ORAL ARGUMENT HELD OCTOBER 19, 2023
DECISION ISSUED ON JANUARY 5, 2024

No. 22-5339

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:22-cv-01976-JEB
Before the Honorable James E. Boasberg

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Authorities upon which appellant principally relies are marked with an asterisk*

Cases: Page

Statutes:

Other Materials:

GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
ECU	End Citizens United PAC
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTRODUCTION AND RULE 35(b) STATEMENT

Rehearing is necessary to correct a line of recent rulings that flouts decades of settled precedent applying the special review provision in the Federal Election Campaign Act (FECA) and instead—contrary to express statutory directive—"arm[s] an agency minority with what is in effect a judicial-review kill switch." *Citizens for Resp. & Ethics in Washington (CREW) v. FEC*, 55 F.4th 918, 922 (D.C. Cir. 2022) ("*New Models II*") (Millet, J., dissenting from denial of rehr'g en banc).

In following these rulings to hold the agency dismissal challenged here judicially unreviewable, the panel gravely compounded their errors. Its decision, like the divided panel rulings in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission on Hope*"),[1] gives minority blocs on the Commission the power to vanquish challenges to their interpretations of law by cloaking them in the "magic words" of prosecutorial discretion, without regard to whether that rule comports with the statutory text, governing precedent, or the public's interest in fair and transparent elections. It emphatically does not.

Like the *CREW* rulings on which it relies, the panel decision "[c]onflict[s] with FECA's terms, structure, and purpose; with the Supreme Court's decision in

[1] This petition refers to each *CREW* case by the name of the administrative respondent, and to the decisions collectively as the "*CREW*" cases.

[*FEC v.*] *Akins*, 524 U.S. 11 [(1998]; and with [this Circuit's] decisions in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), *Democratic Congressional Campaign Committee v. FEC* (*DCCC*), 831 F.2d 1131 (D.C. Cir. 1987), and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)." *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1184 (D.C. Cir. 2024) ("*ECU*") (Pillard, J., dissenting).

And by "effectively scuttl[ing] FECA's enforcement mechanism," *id.*, the decisions eviscerate the campaign-finance restrictions and transparency requirements in FECA—"laws that protect the electoral building blocks of our democracy," *New Models II*, 55 F.4th at 932 (Millett, J., dissenting from denial of rehr'g en banc).

En banc review is therefore necessary to restore uniformity and coherence to this Circuit's FECA decisions and bring them back into harmony with the statutory scheme Congress devised. The panel ruling, which "continues along the path marked by the wrong turn in *Commission on Hope*," *ECU*, 90 F.4th at 1187 (Pillard, J., dissenting), demands prompt correction by the full Court.[2]

Congress expressly provided for judicial oversight of FEC enforcement dismissals to ensure that the Commission was not "turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know."

[2] Contemporaneously with this petition, plaintiff-appellant in *ECU*, No. 22-5277, is seeking en banc rehearing of the divided panel decision in 90 F.4th 1172 (D.C. Cir. 2024), which, like the ruling here, applies and extends the *CREW* cases.

Commission on Hope, 892 F.3d at 442 (Pillard, J., dissenting). The panel decision, like the *CREW* decisions it followed, reads that safeguard out of the statute. By treating the Act's "unusual" provision for judicial review as something that minority blocs of FEC commissioners can "turn . . . off like a light switch," *New Models*, 993 F.3d at 901 (Millett, J., dissenting), the decision flies in the face of the carefully balanced enforcement scheme prescribed by Congress and acutely impairs the Act's core objectives.

The Court should grant rehearing en banc.

STATEMENT OF THE CASE

1. "The Federal Election Commission is entrusted with the weighty responsibility of ensuring public transparency and accountability by those individuals and entities expending significant sums of money on our Nation's elections." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting from denial of rehr'g en banc). Congress, mindful that the Commission's partisan-balanced structure created a propensity for gridlock, gave the agency initial enforcement responsibility under FECA but crafted an unusual judicial review provision, 52 U.S.C. § 30109(a)(8)(C), to ensure proper implementation of the Act.

As a bulwark against "partisan gamesmanship," *CREW v. FEC*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) ("*Commission on Hope II*") (Griffith, J., concurring in denial of rehr'g en banc), and to "prevent the agency's frequent deadlock from

sweeping under the rug serious campaign finance violations," *Commission on Hope*, 892 F.3d at 442 (Pillard, J., dissenting), Congress authorized complainants to seek judicial review when "aggrieved by" the dismissal of their enforcement complaints, and created a private right of action triggered only if, following review, the Commission fails to conform to a court order holding the challenged agency decision "contrary to law." *See* 52 U.S.C. § 30109(a)(8).

