IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER Plaintiff, v. FEDERAL ELECTION COMMISSION Defendant.	Civil Action No. 1:22-cv-01976-JEB

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF ABBREVIATIONS

AMMC	American Made Media Consultants, LLC
APA	Administrative Procedure Act
CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
TMAGA	Trump Make America Great Again Committee

INTRODUCTION & SUMMARY OF ARGUMENT

This lawsuit challenges the dismissal of an administrative complaint filed by plaintiff Campaign Legal Center ("CLC") with the Federal Election Commission ("FEC" or "Commission") against former 2020 presidential candidate Donald J. Trump's authorized campaign committee, Donald J. Trump for President, Inc. ("Campaign" or "Trump Campaign"), and one of his authorized joint fundraising committees, Trump Make America Great Again Committee ("TMAGA"; collectively, "Committees" or "Trump Committees") for violations of the Federal Election Campaign Act ("FECA" or "Act").[1] The disclosure violations alleged in CLC's administrative complaint, and a supplement thereto, were not minor: the complaint and its supplement set forth in meticulous detail why there was reason to believe the Trump Committees had violated FECA by routing upwards of three quarters of a *billion* dollars in 2020 campaign spending through affiliated firms, thereby concealing the details of the transactions and the identities of the ultimate payees. In fact, the total potential amount in violation— $781,584,527— would have been the largest in the Commission's history. *See* Suppl. Statement of Reasons of Comm'r Ellen L. Weintraub at 2, MUR 7784 (July 14, 2022) (ECF No. 13-3) ("Weintraub Suppl. Statement").

In considering whether to follow the advice of its Office of General Counsel ("OGC") to proceed on these allegations,[2] the Commission chose to bifurcate its decision into distinct votes on distinct paths forward: first, the Commissioners voted on whether to find "reason to believe" FECA

[1] In February 2021, the Trump Campaign changed its name to Make America Great Again PAC and converted to a multicandidate committee. *See* Statement of Reasons of Chairman Allen J. Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor, III at 1 n.1, MUR 7784 (Make America Great Again PAC *et al.*) (June 9, 2022) (ECF No. 13-1) ("Dickerson, Cooksey & Trainor Statement").

[2] *See* First General Counsel's Report at 1-2, MUR 7784 (Apr. 6, 2022) ("OGC Report"), attached as Exhibit 1.

had been violated, and second, on whether to exercise the Commission's prosecutorial discretion and dismiss the complaint under *Heckler v. Chaney*, 470 U.S. 821 (1985). Both votes failed 3-3. *See* Certification at 1-3, MUR 7784 (dated May 11, 2022), attached as Exhibit 2. Only after those deadlocks did the Commission vote 4-2 to close the file and thereby dismiss the complaint. *Id.* at 3.

Three Commissioners later purported to invoke prosecutorial discretion in their Statement of Reasons—and according to the FEC, that invocation alone suffices to negate FECA's express provision for judicial review. *See* 52 U.S.C. § 30109(a)(8); FEC Mem. Supp. Mot. to Dismiss 13-15 (ECF No. 13) ("FEC Mem.") (citing *CREW v. FEC*, 993 F.3d 880, 884-85 (D.C. Cir. 2021) ("*New Models*") and *CREW v. FEC*, 892 F.3d 434, 440-42 (D.C. Cir. 2018) ("*Commission on Hope*")). But the FEC's reliance on these two recent D.C. Circuit decisions is misplaced. Although both held that some FEC dismissals premised on prosecutorial discretion are unreviewable, they also made clear that the mere invocation of prosecutorial discretion will not "shield the Commission's decision from judicial review . . . [where] the Commission has not relied on it." *New Models*, 993 F.3d at 893-94. So too here. Because the Commission in no way "relied on" prosecutorial discretion to dismiss CLC's administrative complaint, there is no basis to hold the dismissal unreviewable.

First, because the Commission expressly voted against authorizing any exercise of prosecutorial discretion, the three Commissioners who nevertheless invoked it are not controlling on this issue and cannot preclude review. Otherwise put, the Commission explicitly declined to dismiss the complaint as a matter of prosecutorial discretion, so there *was* no effective exercise of that power. Having been on the losing side of an on-the-record *Heckler* vote, the three Commissioners who subsequently invoked prosecutorial discretion in their Statement of Reasons

do not speak for the agency on that question. The Commission's choice to decide the merits questions separately from those implicating its prosecutorial discretion is alone sufficient to distinguish the dismissals at issue in *Commission on Hope* and *New Models*, which merged consideration of both questions and involved no separate *Heckler* votes. At a minimum, neither case requires—and FECA does not permit— authorizing a minority bloc of FEC Commissioners to wield unreviewable prosecutorial discretion after the failure of an express vote on that question. The dismissal therefore is reviewable for legal error.

Second, even assuming there had been an effective invocation of prosecutorial discretion, the linchpin of the Commissioners' decision to dismiss CLC's complaint—as unambiguously set forth in their Statement of Reasons—was their conclusion that the Trump Committees did not violate the law. This is not the "discretionary" terrain over which a partisan bloc of FEC Commissioners enjoy unfettered and unreviewable discretion. As *Commission on Hope* and *New Models* both recognized, administrative complaints dismissed on the basis of the Commission's interpretations of law remain subject to the judicial review that FECA expressly provides. *See Commission on Hope*, 892 F.3d at 441 n.11 ("The interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion.") (citing *Heckler*, 470 U.S. at 833 n.4; *FEC v. Akins*, 524 U.S. 11, 26 (1998)); *New Models*, 993 F.3d at 894 (same). *See also* 52 U.S.C. § 30109(a)(8).

And, by its terms, the Commissioners' invocation of prosecutorial discretion here was wholly based on legal analysis. That they sought to clothe these legal determinations in discretionary garb does not alter the decision's fundamental nature or automatically immunize it from scrutiny. Each purportedly "discretionary" justification is indistinguishable from the legal judgments underlying it. For example, the Commissioners' reasoning is not rendered unreviewable

because, having decided there was "insufficient factual or legal support for OGC's theory of enforcement," they consequently perceived obstacles to the success of any future enforcement effort. Dickerson, Cooksey & Trainor Statement at 12. Of course they would harbor such concerns—*they had already decided that the law does not permit enforcement on these facts*. These are not the kinds of decisions afforded absolute protection from FECA's judicial check.

