ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5277

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

NEW REPUBLICAN PAC,
Intervenor-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:21-cv-2128-RJL
Before the Honorable Richard J. Leon

PETITION FOR REHEARING EN BANC

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GLOSSARY OF ABBREVIATIONS

CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
PAC	Political Committee

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. In 2018, Plaintiff-Appellant End Citizens United PAC filed an FEC complaint alleging that U.S. Senator Rick Scott, his campaign, and New Republican PAC (a Scott-aligned super PAC) violated FECA during Scott's 2018 Senate campaign. JA118-22. Under FECA, once a person receives or spends more than $5,000 for the purpose of influencing a federal election, that person must file a statement of candidacy and create a campaign committee, which must file regular disclosure reports with the FEC. 52 U.S.C. §§ 30102(e)(1), 30103(a), 30104(a). In

New Republican PAC. JA097-115. Relying on the split-panel decision in *New Models*, the district court concluded that the FEC's dismissal was unreviewable because the controlling commissioners invoked prosecutorial discretion. JA107-10.

A divided panel of this Court affirmed. *ECU*, 90 F.4th at 1172. The panel majority relied on the split decisions in the *CREW* cases in claiming that "FECA's contrary to law review does not eliminate the Commission's prosecutorial discretion." *Id.* at 1178 (citing *Chaney*, 470 U.S. at 831-32). The majority then found that review was foreclosed even though the controlling commissioners' Statement "provided legal reasons . . . for declining enforcement in addition to invoking prosecutorial discretion." *Id.* at 1180 (internal quotation marks omitted). The divided panel also rejected the argument that the *CREW* cases are not binding because they conflict with earlier D.C. Circuit and Supreme Court rulings. *Id.*

Judge Pillard dissented, explaining that "[t]he majority repeats the mistakes from *Commission on Hope* and *New Models*, which continue to call out for correction." *Id.* at 1188. As Judge Pillard explained, "[i]t is perverse to treat a non-majority's statement of reasons, elicited to facilitate judicial review, as instead its ticket to bypass judicial review altogether." *Id.* at 1189. By doing so, the *CREW* cases "make[] a mockery of the carefully balanced bipartisan structure which Congress has erected." *Id.* (internal quotation marks 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 split-panel opinion rests on a premise flatly contradicted by governing precedent: that FEC dismissal decisions are "control[led]" by *Chaney* and its "presumption" that "an agency's decision not to undertake enforcement" is not reviewable, *Commission on Hope*, 892 F.3d at 439. *See ECU*, 90 F.4th at 1178. As the Supreme Court held in *Akins*, FECA "explicitly

indicates the contrary." 524 U.S. at 26. Therefore, "[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 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." *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)—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 the same argument." 90 F.4th at 1180. *New Models* did try to justify its radical departure from precedent, but not successfully. The *New Models* majority 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 its 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 *Chaney*, 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 Pet'r, *FEC v. Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 523890, 23, 29 (Aug. 21, 1997); Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 675443, 9 n.8 (Oct. 30, 1997).

The significant inconsistency and conflict in decisions since *Commission on Hope* also belies the suggestion in *New Models* that its rule "readily conforms with [the Court's] earlier cases." 993 F.3d at 893. *Compare, e.g.*, *Campaign Legal Ctr. and Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (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 *Chaney* "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 defendant's 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]

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[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

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

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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*).

the *CREW* cases threaten 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 split-panel decision here 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 majority believed, to pinpoint any discretionary concerns in the Statement that theoretically stand apart from the commissioners' overarching merits analysis, 90 F.4th at 1178-79, that still does not justify shielding their *legal* conclusions—the only aspect of the decision End Citizens United PAC seeks to challenge—from review. *Cf. New Models*, 993 F.3d at 905 (Millett, J., dissenting).

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 End Citizens United PAC'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, as the panel majority held, that an FEC dismissal escapes statutorily directed review wherever some notionally independent, "discretionary factors" can be gleaned from an otherwise reviewable legal analysis. 90 F.4th at 1179.

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 permitted to assume, "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) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). Because of the *CREW* decisions, that judicial backstop is now routinely unavailable.