The special review provision Congress devised thus bears two unique features. First, "to avoid nullification of FECA by a non-majority bloc of commissioners refusing to act on apparent violations of campaign-finance laws, Congress made such refusals to act—no matter the reason—reviewable in court." *ECU*, 90 F.4th at 1184 (Pillard, J., dissenting). Second, if the reviewing Court "detect[s] statutory misreading" but the agency fails to correct its error, "the court's ruling paves the way for private enforcement." *Id.* at 1187. Under this scheme, the Commission enjoys "the right of first refusal on enforcement," but "no court will force it" to bring an enforcement action if it declines to do so following judicial review. *New Models II*, 55 F.4th at 929 (Millett, J., dissenting from denial of rehr'g en banc).

2. Plaintiff-appellant Campaign Legal Center (CLC) filed an administrative complaint alleging that Donald J. Trump's authorized 2020 presidential campaign committee, Donald J. Trump for President, Inc., and one of his authorized joint

fundraising committees, Trump Make America Great Again Committee, had violated the Act's disclosure provisions. JA51. The complaint alleged, in essence, that the Committees had unlawfully concealed the true recipients of hundreds of millions of dollars in 2020 campaign spending by funneling payments to vendors and staff through conduits without reporting their ultimate payees as the law requires. *See* JA243. The allegations in the complaint were thoroughly supported with credible, uncontroverted evidence, and described clear violations of the Act's disclosure provisions—laws that directly serve the vital interests of preventing political corruption and "providing the electorate with information" about federal campaign spending. *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

Yet the Commission, in the face of these glaring transparency violations and contrary to its own General Counsel's recommendations, JA197-98, dismissed the complaint after deadlocking 3-3 on two separate votes: first, on whether to find "reason to believe" the Committees violated FECA, and second, on whether to exercise the Commission's prosecutorial discretion and dismiss the complaint under *Heckler v. Chaney*, 470 U.S. 821 (1985). JA221-23.

The three "controlling" commissioners undertook a thorough legal and factual analysis of the complaint and made conclusive legal determinations on the merits, but also characterized their decision as an exercise of prosecutorial discretion. JA224-36. In explaining their rationale, the commissioners narrowly construed the

relevant disclosure provisions as requiring subvendor itemization only if the named vendor served exclusively as a pass-through for the Committees' disbursements to subvendors, JA229-32, acting "*only* out of a desire to conceal" the ultimate recipients, JA229 (emphasis added). They then opined that dismissal was warranted because, on the facts alleged, "the law does not require" the Committees to disclose the true recipients of disbursements made through conduits, and there was otherwise "insufficient factual or legal support" to proceed, JA235—conclusions they reached only by eschewing the legal standard dictated by FEC precedent in favor of an unduly stringent "intent to disguise" test of their own invention, and by categorically refusing to consider the unrebutted record evidence, *see* JA24-25.

Two of the three dissenting commissioners who voted to approve the General Counsel's reason-to-believe recommendation also issued a Statement of Reasons explaining their votes. JA237-41. As these commissioners highlighted, the complaint's allegations were "meticulously documented," involved the concealment of "exactly the type of information the FECA is intended to expose to the sunlight of disclosure," and were analogous to reporting violations that the Commission *had* recently pursued against a political committee from the opposite party. JA 239-41. The commissioners concluded by observing that the differential treatment "carries the unmistakable stench of partisanship" and "damag[es] . . . the integrity of America's campaign-finance process." JA241.

3. CLC filed suit to challenge the dismissal. The district court, on the FEC's preemptive motion to dismiss under Fed. R. Civ. P. 12(b)(6), concluded that "*New Models*'s quite capacious rule" precluded any review of the dismissal, JA46, JA49.

The panel affirmed. *Campaign Legal Center v. FEC*, 89 F.4th 936, 942 (D.C. Cir. 2024). First, it found the commissioners' Statement unreviewable under *New Models* because its "invocation of discretion was offered 'in addition' to," rather than based on or intertwined with, its legal analysis, *id.* (quoting *New Models*, 993 F.3d at 886)—notwithstanding that the Statement merges dispositive legal analysis with "discretionary" discussion in a manner quite distinct from the isolated invocation of discretion addressed in *New Models*. Second, the panel declined to give effect to the Supreme Court's clear holding in *Akins* or the decades of controlling Circuit decisions affirming the reviewability of FEC enforcement dismissals, although "[t]he law of the circuit is clear . . . [and] was well-established long before the decision in [*Commission on Hope*]," *Campaign Legal Center & Democracy 21 v. FEC*, 952 F.3d 352, 362 (D.C. Cir. 2020) (Edwards, J., concurring) (citations omitted).

REASONS FOR GRANTING REHEARING EN BANC

En banc review is reserved for exceptional cases that break from established precedent or present urgent issues meriting the full Court's consideration. Fed. R. App. P. 35(a). The decision here compels rehearing for both reasons. Like the *CREW*

cases on which it relies, the decision directly contravenes binding Supreme Court and Circuit precedent and vitiates the statutory enforcement scheme. The full Court's intervention is needed to resolve the deepening conflict created by this line of decisions and restore the effective operation of a vitally important statute.

I. Immunizing the Commission's Legal Errors from Review Contravenes FECA and Controlling Precedent.

As affirmed by the Supreme Court in *Akins* and in the long-established law of this Circuit, FEC enforcement dismissals, unlike the nonenforcement decisions of most other agencies, are subject to judicial oversight—because Congress expressly provided for such review in the FEC's governing statute. In nevertheless applying the *CREW* cases to bar review here, the panel decision directly contravenes this authority.