For its part, the FEC concedes that the relevant Statement of Reasons contained "extensive legal discussion," FEC Mem. at 15, but insists that judicial review is nevertheless unavailable because the Commissioners also invoked prosecutorial discretion as a "*distinct* basis for the dismissal," *id.* (emphasis added). The Statement itself belies that assertion. Following the path of the Commissioners' reasoning, exactly as it is laid out in their Statement, admits but one conclusion: the dismissal was based exclusively on their assessment that FECA had not been violated and the agency thus lacked any sufficient legal or factual basis to proceed. Far from suggesting that discretion was an alternative or "distinct" basis for their decision, the Commissioners' Statement makes clear that prosecutorial discretion was little more than an expedient framing device with which to cloak their dispositive assessments of fact and law.

Third, the FEC offers no other basis to preempt judicial review. And it would be especially inappropriate to cut off review at this preliminary stage, when the FEC has yet to produce the full administrative record or even to inform plaintiff of its contents. Moreover, its motion relies on recent holdings of divided D.C. Circuit panels that were inconsistent with prior Supreme Court and circuit precedent and remain subject to review by the en banc court. *See, e.g.*, Pl.-Appellant's Pet. for Reh'rg En Banc, *New Models*, No. 19-5161 (D.C. Cir. June 23, 2021); *Akins*, 524 U.S. at 26 (holding that FECA "explicitly indicates" that FEC dismissals are subject to review, notwithstanding *Heckler*); *CLC & Democracy 21 v. FEC*, 952 F.3d 352, 361 (D.C. Cir. 2020)

(Edwards, J., concurring) (noting that Supreme Court and well-established circuit precedent confirm that *Heckler*'s presumption of nonreviewability "has no application in actions arising under the FECA" and *Commission on Hope*'s contrary holding was nonbinding under law-of-the-circuit doctrine).

Because the dismissal of CLC's administrative complaint is clearly reviewable, plaintiff respectfully requests that the Court deny the FEC's motion to dismiss.

BACKGROUND

I. Statutory and Regulatory Framework

A. FECA disclosure provisions

A core purpose of federal campaign finance law is to serve the electorate's interest in knowing "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 thereby "enable[] the electorate to make informed decisions," *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). Toward that end, FECA contains numerous provisions designed to ensure accurate reporting from those who give and spend money to influence elections.

One such provision requires that "[e]ach treasurer of a political committee . . . file reports of receipts and disbursements" with the Commission. 52 U.S.C. § 30104(a)(1). These reports must disclose "the name and address" of each person to whom the committee has made operating expenditures or other disbursements of over $200, "together with the date[s], amount[s], and purpose[s]" of those expenditures or disbursements. *Id.* § 30104(b)(5), (6).

FEC regulations similarly require that political committees disclose the dates, amounts, and purposes of expenditures and disbursements in excess of $200. 11 C.F.R. § 104.3(b)(3)(i), (b)(4)(i). Those regulations define "purpose" to mean "a brief statement or description of why the

disbursement was made." *Id.* § 104.3(b)(3)(i)(A), (b)(4)(i)(A). A Commission policy statement further provides that the "purpose" description, together with the recipient's name, should enable "a person not associated with the committee [to] easily discern why the disbursement was made." FEC Statement of Policy: "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887, 888 (Jan. 9, 2007).

Commission precedent makes clear that a federal political committee must itemize payments to a subvendor if (1) the immediate vendor receiving the disbursement does not have an arm's-length relationship with the committee, (2) the payments to the subvendor are unrelated to the services provided pursuant to the immediate vendor's contract with the committee, or (3) the immediate vendor is merely acting as a "conduit" for disbursements to subvendors. *See, e.g.*, General Counsel's Brief 33-37, MUR 3847 (Stockman) (Sept. 15, 1997); Conciliation Agreement 2-4, MUR 4872 (Jenkins) (Feb. 15, 2002); Factual and Legal Analysis at 8-10, MUR 6724 (Bachmann for President) (July 13, 2017). Under these circumstances, failing to itemize disbursements to the ultimate payee violates 52 U.S.C. § 30104(b).

In addition, Commission precedent specifically indicates that political committees must itemize and individually report salary payments to committee staffers, even when those staffers are paid through an outside firm. *See* Factual and Legal Analysis at 4-6, MUR 6818 (Allen Weh for Senate) (June 15, 2017); *see also* Factual and Legal Analysis at 8-10, MUR 6724 (Bachmann for President) (July 13, 2017).

B. FEC administrative complaint and enforcement process

Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). Commission regulations specify, in relevant part, that a complaint must identify the complainants and be sworn and signed, and that any allegations in a complaint "not based upon

personal knowledge" should identify the source of the information that "gives rise to the complainant's belief in the truth of such." 11 C.F.R. § 111.4(b), (d).

The Commission, after reviewing the complaint, any responses, and OGC's recommendation, then votes on whether there is "reason to believe" a violation has occurred. 52 U.S.C. § 30109(a)(2). The Commission will find "reason to believe" where a complaint "credibly alleges" that a FECA violation "may have occurred." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).

After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, 52 U.S.C. § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties, *id.* § 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id.* § 30109(a)(6)(A). All of these decisions require four affirmative votes. If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the controlling group of Commissioners who voted not to proceed must issue a Statement of Reasons to serve as the basis for any judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

Any "party aggrieved" by the Commission's dismissal or failure to act upon an administrative complaint may seek judicial review in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A).

