprived the plaintiffs of standing. *See* 524 U.S. at 25. *Akins* also rejected the FEC's argument that the dismissal at issue was "not subject to judicial review"

under *Heckler* because it too "involv[ed] an agency's decision not to undertake enforcement action." *Id.* at 26. Thus, the Court rejected the FEC's suggestion that *Heckler* prevented judicial review of the very dismissal before the Court.[1]

Notwithstanding its attempt to limit *Akins* to its facts, the panel decision is irreconcilable with the Supreme Court decision and this Court's *en banc* decision in that case.

II. The Panel's Decision Conflicts with Circuit Authority

In addition to conflicting with a binding decision of the Supreme Court, the panel opinion also conflicts with prior authority of this Circuit. Specifically, the panel decision conflicts with the Circuit's decisions in *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) ("*DCCC*"), and *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

In *DCCC*, this Court found that a dismissal by the FEC was reviewable, notwithstanding a claim that the dismissal was an exercise of "prosecutorial discretion" under *Heckler*. 831 F.2d at 1133–34. This Court stated that "a 6-0 decision not to initiate an enforcement action presumably would be reviewable under the words of § [30109](a)(8)(C)," and thus found that a 3-3 dismissal based

[1] Indeed, the Commission had argued that the dismissal on review "might be characterized as a discretionary judgment" in addition to a legal interpretation. *See* Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8. Nevertheless, the Supreme Court went forward with reviewing the dismissal.

on "prosecutorial discretion" would also be reviewable. *Id.* Indeed, it said the Court "resist[ed] confining the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits." *Id.* Moreover, the Court expressly stated that where the Commission "is unable *or unwilling* to apply 'settled law to clear facts,' judicial intervention serves as a necessary check." *Id.* at 1135 n.5 (emphasis added).[2] Thus, this Court expressly recognized that judicial review is not limited to cases where the agency is "unable" to enforce on the merits but extends to review of an "unwilling" agency—a term that covers a discretionary decision not to enforce. This is in direct conflict with the panel's conclusion that an unwilling agency is absolutely immune from judicial review and that review is only available where a dismissal "was based entirely on [the FEC's] interpretation of the statute." *CREW*, 892 F.3d at 441 n.11.

Similarly, the panel's decision contravenes this Court's holding in *Chamber of Commerce*. That decision held that the FEC's "unwillingness" to proceed with enforcement is contrary to law. *Chamber of Commerce*, 69 F.3d at 603. In that case, the plaintiffs sought review of an agency rule they argued was inconsistent with the statute. *Id.* at 603. The FEC challenged the plaintiffs' standing—successfully below—because they were not "faced with any present danger of an

[2] Where the law was unsettled or facts unclear, the Court similarly would find review appropriate, but subject to deference like that under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). *See DCCC*, 831 F.2d at 376 n.5.

enforcement proceeding" as three commissioners had declined to find that plaintiffs violated the law, and four votes would be needed before any enforcement proceeding could begin. *Id.* This Court nevertheless found that the plaintiffs were in fact still subject to enforcement, notwithstanding the commitment of three commissioners to refuse to proceed. *Id.* The Court first noted that the FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce." *Id.* Thus, this Court found, if the plaintiffs violated the FEC's rule, a complaint was filed, and the Commission exercised discretion to decline enforcement, the complainant could file suit and easily obtain reversal and bring its own enforcement action:

> [I]t would be easy to establish that such agency action was contrary to law; the Commission's refusal to enforce would be based not on a dispute over the meaning or applicability of the rule's clear terms, *but on the Commission's unwillingness to enforce its own rule.*

Id. (emphasis added). Accordingly, the Court found that, "even without a Commission enforcement decision, [plaintiffs] [were] subject to litigation challenging . . . their actions if contrary to the Commission's rule." *Id.*[3] Thus, *Chamber of Commerce* holds, contrary to the panel's decision here, that the FEC's

[3] 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 panel decision holds, then the plaintiffs faced no realistic threat of enforcement and would not have had standing.

voluntary choice to forgo enforcement is an "easy" case for a reviewing court to find that the dismissal of the administrative complaint was "contrary to law." *Chamber of Commerce*, 69 F.3d at 603.

Indeed, *Chamber of Commerce* is necessarily correct on this point, because to find otherwise conflicts with the plain language of the statute. As Judge Pillard recognized in her dissent, the FECA creates a specific statutory framework for FEC decision-making, setting forth only two questions for the Commission to answer, both related to the merits of the complaint. *See CREW*, 892 F.3d at 442–43 (Pillard, J., dissenting) (discussing 52 U.S.C. § 30109(a)(2) "reason to believe" and *id.* § 30109(a)(4)(A)(i) "probable cause to believe" votes)). Each question directs the Commission to render a decision on the merits of the complaint. The law is clear that, if the Commission answers the first question in the affirmative, it "shall make an investigation," 52 U.S.C. § 30109(a)(2), and if the Commission answers the second in the affirmative, it "shall attempt . . . to correct or prevent such violation," *id.* at § 30109(a)(4)(A)(i).[4] If the Commission answers either question in the negative, it may dismiss but must provide an "adequate explanation" of its decision. *DCCC*, 831 F.2d at 376 n.5. To be lawful, that explanation must "includ[e] a rational connection between the facts found and the

[4] While mandating enforcement, the FECA provides the FEC discretion in its enforcement methods. *See* 52 U.S.C. § 30109(a)(5)(D) (stating FEC "may institute a civil action").

choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An explanation that the agency does not wish to devote resources to an investigation, however reasonable, is not "rational[ly] connect[ed]" to its choice to find, on the merits, either probable cause nor reason to believe a violation occurred. Accordingly, it is "easy" to find such a discretionary choice is contrary to the plain terms of the FECA itself. *Chamber of Commerce*, 69 F.3d 603.

The panel's decision is irreconcilable with these earlier binding decisions, and *en banc* review is necessary to correct the panel's error.

III. The Panel's Decision Threatens the "Free Functioning of Our National Institutions"

The Supreme Court recognizes vigorous enforcement of our nation's campaign finance laws, including the disclosure laws at issue here, is needed to protect a matter of exceptional importance: the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66. The Court has found adequate disclosure serves a number of compelling interests. *Id.* at 66–68; *see also Citizens United v. FEC*, 558 U.S. 310, 370 (2010); *McConnell v. FEC*, 540 U.S. 93, 201 (2003). As the FEC's own commissioner recognized, however, the panel's decision threatens to "destroy" federal campaign enforcement, imperiling these compelling interests. Weintraub Statement 1.

The panel's decision, if left in place, would effectively end enforcement of campaign finance law because judicial oversight is the only check against FEC inaction from any branch of government. The FECA places stricter limits on the control of the Commission than apply to any other independent agency, preventing the President or Congress from correcting underenforcement by replacing a majority of its members with individuals from the elected branches' governing political party. *See* 52 U.S.C. § 30106(a)(1), (c). To ensure the agency did not abuse this independence and "shirk its responsibility," *see DCCC*, 831 F.2d at 1135, Congress paired the unique limit on the elected branches' control with a unique provision for judicial review of FEC nonenforcement. Further, as with other agencies like the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-5(f)(1), and the Environmental Protection Agency, *see, e.g.*, 52 U.S.C. § 1365, agency nonenforcement results in the authorization of a civil suit brought by the complainant at its own expense, not an order to the agency to expend its own resources, 52 U.S.C. § 30109(a)(8)(C). The panel decision, however, nullifies Congress's design, eliminating judicial review of the very type of FEC inaction Congress sought to correct. The panel's decision thus renders the FEC beyond the correction of any branch of government.

Indeed, this is far from a speculative scenario. As Commissioner Weintraub noted, the Commission has chosen to "spike most major enforcement cases."

Weintraub Statement 1. Moreover, since the district court decision below, the commissioners have cited prosecutorial discretion in *every one* of their statements justifying finding no reason to believe a complaint stated a violation, blocking enforcement despite OGC's recommendation to proceed. *See* Exhibit 1.[5] Thus, as Commissioner Weintraub recognized, the panel's decision will prevent review of "*every* future statement." Weintraub Statement 2. The panel's decision effectively means that *no* FEC reason to believe finding is subject to judicial review and *none* of the agency's legal interpretations may be corrected because the commissioners can and will cite prosecutorial discretion among their reasons to decline enforcement of every complaint. If the panel's decision remains standing, it will eviscerate the FECA's judicial review provision and nullify the statutory remedy for nonenforcement.

Voters are already deprived knowledge about the sources of hundreds of millions of dollars spent in their elections. *See* OpenSecerts.org, Outside Spending by Disclosure, Excluding Party Committees, https://bit.ly/2MDHV8H. The panel's decision serves to ensure voters will never know "the source of [their] candidate's financial support." *Buckley*, 424 U.S. at 67. This decision cannot be

[5] While the commissioners have issued other statements during this time, those statements either concurred with or criticized nonenforcement. Such statements would not determine whether a dismissal is reviewable under the panel's decision.

reconciled with controlling precedent and it will cause grievous harm to the compelling interests served by campaign finance disclosure law.

CONCLUSION

For the reasons stated herein, CREW respectfully requests rehearing *en banc.*

Dated: July 27, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, 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

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Dated: July 27, 2018

/s/ Stuart C. McPhail
Counsel for Appellants

ADDENDUM

1. Exhibit 1
2. Certificate as to Parties, Rulings, Related Cases, and Amici
3. Corporate Disclosure Statement
4. Panel Decision

Exhibit 1

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Controlling Statement Reasons	**URL**	**Pages in this Exhibit[1]**	**Location of Reference to Prosecutorial Discretion**
In re New Models, MUR 6872	http://eqs.fec.gov/eqsdocsMUR/17044435569.pdf	1-3	Page 31 & n. 139 of Statement
In re ACU, MUR 6920	http://eqs.fec.gov/eqsdocsMUR/17044435563.pdf	4-6	Pages 4–5 & n.16 of Statement
In re Tread Standards LLC, Right to Rise, DE First Holdings, MURs 6968, 6995, 7014, 7017, 7019, 7090	http://eqs.fec.gov/eqsdocsMUR/6968_2.pdf	7-11	Pages 3, 14 & n.90 of Statement
In re Kinzler for Congress, MUR 7023	http://eqs.fec.gov/eqsdocsMUR/18044435928.pdf	12-14	Page 6 n. 26 of Statement
In re Casperson for Congress, MUR 7114	http://eqs.fec.gov/eqsdocsMUR/17044431916.pdf	15-17	Pages 1, 5 of Statement

[1] This exhibit contains abbreviated versions of the Statement of Reasons, including only the cover page and pages sufficient to show a reference to prosecutorial discretion. Full versions may be accessed at the URL provided.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
New Models	)	MUR 6872
	)	

STATEMENT OF REASONS OF
VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONER LEE E. GOODMAN

In this matter the Commission was called upon to determine whether New Models, a social welfare organization incorporated under section 501(c)(4) of the Internal Revenue Code ("IRC"), failed to register and report as a "political committee" under the Federal Election Campaign Act of 1971, as amended (the "Act").