* * *

The rule of automatic and absolute nonreviewability 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 Split-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 cannot be reconciled with a rule that empowers a partisan-aligned non-majority bloc to unilaterally preclude review of their decisions—including decisions, as in this case, based on extensive legal analysis and involving "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 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. *See, e.g.*, *id.* Worse still, the rulings allow partisan FEC 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." *New Models II*, 55 F.4th at 931 (Millett, J., dissenting from denial of rehr'g en banc).

The panel majority'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 erroneous legal test that contravenes the relevant standard, and indeed, opens a massive and readily exploited loophole in FECA's candidate reporting requirements and contribution limits. 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), 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 requirements and the voting public's right to know how political campaign money is raised and spent.

The split-panel decision, like the *CREW* cases, is irreconcilable with the balanced statutory scheme that Congress devised. In allowing one partisan non-majority 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/ *Kevin P. Hancock*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 35(c), Petitioner End Citizens United PAC submits its corporate disclosure statement.

(a) End Citizens United PAC certifies that it has no parent companies and no publicly held company with a 10% or greater ownership interest.

(b) End Citizens United PAC is a political action committee whose mission is to get big money out of politics and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation.

PANEL DECISION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 26, 2023 Decided January 19, 2024

No. 22-5277

END CITIZENS UNITED PAC,
APPELLANT

v.

FEDERAL ELECTION COMMISSION AND NEW REPUBLICAN PAC,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02128)

Kevin P. Hancock argued the cause for appellant. With him on the briefs were *Adav Noti*, *Alexandra Copper*, and *Allison Walter*. *Molly Danahy* entered an appearance.

Stuart C. McPhail and *Adam J. Rappaport* were on the brief for *amicus curiae* Citizens for Responsibility and Ethics in Washington in support of appellant.

Jason B. Torchinsky argued the cause for intervenor-appellee New Republican PAC. With him on the brief were

End Citizens United filed two administrative complaints with the Commission, alleging New Republican and Scott[1] violated several requirements of the Federal Election Campaign Act of 1971 ("FECA"). *See* Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30101 *et seq.*). According to End Citizens United, before officially declaring his Senate run, Scott began informal campaign activities and used New Republican's resources to support his nascent candidacy. He also allegedly continued to exert control over New Republican into 2018—well after his chairmanship ended. He purportedly did this by fundraising for New Republican, participating in conference calls, and interacting with political allies connected to the PAC, among other things. Immediately after Scott officially declared his candidacy in April 2018, New Republican revamped its website and issued a press release to announce its "focus[] on the election of Rick Scott in the race for Florida United States Senate."

Based on this timeline, End Citizens United's first complaint maintained that Scott became a "candidate" in May 2017, the same month he became chairman of New Republican, and that he failed to register his campaign until nearly a year later. Complaint at 1–5, FEC Matter Under Review 7370 ("Complaint One") (Apr. 23, 2018); *see also* 52 U.S.C. § 30101(2) (defining "candidate"); 11 C.F.R. § 100.72(a) (outlining permissible activities and reporting requirements for individuals "determining whether … [to] become a candidate"). As a consequence of the alleged failure to timely register his campaign, Scott failed to make the necessary filings and reports to the FEC. *See* 52 U.S.C. §§ 30102–04. The complaint also alleged that New Republican

[1] End Citizens United also alleged Scott's campaign had violated FECA. For purposes of this case, we do not distinguish between Scott and his campaign because the distinction is not relevant here.

Reasons.[2] Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III, FEC Matters Under Review 7370 and 7496 ("Statement of Reasons") (July 21, 2021). With respect to Complaint One, they offered legal and evidentiary grounds for dismissal. They also explicitly "invoked … prosecutorial discretion pursuant to *Heckler v. Chaney*," concluding it would be unwise to "authoriz[e] an expensive and resource-consuming investigation while the Commission is … working through a substantial backlog of cases." *Id.* at 10 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). As to Complaint Two, the controlling commissioners offered two independent reasons for dismissal. First, they suggested the coordination allegation could not go forward without "a threshold finding" that Scott or New Republican had violated FECA's campaign registration, filing, reporting, or spending requirements, as alleged in Complaint One. *Id.* at 2 n.2. Second, they incorporated by reference the general counsel's evidentiary analysis, agreeing the record did not support a reason to believe coordination had occurred. *Id.* at 5 n.25.