II. Factual Background

A. Plaintiff's administrative complaint and supplement

On July 24, 2020, CLC and Margaret Christ, an individual, filed an administrative

complaint with the FEC alleging that the Trump Committees had violated 52 U.S.C. § 30104(b) by routing payments to vendors and staff through two firms—American Made Media Consultants, LLC ("AMMC"), a corporation apparently created and controlled by Campaign officials, and Parscale Strategy, LLC, the consulting firm of former Campaign manager Bradley J. Parscale—without itemizing those disbursements or properly reporting them to the FEC. Compl. ¶ 29 (citing Admin. Compl. ¶¶ 70-91, MUR 7784 (July 24, 2020) (ECF No. 1-1)). In a supplement filed on January 28, 2021, CLC detailed how the Committees had continued to route payments through AMMC and Parscale Strategy in the six months since CLC's original administrative complaint, and provided further evidence that AMMC was an extension of the Trump Campaign used to conceal the Campaign's spending, such as reporting that senior Campaign officials had approved AMMC's creation and served on its board. *Id.* ¶ 30 (citing Suppl. to Admin. Compl. 1-2, MUR 7784 (Jan. 28, 2021) (ECF No. 1-2)).

Collectively, the administrative complaint and its supplement—drawing on publicly available information including media reports, public statements by Trump Campaign officials and contractors, FEC disclosure reports, and filings with other state and federal agencies—alleged that the Committees violated FECA by failing to itemize and accurately describe the purposes of payments to subvendors paid through AMMC and Parscale Strategy even though those firms both (1) did not have arm's-length relationships with the Committees and (2) were used by the Committees as conduits for disbursements to subvendors that were effectively working directly for the Committees. Compl. ¶¶ 3, 31.

Responses to the administrative complaint filed by AMMC, its parent corporation, and the Committees did not dispute any of its factual assertions; for example, respondents "acknowledged that AMMC has been run by individuals known and trusted by the Campaign." Compl. ¶ 53

(quoting Suppl. Response of Make America Great Again PAC, *et al.*, MUR 7784 (Mar. 12, 2021), https://www.fec.gov/files/legal/murs/7784/7784_27.pdf).[3] Instead, the respondents principally asserted that some past campaigns had similarly contracted with clearinghouse vendors; however, they did not point to any statutory or regulatory authority allowing, or FEC precedent approving, such arrangements. *Id*. (citing Committees' Response at 2-4).

B. The FEC's Office of General Counsel recommends finding reason to believe

Upon reviewing the administrative complaint, its supplement, and the responses, the OGC recommended that the Commission find reason to believe that (1) the Trump Campaign "violated 52 U.S.C. § 30104(b)(5)(A) and 11 C.F.R. § 104.3(b) by misreporting the payees of payments made to [AMMC] and Parscale Strategy," (2) TMAGA "violated 52 U.S.C. § 30104(b)(5)(A) and 11 C.F.R. § 104.3(b) by misreporting the payees of payments made to [AMMC]," and (3) the Trump Campaign "violated 52 U.S.C. § 30104(b)(5)(A) and 11 C.F.R. § 104.3(b) by misreporting the purpose of payments made to Parscale Strategy." Ex. 1, OGC Report at 26. *See* Compl. ¶¶ 54-58.

In its written report accompanying this recommendation, OGC first explained that there was reason to believe the Committees "improperly failed to itemize[] AMMC's payments to subvendors in connection with their disclosures of more than three quarters of a billion dollars ($781,584,527.57) in disbursements to AMMC." Ex. 1, OGC Report at 15, 11-21. OGC determined that the Committees' lack of an arm's-length relationship with AMMC and use of the firm as a conduit for subvendor payments required the Committees to report the ultimate payees

[3] *See also* Response of Donald J. Trump for President, Inc., *et al.*, at 5-7, MUR 7784 (Oct. 19, 2020), https://www.fec.gov/files/legal/murs/7784/7784_14.pdf ("Committees' Response"); Response of American Made Media Holding Corporation, Inc., and American Made Media Consultants, LLC, MUR 7784 (Nov. 16, 2020), https://www.fec.gov/files/legal/murs/7784/7784_15.pdf.

of those disbursements, emphasizing that AMMC received significant shares of the Committees' overall disbursements, was created and run by Campaign staff, and appeared to have been "created to serve the needs of the Trump [Campaign]"; moreover, the Committees and the RNC appeared to be AMMC's only clients, and several of the supposed subvendors paid through AMMC appeared in fact to have been hired or controlled by the Campaign. *Id.* at 15-17, 20-21. OGC also considered and rejected the Committees' arguments that they were not required to report their ultimate payees because their use of AMMC assertedly followed historical practice and because AMMC was a distinct legal entity. *See id.* at 17-19; Compl. ¶ 56.

In recommending that the Commission find reason to believe that the Trump Campaign misreported the payees of disbursements to Parscale Strategy, OGC noted precedent that "a committee should disclose salary payments to specific, individually identified employees" and that, regardless, a committee must report payments to subvendors when the initial recipient of the funds is "merely a conduit for the intended recipient." Ex. 1, OGC Report at 19. Moreover, the record indicated that "Parscale Strategy was used [as] a pass-through to conceal" salary payments to Campaign staff, including Kimberly Guilfoyle and Lara Trump, that "should have been reported as salary payments to the ultimate individual payees." *Id.* at 20. *See also* Compl. ¶¶ 49-50, 57.

Finally, OGC explained that the record established reason to believe that the Trump Campaign failed to accurately disclose the purposes of disbursements to Parscale Strategy, further noting that these facts were closely analogous to those in a matter recently investigated and settled by the Commission. Ex. 1, OGC Report at 21-25.

C. The Commissioners reject OGC's reason-to-believe recommendations, reject dismissal as a matter of prosecutorial discretion, dismiss the complaint, and issue Statements of Reasons

On May 10, 2022, by a deadlocked vote of 3-3, the Commission failed to approve OGC's recommendations, falling short of the four affirmative votes required to find reason to believe that

the Committees had violated 52 U.S.C. § 30104(b)(5)(A) and 11 C.F.R. § 104.3(b). *See* Ex. 2, Certification at 1-2. Also on May 10, the Commission failed by 3-3 votes to dismiss the allegations as an exercise of prosecutorial discretion under *Heckler*, *see id.* at 2, or to find reason to believe that the Trump Campaign and its treasurer had "violated 52 U.S.C. § 30104(b)(5)(A) and 11 C.F.R. § 104.3(b) by misreporting the purpose of payments made to Parscale Strategy," *id.* at 3. Finally, again on May 10, the Commission voted by a 4-2 margin to "[c]lose the file," thereby dismissing the matter. *Id.* By letter dated May 16, 2022, the Commission notified plaintiff that it had closed the file and dismissed plaintiff's complaint. Notification to CLC at 1, MUR 7784 (May 16, 2022), https://www.fec.gov/files/legal/murs/7784/7784_34.pdf.