This agency's controlling statute and court decisions stretching back over forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups from burdensome political committee registration and reporting requirements.[1] Organizations such as New Models do not become political committees under the Act merely as a result of making incidental or occasional campaign contributions. Rather, such organizations may be regulated as political committees only if their "major purpose" is the nomination or election of federal candidates.[2] Determining an organization's major purpose requires a comprehensive, case-specific inquiry that focuses on the organization's public statements, organizational documents, and overall spending history.[3] The Commission has settled on a "case-by-case analysis of an organization's conduct" in applying the major purpose doctrine.[4]

Publicly available tax returns indicate that for over 15 years, from 2000 to 2015, New Models engaged almost exclusively in policy research, polling and public policy discussion. That was consistent with New Models's social welfare mission and maintenance of its tax-

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1 *Accord* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6396 (Crossroads GPS).

2 *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

3 Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*).

4 *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5,596, 5,601 (Feb. 7, 2007) ("2007 Supplemental E&J"). *See also Real Truth About Abortion v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) ("*RTAA*").

contributions or make any disbursements that would otherwise qualify it as a political committee may terminate, provided that such committee has no outstanding debts and obligations."[138] Thus, in order to stop filing burdensome and invasive financial reports, a committee would have to surrender its political rights and agree to not make *any* independent expenditures, regardless of the organization's major purpose.

For all of these reasons, the Commission's analysis of an organization's major purpose has avoided setting a definitive time frame for judging each organization's activities. Here, applying our expertise in the context of the Commission's well-established case-by-case framework, we considered New Models's contributions in 2012 in the context of the organization's history, before and after its contributions in 2012, to conclude that New Models's overall spending history did not support finding reason to believe that it had the major purpose of nominating or election federal candidates to office. Nor do we conclude that New Models's contributions in 2012, by themselves, support finding reason to believe that New Models fundamentally changed its organizational purpose.

V. CONCLUSION

Based on our review of the evidence in the record, New Models is an organization that made permissible contributions to independent expenditure-only political committees. These occasions were irregular, occurring in 2010 and 2012 and totaled less than 20% of the organization's total lifetime expenses. As the 2007 Supplemental E&J made clear, however, to be considered a political committee under the Act, the nomination or election of a candidate must be the major purpose of the organization. Here, New Models's organizational purpose, tax exempt status, public statements, and overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates. As a result, it cannot (nor should it) be subject to the "pervasive" and "burdensome" requirements of registering and reporting as a political committee. For these reasons, and in exercise of our prosecutorial discretion,[139] we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.

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[138] 11 C.F.R. § 102.3(a).

[139] *See Heckler v Chaney*, 470 U.S. 821 (1985). 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. *See* 28 U.S.C. § 2462. *See also Nader v. FEC*, 823 F. Supp. 2d 53, 65-66 (D.D.C. 2011) (finding Commission decision to dismiss allegations that several groups were political committees was not contrary to law, and "represents a reasonable exercise of the agency's considerable prosecutorial discretion" given the "staleness of evidence and the defunctness of several of the groups").

Caroline C. Hunter
Vice Chair

Dec. 20, 2017
Date

Lee E. Goodman
Commissioner

Dec. 20, 2017
Date

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
American Conservative Union, *et al.*	)	MUR 6920
	)	

STATEMENT OF REASONS OF VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONER LEE E. GOODMAN

The Commission found reason to believe that Respondents American Conservative Union ("ACU"), Now and Never PAC, and Government Integrity, LLC ("GI, LLC") violated section 30122 of the Federal Election Campaign Act of 1971, as amended ("the Act"), conducted an investigation, voted unanimously to find probable cause that ACU violated the Act, and entered into a conciliation agreement that required the Respondents to pay a civil penalty in the amount of $350,000.

The Commission voted unanimously, on January 24, 2017, to find reason to believe that ACU and Now or Never PAC violated the Act. The Commission also voted unanimously to find reason to believe against an "Unknown Respondent."[1] Nine months later, on September 19, 2017, the Commission's Office of General Counsel ("OGC") submitted a report to the Commission recommending that the Commission find reason to believe two non-respondents, [redacted] ("[redacted]") and an individual associated with [redacted], violated the Act by making a contribution to Now or Never PAC in the name of ACU.[2] We voted to proceed to enforce the Act against three Respondents—ACU, Now or Never PAC, and GI, LLC—but not to add the fourth organization, [redacted],[3] as a Respondent for the following reasons.

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[1] Commission Certification, MUR 6920 (Jan. 24, 2017). On July 11, 2017, the Commission voted unanimously to substitute GI, LLC in place of "Unknown Respondent" and voted unanimously to find reason to believe GI, LLC violated the Act. *See* Commission Certification, MUR 6920 (July 11, 2017).

[2] OGC did not recommend substituting [redacted] as an Unknown Respondent. That was irregular. The Commission typically would vote to add a person or organization and then vote to find reason to believe. We believe that parties added to a matter are entitled to formal notice of a complaint pursuant to 52 U.S.C. § 30109(a)(1), and a right to respond to the complaint, before the Commission votes to find reason to believe that party has violated the Act.

[3] References herein to [redacted] incorporate an individual associated with [redacted].

However, even if the Commission had dispensed with formal notice and the right to respond and proceeded directly to enforcement of its reason to believe finding, it would have forced yet another series of precious time consuming procedures. OGC's post-investigation recommendation to find probable cause would have been sent to [redacted] and [redacted] would have fifteen (15) more days to respond to that recommendation.[12] Even if the Commission voted to find probable cause, [redacted] would have had a minimum of thirty (30) days to conciliate.[13]

Thus, the Commission was aware that the time remaining on the five-year statute of limitations to conclude enforcement was imminent. The statute of limitations would run on or about October 31, 2017, five years after the date ACU contributed to Now or Never PAC.[14] A majority of Commissioners expressed concerns about concluding the case before the statute of limitations ran, and we believed the most efficient prosecutorial path forward was to finalize the case against the three Respondents as efficiently and expeditiously as possible, whether by conciliation or civil action.

Moreover, we were confident that a global conciliation with the Respondents could be achieved, absent the procedural, legal, and investigative complexities presented by [redacted] involvement. [redacted] Yet OGC had declined to pursue conciliation with the three named Respondents for several months while it devoted time and resources to investigating a potential violation by [redacted]. We were concerned that OGC had already lost several months of the statute of limitations in this process. We did not want to lose additional time or lose the realistic opportunity to resolve the matter effectively. Furthermore, we believed time would not accommodate the remaining enforcement steps, required by statute, and thus any finding would be academic. We have declined to issue purely academic findings.[15]

C. Commission's Decision Was Reasonable under *Heckler*

In sum, we concluded the prudent and preferred course was to conciliate with the named Respondents. The Commission was well within its discretion to take the safer course.

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12 52 U.S.C. § 30109(a)(3).

13 52 U.S.C. § 30109(a)(4).

14 *See* Third Gen. Counsel's Rpt. at 1 n.1 (Sept. 15, 2017), MUR 6920 (ACU, *et al.*); 28 U.S.C. § 2462 (statute of limitations for civil penalties). *See also FEC v. Nat'l Right to Work Comm.*, 916 F. Supp. 10 (D.D.C. 1996); *FEC v. NRSC*, 877 F. Supp. 15 (D.D.C 1995).

15 *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MURs 6391/6471 (Commission on Hope, Growth, and Opportunity). *See also CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017).

"An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[16] Here, we concluded the unclear state of the law, imminent expiration of the statute of limitations and other legal difficulties weighed in favor of proceeding to conciliation with the named Respondents promptly and without jeopardizing the resolution in hand by adding [redacted] on more uncertain legal and factual grounds. That decision was reasonable.[17]

D. The Public Interest was Served By the Commission's Decision

Finally, we believed the public interest would be best served by establishing the legal precedent that the prohibition against contributing in the name of another in section 30122 is violated where Donor 1 donates funds to Non-Profit 2 with specific instructions to contribute those funds to Super PAC 3. The Commission had strong, direct evidence establishing that course of conduct here with respect to three Respondents, but not [redacted]. In addition to establishing the precedent, we believed the Commission could deter future misconduct by a conciliation agreement requiring a significant civil penalty. These objectives would be complicated by adding two additional Respondents with novel legal and factual defenses. In the end, our effort proved successful. The Conciliation Agreement in this enforcement matter establishes clear precedent, imposed a large $350,000 civil penalty, and it will deter future misconduct. The Act's disclosure and informational purposes were served. This matter could have gone in a different direction, one that would have delayed any resolution for years. We avoided that.

Caroline C. Hunter /ejg per CCH — Dec. 20, 2017
Caroline C. Hunter — Date
Vice Chair

Lee E. Goodman — Dec. 20, 2017
Lee E. Goodman — Date
Commissioner

---

[16] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (Agencies must determine what action, if any, should be taken, depending on numerous factors, including "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 requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

[17] *See CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017). "Under [] established notions of prosecutorial discretion, then, it is hardly incumbent upon the Commission to pursue every additional, alleged violation that occurred against every potential respondent that exists, especially when" the Commission pursued the central respondent. Statement of Reasons of Commissioner David M. Mason at 4, MURs 4568, 4633. 4634, and 4736 (Carolyn Malenick, *et al.*).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	
Tread Standard LLC, *et al*.	)	MUR 6968
Right to Rise, *et al.*	)	MUR 6995
DE First Holdings, *et al.*	)	MURs 7014/7017/7019/7090

STATEMENT OF REASONS OF
CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN

Prior to *Citizens United* and subsequent legal developments stemming from that decision, corporate contributions and expenditures were generally prohibited under the Federal Election Campaign Act of 1971, as amended (the "Act"). Thus, the Commission had not considered whether a contribution made by a closely held corporation or limited liability company taxed as a corporation ("corporate LLC") would violate the ban on contributions made in the name of another, as opposed to the Act's prohibition on corporate contributions and expenditures. When presented with a contribution allegedly made by a corporation, the Commission did not peer behind the corporate veil to ascertain the "true source" of the funds. Instead, a contribution made by a corporation was simply a prohibited corporate contribution, even if the corporation used funds provided by an individual.