End Citizens United filed suit in 2021, challenging the Commission's dismissals as "contrary to law." *See* 52 U.S.C. § 30109(a)(8)(C). The Commission did not defend its dismissals in district court. After allowing New Republican to intervene as a defendant, the district court granted summary judgment in New Republican's favor. *End Citizens United*

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[2] The commissioners voting against enforcement are called "controlling [c]ommissioners," and their stated reasons are "treated as if they were expressing the Commission's rationale for dismissal." *New Models*, 993 F.3d at 883 n.3 (cleaned up); *see also Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) (establishing the requirement for the controlling commissioners to issue a statement of reasons).

PAC v. FEC, No. 21-2128, 2022 WL 4289654, at *1 (D.D.C. Sept. 16, 2022). The district court concluded the Commission's dismissal of the first complaint was unreviewable because that dismissal was based in part on prosecutorial discretion. *Id.* at *5 (citing *New Models*, 993 F.3d at 889). And it concluded the Commission's dismissal of the second complaint was reviewable but not contrary to law. *Id.* at *6–7. End Citizens United timely appealed. Our review is de novo. *Citizens for Resp. & Ethics in Wash. v. FEC* ("*Commission on Hope*"), 892 F.3d 434, 440 (D.C. Cir. 2018).

II.

End Citizens United argues the dismissal of Complaint One was contrary to law because the controlling commissioners erroneously interpreted FECA to require a showing of Scott's "subjective intent" to become a candidate. And, it argues, the Complaint Two dismissal was also contrary to law because the controlling commissioners applied FECA to the facts in an arbitrary and irrational way.

FECA allows a court to "declare that the dismissal of [a] complaint … is contrary to law." 52 U.S.C. § 30109(a)(8)(C). Under our precedents, a dismissal is "contrary to law" if "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA] … or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion."[3] *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir.

[3] Since *Orloski v. FEC*, this circuit has included arbitrary and capricious review, as well as abuse of discretion review, under FECA's "contrary to law" standard. 795 F.2d 156, 161 (D.C. Cir. 1986). But prior decisions did not conflate these different forms of review. For instance, the Supreme Court explained that given the

First, *Heckler* teaches that an "*agency's* decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831 (emphasis added). To count as action by the Commission, a decision to "dismiss" a claim must "be made by a majority vote." 52 U.S.C. §§ 30106(c), 30109(a)(1). A dismissal vote predicated on prosecutorial discretion by a majority of commissioners, for example, would amount to an agency decision to refuse enforcement. If *Heckler* applied to FECA, that decision might be unreviewable. In this case, though, the Commission deadlocked; it could not garner a majority vote to do anything other than close the file.

Relying on *Commission on Hope* and *New Models*, the majority erroneously treats the three controlling commissioners' statement explaining their votes against enforcement as the Commission's decision to refuse enforcement. Maj. Op. 9-10. A statement of reasons, even by a non-majority causing a deadlock, explains the standstill and helps "make judicial review a meaningful exercise." *Nat'l Republican Sen. Comm.*, 966 F.2d at 1476. But we do not—and cannot—treat the controlling commissioners' rationales or votes as an "exercise" of the Commission's "duties and powers." 52 U.S.C. § 30106(c). To the contrary, we have explained that a statement of reasons for a non-majority's vote cannot be an "*official* Commission decision," since the latter requires "at least a 4-2 majority vote." *Common Cause*, 842 F.2d at 449 n.32 (emphasis in original). What is more, FECA also provides for review of a "failure to act" on a complaint within 120 days, 52 U.S.C. § 30109(a)(8)(C), implying that a court may evaluate the legality of inaction even in the absence of any vote or statement of reasons.

Under the majority's view, it would make no difference whether a partisan bloc of three commissioners or a bipartisan

majority of four commissioners voted to dismiss a claim based on prosecutorial discretion—both would be unreviewable. But under FECA, there is a critically important difference between partisan and bipartisan action. Even assuming a bipartisan majority's vote to exercise prosecutorial discretion defeats judicial review, affording that power to a non-majority makes a mockery of the "carefully balanced bipartisan structure which Congress has erected." *Common Cause*, 842 F.2d at 449 n.32. It is perverse to treat a non-majority's statement of reasons, elicited to facilitate judicial review, as instead its ticket to bypass judicial review altogether. That alone shows that *Commission on Hope* and *New Models* are wrong.