On June 9, 2022, the three Commissioners who voted against finding reason to believe issued a Statement of Reasons explaining the basis for their votes. *See* Dickerson, Cooksey & Trainor Statement (ECF No. 13-1). These Commissioners justified their decision as compelled by their analyses of the complaint's legal and factual merits, which in turn depended on the imposition of an unjustifiably stringent legal standard that is contrary to FECA and relevant agency precedent and "unduly compromises the Act's purposes." *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986). *See* Compl. ¶¶ 63-68. Among their legal errors, the Commissioners summarily rejected OGC's conclusion that the Committees were required to disclose the ultimate payees of disbursements made through AMMC and Parscale Strategy, eschewing the careful analysis dictated by FEC precedent and instead vacillating between conclusory refutations of the evidence and the formulation of impossible legal tests. *See, e.g.*, *id.* ¶¶ 64-65 (noting Commissioners' determinations that subvendor reporting would not be required absent proof "the committee has previously instructed the payee to pass payments along to a third party that was not involved in the provision of services by the payee" and/or that the reported vendor was deliberately used as a

conduit "*only* out of a desire to conceal payments" to the ultimate subvendor). The Commissioners also grounded their votes on the conclusion that use of a single clearinghouse vendor like AMMC was "unremarkable" and consistent with the "historical practice" of past campaigns, arguing that the Commission had silently "acquiesce[d]" in the practice. Dickerson, Cooksey & Trainor Statement at 12-13.

The Commissioners then purported to frame their dispositive legal and factual analysis as an exercise of prosecutorial discretion. In support of this asserted rationale, the Commissioners merely reiterated their views of the complaint's merits—reasoning that because "the law does not require" subvendor reporting on these facts and there was "insufficient factual or legal support for OGC's theory of enforcement," pursuing the matter was unwarranted. Dickerson, Cooksey & Trainor Statement at 12.

Two of the three Commissioners who voted to approve OGC's reason-to-believe recommendation also issued a Statement of Reasons explaining their votes. *See* Statement of Reasons of Comm'rs Shana M. Broussard and Ellen L. Weintraub ("Broussard & Weintraub Statement"), MUR 7784 (June 15, 2022) (ECF No. 13-2). The Commissioners found that the "meticulously documented" administrative complaint alleged the concealment of "exactly the type of information the FECA is intended to expose to the sunlight of disclosure." *Id.* at 4. They rejected the no-voting Commissioners' "attempt to discredit news reports as appropriate sources of information for complaints," and further noted that the dismissal continued former President Trump's "remarkable win streak before th[e] Commission," during which "the FEC has received more than 40 complaints involving Donald Trump or his committee" but conducted "a grand total of zero" investigations, departing from OGC's recommended reason-to-believe finding in "at least 24" of those matters—and despite the Commission's recently pursuing enforcement against the

Democratic National Committee based on analogous subvendor reporting allegations. *Id.* at 1, 5. The Commissioners concluded that the complaint's dismissal violated principles of fairness and consistent treatment under the law, and would "damag[e] . . . the integrity of America's campaign-finance process." *Id.* at 5.

Commissioner Weintraub issued a supplemental Statement of Reasons on July 14, 2022, further explaining why the invocation of prosecutorial discretion in the Dickerson, Cooksey, and Trainor Statement was ineffective; in it, she explains that those Commissioners not only lacked the authority to invoke discretion because the full Commission had expressly voted *not* to do so, but also based their assertion of discretion entirely on a legal analysis of the complaint's merits. Weintraub Suppl. Statement at 1-5 (ECF No. 13-3).

III. Procedural History

On March 29, 2022, after the FEC had failed to act on CLC's administrative complaint for over twenty months (and its supplement for over fourteen months), CLC filed suit in this district to challenge the Commission's inaction as unlawful under the Act. *See* Compl., *CLC v. FEC*, No. 1:22-cv-00838 (D.D.C. Mar. 29, 2022); *see also* 52 U.S.C. § 30109(a)(8)(A) (authorizing suit by administrative complainant to challenge FEC delay). Only after CLC took the agency to court did the Commission finally act on the administrative complaint. *See* Ex. 2, Certification at 1-3 (dated May 11, 2022). CLC voluntarily dismissed the delay suit on May 19, 2022, after receiving notice that the Commission had dismissed its administrative complaint. *See* Min. Order, *CLC v. FEC*, No. 1:22-cv-00838 (D.D.C. May 19, 2022).

Thereafter, CLC filed this action on July 8, 2022, challenging the dismissal of its administrative complaint as contrary to law. Compl. (ECF No. 1). Defendant FEC moved to dismiss, asserting that judicial review is unavailable where the Commission exercises prosecutorial

discretion and claiming that, in this case, the Commission has effectively done so.

LEGAL STANDARD

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The Court "must take all of the factual allegations in the complaint as true," *id.*, and "construe[] the complaint liberally in the plaintiff's favor." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). For a Rule 12(b)(6) motion, the Court may only "consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Id.*

ARGUMENT

I. The Dismissal of Plaintiff's Administrative Complaint Is Reviewable.

"[T]o honor the presumption of review" generally applicable to agency action, exceptions to review are to be read "quite narrowly," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)—all the more so when Congress has evinced its clear intent to make review available, as it did here. 52 U.S.C. § 30109(a)(8); *Akins*, 524 U.S. at 26. In two recent divided panel decisions, however, the D.C. Circuit found that the FEC's dismissal of an administrative complaint on the basis of prosecutorial discretion is sometimes unreviewable. *See New Models*, 993 F.3d at 884-85; *Commission on Hope*, 892 F.3d at 440-42. The dismissal here is readily distinguishable from those cases and not entitled to the narrow exception they carved out from FECA's judicial review provision.