A. Like the *CREW* decisions it follows, the panel opinion rests on a premise flatly contradicted by governing precedent: that FEC dismissals are "control[led]" by *Heckler*, 470 U.S. 821, and its "presumption" that "an agency's decision not to undertake enforcement" is not reviewable, *Commission on Hope*, 892 F.3d at 439. *See CLC*, 89 F.4th at 941. As the Supreme Court held in *Akins*, FECA "explicitly indicates the contrary." 524 U.S. at 26. Therefore, and "[a]s the Supreme Court has specifically held, 'reason-to-believe' assessments under [FECA] are expressly excepted from the general presumption that decisions not to enforce the law are

unreviewable." *New Models II*, 55 F.4th at 927 (Millett, J., dissenting from denial of rehr'g en banc).

Until "the wrong turn in *Commission on Hope*," *ECU*, 90 F.4th at 1187 (Pillard, J., dissenting), this Circuit's decisions had uniformly recognized the same.

In *DCCC*, the Court definitively rejected the FEC's argument "that deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion." 831 F.2d at 1133-34 (citing Br. for the FEC at 17-20). In so doing, the Court expressly declined to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits." *See id.* at 1134-35 & n.5.

Likewise, in *Chamber of Commerce*, the Court affirmed the reviewability of the FEC's "unwillingness to enforce" the law, noting that FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce," such that "even without a Commission enforcement decision, [administrative respondents] are subject to litigation." 69 F.3d at 603.

Finally, *Orloski*—which articulated the test courts have applied for decades when reviewing whether FEC dismissals are "contrary to law" under § 30109(a)(8)(C)—also affirmed that FEC nonenforcement decisions are reviewable. Under the standard it established, an FEC dismissal is contrary to law if it was either based on an impermissible interpretation of the statute *or*, "under a

permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." 795 F.2d at 161.

B. The panel's disregard for *Akins* and Circuit authority is not excused because the *New Models* majority "addressed these same objections." 89 F.4th at 942 (citing *New Models*, 993 F.3d at 890-95). *New Models* did try to justify its radical departure from precedent, but not successfully. First, it suggested that *Akins* can be limited to its facts, but that requires ignoring the Supreme Court's clear holding that the presumption of nonreviewability is inapplicable in the FECA context. *Akins*, 524 U.S. at 26. And the assertion that *Akins* can be disregarded because the FEC nonenforcement decision it reviewed "did not invoke enforcement discretion as a basis for dismissal," *New Models*, 993 F.3d at 893, is equally unavailing. Indeed, in its briefing to the Court in *Akins*, the FEC relied on *Heckler*, invoked its "authority to exercise prosecutorial discretion" as the reason plaintiffs lacked a redressable injury, and characterized the underlying administrative decision as "a discretionary judgment." Br. for Petitioner at 23, 29, *FEC v. Akins*, 524 U.S. 11 (1998) (No. 96-1590), 1997 WL 523890; Reply Br. for Petitioner at 9 n.8, *FEC v. Akins*, 524 U.S. 11 (1998) (No. 96-1590), 1997 WL 675443.

The significant inconsistency and conflict in decisions since *Commission on Hope* further belies any suggestion that its rule "readily conforms with [the Court's] earlier cases." *New Models*, 993 F.3d at 893. *Compare, e.g.*, *Democracy 21*, 952

F.3d at 356 (declining to decide whether to follow *Commission on Hope* and proceeding to consider the merits of a "discretion[ary]" dismissal), *Lieu v. FEC*, 370 F. Supp. 3d 175, 183 (D.D.C. 2019) (noting that "FECA's express provision for the judicial review of FEC dismissal decisions" rendered *Heckler* "inapposite"), *and CREW v. FEC*, 316 F. Supp. 3d 349, 421-22 (D.D.C. 2018) (same), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020), *with CREW v. Am. Action Network*, 590 F. Supp. 3d 164, 173 (D.D.C. 2022) (dismissing citizen suit on reconsideration of motion to dismiss following *New Models*, reversing initial ruling that "FEC dismissals based on [prosecutorial] discretion rooted entirely in legal conclusions are reviewable" under *Commission on Hope*), *appeal docketed*, No. 22-7038 (D.C. Cir. Mar. 31, 2022); *Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 54-55 (D.D.C. 2021) (declining to review FEC dismissal where a single footnote in the controlling statement[3] merely "note[d] that the Commission maintains broad discretion" that it "could" have applied).[4]

Instead, as multiple members of this Court have recognized, the unbounded rule of nonreviewability first pronounced in *Commission on Hope* conflicts with

[3] *See* Statement of Reasons of Chair Lee Goodman & Comm'rs Caroline C. Hunter and Matthew S. Petersen, MUR 6396 (Crossroads GPS) (Jan. 8, 2014), https://www.fec.gov/files/legal/murs/6396/14044350970.pdf.