Second, even if it were appropriate to treat a non-majority invocation of prosecutorial discretion as an official Commission decision, *Heckler* still would not apply. *Heckler*'s presumption of non-reviewability is just that: a presumption. 470 U.S. at 831. It "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. In *Akins*, the Supreme Court ruled that FECA categorically rebuts that presumption because it "explicitly indicates" that the Commission's decision "not to undertake an enforcement action" is subject to judicial review to determine whether the Commission's passivity is contrary to law. 524 U.S. at 26. Judge Silberman, speaking for our *en banc* court in *Akins*, described judicial review under FECA as "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings." 101 F.3d 731, 734 (D.C. Cir. 1996) (distinguishing *Chaney*), *vacated on other grounds*, 524 U.S. 11 (1998). *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. *See, e.g.*, *Chamber*

of Commerce, 69 F.3d at 603; *DCCC*, 831 F.2d at 1133; *Orloski*, 795 F.2d at 161.

Third, *Heckler* emphasizes that an agency's non-enforcement decision is generally unreviewable because its enforcement activity should be "committed to an agency's absolute discretion." 470 U.S. at 831. That is so because the agency must itself assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies." *Id.* But judicial review under FECA need not intrude on the Commission's discretion to balance those factors. To the contrary, FECA's creation of a private right of action means that, if the Commission declines to investigate a complaint that a court holds legally sufficient to proceed, private citizens may take up the task without the Commission having to use its own resources or act under court direction. *See* 52 U.S.C. § 30109(a)(8)(C). For this reason, too, the separation-of-powers concerns that animated *Heckler* (and that my colleagues referenced in *New Models I*, *see* 993 F.3d at 888) are wholly misplaced in the context of FECA.

Crucially, the case before us does not raise the question whether there may be some circumstances in which FECA authorizes the Commission to exercise unreviewable enforcement discretion. For example, a bipartisan majority of commissioners might be able to shut down the enforcement process at the reason-to-believe phase by explicitly dismissing a complaint on enforcement-discretion grounds. 52 U.S.C. § 30109(a)(1); Guidebook at 12. In this case, though, the vote over whether to dismiss the Filing Claims "under *Heckler v. Chaney*" "failed"—it deadlocked 3-3. J.A. 272 (June 14, 2021, Vote Certification). And the commissioners never even held such a vote with respect to the Soft-money Claims. So,

assuming a bipartisan majority of the Commission could wield unreviewable enforcement discretion, it did not do so in this case. The Act also expressly grants discretion to halt a case if, after the complaint travels through all the prescribed checkpoints, the Commission votes against filing a civil action for relief. 52 U.S.C. § 30109(a)(6)(A). At that stage, the statute switches from specifying that the commission "*shall*" proceed where statutory standards are met, *id*. § 30109(a)(2), (a)(4)(A)(i) (emphasis added), to providing that "the Commission *may*, upon an affirmative vote of 4 of its members, institute a civil action for relief," *id*. § 30109(a)(6)(A) (emphasis added). This case, however, stalled out at the very beginning, at the reason-to-believe phase. A non-majority incantation of enforcement discretion at that phase cannot interfere with the court's obligation under FECA to decide whether the Commission's inaction or dismissal was "contrary to law"—as it would be, for example, if the commissioners voted to dismiss a complaint that, under the law as properly understood, gave "reason to believe that the respondent has committed or is about to commit a violation" of FECA or the presidential campaign funding laws. *Id*. § 30109(a)(2), (a)(8)(C).

All these mistakes have something in common: They ignore the many ways in which both the Commission and FECA's enforcement scheme are uniquely crafted to avoid partisan gridlock. The Supreme Court in *Akins* appreciated how Congress intended to avoid that gridlock. And, before *Commission on Hope*, we did too.

B.