Although three Commissioners may have *purported* to justify their no-reason-to-believe votes on the ground of prosecutorial discretion, they had no power to do so. Because the Commission had already explicitly voted against dismissing the administrative complaint as a

matter of prosecutorial discretion, these Commissioners' subsequent invocation of that power was ineffective. Even if they could have exercised that authority, their reasons were overtly (and exclusively) based upon analyses of the complaint's legal and factual merits. Indeed, the Commissioners' invocation of prosecutorial discretion appears to have been little more than a contrivance intended to insulate their faulty legal determinations from scrutiny. Under these circumstances, neither *New Models* nor *Commission on Hope* authorizes withholding the judicial review that Congress prescribed.

A. The Commission expressly declined to exercise prosecutorial discretion.

The dismissal of CLC's administrative complaint is not shielded from judicial review by three Commissioners' nominal invocation of prosecutorial discretion in their Statement of Reasons. The full Commission expressly decided not to dismiss on that ground, and accordingly, those Commissioners' contrary views about prosecutorial discretion are not "controlling." Instead, their Statement provides the controlling rationale only with respect to the Commission's separate, substantive determination to find no "reason to believe" FECA had been violated. The Statement therefore is reviewable for legal error.

Immediately before voting to close the file and dismiss plaintiff's administrative complaint, the Commission voted on whether to "[d]ismiss the allegations pursuant to *Heckler v. Chaney*." *See* Ex. 2, Certification at 2. That vote, like the reason-to-believe votes preceding it, failed 3-3. *See id.* Having failed to muster the requisite four Commissioner votes to dismiss as a matter of prosecutorial discretion, the Commission voted 4-2 to close the file and thereby dismiss the complaint; accordingly, there *was* no exercise of prosecutorial discretion. *Id.*; *see also* Weintraub Suppl. Statement at 2 ("Just a few minutes before the Commission successfully voted on a motion to dismiss this matter, we voted on a motion to specifically dismiss the matter pursuant to the

Commission's prosecutorial discretion. That vote failed."). Otherwise put, the Commission expressly *declined* to dismiss the matter for reasons of prosecutorial discretion. That three Commissioners later issued a Statement of Reasons purporting to rely on prosecutorial discretion to justify their no-reason-to-believe votes cannot override the contemporaneous failure of an express *Heckler* vote or insulate the same minority bloc's legal errors from judicial review.

To hold otherwise would not only ignore the record in this case but also countermand the entire statutory scheme. FECA provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under . . . this Act shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c). And whether to exercise prosecutorial discretion is one of those "powers" that requires four votes to wield. *See Akins*, 524 U.S. at 25; FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf ("Pursuant to an exercise of its 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." (emphasis added)).

The separate vote on whether to exercise prosecutorial discretion also sets this matter apart from circuit decisions where FEC dismissals were held unreviewable because the controlling Commissioners relied on prosecutorial discretion in their statements of reasons. In those cases, there was no parallel vote on whether to dismiss as a matter of prosecutorial discretion. *See* Certification, MUR 6872 (*New Models*) (Nov. 15, 2017), https://www.fec.gov/files/legal/murs/6872/17044432619.pdf; Certification, MURs 6391 & 6471 (*Commission on Hope*) (Oct. 2, 2015),

https://www.fec.gov/files/legal/murs/6391/15044380175.pdf.[4] Instead, the dismissals reviewed in those cases each involved a single substantive vote that merged considerations of legal and discretionary factors, leading to judicial concerns about the absence of a "meaningful standard against which to judge the [Commissioners'] exercise of discretion." *Commission on Hope*, 892 F.3d at 439 (quoting *Heckler*, 470 U.S. at 830); *see New Models*, 993 F.3d at 885. No such concerns obtain here. Because the Commission expressly voted on whether to exercise discretion, there is clear law to apply—FECA's majority-vote requirement. *See* 52 U.S.C. § 30106(c). In other words, unlike in the *CREW* cases, the Court is not called upon to "judge the . . . exercise of discretion," but merely to recognize that there was no exercise of discretion at all.

Neither does the requirement that the "controlling Commissioners" release a Statement of Reasons in deadlock dismissals negate an express vote of the full Commission. In 3-3 dismissals like this one, the D.C. Circuit has held that the "controlling Commissioners"—those who voted against proceeding—must release a Statement of Reasons explaining their rationale in order "to allow meaningful judicial review of the Commission's decision." *Common Cause*, 842 F.2d at 449. This requirement exists because Congress mandated judicial review and the courts cannot simply guess at the Commission's reasoning for a particular decision. When the FEC decides not to act, it must explain why. In the cases like *Commission on Hope* and *New Models* where a

[4] The absence of an express *Heckler* vote likewise serves to distinguish district court decisions holding FEC dismissals unreviewable under *Commission on Hope* or *New Models*. *See, e.g.*, Certification, MUR 6396 (Crossroads GPS) (Dec. 5, 2013), https://www.fec.gov/files/legal/murs/6396/14044350869.pdf (dismissal held unreviewable in *Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 55-56 (D.D.C. 2021)); Certification, MUR 7609 (May 5, 2021), https://www.fec.gov/files/legal/murs/7609/7609_07.pdf (dismissal held unreviewable in *End Citizens United PAC v. FEC*, No. 1:21-cv-1665-TJK, 2022 WL 1136062 (D.D.C. Apr. 18, 2022)); Certification, MUR 6589 (Oct. 19, 2016), https://www.fec.gov/files/legal/murs/6589/16044401006.pdf (dismissal held unreviewable in *CREW v. Am. Action Network*, No. 1:18-cv-945-CRC, 2022 WL 612655 (D.D.C. Mar. 2, 2022)).

statement from the naysaying Commissioners is the only information the court has about the basis for dismissal, there is no choice but for the court to rely on it. But where, as here, the Commission voted on one possible justification for its dismissal—prosecutorial discretion—and explicitly rejected that rationale, the controlling Commissioners' statement is not the only information available to the Court. Their invocation cannot override an on-the-record vote of the full Commission.