In those pre-*Citizens United* days, a typical name-of-another scheme involved individuals serving as conduits for prohibited corporate contributions, not corporations or corporate LLCs serving as conduits for individuals. The issue of whether an *individual* could violate the Act by making contributions through a corporation was unexplored.

In 2016, the Commission wrestled for the first time with whether, and under what circumstances, a contribution from a closely held corporation or a corporate LLC violated the prohibition against making a contribution in the name of another at 52 U.S.C. § 30122.[1] We concluded that "to vindicate the purpose underlying section 30122 without violating First Amendment rights, the proper focus . . . is whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements, making the individual, not

[1] *See* MURs 6485 (W Spann LLC), 6487 & 6488 (F8, LLC), 6711 (Specialty Investments Group, Inc.), and 6930 (SPM Holdings LLC).

the corporation or corporate LLC, the true source of the funds."[2] We also concluded, however, that because the question was "one of first impression, and because past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm."[3] Accordingly, we voted to exercise prosecutorial discretion and dismiss the matters.[4] Campaign Legal Center, complainant in the matters, soon challenged the Commission's dismissals.[5]

On June 7, 2018, the U.S. District Court for the District of Columbia determined that the dismissals were not contrary to law, recognizing that our fair notice and due process concerns were "proper" given the First Amendment context in which the Commission acts.[6] "Finding that there was a rational basis for the Commission's exercise of its prosecutorial discretion," the court upheld the Commission's handling of the matters addressed in the LLC Statement.[7]

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[2] Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Lee E. Goodman at 2, MURs 6485, 6487, 6711, and 6930 (April 1, 2016) ("LLC Statement") (attached as Appendix).

[3] *Id.*

[4] *Id.* at 2-3 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Furthermore, in our prior LLC Statement we explained that we resolved several similar matters together. Not only did this reflect our attempt to treat like respondents similarly, "it was necessary to examine a sufficient number of factual scenarios to ensure a sound application of the Act and to provide clear public guidance on the appropriate standard that we will apply in future matters. Indeed, with the benefit of varying fact patterns . . . [OGC] significantly refined its analysis for considering these types of matters." LLC Statement at 2.

[5] *See* Complaint at 1-2, *Campaign Legal Center v. FEC*, No. 1:16-cv-00752 (D.D.C. Apr. 22, 2016) (invoking judicial review under 52 U.S.C. § 30109(a)(8)). The U.S. District Court for the District of Columbia ruled that the plaintiffs lacked standing to challenge two of those dismissals. *See Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119, 122 (D.D.C. 2017).

[6] *See Campaign Legal Center v. FEC*, No. 1:16-cv-00752, 2018 WL 2739920, at *8 (D.D.C. June 7, 2018). We had preferred to resolve the matters here after a decision on the merits in Campaign Legal Center's challenge to benefit from judicial guidance on the legal issues involved. Ultimately, however, we decided to resolve these matters despite the pending litigation. Coincidentally, the District Court handed down its opinion upholding the Commission's dismissal of these matters shortly after our dispositive votes.

[7] *Id.* at *1. Since the District Court's decision in *Campaign Legal Center*, the Court of Appeals for the District of Columbia ruled in a separate case that a Commission dismissal pursuant to prosecutorial discretion was "not subject to judicial review," *CREW v. FEC*, No. 17-5049, 2018 WL 2993249, at *5 (D.C. Cir. June 15, 2018), because FECA provides courts "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at *3 (internal quotes omitted) (quoting *Heckler*, 470 U.S. at 830). The plaintiffs were thus "not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at *5.

The complaints addressed in this statement similarly arise from contributions made by a closely held corporation[8] and corporate LLCs to Super PACs.[9] The conduct alleged in these complaints occurred before "the relevant notice date"[10] (that is, April 1, 2016), when we issued our prior LLC Statement, which first articulated the correct legal standard in these types of matters.[11] Therefore, the same considerations of due process, fair notice, and First Amendment clarity, which informed our decision to exercise prosecutorial discretion in those prior matters, also apply here.[12]

Accordingly, in exercise of prosecutorial discretion, we voted against finding reason to believe that the respondents in these matters violated the Act and instead voted to close the files.

I. FACTUAL BACKGROUND

A. MUR 6968 (TREAD STANDARD LLC, *ET AL.*)

On June 17, 2015, Tread Standard LLC made a $150,000 contribution to Right to Rise, a Super PAC that ran independent expenditures supporting Jeb Bush in the 2016 presidential election.[13] Tread Standard is a Delaware company that was created on April 30, 2015.[14] It appears to be taxed as a corporation.[15] Its owner's identity is unclear, but Vivian Rivero, a paralegal at a Miami law firm, filed Tread Standard's organizing paperwork.[16] In its Designation of Counsel, which was filed with the Commission in connection with this matter, Tread Standard

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8 One of the respondents here, DE First Holdings, is a Delaware statutory trust, not an LLC, but is taxed as a corporation. *See infra* I.C. For reasons explained below, *see infra* note 44, we analyzed DE First as we would a corporation and thus include it in the term "closely held corporation."

9 The complaints also included allegations that certain respondents failed to register as political committees. OGC recommended taking no action on those allegations, and the Commission did not hold a substantive vote on those allegations, which are further discussed below. *See infra* Section III.

10 *Campaign Legal Center*, 2018 WL 2739920, at *8 n.8.

11 LLC Statement at 12-13.

12 We adopt the full rationale in our LLC Statement for purposes of this Statement, and have appended it.

13 Right to Rise USA, Inc., Amended 2015 Mid-Year Report at 1414, 1416 (May 20, 2016).

14 First General Counsel's Report at 3 n.4 (Apr. 13, 2016), MUR 6968 (Tread Standard LLC, *et al.*) (citing "Tread Standard LLC," Dun & Bradstreet Public Records Search).

15 FGCR at 3 n.7, MUR 6968 (Tread Standard LLC, *et al.*); Response of Tread Standard LLC at 1 (Nov. 4, 2015), MUR 6968 (Tread Standard LLC, *et al.*).

16 FGCR at 3, MUR 6968 (Tread Standard LLC, *et al.*); Complaint at 2-3 (Sept. 14, 2015), MUR 6968 (Tread Standard LLC, *et al.*) (citing Zachary Mider, "Masked Donations to Jeb Bush Super-PAC Lead to Miami Paralegal," BLOOMBERG NEWS (Aug. 25, 2015), https://www.bloomberg.com/news/articles/2015-08-25/masked-super-pac-donations-to-jeb-bush-super-pac-lead-to-miami-paralegal).

under section 30122, it was not necessary to analyze further the political committee status allegations.

IV. CONCLUSION

For the foregoing reasons, we concluded that the complaints in MURs 6968, 6995, 7014, 7017, 7019, and 7090 should be dismissed in an exercise of prosecutorial discretion.[90] Accordingly, we voted to close the files.

[90] *See Heckler v. Chaney*, 470 U.S. 821 (1985); *CREW v. FEC*, No. 17-5049, 2018 WL 2993249 (D.C. Cir. June 15, 2018).

Caroline C. Hunter
Chair

7/2/2018
Date

Matthew S. Petersen
Commissioner

7/2/2018
Date

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Kinzler for Congress and Raj P. Thakral in his official capacity as treasurer	)	MUR 7023
Illinois Families First and Kristin Kolehouse in her official capacity as treasurer	)	
Illinois Family Action	)	

STATEMENT OF REASONS OF CHAIR CAROLINE C. HUNTER AND COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN

In this matter, we voted to find no reason to believe that Illinois Family Action ("IFA"), a section 501(c)(4) organization, made a prohibited corporate contribution to a candidate in violation of 52 U.S.C. § 30118(a).[1]

The factual basis of the alleged violation was limited to IFA's use of its own free Twitter account to tweet a link to a YouTube video produced by Kinzler for Congress, the principal campaign committee of congressional primary candidate Gordon (Jay) Kinzler.[2] The Complaint alleges that the source of the video could have been the Kinzler Committee's non-public YouTube channel.

The Complaint posits that the Kinzler Committee and IFA coordinated IFA's tweet republishing campaign material, resulting in a prohibited corporate contribution from IFA to the Kinzler Committee.[3] The Kinzler Committee, Kinzler, and IFA deny coordinating IFA's tweet. The Kinzler Committee asserts it used social media to notify its supporters about the video after it was made public and encouraged them to share it.[4] Without determining whether or not IFA violated the Federal Election Campaign Act of 1971, as amended ("the Act"), the Office of General Counsel ("OGC") recommended that the Commission dismiss the matter in an exercise of its prosecutorial discretion due to the likely *de minimis* amount IFA spent on its tweet "[e]ven

1 Certification at ¶ 3, MUR 7023 (Kinzler for Congress, *et al.*) (Apr. 27, 2017).

2 Compl. at 5-6, Attach. at 32.

3 *Id.* at 5-6, Attach. at 35.

4 Kinzler Committee Resp. at 2; Kinzler Aff. ¶ 8; IFA Resp. at 1.

create an internal conflict in the Commission's rules, subjecting to regulation any unsuspecting person who uses a free Twitter account to send a link to a campaign video.

It is impossible to reconcile the broad protection afforded by the Internet Exemption and the Commission's explicit recognition of its application to the online republication of campaign materials[24] with a theory that the republication rule at section 109.23 countermands the Internet Exemption with respect to online republications.[25] Accordingly, by the basic rules of logic, because IFA's tweet is exempt from the definition of public communication under section 109.21 and exempt from the definition of contribution and expenditure under sections 100.94 and 100.155, the tweet cannot be considered a contribution under section 109.23.

* * *

In sum, considering the statutory, regulatory, and policy backdrop set forth above, we could not interpret our regulations to conclude that IFA made a contribution to the Kinzler Committee merely by tweeting a link to a Kinzler Committee YouTube video. Our colleagues disagreed with our conclusion that IFA's tweet is exempt from regulation and instead voted for a draft Factual and Legal Analysis that implied IFA's tweet might constitute an in-kind contribution, but dismissed the violation merely because the tweet's value was likely *de minimis*.[26] We fundamentally disagree with our colleagues' legal interpretation because, in contravention of the Commission's 2006 Internet Exemption, it would erroneously leave free postings on the Internet subject to Commission regulation based on case-by-case judgments of what does or does not constitute *de minimis* value.[27]

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or trigger reporting requirements." Explanation and Justification at 18,600 (quoting Senator Russ Feingold, *Blogs Don't Need Big Government* (Mar. 10, 2005), http://www.mydd.com/ story/2005/3/10/112323/534 (last visited. Mar. 24, 2006)).

[24] *See supra* Section I.