[4] Tellingly, even the FEC itself—at least before *Commission on Hope*—recognized "that when FEC commissioners purport to invoke prosecutorial discretion in dismissing a complaint, the matter in dispute is subject to judicial review." *Democracy 21*, 952 F.3d at 361 (Edwards, J., concurring) (citing the FEC's briefing in *Commission on Hope*).

binding Supreme Court and Circuit precedent, countermands Congress's directive in section 30109(a)(8), and "opens the door to the dangerously easy evasion of judicial review." *New Models*, 993 F.3d at 905 (Millett, J., dissenting). *See also ECU*, 90 F.4th at 1189 (Pillard, J., dissenting) ("*Commission on Hope* and *New Models* squarely contravene the Supreme Court's and our own views in *Akins*, and multiple other decisions of our circuit affirming the reviewability of the Commission's non-enforcement decisions."); *New Models II*, 55 F.4th at 926 (Millett, J., dissenting from denial of rehr'g en banc) ("As Judge Griffith worried, Judge Pillard predicted, and Judge Edwards has since echoed, the *Commission on Hope* chickens have come home to roost. The court's decision in this case renders for naught statutorily mandated judicial review."); *Democracy 21*, 952 F.3d at 360 (Edwards, J., concurring); *Commission on Hope II*, 923 F.3d at 1142 (Griffith, J., concurring in denial of rehr'g en banc); *Commission on Hope*, 892 F.3d at 442 (Pillard, J., dissenting).

C. The panel here erroneously embraced and extended the rule of unconditional immunity created by the *CREW* cases, confirming that the decisions cannot be harmonized with FECA or prior controlling precedent. As now extended, the *CREW* framework threatens to shield any Commission decision that utters the phrase "prosecutorial discretion"—however contingent or pretextual the reference, and regardless of what else the decision says—from all scrutiny.

Crucially, the panel decision appears to slam shut the one narrow window left open by *New Models* for finding that an FEC dismissal invoking discretion is not immune from congressionally mandated review. While the *New Models* majority suggested that FECA review would remain available in circumstances where the controlling commissioners "reference their merits analysis as a ground for exercising prosecutorial discretion," *New Models II*, 55 F.4th at 920-21 (Rao, J., concurring in denial of rehearing en banc) (citation omitted), the decision here reveals how little of the statutory review mechanism that caveat preserves.

Even assuming it were possible, as the panel believed, to pinpoint any "intuitively prudential" concerns in the Statement that theoretically stand apart from the commissioners' overarching merits analysis, 89 F.4th at 942, that still does not justify shielding their *legal* conclusions—the only aspect of the decision CLC seeks to challenge—from review. *Cf. New Models*, 993 F.3d at 905 (Millett, J., dissenting) ("No one is 'teasing' a legal ruling out of the commissioners' decision here. Legal determinations are all over the face of the document.") (citation omitted).

The mere act of undertaking this fraught interpretive exercise only drives home its conflict with *Akins* and Circuit authority. It is a bedrock principle of administrative law that an agency's "formal action, rather than its discussion . . . is dispositive" of whether the action is reviewable. *I.C.C. v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 281 (1987). The formal agency action taken here was the

dismissal of CLC's complaint following a failed reason-to-believe vote, and the statute makes that action reviewable. Whether an FEC dismissal withstands review, or what degree of deference its decisionmaking is due, are altogether different questions. But it cannot be the case that an FEC dismissal escapes statutorily directed review wherever some notionally independent, "prudential" reasoning can be gleaned from an otherwise reviewable legal analysis.

Indeed, *New Models* inappropriately authorizes courts to guess, when reviewing an FEC decision based on multiple grounds, what the agency would do on remand if its legal basis for dismissal is held invalid. As in *Akins*, however, "we cannot know," and the panel was not free to presume, "that the FEC would have exercised its prosecutorial discretion in this way" if the commissioners' dispositive legal conclusions were held contrary to law. 524 U.S. at 25. The role of the courts is to "correct[] a legal error—if error is committed—in the agency decision," provided the error is "one upon which the agency decision rests." *Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)), *vacated on other grounds*, 524 U.S. 11 (1998). But thanks to the *CREW* decisions, that judicial backstop is now routinely unavailable.

* * *

The rule of automatic and absolute immunity heralded by the *CREW* decisions and embraced by the panel here cannot be squared with FECA's text, the Supreme

Court's holding in *Akins*, or longstanding Circuit precedent. As confirmed in *Akins* and controlling D.C. Circuit decisions, the Act expressly subjects Commission nonenforcement decisions to judicial scrutiny under a "contrary to law" standard. *See* 52 U.S.C. § 30109(a)(8)(A), (C). The *CREW* panels were not authorized to overrule this authority.