Relatedly, while the naysaying Commissioners' rationale may be "controlling" with respect to the ultimate dismissal, it is not controlling with respect to the vote on whether to exercise unreviewable prosecutorial discretion to dismiss. When a dismissal follows a deadlock that merges consideration of discretionary factors into the reason-to-believe vote, the "controlling Commissioners" are those who voted against proceeding with enforcement, and theirs is the reasoning the Court must analyze when evaluating whether the dismissal was contrary to law. Conversely, however, where a dismissal follows separate deadlocks on both substantive and *Heckler* votes, the decision of those Commissioners who voted *against* exercising discretion—and thus against rendering the substantive deadlock potentially unreviewable—must also be given effect. Allowing the same minority bloc of Commissioners to speak for the agency regardless of whether their positions on a proposed agency action succeed or fail would separate *Common Cause*'s rule from its rationale.

Moreover, because a matter that stalls out in a deadlock among the Commissioners still cannot be dismissed without four affirmative votes—which in this scenario requires the assent of at least one Commissioner who supported a reason-to-believe finding *and* opposed dismissing the case as a matter of prosecutorial discretion—the Commission's choice to vote separately on the *Heckler* question should be understood as essential to the outcome. An on-the-record vote

declining to exercise prosecutorial discretion gives Commissioners who favored proceeding with enforcement some assurance that, if they subsequently agree to dismiss the matter in light of the deadlocked reason-to-believe vote, at least the substantive disagreements that prompted the deadlock will remain subject to FECA's judicial check. Without that protection, the matter might well remain open and unresolved. *See, e.g.*, Weintraub Suppl. Statement at 2 (noting that "[n]o Commissioner had articulated any basis for invoking prosecutorial discretion in this matter at the time the Commission voted to dismiss it"). And, of course, under the familiar principle of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), an agency action "must be judged" according to the grounds "upon which the record discloses that its action was based," *id*. at 87. The vote record in this case confirms that prosecutorial discretion was not the reason for the dismissal.

Allowing a non-controlling bloc to wield the Commission's prosecutorial discretion after it has explicitly voted not to exercise that power would flout the statutory scheme and the FEC's "inherently bipartisan" structure. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Recognizing that the Commission often "must decide issues charged with the dynamics of party politics," Congress incorporated safeguards against partisanship into the agency's structure, including the rule "that no more than three of its six voting members may be of the same political party" and that the agency act by majority vote. *Id.*; *see* 52 U.S.C. § 30106(a)(1), (c). Empowering minority blocs of Commissioners "to turn off statutorily directed judicial review like a light switch" by invoking prosecutorial discretion, *New Models*, 993 F.3d at 901 (Millett, J., dissenting), *even after a failed vote on that question*, would needlessly upend the balanced enforcement scheme prescribed by Congress. The Act's bipartisan design—and provision for judicial review as a safety valve in cases of agency stalemate—simply does not permit three Commissioners of the same political party to wrest unreviewable enforcement discretion from the

full Commission after it has formally declined to exercise that power.

B. Even if credited, the Commissioners' invocations of prosecutorial discretion hinged entirely on legal analysis and cannot immunize the dismissal from scrutiny.

If the Court determines that the invocation of prosecutorial discretion in the Dickerson, Cooksey, and Trainor Statement can override the Commission's express vote *not* to dismiss on that basis, the dismissal would still be reviewable because their stated rationale depended entirely on erroneous interpretations of law. Although the Commissioners purported to invoke prosecutorial discretion in their Statement, the appeal to discretion was merely an endpoint of their legal reasoning: each "discretionary" justification they put forward is avowedly premised on an underlying assessment of the legal merits. The dismissal thus rested on the kind of legal decisionmaking that forms the heartland of judicially reviewable agency action, and neither *CREW* decision insulates it from scrutiny.

1. Neither* Commission on Hope *nor* New Models *precludes review of dismissals premised on legal interpretation.

As both *CREW* decisions explicitly recognized, when the FEC dismisses an administrative complaint "on the basis of its interpretation of FECA," the dismissal remains reviewable. *Commission on Hope*, 892 F.3d at 441 n.11; *see also New Models*, 993 F.3d at 884. Likewise, although the *New Models* majority suggested that an FEC dismissal may be unreviewable when it "rests even in part on prosecutorial discretion," it, too, acknowledged that a dismissal that does *not* "rest on" prosecutorial discretion at all remains reviewable. 993 F.3d at 885. The *New Models* majority found the dismissal of CREW's complaint unreviewable because it "rested on two *distinct* grounds: the Commission's interpretation of FECA *and* its exercise of prosecutorial discretion." *Id.* at 884 (emphases added); *see also id.* at 887 (emphasizing that "prosecutorial discretion [had been] exercised *in addition to the legal grounds*" offered by the agency). Because this assertion of prosecutorial discretion was presented as an independent and alternative "basis for dismissal,"

holding the agency's legal reasoning contrary to law would have amounted to an advisory opinion that "would not affect the Commission's ultimate decision to dismiss." *Id.* at 889.

The same cannot be said here. In this case, the naysaying Commissioners did not exercise discretion independently of their legal conclusions about the scope of FECA disclosure requirements or their authority to consider credible and unrebutted record evidence; rather, they explicitly invoked discretion entirely *because of* those legal errors.

2. The Commissioners' purported "discretionary" rationale is exclusively founded upon legal conclusions.

Unlike in the *Commission on Hope* and *New Models* cases, the Commissioners here confirmed throughout their Statement of Reasons that their supposed "discretionary" concerns were entirely dependent on (and indeed, coterminous with) their assessments of the legal merits. Each and every one of the putative "discretionary" justifications asserted by these Commissioners was expressly founded on legal and factual judgments about the complaint. That is a far cry from the *Commission on Hope* and *New Models* cases—where prosecutorial discretion was invoked on the ground that the respondent groups had become defunct during the matters' pendency, thus furnishing an independent and alternative rationale for dismissal irrespective of any merits analysis. *See Commission on Hope*, 892 F.3d at 438; *see also New Models*, 993 F.3d at 887 ("Here the prosecutorial discretion is exercised *in addition to the legal grounds*.") (emphasis in original). Their invocation of prosecutorial discretion here is thus impossible to separate from the antecedent legal errors upon which it rests. Accordingly, as in *Akins*, the dismissal remains reviewable—for "we cannot know," given the contingency of the Commissioners' reasoning, "that the FEC would have exercised its prosecutorial discretion in this way" if their underlying legal conclusions were deemed incorrect. 524 U.S. at 25.