[25] *Id.*; *see also* Explanation and Justification at 18,604 (confirming that, "[u]nder the final rules at 11 CFR 100.94 and 100.155, individuals are free to republish materials using the Internet without making a contribution or expenditure").

[26] The video's URL was apparently copied at no charge from the Committee's YouTube channel, and the costs associated with the tweet were likely little or nothing. *See, e.g.,* Factual and Legal Analysis at 5, MUR 6795 (CREW) ("[I]t does not appear that the costs of posting press releases on CREW's website and sending a mass email would have triggered the $250 independent reporting threshold"); Statement of Reasons of Chairman Scott Thomas, Vice Chairman Michael Toner, Commissioner Danny McDonald, Commissioner Ellen Weintraub at 2, MUR 5523 (Local 12 United Assoc. Plumbers) ("[T]he expenditures associated with these express advocacy and solicitation website communications were negligible."); Explanation and Justification at 18,596 ("[T]here is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients."). We agree that even if IFA's tweeting of the link to the Committee's YouTube video could constitute contributions (as dissemination, distribution, or republication of campaign materials by operation of 11 C.F.R. § 109.23), the costs were likely *de minimis* and the allegation should be dismissed pursuant to our prosecutorial discretion.

[27] Our disagreement with our colleagues' efforts to regulate and restrict free speech by American citizens on the Internet continues. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C.

Caroline C. Hunter
Chair

1/23/18
Date

Lee E. Goodman
Commissioner

Jan. 23, 2018
Date

Matthew S. Petersen
Commissioner

JAN. 23, 2018
Date

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Casperson for Congress and Judi Skradski in her official capacity as treasurer	)	MUR 7114
Tom Casperson	)	
Tom Casperson for State Senate	)	

STATEMENT OF REASONS OF
VICE CHAIR CAROLINE C. HUNTER AND
COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN

The Complaint alleges that Tom Casperson for State Senate ("State Committee") transferred funds to Casperson for Congress ("Federal Committee") by paying for travel related to Casperson's congressional campaign, in violation of the Federal Election Campaign Act of 1971, as amended ("the Act").[1] The Complaint also alleges that after Tom Casperson became a federal candidate, the State Committee raised and spent non-federal funds, in violation of the Act. The Commission voted unanimously to dismiss all allegations in this case under *Heckler v. Chaney* but was unable to agree on a Factual and Legal Analysis. Our reasons for voting to dismiss the Complaint are set forth below.

I. FACTUAL BACKGROUND

The State Committee was formed on August 10, 2009.[2] Casperson was elected as a state senator for Michigan's 38th State Senate District in 2010 and won re-election to another four-year term in 2014.[3] Michigan limits its state senators to two terms in office.[4] Casperson

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[1] Casperson and the Federal Committee filed a joint response. *See* Response to Complaint from Tom Casperson and Casperson for Congress (Sept. 16, 2016) ("Fed. Comm. Resp."). The State Committee filed a separate response. *See* Response to Complaint from Tom Casperson for State Senate (Jan. 30, 2017) ("State Comm. Resp.").

[2] *See* Statement of Organization, Tom Casperson for State Senate (Aug. 10, 2009), https://cfrsearch.nictusa.com/documents/318465/details?type=scanned&page=1

[3] Casperson has served as a state senator since 2010. *See* State Senator Tom Casperson, *Meet Tom*, http://www.senatortomcasperson.com/meet-senator-tomcasperson/ (last visited Mar. 30, 2017).

[4] MICH. CONST. art. IV, § 54.

establish receipt of clearly prohibited or excessive contributions under the Act or persuade us that an investigation is warranted.[27] Moreover, given the somewhat modest amounts at issue, and the use of funds to offset official state officeholder duties, we voted to exercise our prosecutorial discretion and dismiss this allegation.

Regarding the State Committee's alleged use of soft money to pay for Casperson's federal campaign activities, the Act and Commission regulations prohibit the transfer of funds or assets from a candidate's non-federal campaign committee to his or her federal campaign committee.[28] Thus, if the State Committee made disbursements for campaign travel on behalf of the Federal Committee, those payments would constitute improper transfers to the Federal Committee.

It appears that the four specific overnight stays discussed in the Complaint were related to Casperson's state office duties, and under Michigan law, elected officials may use their candidate committee funds to pay for "incidental expenses," defined as expenditures that are "ordinary and necessary expense[s] paid or incurred in carrying out the business of an elective office."[29] While it appears that the State Committee also reported travel-related expenses beyond the four specific overnight stays listed in the Complaint, those additional travel-related expenses could relate to Casperson's official state officeholder duties, and the travel expenses the State Committee reported were relatively small. Under these circumstances, we voted to exercise our prosecutorial discretion and dismiss the allegations that Respondents violated the Act by transferring non-federal funds.[30]

10/20/17
Date

Caroline C. Hunter
Vice-Chair

Oct. 26, 2017
Date

Lee E. Goodman
Commissioner

[27] Moreover, despite alleging that the State Committee received over $10,000 from state PACs, the Complaint fails to identify any contribution in excess of the Act's amount limitations or from a prohibited source that was, in fact, received by a state PAC and in turn, forwarded to the State Committee during Casperson's candidacy.

[28] 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 110.3(d).

[29] *See* User Guide – Candidate Committee, MICH. BUREAU OF ELECTIONS, http://mertsplus.com/mertsuserguide/index.php?n=MANUALCAN.ExpendituresAndDisbursements #canincexp

[30] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

Nov. 16, 2017
Date

Matthew S. Petersen
Commissioner

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 35(c), Petitioners Citizens for Responsibility and Ethics in Washington and Melanie Sloan hereby certify as follows:

A. Parties and Amici. Petitioners are Appellants Citizens for Responsibility and Ethics in Washington, a non-profit corporation, and Melanie Sloan. Defendant-Appellee is the Federal Election Commission. There were no *amici curiae* in the district court. Demos and the Campaign Legal Center have appeared as *amici curiae* before this Court.

B. Ruling Under Review. Petitioners sought review by the panel of the Decision of Judge Rudolph Contreras, ECF Dkt. Nos. 26, 27, in *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 15-cv-2038 (RC) (Hon. Rudolph Contreras). The district court's opinion is available at 236 F. Supp. 3d 378 and is reprinted in the Joint Appendix ("JA") at 861–88. The panel's Opinion is attached to this Petition. This Petition for Rehearing *En Banc* seeks review of the panel's decision.

C. Related Cases. The case on review has not previously been before this Court or any other court. There are no related cases to the case on review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 35(c), Petitioner 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 principle 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, including financing of political committees, 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.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2017 Decided June 15, 2018

No. 17-5049

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND MELANIE T. SLOAN,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-02038)

Stuart C. McPhail argued the cause for appellants. With him on the briefs was *Adam J. Rappaport*.

Paul M. Smith was on the brief for *amicus curiae* Campaign Legal Center and Dēmos in support of appellants.

Jacob S. Siler, Attorney, Federal Election Commission, argued the cause for appellee. With him on the brief were *Kevin Deeley*, Associate General Counsel, and *Harry J. Summers*, Assistant General Counsel. *Greg J. Mueller*, Attorney, entered an appearance.

Before: KAVANAUGH and PILLARD, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* PILLARD.

RANDOLPH, *Senior Circuit Judge*: This is an appeal from the district court's grant of summary judgment in favor of the Federal Election Commission. Petitioners are Citizens for Responsibility and Ethics in Washington (CREW), and its executive director, Melanie Sloan, a registered voter in the District of Columbia. They brought this action[1] alleging that the Commission acted "contrary to law" in 2015 when it dismissed their administrative complaint against an unincorporated association whose name is too cumbersome to condense.[2] CREW's charges against the association, filed in 2011, were that the association had violated the federal election laws in 2010.

In the district court, and now in this court, CREW invoked the judicial review provision of the Federal Election Campaign Act, or "FECA" as it is sometimes called. The provision states that the district court "may declare that the dismissal of the complaint . . . is contrary to law," and, if the Commission fails to correct the illegality on remand, the "complainant may bring"

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[1] CREW and Sloan mislabeled their pleading a "Complaint for Injunctive and Declaratory Relief." The Administrative Procedure Act, 5 U.S.C. § 703, required the "form of proceeding for judicial review" to be the special statutory review relating to Commission dismissals of complaints—namely, a "petition" filed in the district court. 52 U.S.C. § 30109(a)(8)(A). *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31 & n.3 (1981).

[2] The Commission on Hope, Growth, and Opportunity.

an action in its own name against the alleged violator "to remedy the violation involved in the original [administrative] complaint." 52 U.S.C. § 30109(a)(8)(C).

CREW's petition in the district court also invoked the Administrative Procedure Act. The APA, enacted in 1946, states that a later statute—FECA is one—"may not be held to supersede or modify . . . chapter 7 . . . except to the extent that it does so expressly." 5 U.S.C. § 559. APA Chapter 7 contains the APA's judicial review provisions. *See* 5 U.S.C. §§ 701–706. Rather than "expressly" contradicting those provisions, FECA is consistent with them. FECA's "contrary to law" formulation, for example, reflects APA § 706(2)(A), which requires the court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .."[3] We will have more to say about APA § 706 later in this opinion.

The Commission's dismissal of CREW's complaint constituted the "agency action" supporting the district court's jurisdiction. S*ee* 52 U.S.C. § 30109(a)(8)(A). After the Commissioners voted 3 to 3 on whether to begin enforcement proceedings, the Commission closed the administrative file on the case. The deadlock meant that the Commission could not proceed: under FECA, the Commission may pursue enforcement only upon "an affirmative vote of 4 of its members." 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

The district court held that the Commission's explanation of its failure to prosecute was a "rational exercise of

[3] In *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), the court repeated this language from the APA, stating that the Commission would have acted "contrary to law" if its dismissal of a complaint "was arbitrary or capricious, or an abuse of discretion." *See also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

prosecutorial discretion." *Citizens for Responsibility and Ethics in Washington v. FEC*, 236 F. Supp. 3d 378, 397 (D.D.C. 2017). This raises a question: how can a court attribute to "the Commission" any particular rationale when the Commissioners were evenly split? The answer comes from *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987), and its expansion in *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988). Together, these cases establish two propositions of circuit law. The first is that if the Commission fails to muster four votes in favor of initiating an enforcement proceeding, the Commissioners who voted against taking that action should issue a statement explaining their votes. *Common Cause*, 842 F.2d at 449. The second is that, for purposes of judicial review, the statement or statements of those naysayers—the so-called "controlling Commissioners"—will be treated as if they were expressing the Commission's rationale for dismissal, a rather apparent fiction raising problems of its own.[4] *Id.*

Here, the three Commissioners who voted not to begin enforcement proceedings issued a joint statement explaining their votes.[5] These Commissioners were concerned that the

[4] For instance, what if the three Commissioners each expressed a different reason for voting against enforcement proceedings? One Commissioner may have believed that FECA did not cover the activities alleged in the complaint. Another may have believed that the evidence of a violation was too weak. The third Commissioner may have concluded that the alleged violations were too trivial to warrant the Commission's attention.