II. The Panel Decision Vitiates FECA's Enforcement Scheme and the Critically Important Interests It Serves.

FECA's review provision is an integral component of the statutory enforcement scheme. Judicial review provides the "countermeasure to otherwise predictable deadlock at the Commission," *ECU*, 90 F.4th at 1187 (Pillard, J., dissenting), and safeguards the vital transparency and anti-corruption laws the FEC is charged to enforce. The statute simply cannot be reconciled with a rule that empowers a partisan-aligned minority faction of commissioners to unilaterally block review of their decisions—including decisions, as in this case, based on extensive legal analysis and involving "even the most serious violations of federal campaign finance law"—by summoning the "magic words" of enforcement discretion. *Commission on Hope II*, 923 F.3d 1141, 1144 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of rehr'g en banc).

The *CREW* rulings have already had profoundly consequential—and profoundly damaging—effects on the operation of federal campaign finance law. Since *Commission on Hope*, commissioners "have routinely cited 'prosecutorial

discretion' to stymie judicial scrutiny of apparently serious FECA violations." *ECU*, 90 F.4th at 1184. And, predictably, the impetus to tack on a "discretionary" ground for dismissal and thereby defeat judicial review has proven most irresistible in cases where the controlling bloc lacks a defensible legal basis for refusing to proceed. *New Models II*, 55 F.4th at 929-30 & n.3 (Millett, J., dissenting from denial of rehr'g en banc). Worse still, the rulings allow minorities to entrench impermissible statutory interpretations without recourse to the judicial check that Congress authorized. "[T]hese legal pronouncements, while walled off from judicial review, directly influence the conduct of regulated parties, who regularly rely on and invoke them in subsequent proceedings before the Commission." *Id.* at 931.

The panel's endorsement of an unqualified barrier to review thus perversely shields the very legal interpretations that are most in need of judicial correction. Under *New Models*, the panel held the controlling commissioners' unsustainable legal interpretations beyond all scrutiny. The commissioners' analysis relied on an invented legal test that contravenes the relevant statutory and regulatory standard, and indeed, opens a massive and readily exploited loophole in FECA's candidate reporting requirements. Letting these legal errors go unchallenged seriously frustrates FECA's core purpose of informing voters about "where political campaign money comes from and how it is spent," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (quoting H.R. Rep. No. 92-564, at 4 (1971)), and is precisely the kind

of impermissible statutory interpretation that FECA's judicial review provision exists to correct. By refusing to review the adequacy of the controlling commissioners' interpretations of FECA, the panel decision leaves that faulty legal analysis in place—imperiling FECA's disclosure requirements and the voting public's right to know how political campaign money is raised and spent.

The panel decision, like the *CREW* cases, is an affront to the balanced statutory scheme that Congress devised. In allowing one partisan faction of commissioners to dictate the law's requirements and thwart any accountability for their decisions, these rulings "turn[] the rule of law upside down and render[] the statutory provision for review of dismissal decisions a dead letter." *New Models II*, 55 F.4th at 932 (Millett, J., dissenting from denial of rehr'g en banc). The federal campaign finance laws are too important to let this damaging line of decisions stand uncorrected.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing en banc.

Dated: February 20, 2024

Respectfully submitted,

/s/ Megan P. McAllen

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CERTIFICATE OF COMPLIANCE

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/s/ Megan P. McAllen
Megan P. McAllen

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2024, I electronically filed this Brief 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/ Megan P. McAllen
Megan P. McAllen

ADDENDUM

ADDENDUM – TABLE OF CONTENTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2023 Decided January 5, 2024

No. 22-5339

CAMPAIGN LEGAL CENTER,
APPELLANT

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:22-cv-01976)

Megan P. McAllen argued the cause for appellant. With her on the briefs were *Erin Chlopak* and *Allison Walter*.

Greg J. Mueller argued the cause for appellee. With him on the brief were *Lisa J. Stevenson*, *Kevin Deeley*, and *Harry J. Summers*.

Before: SRINIVASAN, *Chief Judge*, HENDERSON, *Circuit Judge*, and ROGERS, *Senior Circuit Judge*.

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

ROGERS, *Senior Circuit Judge*: The Federal Election Commission dismissed an administrative complaint by the Campaign Legal Center alleging campaign finance violations by two presidential campaign committees. Although dismissals predicated upon the Commission's exercise of prosecutorial discretion are excepted from judicial review, Campaign Legal contends that the Commission's invocation of discretion was dependent upon legal analysis and thus subject to review under the Federal Election Campaign Act. The district court concluded the Commission's reliance on "quintessential" considerations of prosecutorial discretion stood "apart" from its legal analysis and precluded review. In view of circuit precedent, we affirm.

I.

The Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.*, "seeks to remedy any actual or perceived corruption of the political process." *FEC v. Akins*, 524 U.S. 11, 14 (1998). At its heart are disclosure requirements that the Supreme Court has stated are "particularly effective means of arming the voting public with information" and "deter[ring] actual corruption and avoid[ing] the appearance of corruption" in today's politics. *McCutcheon v. FEC*, 572 U.S. 185, 223–24 (2014). The Act requires covered "political committee[s]" to "file reports of receipts and disbursements" with the Federal Election Commission that identify "each person to whom an expenditure . . . in excess of $200" was made, as well as the "date, amount, and purpose" of the expenditure. 52 U.S.C. § 30104(a)(1), (b)(5)–(6). The Commission of six voting members, no more than three of whom may be "affiliated" with the same political party, *id.* § 30106(a)(1), (a)(2)(A), may investigate potential violations on its own initiative or in response to an administrative complaint, which may be filed by any person who "believes" that a statutory violation has

occurred. *Id.* §§ 30107(a), 30109(a). If at least four Commissioners find "reason to believe" a complaint's allegations, the Commission "shall" investigate and pursue appropriate remedies. *Id.* § 30109(a)(2), (4)–(6). In the absence of four affirmative "reason to believe" votes, the Commission may dismiss the complaint. *Id.* §§ 30106(c), 30109(a)(2). The Commissioners who vote against proceeding must issue an explanatory statement, which is treated as expressing the Commission's rationale and forms the basis of judicial review. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022).

"Any party aggrieved by" the dismissal may seek judicial review on the ground that the Commission acted "contrary to law." 52 U.S.C. § 30109(a)(8)(A)–(C). Relief is appropriate if the Commission relied on "an impermissible interpretation of the Act," or if the dismissal was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Upon a judicial determination that the dismissal was improper, the Commission has 30 days "to conform with such declaration," or the complainant may file suit. 52 U.S.C. § 30109(a)(8)(C).

Access to judicial review of Commission dismissals, however, is far from absolute. "In our system of separated powers, an agency's decision not to enforce the law is an exercise of executive discretion and therefore generally unreviewable by the courts." *Citizens for Resp. & Ethics v. FEC* ("*New Models*"), 993 F.3d 880, 882 (D.C. Cir. 2021). "[R]econciling" this principle with FECA's "unusual" judicial review provision, the court has held that "a Commission nonenforcement decision is reviewable only if the decision rests *solely* on legal interpretation." *Id.* at 884 (citing *Citizens for Resp. & Ethics in Washington v. FEC* ("*Commission on Hope*"), 892 F.3d 434, 441–42 (D.C. Cir. 2018)).

Campaign Legal Center filed an administrative complaint in July 2020 alleging that former President Trump's campaign committee ("Donald J. Trump for President, Inc.") and a joint fundraising committee ("Trump Make America Great Again Committee") failed, as required by 52 U.S.C. § 30104(b), to report more than three quarters of a billion dollars in payments to sub-vendors and staff – concealing the expenditures by routing them through sham payments to two LLCs controlled by senior campaign figures. *See* Admin. Compl., MUR 7784 (July 24, 2020). In May 2022, the Commission deadlocked 3-3 on finding "reason to believe" the complaint. After deadlocking 3-3 twice more, on a second "reason to believe" vote and a separate vote on whether to dismiss the complaint pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), the Commission voted 4-2 to close the file and dismiss the complaint.

The three Commissioners who voted against finding "reason to believe" explained that "the legal support for enforcement" of the alleged reporting violations was "remarkably thin," and that "the only arguable factual support comes from inferences based upon media reports citing anonymous sources." Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR 7784 (June 9, 2022) at 1 (hereinafter "2022 Statement"). Refusing to "pursue enforcement-by-rumor," they "instead voted to dismiss this matter as an exercise of prosecutorial discretion pursuant to *Heckler v. Chaney*." *Id.* After elaborating on factual and legal issues, *id.* at 2–12, they stated:

> We foresee significant litigation risk if we were to act on [this record] and, as importantly, we decline to permit the investigatory resources of the federal government to be mobilized on such a basis. This is

> particularly so here, where the size and scope of the proposed investigation could quickly consume an outsized share of the resources available to the Commission.

Id. at 12. They also observed that the "regulatory environment is uncertain at best," citing a related pending Commission rulemaking petition, *id.*, and noted that, although "numerous campaigns have used similar vendor arrangements in the past, [] the Commission has declined to pursue enforcement action" in those cases. *Id.*

Campaign Legal filed suit, alleging that the dismissal was "contrary to law." Compl. (July 8, 2022); *see* 52 U.S.C. § 30109(a)(8)(A). The district court granted the Commission's motion to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6), concluding that the Commissioners invoked discretion in a manner precluding judicial review under this court's precedents. *Campaign Legal Ctr. v. FEC*, 1:22-cv-01976 (D.D.C. Dec. 8, 2022) ("Mem. Op."). It found the "practical" concern "that the 'size and scope of the proposed investigation' could quickly consume the resources available to the Commission" reflected "quintessential consideration[s] in the exercise of prosecutorial discretion" that "stand[] apart from the legal questions" at issue. Mem. Op. at 16–17 (quoting 2022 Statement at 12). The district court also noted the discussion of the "uncertain regulatory environment." Mem. Op. at 17.

II.