There is no justification to withhold review when FECA expressly provides for it and the relevant FEC dismissal is founded on substantive legal analysis. The Commissioners here opined at length about why they believed the record showed an "absence of support for enforcement," Dickerson, Cooksey & Trainor Statement at 12, and why they thought OGC's reason-to-believe recommendation should be rejected because it was based on what they viewed as a "flaw[ed]" or "tenuous legal theory," *id.* at 1, 11—legal conclusions that explicitly turned on the Commissioners' own contrary analyses of statutory and regulatory reporting requirements, prior FEC precedent, and the standard of proof required at the very earliest stage of FEC enforcement proceedings, *see id.* at 4-11. The Commissioners then stated in conclusory fashion that, "[f]or the reasons given above, we find insufficient factual or legal support for OGC's theory of enforcement and do not believe the Commission would ultimately be successful in pursuing it." *Id.* at 12. *See also, e.g.*, *id.* at 1 (opining that "the legal support for enforcement here is remarkably thin").

And, of course, it is hardly surprising that these Commissioners would perceive obstacles to future enforcement over the Trump Committees' alleged reporting violations—a mere three sentences later, they state unconditionally that "the law does not require such reporting." *Id.* at 12. Likewise, in summarizing their decision to reject OGC's finding that the Trump Campaign failed to adequately describe the purpose of payments made through Parscale Strategy, the Commissioners did not even attempt to characterize their reasoning as resting on anything other than a legal judgment about whether enforcement was *permissible*, concluding: "in the purpose-reporting context, the Commission *may* enforce where a 'person reading the Committee's disclosure reports could not have discerned [why] the Committee was disbursing funds,' which is plainly not the case here." *Id. See also id.* at 10-12; Compl. ¶¶ 42, 52.

The Commissioners' other invocations of discretion fare no better. For example, they posited that "the regulatory environment is uncertain" based on the respondents' contentions that the Commission has previously "acquiesce[d] in similar circumstances," Dickerson, Cooksey & Trainor Statement at 12—an argument the OGC considered and rejected as both unfounded and contrary to Commission precedent. Ex. 1, OGC Report at 17. *See also* Dickerson, Cooksey & Trainor Statement at 8 ("We decline OGC's invitation to depart from this historical practice based on news articles."). The suggestion that use of a single clearinghouse vendor like AMMC was "unremarkable" and consistent with the "historical practice" of past campaigns is exactly the kind of unreasoned decisionmaking that demands judicial oversight—as here, it enabled the Trump Campaign to conceal the true recipients of nearly three-quarters of its 2019-20 reported spending, *see* Ex. 1, OGC Report at 15 n.66 (noting that Trump Campaign's $516,697,606.57 million in reported disbursements to AMMC amounted to 69% of its $752,889,328.62 in total expenditures). The Commissioners' resort to unexamined "historical" instances of supposedly similar conduct to excuse this blatant abuse of FECA disclosure requirements is nothing more than a merits assessment masquerading as a discretionary one.

So too was the Commissioners' recurrent grievance that there was an "insufficient" or "thin" factual basis to proceed with enforcement, which they primarily based on their belief that enforcement would be illegitimate because the evidence drew "to a material extent" on reports in the national news media quoting unnamed sources. Dickerson, Cooksey & Trainor Statement at 12. *See also id.* at 1 ("We will not pursue enforcement-by-rumor."). Putting aside whether that gloss on the factual record is even remotely accurate—and it is not, *see, e.g.*, Compl. ¶¶ 35, 66, 69; Admin. Compl. ¶¶ 5-60—it was also premised on applying an impermissibly heightened standard of proof at the reason-to-believe stage and arbitrarily refusing to credit evidence derived

from news articles. Both of those legal errors merit judicial correction. The factual basis for a claim is an element of its legal merits, not a discretionary judgment warranting absolute immunity from scrutiny; all the more so when that factual analysis turns on the imposition of a legally unsustainable standard of proof in order to disregard reliable and undisputed evidence.

The Commissioners offered two principal reasons for finding the factual allegations in the complaint legally insufficient to support a reason-to-believe finding. First, ignoring that the administrative respondents had not disputed the accuracy of any of the complaint's factual allegations, the Commissioners opined that published news reports drawing on unnamed sources "are not a proper basis for Commission enforcement action." Dickerson, Cooksey & Trainor Statement at 8-9. Second, the Commissioners argued that "the bulk of the [cited] articles' factual allegations . . . would not persuade us to pursue enforcement here, even if they were true," as "ties" or even common staff between a vendor and a committee would not, in their legal judgment, suffice to show that the vendor was "merely a conduit" for disbursements to subvendors. *Id.* at 9. Like the rest of their supposedly "discretionary" justifications for dismissal, therefore, the Commissioners' analysis of the evidence and concerns about pursuing "enforcement-by-rumor" hinged on faulty legal determinations and remain susceptible to judicial review.[5]

The terminus of the Commissioners' extended effort to discredit the available evidence (and to cast that effort as an exercise of prosecutorial discretion) was their outright refusal "to permit the investigatory resources of the federal government to be mobilized" where the factual record relies in part on published news reports drawing on "anonymous" sources. Dickerson,

[5] The Commissioners also failed to address other significant and uncontested factual allegations—for example, the evidence that Campaign staff created AMMC to benefit the Campaign, that the firm existed solely to benefit the Committees, or that the Committees directly worked with and supervised subvendors and staff paid through AMMC and Parscale Strategy. *See* Admin. Compl. ¶¶ 73-74, 87-88.

Cooksey & Trainor Statement at 12. That they imposed this unjustified evidentiary bar at the threshold reason-to-believe stage further undercuts their appeal to prosecutorial discretion. A decision to find reason to believe is not a determination of liability and does not trigger any penalties; rather, it initiates further investigation by the FEC. *See* 52 U.S.C. § 30109(a)(2); Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. at 12546 ("The Commission finds 'no reason to believe' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law."). Particularly given this low bar, the Commissioners' refusal to credit undisputed evidence because it was drawn from published news reports quoting "anonymous" sources only compounded the fatal legal errors underlying their decision. And, as Commissioners Broussard and Weintraub rejoined in their dissenting Statement of Reasons, it was also "ironic, ahistorical, arbitrary, and capricious"—for the FEC "might not exist were it not for some exceptional reporting relying on an anonymous source then known to the public only as 'Deep Throat.'" Broussard & Weintraub Statement at 4-5.