[5] About the same time, two of the Commissioners who voted to proceed with enforcement issued a joint statement of their own. The third Commissioner who voted to proceed issued his statement of reasons on March 21, 2016, nearly four months after CREW filed its complaint in the district court. An agency cannot *sua sponte* update the administrative record when an action is pending in court. *See, e.g.*,

statute of limitations had expired or was about to; that the association named in CREW's complaint no longer existed; that the association had filed termination papers with the IRS four years earlier; that it had no money; that its counsel had resigned; that the "defunct" association no longer had any agents who could legally bind it; and that any action against the association would raise "novel legal issues that the Commission had no briefing or time to decide." For these reasons, the "case did not warrant further use of Commission resources."

In short, these Commissioners would have exercised the agency's prerogative not to proceed with enforcement. There is no doubt the Commission possesses such prosecutorial discretion. Although today "prosecutorial" usually refers to criminal proceedings, it was not always so. Under the APA, agency attorneys who bring civil enforcement actions are engaged in "prosecuting functions," 5 U.S.C. § 554(d). *See 3M Co. v. Browner*, 17 F.3d 1453, 1456–57 (D.C. Cir. 1994). The Supreme Court has recognized that federal administrative agencies in general, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and the Federal Election Commission in particular, *FEC v. Akins*, 524 U.S. 11, 25 (1998), have unreviewable prosecutorial discretion to determine whether to bring an enforcement action. *See CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007).[6]

Peter L. Strauss, Citizens to Preserve Overton Park v. Volpe—*of Politics and Law, Young Lawyers and the Highway Goliath*, *in* Administrative Law Stories 259, 322 (2006); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422 (1971) (Black, J., dissenting). We have refused to consider a district court's opinion issued while the case was pending on appeal and after appellate briefs had been filed. *See United States v. Hallford*, 816 F.3d 850, 855 n.4 (D.C. Cir. 2016).

[6] The dissent thinks the Supreme Court held in *Akins* that FECA cabins "the agency's exercise of prosecutorial discretion at

As to an agency's prosecutorial discretion, *Heckler v. Chaney* is the leading case. *Chaney* interpreted APA § 701(a)(2), which bars judicial review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under § 701(a)(2), "certain categories of administrative decisions are unreviewable," among which are "agency decisions not to institute enforcement proceedings." *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006). In a frequently quoted passage, which is set forth in the margin,[7] the Supreme Court recited many of the reasons why an

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various decisional stages." Dis. Op. 5–6. That is not correct. The only issue the Court decided in *Akins* dealt with standing. The Federal Election Commission issued an interpretation of § 431(4)(A) of FECA to dismiss one of two charges in a complaint. (The Commission, relying on *Heckler v. Chaney*, invoked prosecutorial discretion to dismiss the other charge, which alleged a violation of § 441b of FECA; this Commission action was not at issue in the Supreme Court. *See* 524 U.S. at 25; *Akins v. FEC*, 736 F. Supp. 2d 9, 13–15 (D.D.C. 2010).) The Court held only that the complainants had standing even though, on remand, the Commission might invoke its prosecutorial discretion to dismiss the remaining charge, as it had done with respect to the § 441b allegation. 524 U.S. at 25.

[7] *Chaney*, 470 U.S. at 831–32:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but 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 requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

agency's exercise of its prosecutorial discretion cannot be subjected to judicial scrutiny. At this point in its *Chaney* opinion, the Court added a caveat. An agency's decision not to undertake enforcement "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney*, 470 U.S. at 832–33; *see also Webster v. Doe*, 486 U.S. 592, 600 (1988) ("§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based . . ..").

Chaney controls this case. The three naysayers on the Commission placed their judgment squarely on the ground of prosecutorial discretion. Nothing in the substantive statute overcomes the presumption against judicial review. FECA provides that "the Commission may, upon an affirmative vote of 4 of its members, institute a civil action . . .." 52 U.S.C. § 30109(a)(6)(A). To state the obvious, the word "may" imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action. Nor do the adjacent sections directing that the

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> The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

See also Wayte v. United States, 470 U.S. 598, 607 (1985):

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Commission "shall" take specific actions after making certain threshold legal determinations. 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i). Neither of those sections constrain the Commission's discretion whether to make those legal determinations in the first instance. The consequence is that the operative "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830.

Rather than confronting *Chaney* and the many other cases applying § 701(a)(2), CREW sweeps these precedents off the table. With the way thus cleared, it argues that whenever the Commission exercises its prosecutorial discretion to decline an enforcement action, it acts "contrary to law." Implicit is the idea that even if the Commission's exercise of prosecutorial discretion is immune from judicial questioning, this does not close the door. Instead, it triggers FECA's "citizen-suit" provision, which entitles a private entity to bring an enforcement action when the Commission has declined to do so. 52 U.S.C. § 30109(a)(8)(C).

CREW's argument contradicts the principle that an agency's exercise of prosecutorial discretion is not subject to judicial review. It contradicts this principle because a court may not authorize a citizen suit unless it first determines that the Commission acted "contrary to law" under FECA or under the APA's equivalent "not in accordance with law." 52 U.S.C. § 30109(a)(8)(C); 5 U.S.C. § 706(2)(A). Yet to make this determination, a court necessarily must subject the Commission's exercise of discretion to judicial review, which it cannot do. That is enough to reject CREW's argument, but two other dispositive points deserve mention. While insisting that the Commission's discretionary decisions not to prosecute are *per se* "contrary to law," CREW never identifies what "law" it has in mind. For the reasons already given, the "law" cannot be

FECA. And it cannot be the APA.[8] CREW's argument also flies in the face of *Chaney*'s holding that § 701(a)(2) bars judicial review when there is no "law" to apply in judging how and when an agency should exercise its discretion, 470 U.S. at 830.[9] *See also Overton Park*, 401 U.S. at 410; *Webster v. Doe*, 486 U.S. at 600; *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

Before we end this opinion, several additional subjects need to be addressed. The district court held that an agency's "absolute discretion" to decide whether to bring an enforcement action will be sustained unless the petitioner shows that the Commission abused its discretion. *Citizens for Responsibility and Ethics in Washington*, 236 F. Supp. 3d at 391. Both Commission counsel and CREW have accepted the district court's formulation. We do not. The district court's statement of law is inconsistent with the precedents of this court and of the Supreme Court. Our duty in conducting *de novo* review on appeal is to resolve the questions of law this case presents. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994). "When an issue or claim is properly before the court, the court is not limited to

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[8] One might suppose that under § 701(a)(2), an agency's exercise of prosecutorial discretion merely renders the APA inapplicable. But our decisions hold that even if the APA is out of the picture, an agency's prosecutorial discretion is still presumptively immune from judicial review. *See Steenholdt v. FAA*, 314 F.3d 633, 638–39 (D.C. Cir. 2003); *Twentymile Coal Co.*, 456 F.3d at 160.

[9] *Chaney* left open the possibility that an agency nonenforcement decision may be reviewed if "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 410 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)). CREW cites this footnote but its own submissions show that the Commission routinely enforces the election law violations alleged in CREW's administrative complaint.

the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991); *see also U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446 (1993).

The district court's statement embodies a contradiction: as the court put it, an agency has "absolute discretion" when it comes to enforcement decisions, but it is up to the court to decide whether the agency abused its absolute discretion. The Court in *Chaney* took notice of the same ostensible contradiction between the "abuse of discretion" standard in APA § 706 and § 701(a)(2)'s bar against review to the extent the action is "committed to agency discretion." The Court then resolved the conflict on this basis: "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Chaney*, 470 U.S. at 830.[10]

Following *Chaney*, this court has held that if an action is committed to the agency's discretion under APA § 701(a)(2)—as agency enforcement decisions are—there can be no judicial review for abuse of discretion, or otherwise. Examples include *Drake v. FAA*, 291 F.3d 59, 69–72 (D.C. Cir. 2002); *Steenholdt v. FAA*, 314 F.3d 633, 638–39 (D.C. Cir. 2003); *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006); *Association of Irritated Residents v.*

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[10] Justice Scalia, dissenting in *Webster v. Doe*, 486 U.S. at 609–10, offered a more detailed explanation of the "seeming contradiction" between § 701(a)(2) and § 706. A unanimous Supreme Court later endorsed Justice Scalia's explanation. *Lincoln v. Vigil*, 508 U.S. at 191.

EPA, 494 F.3d 1027, 1031–33 (D.C. Cir. 2007); and *Sierra Club v. Jackson*, 648 F.3d 848, 855–56 (D.C. Cir. 2011).

The upshot is that agency enforcement decisions, to the extent they are committed to agency discretion,[11] are not subject to judicial review for abuse of discretion. It follows that CREW is not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings.

The dissent goes off in a different direction, one that neither CREW nor the Commission ever argued. As the dissent sees it, the controlling Commissioners must have rendered an interpretation—or rather, a misinterpretation—of "political committee" as used in FECA.[12] The vote of these Commissioners had that effect because, according to the dissent, each Commissioner is obliged to issue or join an opinion reaching the merits before the Commission may, in the exercise of its prosecutorial discretion, dismiss a complaint to avoid

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[11] The interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion. *See Chaney*, 470 U.S. at 833 n.4; *Akins*, 524 U.S. at 26. Thus, if the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's decision is subject to judicial review to determine whether it is "contrary to law." *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981). This is what the Court meant in *Akins* when it wrote that although "an agency's decision not to undertake an enforcement action" is "generally not subject to judicial review," there may be such review under FECA if—as in *Akins*, *see* note 6 *supra*—the agency's action was based entirely on its interpretation of the statute. *Akins*, 524 U.S. at 26.

[12] *See* 52 U.S.C. § 30101(4)(A); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

reaching the merits. Dis. Op. 13–17. The dissent's position contradicts the record, which is doubtless why neither party mentioned it.[13] But even if some statutory interpretation could be teased out of the Commissioners' statement of reasons, the dissent would still be mistaken in subjecting the dismissal of CREW's complaint to judicial review. The law of this circuit "rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions." *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *see also Association of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 283 F.3d 339, 343–44 (D.C. Cir. 2002). In so holding, we followed the Supreme Court's decisions in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282–83 (1987), and *Chaney*, 470 U.S. at 827–28. (The agency in *Chaney* had determined that it lacked jurisdiction but that even if it had enforcement jurisdiction it would not exercise it. 470 U.S. at 824–25.) As to this firmly-established principle, the dissent has nothing to say. This is odd because the principle, as applied to this case, renders the dissent's novel theory superfluous.