On appeal, Campaign Legal contends that the Commissioners "in no way 'relied on' discretionary factors to dismiss plaintiff's administrative complaint, but rather simply characterized their conclusive legal determinations on the

merits as an exercise of prosecutorial discretion." Appellant's Br. 20 (quoting Mem. Op. at 16). Because "each of the putative discretionary justifications . . . was expressly dependent upon legal and factual judgments about the allegations in the complaint," Campaign Legal maintains that even though the "Commissioners couched their rationale in superficially prudential terms, such 'magic words' cannot manifest independent discretionary justifications where none exist." *Id.* at 30–31. For instance, "asserted agency resource concerns are impossible to separate from their underlying judgment that there was 'insufficient factual or legal support' to move forward." *Id.* at 34 (quoting 2022 Statement at 12–13). Because the Commissioners reached that conclusion after applying "improper legal and evidentiary tests," it is "impossible to know whether" absent that flawed analysis their "stated concerns about 'the size and scope of the proposed investigation' would still obtain." *Id.* at 35 (quoting 2022 Statement at 12).

This court has distinguished two different types of Commission refusals to prosecute administrative complaints. "When interpreting FECA, the Commission renders a legal determination 'not committed to the agency's unreviewable discretion.'" *New Models*, 993 F.3d at 884 (quoting *Comm'n on Hope*, 892 F.3d at 441). If "the Commission declines an enforcement action 'based entirely on its interpretation of the statute,'" the decision is reviewable pursuant to the "contrary to law" provision. *Id.* Because FECA does "not limit the Commission's enforcement discretion [] by providing specific requirements for the exercise of that discretion," when the Commission "weigh[s] [] practical enforcement considerations," FECA "provides 'no law to apply.'" *Id.* (quoting *Comm'n on Hope*, 892 F.3d at 439–40).

Commission on Hope was the court's first Commission discretionary refusal to prosecute case and held unreviewable a dismissal where the relevant Commission statement "placed their judgment [] on the ground of prosecutorial discretion." 892 F.3d at 439. The court reiterated this principle as applied to statements relying on both law and discretion in *New Models*. There, the Commissioners issued a thirty-two page statement "dedicated most[ly]" to "legal analysis of the alleged violations[,]" concluding that the organization did not qualify as a covered "political committee" under the statute. 993 F.3d at 883. The concluding paragraph invoked *Heckler*, explaining that the Commissioners "were also declining to proceed with enforcement 'in exercise of their prosecutorial discretion.'" *Id.* (citation omitted). The Commissioners had added only that "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." *Id.* (citation omitted).

The court held this brief invocation of discretion was sufficient to bar judicial review, as it "explicitly relie[d] on prosecutorial discretion" and "expressed discretionary considerations at the heart of [*Heckler*'s] holding, such as concerns about resource allocation" and "potential evidentiary . . . hurdles." *Id.* at 885. Those discretionary considerations, the court said, were a "distinct ground[]" on which the "Commission's decision to dismiss . . . rested." *Id.* at 884. Rejecting the notion that the inclusion of "lengthy" legal bases for dismissal made the decisions reviewable, *see id.* at 895–96 (Millett, J., dissenting), the court stated that "[a]lthough [] analysis of statutory requirements standing alone may be amenable to judicial review," the "Commission's legal analysis here is not reviewable because it is joined with an explicit exercise of prosecutorial discretion." *Id.* at 885–87. Because "[t]he Commission's invocation of prosecutorial discretion []

rested squarely on prudential and discretionary considerations" and was "offered [] in addition to its legal analysis," the court concluded that there was "no room [] to selectively exercise judicial review based on whether the Commission places more or less emphasis on discretionary factors when declining to pursue enforcement." *Id.*

Just so here. The Commissioners' "explicit[] reli[ance]" on prosecutorial discretion, *id.* at 885, followed nearly a full page of analysis discussing several classic criterion in the exercise of prosecutorial discretion. They observed that the proposed investigation was inconsistent with the agency's priorities and resource allocation given its "size and scope," worried that the agency was unlikely to succeed in pursuing the allegations and that enforcement carried "significant litigation risk," characterized enforcement as deviating from the Commission's past practice, and articulated why it was inappropriate given what they regarded as a shifting and uncertain regulatory landscape and the complaint's undue reliance on anonymously-sourced reporting. 2022 Statement at 12. These "discretionary considerations [lie] at the heart of [*Heckler*'s] holding" and implicate "concerns about resource allocation" and "potential evidentiary . . . hurdles." *New Models*, 993 F.3d at 885; *see Heckler*, 470 U.S. at 831.

Some of these considerations appear distinct from and lack a clear nexus to any reviewable legal analysis. As the district court observed, the concern that the "the size and scope of the proposed investigation could quickly consume an outsized share of the resources available to the Commission," 2022 Statement at 12, "stands [particularly] apart." Mem. Op. at 17. An agency's careful management of its limited resources is a core policy prerogative and its choice not to pursue especially resource-intensive matters ordinarily does not center on the legal merits, but rather the agency's pragmatic estimation of

the resource demands of the proposed action, its size, duration, and personnel requirements. These are the types of prudential judgments that the Supreme Court has stated are "peculiarly within" the agency's "expertise" and form the core of unreviewable discretion. *Heckler*, 470 U.S. at 831–32.