Finally, insofar as the Statement invokes any considerations that might otherwise be deemed prudential, such as its perfunctory references to agency resources or "litigation risk," these, too, are impossible to extricate from the Commissioners' underlying judgment that there was "insufficient factual or legal support" to move forward. Dickerson, Cooksey & Trainor Statement at 12. As Commissioner Weintraub aptly summarized in her Supplemental Statement:

> Commissioners' factual and legal analyses of matters cannot form the sole basis of an application of prosecutorial discretion: *I voted to dismiss the matter as an exercise of prosecutorial discretion because I did not believe the facts and the law warranted moving forward.* That is nothing but a factual and legal judgment with *Heckler* fairy dust sprinkled inappositely on top.

Weintraub Suppl. Statement at 5 (ECF No. 13-3).

II. The FEC Provides No Basis to Preempt Review.

In response to this 12(b)(6) motion, plaintiff CLC has not attempted to enumerate all of the reasons the dismissal of its administrative complaint was contrary to law, which will require full briefing; it has instead focused on the FEC's attempt to forestall any consideration of that question before this case has even left the starting gates. The foregoing discussion thoroughly explains why that attempt must fail. Plaintiff has shown that the dismissal rested not on any unreviewable exercise of prosecutorial discretion by a Commissioner bloc capable of wielding that power, but instead on interpretations of the Act and FEC precedent that were impermissible, arbitrary and capricious, and otherwise contrary to law. *See Orloski*, 795 F.2d at 161; Compl. ¶¶ 64-68. That is more than sufficient to reject the FEC's motion to dismiss—all the more so in light of preliminary stage of the case and the FEC's decisions to withhold the administrative record and base its motion on circuit authority that is in no way as "established" as it claims. FEC Mem. 10.

A. Plaintiff has not had an opportunity to review the full administrative record.

Reflexively cutting off plaintiff's right to judicial review and disposing of this challenge would be particularly unwarranted at this stage. This is especially so given the FEC's decision to withhold the full administrative record—although local rules specify that its contents should be disclosed "simultaneously with the filing of a dispositive motion." *See* LCvR 7(n) (requiring agency to file a certified list of the contents of the administrative record with the Court "within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion"). The FEC must now bear the weight of its choice.

On a 12(b)(6) motion to dismiss, the Court is bound to draw all factual inferences for and "construe the complaint liberally in the plaintiff's favor." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The full administrative record necessarily discloses the agency's reasons for acting as it did—and at this

stage, it can be assumed that the record will reveal aspects of the agency's decisionmaking that support plaintiff's arguments here or further indicate that the Commissioners' stated rationale for dismissal was pretextual and contrived to avoid review.

Just as a statutorily ineffective and contingent exercise of prosecutorial discretion cannot obviate plaintiff's right to judicial review, neither can a superficial or pretextual one. Although there is a presumption of regularity afforded to agency decisionmaking, an agency action is arbitrary and capricious, and therefore contrary to law, when the justification for that action was pretextual or contrived. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-76 (2019) (holding decision arbitrary and capricious because the Secretary of Commerce's asserted rationale was pretextual and record suggested he had predetermined his chosen outcome and then retroactively invented an explanation). The administrative record here may similarly indicate that the Commissioners decided their preferred outcome and then searched for an expedient justification. They virtually admitted as much in their Statement of Reasons, acknowledging the dispositive legal nature of their decisionmaking throughout the Statement but then conveniently repackaging those conclusions as discretionary. *See supra* at 21-25. The conspicuous timing of the dismissal also supports the inference that the Commissioners first made a decision and then fabricated an explanation. The conclusive vote took place on May 10, 2022, *see* Ex. 2, Certification at 1-2—just in time to relieve the Commission from having to defend itself in CLC's predecessor suit based on agency delay. *See supra* at 13.

The full record is thus indispensable to evaluating whether the Commissioners' invocation of discretion, even assuming it *could* suffice to render the dismissal unreviewable, discloses the true or complete basis for their decision.

B. The FEC's motion relies entirely on a D.C. Circuit decision that contravened governing precedent and remains subject to possible revision by the en banc court.

For the reasons already explained, *Commission on Hope* and *New Models* are readily distinguishable from this case. But in the event the Court disagrees, plaintiff notes that *New Models* remains the subject of a pending petition for rehearing *en banc*. *See* Pl.-Appellant's Pet. for Reh'rg En Banc, *New Models*, No. 19-5161 (D.C. Cir. June 23, 2021).

Furthermore, both of those divided panel decisions rest on a premise contradicted by FECA and governing precedent: that FEC dismissal decisions are "control[led]" by *Heckler* and its "presumption" that "an agency's decision not to undertake enforcement" is unreviewable, *Commission on Hope*, 892 F.3d at 439. As the Supreme Court has confirmed, FECA "explicitly indicates the contrary." *Akins*, 524 U.S. at 26. *See also Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc) (noting that FECA "permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings"), *vacated on other grounds by* 524 U.S. 11 (1998); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (holding that a dismissal based on FEC's "unwillingness" to proceed is subject to judicial review); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134-35 & n.5 (D.C. Cir. 1987) (declining to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . Commission acts on the merits"); *Orloski*, 795 F.2d 156 (recognizing dismissals could be contrary to law *either* because they contained legal error or because they were otherwise arbitrary, capricious, or an abuse of discretion). Indeed, because "[t]he law of the circuit . . . was well-established long before the decision in [*Commission on Hope*]," *CLC*, 952 F.3d at 362 (Edwards, J., concurring) (citations omitted), it is that prior law that must be given effect. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail.").

CONCLUSION

For these reasons, plaintiff respectfully requests that the Court deny the FEC's motion to dismiss.

Dated: September 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

/s/ Megan P. McAllen

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