Affirmed.

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[13] These Commissioners explained that they had "concluded that any conciliation effort would be futile, and the most prudent course was to close the file consistent with the Commission's exercise of its discretion in similar matters" (citing *Heckler v. Chaney*, 470 U.S. at 832, quoted in note 7 *supra* and setting forth many reasons for an agency's declining to bring an enforcement action).

PILLARD, *Circuit Judge*, *dissenting*:

Voters have the right to know who contributes—and how much—to the campaigns of federal office-seekers. That right is only as effective as the agency that enforces it.

Congress enacted the Federal Election Campaign Act (FECA or Act), 52 U.S.C. §§ 30101 *et seq.*, to prevent money from corrupting or appearing to corrupt candidates' positions and actions in office. *See generally Citizens United v. FEC*, 558 U.S. 310, 371 (2010). FECA, in turn, makes the Federal Election Commission (FEC, Commission, or agency) the primary protector of voters' entitlement to "information 'as to where political campaign money comes from and how it is spent by the candidate.'" *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (quoting H.R. Rep. No. 92-564, at 4 (1971)).

But the Commission's partisan-balanced composition and the political nature of the matters it regulates raise risks of inaction. Congress wanted to prevent the agency's frequent deadlock from sweeping under the rug serious campaign finance violations—turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know. To that end, Congress provided for judicial review of Commission decisions not to enforce FECA.

Thus, the Act retains its bite by calling on the Commission to address complaints through a series of judicially reviewable legal determinations in sequential votes on whether there is "reason to believe," and then "probable cause to believe," that campaign finance violations occurred. 52 U.S.C. §§ 30109(a)(2), (a)(4)(A)(i). If the Commissioners deadlock on a vote and, consequently, dismiss the matter, the Commissioners who vote not to proceed (Controlling Commissioners) must explain their reasons. *FEC v. Nat'l Republican Sen. Comm.*, 966 F.2d 1471, 1474 (D.C. Cir. 1992); *Common Cause v. FEC*, 842 F.2d 436, 448-49 (D.C. Cir. 1988); *Democratic Cong.*

Campaign Comm. v. FEC, 831 F.2d 1131, 1135 & n.5 (D.C. Cir. 1987). When the Commission dismisses all or part of a complaint, a complainant who believes it did so in error may file a petition in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). Courts routinely review such dismissals. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d. 77 (D.D.C. 2016). They may declare that the Commission acted "contrary to law," and direct the Commission to conform to that declaration. 52 U.S.C § 30109(a)(8)(C). If the Commission fails to conform to the court's order within thirty days, the statute does not force the agency's hand; rather, it permits the complainant to bring a civil action in its own name to remedy the claimed violation. *Id.*

My disagreement with my colleagues is, at its core, specific to this case—we see the facts differently. My colleagues do not believe that the Commission made any legal decision, so *a fortiori* they see nothing "contrary to law" and no reason to remand. But the Commissioners voted on a legal recommendation by the General Counsel and explained their rejection of that recommendation: According to the Controlling Commissioners, the facts did not add up to legal "reason to believe" that the investigated organization—the Commission for Hope, Growth & Opportunity (CHGO)—may have operated as a "political committee." Because it was, in my view, clearly contrary to FECA to find no "reason to believe" on these facts, I would reverse the district court's grant of summary judgment and remand to the Commission. I believe that it is evident from the Controlling Commissioners' finding and reasoning that their dismissal of CHGO's case depended materially on an erroneous legal view of the organization's political-committee status. If, as my colleagues think, the Commissioners did not base their dismissal on a legal

interpretation, the agency could readily explain as much on remand.

The majority also makes a broader legal error not teed up by any party. The FEC, defending its action as legally correct and reasonable, nevertheless acknowledged that "Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review." FEC Br. 27. The majority, unbidden, departs from that well-established principle. Because this case, properly understood, is an unremarkable subject for judicial review under settled law, I spell out the nature of my disagreement. The court's energetic defense of the FEC's enforcement discretion in rejecting Citizens for Responsibility and Ethics in Washington (CREW)'s particular theory of this case should not be taken to foreclose judicial review in similar cases in the future.

Starting with a few key points of agreement will help to clarify where we differ:

First, as the court acknowledges, and in keeping with our precedent, "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion." Maj. Op. 11 n.11. So, when "the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's decision is subject to judicial review." *Id.*; *see id.* at 7. Even as my colleagues rely on *Heckler v. Chaney*, 470 U.S. 821 (1985), they note that *Heckler*'s brand of unreviewability is inapplicable "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Maj. Op. 7 (quoting *Heckler*, 470 U.S. at 833).

Second, when the FEC is deadlocked, the Controlling Commissioners must issue a statement of reasons explaining their votes, and we, the reviewing court, look to that statement

to assess the lawfulness of the dismissal. *See* Maj. Op. 4; *Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm.*, 831 F.2d at 1135 & n.5.

Third, when we discern legal error, we should remand to allow the FEC to decide how to conform. "[I]t is possible that even had the FEC agreed with [the correct] view of the law, it would still have decided in the exercise of its discretion not to" pursue enforcement. *FEC v. Akins*, 524 U.S. 11, 25 (1998). But because "we cannot know that the FEC would have exercised its prosecutorial discretion in this way," remand is the appropriate course. *Id*.

I read the Commissioners as having dismissed the case based on a legally erroneous view of the law. I believe we have an obligation to review that decision, identify the error, and remand to the Commission either to conform to the court's declaration, or to let CREW pursue the case through a private right of action.

The majority, however, like the district court, sees no legal error because it assumes that the Commission took "no stance" on whether there was reason to believe that CHGO operated as a political committee. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 394 (D.D.C. 2017); *see* Maj. Op. 4-5. Indeed, CREW invites that reading to the extent that it suggests the FEC somehow sidestepped making a no "reason to believe" determination and dismissed "based solely on a choice to preserve its resources." Appellant's Br. 31; *see id*. at 26 (charging the district court's approach as producing the "absurd" result of barring citizen suits "where the FEC *does not reach the merits* but dismisses based on its prosecutorial discretion") (emphasis added).

But the majority takes an unwarranted and incorrect further step, parting ways with the parties and the district court,

by finding the Commission's dismissal of the complaint to be entirely *unreviewable* under *Heckler*, 470 U.S. 821. *Compare* Maj. Op. 7, *with Citizens for Responsibility & Ethics in Wash.*, 236 F. Supp. 3d at 390 ("When the FEC exercises prosecutorial discretion, its controlling statement of reasons must be sufficiently detailed so as to allow a reviewing court to determine why the controlling commissioners decided to forego prosecution."); FEC Br. 27 ("Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review."); Appellant's Br. 21 ("The standard for judicial review under the FECA is whether the dismissal was 'contrary to law.'").

In my view, the Commission's dismissal of the complaint was based on legal error and is reviewable on that ground. Per Section 30109(a)(2), the Commission took a statutorily defined action in response to the complaint and the General Counsel's report: an up-or-down vote on whether there was "reason to believe" that CHGO had violated FECA. It was at this stage that the three Controlling Commissioners voted that there was no "reason to believe." The Controlling Commissioners concluded *both* (a) that the information before them "did not definitely resolve whether there was reason to believe CHGO was a political committee," *and* (b) that, because the claims were also growing stale and CHGO was defunct, the case was not worth the FEC's effort. Joint App'x (J.A.) 769. The dismissal that the majority reads as based on reasons entirely unrelated to the strength of the evidence against CHGO appears on its face to have rested on the Controlling Commissioners' antecedent legal conclusion that the record as it stood failed to show "reason to believe" a FECA violation occurred. J.A. 757, 769. That conclusion can only be seen as "contrary to law." 52 U.S.C. § 30108(a)(9)(C).

More fundamentally and importantly, any FEC dismissal based on a no "reason to believe" vote is reviewable to the extent that such determination was contrary to law. The way my colleagues avoid recognizing the legal constraints on the Commission is to skip over the several steps that the Act spells out for the FEC. *See* 52 U.S.C. § 30109(a)(2)-(4). Instead, they analyze the Controlling Commissioners' dismissal as if it were a different kind of non-enforcement altogether: an unconstrained choice, under a different provision of the Act, which becomes relevant only after the FEC has passed through various defined steps. *See id.* § 30109(a)(6)(A). Viewing the case through that lens, the majority sees it as "obvious," that "the word 'may'" in that section of the Act "imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action." Maj. Op. 7. But this case stalled out on an earlier statutory threshold—a no "reason to believe" vote. *See* 52 U.S.C. § 30109(a)(2). The law is clear that, at that earlier stage, the agency does not have wholly unfettered—or unreviewable—choice as to how it proceeds. *See* Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process* at 12 (May 2012), http://fec.gov/em/respondent_guide.pdf (*FEC Process Guidebook*) (setting out Commissioners' three choices at that stage: find reason to believe, exercise prosecutorial discretion by an affirmative vote of four Commissioners not to proceed, or find no reason to believe).

The Supreme Court and this court have acknowledged that FECA channels the agency's exercise of prosecutorial discretion at various decisional stages. Arguing against judicial redressability in *FEC v. Akins*, the FEC there, like the majority here, contended that its dismissal of the complaint at issue lay in "an area generally not subject to review." 524 U.S. at 26. But the Supreme Court rejected that stance: It made

clear that, while "*Heckler* . . . noted that agency enforcement decisions have traditionally been committed to agency discretion, . . . [w]e deal here with a statute that explicitly indicates the contrary." *Id.* (internal citations, quotation marks, and alterations omitted). In so holding, the Supreme Court sustained the understanding of this court sitting *en banc*. We, too, had expressly distinguished *Heckler*, describing FECA as having "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings challenging the Commission's interpretation of the term 'political committee.'" *Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc) (citations omitted); *see Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir 1986).

The FEC enjoys considerable discretion. It has discretion in promulgating regulations and policies to effectuate the statutory provisions governing campaign finance. It has discretion in how it reasonably applies those rules to the facts of the cases that come before it. And, where it finds violations, it has discretion to decide whether, at the end of the day, to file suit. *See* 52 U.S.C. § 30109(a)(6)(A); Maj. Op. 7. But the agency's discretion is less than absolute at several points, including the one at issue in this case. When the agency votes on whether there is "reason to believe" that a violation of FECA has occurred, it must give reasons for that action that are subject to judicial review. *See* U.S.C. § 30109(a)(2)-(4). Given everything that was not before us in this case (due to the mismatch between the opinion and what was briefed), today's majority should not be read to shut down that review.