To the extent that Campaign Legal views this discussion as inextricably intertwined with antecedent legal analysis, it maintains that the Commissioners regarded the legal and evidentiary support for the complaint as unduly dim and over-estimated the potential resource demands of pursuing its claims. But it does not follow that the Commission's observation about the "size and scope" of the investigation must be regarded as fundamentally premised on substantive legal determinations. It was evident from the complaint that the alleged violations were significant in terms of their estimated value and the complexity and timespan of the alleged obfuscatory mechanism. Citing several dozen news reports, the complaint claimed to identify a scheme involving at least two "conduit" organizations, at least four enumerated ultimate payee subvendors, and hundreds of payments for a range of purposes over multiple years. Admin. Compl. ¶¶ 26–48, 70–91. Campaign Legal itself embraces undisputed practical measures of the allegations' scope, claiming that "the potential amount in violation, $781,584,527, would have been the largest in the Commission's history" and involved the "lion's share" of the Trump team's "spending for the entire presidential election cycle," the most expensive in United States history. Appellant's Br. 1. These intuitive indicia of size and resource intensiveness bear no discernable relationship to theoretically reviewable legal inquiry.

Campaign Legal maintains that the grammar of the relevant sentence evinces the interconnection between the Commissioners' concern over the "size and scope" of the

investigation and antecedent legal conclusions. The relevant phrasing reads in full: "This is particularly so here, where the size and scope of the proposed investigation could quickly consume an outsized share of the resources available to the Commission." 2022 Statement at 12. Campaign Legal reads "[t]his is particularly so here" as suggesting that the following statement about the "size and scope" of the investigation is premised on preceding legal determinations. Even were this contention not forfeited since raised for the first time at oral argument, it is unpersuasive. The key phrasing in *New Models* was invoked in a sentence that otherwise expressly referred to the Commission's preceding legal conclusions, yet the court concluded the statement was "explicit []" in its invocation of discretion. 993 F.3d at 885. Here the relevant sentence stands on its own and is not surrounded by discussion of legal conclusions. Analogizing to *New Models*, where the Commission's statement dedicated thirty-one pages to the merits and only a single concluding sentence to discretion, Mem. Op. at 15 (citing *New Models*, 993 F.3d at 885), the district court correctly observed that it was "clearer in this case than it was in *New Models*" that the Commissioners invoked discretion as an "independent reason for dismissal." Mem. Op. at 17.

Nor does the phrase "[t]his is particularly so" appear to refer to any substantive legal determination. The immediately preceding sentence reads: "We foresee significant litigation risk if we were to act on [this record] and, as importantly, we decline to permit the investigatory resources of the federal government to be mobilized on such a basis." 2022 Statement at 12. These too are prudential considerations at the heart of *Heckler's* conception of enforcement discretion — not reviewable legal determinations. *Cf. Heckler*, 470 U.S. at 831. Any reviewable legal analysis is at least two steps away from the Commission's stated concern about the investigation's

"size and scope." That is too attenuated a link to support the logical leap that intuitively prudential discussion conceals reviewable legal conclusions.

Finally, Campaign Legal urges the court to reconsider the propriety of the *Commission on Hope–New Models* rule due to an alleged conflict with the Supreme Court's opinion in *Akins* and several of this court's FECA holdings. Appellant's Br. 36–41. But "[o]ne three-judge panel does not have the authority to overrule another three-judge panel." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (*en banc*). In *New Models*, 993 F.3d at 890–95, the court addressed these same objections and explained why its holding was consistent with *Akins* and this court's FECA precedents. Rehearing *en banc* was subsequently denied. *New Models II*, 55 F.4th 918 (D.C. Cir. 2022).

Because the Commission's invocation of discretion was offered "in addition" to its legal analysis, as in *New Models*, 993 F.3d at 886, the 2022 Statement of Reasons is unreviewable, and upon *de novo* review, *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 13 (D.C. Cir. 2014), the court affirms the dismissal of the complaint.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 35(c), Petitioner Campaign Legal Center hereby certifies as follows:

(A) Parties and Amici. Campaign Legal Center is the plaintiff in the district court and appellant in this Court. Campaign Legal Center is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest. Campaign Legal Center works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

The Federal Election Commission (FEC) is the defendant in the district court and appellee in this Court.

(B) Rulings Under Review. Petitioner Campaign Legal Center appealed the December 8, 2022 memorandum opinion (ECF No. 18) and order (ECF No. 17) of the United States District Court for the District of Columbia (Boasberg, J.) granting Defendant Federal Election Commission's Motion to Dismiss. The December 8, 2022 opinion is not published in the federal reporter but is available at 2022 WL 17496211 and reproduced in the Joint Appendix at JA32-49.

The panel's Opinion is attached to this Petition and is available at 89 F.4th 936. This Petition for Rehearing En Banc seeks review of the panel's decision.

(C) Related Cases. The appealed ruling has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which counsel are aware.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 35(c), Petitioner Campaign Legal Center submits its corporate disclosure statement.

(a) Campaign Legal Center certifies that it is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest.

(b) Campaign Legal Center works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.