The majority not only errs by applying *Commission on Hope* and *New Models*; it also misreads the record in this case. The majority rules that "the controlling commissioners

expressly invoked their prosecutorial discretion when dismissing the complaint." Maj. Op. 9. That is incorrect. The controlling commissioners were clear in their statement of reasons that they invoked prosecutorial discretion only with respect to the Filing Claims. Because the Soft-money Claims were dismissed on the merits, they are reviewable.

The majority contends that my opinion "misreads" the statement of reasons, Maj. Op. 11 n.4, but the statement speaks for itself. Over and again, the controlling commissioners made clear that they invoked prosecutorial discretion only with respect to the Filing Claims. In the introduction, the controlling commissions explained that they "found no reason to believe that New Republican violated the soft money rules and dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v. Chaney*." J.A. 282. In a footnote, the controlling commissioners addressed the Soft-money Claim against Scott: "Having determined there was no path forward on those elements, we were required to dismiss" the Soft-money Claim because that claim "would have required, at a minimum, a threshold finding that Scott had failed to file a statement of candidacy at the appropriate time, or that New Republican had violated the soft money rules." J.A. 282 n.2. Later, the controlling commissioners repeated that "as regards Rick Scott's alleged failure to timely file his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*." J.A. 290. And, in their conclusion, they summarized their votes:

> For the foregoing reasons, we voted to find no reason to believe that New Republican violated the soft money ban, exercised our prosecutorial discretion regarding the allegations that Scott and his campaign committee failed to timely file candidacy and

> organization forms, and dismissed the remaining allegations against the Respondents for lack of evidence.

J.A. 290-91.

The controlling commissioners repeatedly tell us that they are dismissing the Soft-money claims on the merits, but the majority refuses to take them at their word. It deems the dismissal of all four claims unreviewable on the theory that "the controlling commissioners expressly invoked their prosecutorial discretion when dismissing the complaint." Maj. Op. 9. There is no basis for that conclusion. The majority emphasizes that the controlling commissioners at one point say that they "determined that this Matter merited the invocation of our prosecutorial discretion." J.A. 290. The majority appears to read "this Matter" to mean "all the claims" in the first complaint. Maj. Op. 11 n.4. That reading conflicts with what the controlling commissioners actually say. After giving their reasons for invoking enforcement discretion, the controlling commissioners clarify the scope of the invocation: "Accordingly, as regards Rick Scott's alleged *failure to timely file* his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*." J.A. 290 (emphasis added). And they are even clearer in the conclusion, where they invoke prosecutorial discretion only "regarding the allegations that Scott and his campaign committee *failed to timely file* candidacy and organization forms." J.A. 290-91 (emphasis added). As to the Soft-money Claims, they say that they "voted to find no reason to believe" New Republican violated the soft money ban, and dismissed the Soft-money Claim against Scott for "lack of evidence." J.A. 290-91.

The majority erroneously concludes that End Citizens United "did not raise this argument on appeal." Maj. Op. 11 n.4. In fact, End Citizens United argued that dismissal of the Soft-money Claims was reviewable, Appellant's Br. 23-24, specifically described that dismissal as based not on enforcement discretion but on an erroneous interpretation of FECA, *id*. 18, and confirmed during oral argument that the controlling commissioners invoked discretion only with respect to the Filing Claims, not the Soft-money Claims, *see* Oral Arg. Rec. at 7:43-9:48. The parties drew the same battle line in the district court, *compare* ECU Opp. to MTD 28-29, *End Citizens United PAC v. FEC*, No. 21-cv-2128 (D.D.C. Sept. 16, 2022), ECF No. 25, *with* New Republican Reply 11, ECF No. 29, and even New Republican does not assert forfeiture here.

The court has erred in empowering a partisan bloc of commissioners to invoke enforcement discretion to evade review the statute authorizes. Adding to the muddle that error has created, today's majority relies on the bloc's discretionary reasoning about the Filing Claims to avoid reviewing the other claims in the first complaint. Because the controlling commissioners did not invoke enforcement discretion with respect to the Soft-money Claims, I would hold the dismissal of those claims reviewable even under *Commission on Hope* and *New Models*.

* * *

As I have explained, *Commission on Hope* and *New Models* contravene FECA, ignore binding precedent, and undercut the distinctive features Congress crafted to prevent partisan gridlock. The majority's first mistake is to act as if those decisions are "binding on this panel." Maj. Op. 12.