I. The Federal Election Commission Acted Contrary to Law

The FEC came to consider the case of the Commission on Hope, Growth and Opportunity when it received a complaint alleging that the organization, which registered as a 501(c) non-profit, was operating as a fly-by-night political committee, in contravention of FECA. The FEC General Counsel recommended that the Commission find reason to believe that CHGO was a political committee that violated its obligations under the Act.

A. The Federal Election Campaign Act Supplies Law to Apply

Since its enactment in 1972 and amendment in 1974, FECA has promoted transparency of funding in federal elections. *See McConnell v. FEC*, 540 U.S. 93, 117-19 (2003). The law requires, for example, "[e]very person" who engages in independent campaign-related expenditures to make certain disclosures and disclaimers. *See* 52 U.S.C. § 30104(c)(1), (f)(1); *see generally Citizens United*, 558 U.S. at 366-71. Groups acting as "political committees" must make "similar" disclosures and disclaimers. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); *see* Supplemental Explanation & Justification, *Political Committee Status*, 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007) (*2007 E&J*). Any such group must also register and keep records of its contributions, and disclose donors of more than $200. 52 U.S.C. § 30104(b)(3); *see id.* §§ 30103-30104.

FECA defines as a "political committee" any organization that receives or spends more than $1,000 annually, *id.* § 30101(4)(A); *see id.* §§ (8)(A), (9)(A), and has a "major purpose" of nominating or electing federal candidates, *2007 E&J*, 72 Fed. Reg. at 5601, 5605. In applying the so-called

"major purpose test," the agency is committed to a "fact-intensive inquiry" into each group's "overall conduct." *2007 E&J* at 5601-02, 5605; *id.* at 5597; *see also Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) (*Shays II*); *id.* at 31 (referring to political committee status is a "legal issue" that is "multifaceted"). The test requires the Commission to examine direct and indirect evidence of purpose, including the organization's "public statements" and "organizational statements of purpose," together with its "contribution[s] and "expenditure[s]" related to "federal campaign activity." *2007 E&J*, 72 Fed. Reg. at 5595, 5597, 5601, 5605. The FEC looks to how the group's overall "campaign activities compare[] to its activities unrelated to campaigns." *Id.* at 5601-02; *see Shays II*, 511 F. Supp. 2d at 30; *see also Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012); *Citizens for Responsibility & Ethics in Wash.*, 209 F. Supp. 3d. at 93.

The fact that the Commission makes its legal determinations in the form of a "reason to believe" or "probable cause" inquiry does not place such actions among "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Neither does the fact-intensive character of those determinations make them non-legal. A decision that there is no "reason to believe" that an entity is a political committee is no less a determination of law—and no less subject to judicial review—than a simple determination that it is *not* a political committee. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that "determinations of reasonable suspicion and probable cause should be reviewed *de novo*"). Courts routinely review no "reason to believe" dismissals. *See, e.g.*, *Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm.*, 831 F.2d at 1133; *Citizens for Responsibility & Ethics in Wash*, 209 F.

Supp. 3d. 77. And we have expressly "decline[d] . . . to distinguish deadlock dismissals which run contrary to General Counsel recommendations based on clear legal precedent and [those that run contrary to] General Counsel's less definitive assessment of what the law requires in light of the factual allegations in the case." *Common Cause*, 842 F.2d at 449.

It is beyond debate that Congress, in enacting FECA, supplied meaningful standards against which it expected courts to evaluate the Commission's no "reason to believe" dismissals.

B. The Facts the FEC General Counsel Uncovered About CHGO Provide "Reason to Believe"

The following facts about the Commission on Hope, Growth and Opportunity, as reported by the FEC General Counsel, are largely undisputed. *Citizens for Responsibility & Ethics in Wash.*, 236 F. Supp. 3d at 384.

For an organization that apparently had no records retention policy, *see* J.A. 551, the direct evidence here was telling. In planning documents, CHGO declared its goal to "make a measurable impact on the election outcome in selectively identified Senate races," J.A. 520, "us[ing] express advocacy in targeted Senate races," J.A. 514, and "focusing on . . . key districts to support the election of Republican candidates," J.A. 578; *see generally* J.A. 514-15, 652. The FEC General Counsel meanwhile found *no* documents "reflect[ing] that CHGO's purpose was, as it claimed [in its filings before the FEC], solely to educate the public on matters of economic policy formulation." J.A. 653.

Other evidence supplied yet more reason to suspect that CHGO was concealing its true nature. In response to questioning from the FEC, CHGO's general counsel

represented that he had "no relevant information or records" and "did not know who would have that information" in spite of repeated notices, previously sent by the Commission, instructing the organization to "preserve records . . . as required by law." J.A. 644 & n.9. When the FEC tried to subpoena a vendor CHGO had identified as producing non-campaign-related communications, the putative vendor's offices were vacant. J.A. 505. No such vendor had "[]ever rented [that] office space." J.A. 505. Instead, the tenant was a well-known political strategist. J.A. 505.

What is more, the people CHGO named in its IRS filings as its leadership denied to the FEC General Counsel having any real authority over CHGO's actions; and the people they identified as really running the show were political operatives. *See* J.A. 493-94, 546-52, 808-09. The man listed on CHGO's tax filings as its President and Executive Director told investigators that he had "been associated" with the group but had not exercised control over its activities. J.A. 493-94, 809. He said he was just the "creative person" and described his job as "plac[ing] . . . TV ads." J.A. 493-94, 547. The man listed as CHGO's Treasurer in its IRS application for tax-exempt status, J.A.794, reported that he handled some "accounting and tax work" for CHGO, but "probably" never interacted with the organization's putative president, J.A. 496. CHGO's general counsel, meanwhile, said he "just handled compliance issues" and disavowed any role in reviewing or preparing documents relating to the "funding, production or placement" of advertisements CHGO ran. J.A. 500-01, 555. This lawyer reported that he "did not know" who was in charge. J.A. 501.

Looking also at the organization's balance sheet for insight into its major purpose, the FEC General Counsel was able to confirm that a significant majority—at minimum 61 percent—of the organization's expenditures went to federal election

related communications. J.A. 737. "[O]ne thing is clear," wrote the General Counsel, "a definite majority of CHGO's spending was on activities that reflect the major purpose of influencing federal elections." J.A. 738.

Putting that 61 percent expenditure figure together with the direct and other circumstantial evidence, the General Counsel recommended that the Commission find "reason to believe" that CHGO may have been a political committee.

C. The Federal Election Commission's Legal Error at the "Reason to Believe" Stage

FECA calls on the FEC Commissioners to vote, based on the recommendation of the General Counsel, as to whether there is "reason to believe that a person has committed, or is about to commit, a violation of th[e] Act." 52 U.S.C. § 30109(a)(2); *see FEC Process Guidebook* at 12. The Controlling Commissioners here voted that there was no "reason to believe" that CHGO was a political committee and issued a statement of reasons. J.A. 757-58.

That statement makes clear that the Controlling Commissioners, in evaluating the strength of the claim against CHGO, did not correctly apply the Commission's own "major purpose" test. They did not consider the organization's direct statements that CHGO had a "goal" of affecting federal races, the conduct of CHGO's leadership, or the overwhelming suggestions that everyone involved was trying to hide something. Ignoring that direct and circumstantial evidence runs contrary to the FEC's rule, *see 2007 E&J* at 5595-97, as well as the precedent that the Controlling Commissioners cited for support, J.A. 768 & n.13 (Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Peterson, MUR 6538 (Americans for Job Security) (analyzing organizational statements in

determining major purpose) (*AJS Statement*)); J.A. 769 & n.17. Even looking only to the balance sheet, the Commissioners' conclusion—that 61 percent of total spending on express advocacy for federal candidates did not evince a "major purpose"—runs counter to FEC precedent and applicable law. *See, e.g.*, *AJS Statement* at 12; *compare* J.A. 769 n.16 (suggesting that certain commission payments to political strategists might raise "novel" legal issues), *with* 11 C.F.R. § 100.111(a) (counting as a relevant expenditure "any purchase, payment, distribution, loan . . . , advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office").

Informed by their fundamentally flawed "major purpose" analysis, the Controlling Commissioners reasoned that any violations of FECA's political-committee requirements were not "obvious" and that "the information learned during [the investigation] did not definitely resolve whether there was reason to believe CHGO was a political committee . . . ." J.A. 769. In fact, there was no reason to believe anything else.

II. This Case is Subject to Judicial Review under the Federal Election Campaign Act

The court today declares the unreviewability of the FEC's dismissal. My colleagues see no "law" that the Controlling Commissioners could have contravened (and, admittedly, CREW was less than crystalline on the point). *See* Maj. Op. 8. But the law itself is clear: After receiving a complaint and a General Counsel report recommending further proceedings (or not), the Commission votes on whether there is "reason to believe" that a violation of FECA has occurred. *See* 52 U.S.C. § 30109(a)(2); *FEC Process Guidebook*, at 12-13. In cases in which the Commissioners find no reason to believe and dismiss the complaint, they must explain the basis of their action to

enable judicial review. *See Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm*, 831 F.2d at 1135 & n.5.

The Commission's action dismissing a complaint in those circumstances is "contrary to law" when it is based on a failure to faithfully apply FECA to the facts. *See* 52 US.C. § 30109(a)(8)(C). FECA provides that, "[i]f the Commission . . . determines . . . that it has reason to believe that a person has committed . . . a violation of [FECA]," such as by unlawfully operating as a political committee, "the Commission shall" provide notice and "shall make an investigation." *Id.* § 30109(a)(2). If, when considering whether there is "reason to believe" that an organization operates as a political committee, the Commission does not evaluate the organization's "major purpose" as shown by its "overall conduct"—including "public statements," "internal documents," official filings, and "expenditures," *2007 E&J*, 72 Fed. Reg. at 5597, 5605—then the Commission has acted contrary to law.

Here, the Commission voted on whether there was "reason to believe" that CHGO was a political committee. J.A. 757. Totality-of-the-circumstances decisions whether there is reason to believe a group may have been a political committee are reviewed as questions of law. The Controlling Commissioners answered the "reason to believe" question in the negative—voting that there was no "reason to believe" that CHGO may have been a political committee and dismissing the case—because they thought the evidence was insufficient to "resolve" the question. J.A. 757, 769. On this record, that result cannot be squared with the law.

Where the FEC makes a determination about the law in finding no "reason to believe," we may review the dismissal. In *FEC v. Akins*, the Supreme Court rejected the notion that the

FEC's dismissal of a complaint upon a finding of no "probable cause to believe" that the organization at issue was a political committee would be an unreviewable exercise of enforcement discretion, so unredressable. 524 U.S. at 25-26. "We deal here," the Court wrote, "with a statute that explicitly indicates the contrary." *Id.* at 26. Far from "committing" FEC non-enforcement decisions to the agency's discretion, the FECA requires the agency to take certain steps where there is "reason to believe" a violation has occurred. *See* 52 U.S.C. § 30109(a)(2). And it establishes judicial review of dismissals. 52 U.S.C. § 30109(a)(8)(A). The Act provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with the United States District Court for the District of Columbia." *Id.* Further, "the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring . . . a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

In a series of decisions, we have explained the importance of this judicial check. In *Democratic Congressional Campaign Committee v. FEC*, we held that FECA's "judicial review prescription" calls for review of an FEC dismissal that is, as here, "due to a deadlock"—that is, a three-to-three tie vote by the Commissioners. 831 F.2d at 1133. In so doing, this court expressly rejected the FEC's argument, "citing *Heckler v. Chaney*, that deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion" rather than legal determinations whether there is "reason to believe." *Id.* This court instead suggested that FECA calls for judicial review: "[W]here the Commission is unable or unwilling to apply settled law to clear facts, judicial intervention serves as a necessary check against

arbitrariness." *Id.* at 1135 n.5 (internal quotation marks omitted).

The next year, in *Common Cause v. FEC*, 842 F.2d 436, we reaffirmed the crucial role of judicial review in FECA's scheme. The Commission there had dismissed a complaint via deadlocked vote, contrary to the General Counsel's recommendation to find "reason to believe." We held that the Act requires the FEC to provide a statement of reasons even where the implicated questions of campaign finance are unsettled or fact-intensive; such a statement is necessary "to allow meaningful judicial review of the Commission's decision not to proceed." *Id.* at 449. Judicial review ensures that the agency does not, by unlawfully dismissing complaints, frustrate the statutory scheme and undermine enforcement.

So, too, here, the Commission's decision to dismiss as a result of the deadlocked "reason to believe" vote is not a matter "committed to agency discretion" under FECA. There is a strong presumption that agency action is reviewable. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see also Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 410. *Heckler* is the exception, and its "non-reviewability only applies where the governing statute's enforcement provision describes the agency's role as discretionary." *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007). The Supreme Court, in *Heckler*, acknowledged reviewability of non-enforcement where the relevant statute constrains the agency's discretion. 470 U.S. at 833-34. The Court in *Heckler* distinguished *Dunlop v. Bachowski*, 421 U.S. 560 (1975), where the statute directed the Secretary to investigate complaints and provided that "if he finds probable cause to believe that a violation . . . has occurred . . . he shall" pursue enforcement. *Heckler*, 470 U.S. 833-34 (alterations in original) (quoting 29 U.S.C. § 482(b)); *see also Dunlop*, 421 U.S. at 562-

63 & n.2. Where the Secretary declined to proceed through the defined statutory checkpoint, "'the principle of absolute prosecutorial discretion' [was] inapplicable." *Id*. at 834 (quoting *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974)).

As was the case in *Dunlop*, the FECA provision at issue here provides law for the agency and the court to apply, and calls for judicial review of dismissals. *See supra* Part I.A. After it receives a General Counsel recommendation regarding a complaint, the agency votes on whether there is "reason to believe" that a violation of FECA may have occurred. *See* 52 U.S.C. § 30109(a)(2); *FEC Process Guidebook*, at 12-13. If there is reason to believe, the Commission must take further steps. *See* 52 U.S.C. § 30109(a)(2)-(4); *FEC Process Guidebook*, at 12. The Commission may depart from the General Counsel's recommendation to find "reason to believe," but it must explain any decision to do so. *See Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm.*, 831 F.2d at 1135 & n.5. Judicial review ensures that, if the Commission erred in its reasoning—dismissing a matter under a faulty view of the law where there *is*, in fact, "reason to believe" that a violation may have occurred—the matter is remanded to the agency so that it may reconsider its decision. *See Akins*, 470 U.S. at 25-26.

The statute elsewhere compensates in various ways for those curtailments of enforcement discretion. If it chooses *not* to vote "yes" or "no" on "reason to believe," the Commission has a third option: "Pursuant to an exercise of prosecutorial discretion, the Commission may dismiss a matter when, in the opinion of at least four Commissioners, the matter does not merit further use of Commission resources." *FEC Process Guidebook* at 12. If a court declares a Commission's dismissal to be "contrary to law," the statute contemplates that the

Commission may decline to act in accordance with that directive. 52 U.S.C. § 30109(a)(8)(C). The complainant may then sue in his or her own name to remedy the claimed violation. *Id.* As CREW observes, the Act's limited private right of action helps to prevent cooptation of agency resources. *Id.* Finally, if a complaint passes through all the prescribed checkpoints—from "reason to believe" to conciliation—the Commission enjoys ultimate non-enforcement discretion: It is the Commissioners' option whether to institute a civil action in court. *See* 52 U.S.C. § 30109(a)(6)(A).

As the Supreme Court explained in *Akins*—and the FEC confirmed at oral argument, Oral Arg. Rec. at 44:03-44:18—courts may review for legal error dismissals at FECA's defined steps. 524 U.S. at 26. Where the court finds legal error, the statute provides that the court should remand so that the Commissioners may reassess their action with a correct view of the law in mind: While "it is possible that even had the FEC agreed with [the correct] view of the law, it would still have decided in the exercise of its discretion not to" pursue enforcement, "we cannot know that the FEC would have exercised its prosecutorial discretion in this way." *Id.*

Here, as in *Akins*, we cannot know the counterfactual. We cannot be certain what the FEC would have done had it correctly applied the legal definition of political committee. In this case, all six commissioners voted to investigate the "obvious" violations of the requirement to disclose independent expenditures. If the Controlling Commissioners had not labored under a view of CHGO's political-committee status that was contrary to law, a majority might well have proceeded with that claim, too, as "obvious." J.A. 769.

The majority miscasts this case in the *Heckler* mold. CREW admittedly sidestepped any argument on the "reason to

believe" question—instead framing its case as a direct and wholesale challenge to the agency's enforcement discretion. So it is perhaps understandable that my colleagues turn to FECA Section 30109(a)(6)(A)'s separate provision granting the FEC discretion whether to file suit in federal court. The parties did not focus on, and the court leaves untouched, how the action the Commission took here—a vote keyed to a specific legal question, *i.e.*, "reason to believe"—calls for judicial review. I trust that, in future cases, the court will continue, consistent with existing law, to review legal determinations that the Commissioners make when they vote on the merits of "reason to believe" or "probable cause" questions, *see* 52 U.S.C. § 30109(a)(2)-(6); R. Sam Garrett, Cong. Res. Serv., *The Federal Election Commission: Enforcement Process and Selected Issues for Congress* 5-6 (Dec. 22, 2015) (citing 52 U.S.C. § 30109; *FEC Process Guidebook*), and that they will continue to explain their decisions, *see Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm.*, 831 F.2d at 1135 & n.5. After all, these constraints reflect 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. *Democratic Cong. Campaign Comm.*, 831 F.2d at 1134 (quoting 125 Cong. Rec. 36,754 (1979)); *see id.* at 1135 & n.5.

My colleagues do not grapple with these questions—they remain for future cases. Instead, the court points to non-FECA decisions readily distinguishable from this one and to which no party cited. *E.g.* Maj. Op. 10-12 (citing *Ass'n of Irritated Residents*, 494 F.3d at 1032 (holding non-enforcement decision unreviewable where statute provided that Secretary "'may' take any number of enforcement actions"); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157-58 (D.C. Cir. 2006) (vacating Mining Commission's reversal of Labor Secretary's

citation of mine operator under statute that "provides no meaningful standard against which to judge the Secretary's decision regarding which party to cite"); *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir 2003) (denying review of agency's nonrenewal of petitioner's authorization under provision granting the Administrator authority to rescind such authorization "for any reason the Administrator considers appropriate" (quoting 49 U.S.C. § 44,702(d)(2)); *Drake v. FAA*, 291 F.3d 59, 69-72 (D.C. Cir 2002) (affirming agency dismissal of complaint without investigation under provision authorizing dismissal when Secretary "is *of the opinion* that the complaint does not . . . warrant investigation or action" (quoting 49 U.S.C. § 46,101(a)(3)) (emphasis in *Drake*)); *Sierra Club v. Jackson*, 648 F.3d 848, 856 (upholding agency inaction where the statute tasks the administrator to "take such measures . . . as necessary" but without "guidance . . . as to what action is 'necessary'"); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 672, 676 (D.C. Cir. 1994) (reading *Heckler* to apply where "the relief sought by petitioner" was the initiation of a discretionary "enforcement action," but the Administrator did not view the complained-of conduct as properly within the statute).

The myriad statutes that permit largely unfettered, and therefore unreviewable, discretion do not speak to FECA. There can be no serious claim that FECA equates a "no reason to believe" vote to an exercise of unfettered enforcement discretion. To the contrary, the Act explicitly provides for judicial review of dismissals based on those votes. On *Heckler*'s own logic, then, FECA's constrained agency non-enforcement is judicially reviewable and, if contrary to law, subject to remand. *Heckler*, 470 U.S. at 833-34. It remains for us to conduct such review in future cases that warrant it.

III. Conclusion

Under the correct standards, undeniable "reason to believe" that CHGO operated unlawfully as a political committee should have prompted further investigation and perhaps enforcement by the FEC. The court rests its decision today on its view that the FEC sidestepped the merits wholesale and exercised prosecutorial discretion untainted by an erroneous view of the law. Critically, the majority preserves judicial review where "the Commission declines to bring an enforcement action on the basis of its interpretation of FECA." Maj Op. 11 n.11. I think this is such a case. I read the Controlling Commissioners as having held a clear but incorrect view of the law that informed their dismissal. That decision should have been reviewed, reversed, and remanded to the FEC.

Absent argument from any party, my colleagues have reached out to suggest that any Commission dismissal guided by discretionary considerations is unreviewable. I have here explained why FECA's statutory scheme—and its various limitations on non-enforcement discretion—place cases like this one outside *Heckler*'s ambit. I believe that, in future cases where the parties tee up this issue, *Heckler* will not bar our review.

The end of CHGO's story remains a mystery. The group dissolved within several months of learning that it remained the subject of FEC investigation. Political operatives involved with the group exchanged frantic emails stating that it was urgent to "shut it down" and "[r]eally important . . . to get this terminated ASAP." J.A. 636. The organization lasted only one federal election cycle and managed to slip into the shadows without the scrutiny FECA requires. But the court's holding

today should not be mistaken to mean that other organizations may do the same.