ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), defendant-appellee Federal Election Commission ("Commission" or "FEC") hereby certifies as follows:

(A) Parties and Amici. Citizens for Responsibility and Ethics in Washington and Noah Bookbinder are plaintiffs in the district court and appellants in this Court. The FEC is the defendant in the district court and the appellee in this Court. No amici appeared before the district court. The following individual and entity have appeared as amici before this Court: Randy Elf and Campaign Legal Center.

(B) Ruling Under Review. Plaintiffs-appellants appeal the March 29, 2019 order of the United States District Court for the District of Columbia (Contreras, J.), which denied plaintiffs' motion for summary judgment and granted the FEC's cross-motion for summary judgment. The district court's order appears in the Joint Appendix ("JA") at 138; the Memorandum Opinion is reported at *Citizens for Responsibility & Ethics in Washington v. FEC*, 380 F. Supp. 3d 30 (D.D.C. 2019), and is reprinted at JA139-61.

(C) Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

APA	Administrative Procedure Act
Complainants	Citizens for Responsibility and Ethics in Washington and Noah Bookbinder
FEC or Commission	Federal Election Commission
FECA or Act	Federal Election Campaign Act
JA	Joint Appendix
MUR	Matter Under Review

INTRODUCTION

Appellants Citizens for Responsibility and Ethics in Washington and Noah Bookbinder (collectively, "Complainants") challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaint alleging certain campaign finance violations by New Models. They alleged that New Models violated the Federal Election Campaign Act ("FECA" or "Act") due to three contributions to independent-expenditure-only committees it made in 2012 without registering with the Commission as a "political committee" and complying with the disclosure requirements that apply to such groups. After duly considering those allegations, the Commission did not approve pursuing the matter further by the requisite votes, and so voted to close its file, thereby dismissing the administrative complaint.

Though Complainants may disagree with the dismissal of their administrative complaint, judicial review is not available where, as here, the controlling statement providing the agency's rationale includes an independent justification based on prosecutorial discretion. This Court recently held that FEC dismissals of administrative complaints based, in whole or in part, on prosecutorial discretion are "not subject to judicial review." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("*Comm'n on Hope*"), *pet. for reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019). Because the FEC has

"unreviewable prosecutorial discretion," *id.* at 438, which it exercised in the underlying matter here, this Court should affirm the district court's decision.

In any event, even if the dismissal was judicially reviewable, resolving the merits now would serve the purpose of judicial efficiency. The decision of the Commissioners who voted not to proceed was thoroughly explained in a statement of reasons, was grounded in the administrative record, and reflects a reasonable application of the FEC's repeatedly upheld case-by-case method for determining political-committee status using the Supreme Court's "major purpose" test. It is also consistent with courts' repeated admonitions to interpret the Act with sensitivity to the First Amendment area in which the Commission regulates. The analysis readily satisfies the review under heightened deference applicable here and should be affirmed without a remand.

STATUTES AND REGULATIONS

Applicable statutory and regulatory provisions are in the Addendum and Complainants' Brief's Addendum.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA.

Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible FECA violations, *id.* § 30109(a)(1)-(2). The FEC has "exclusive jurisdiction" to initiate civil enforcement actions for FECA violations. *Id.* §§ 30106(b)(1), 30109(a)(6).

B. Enforcement and Judicial Review

Any person may file an administrative complaint with the Commission alleging a FECA violation. *Id.* § 30109(a)(1). After considering these allegations and any response, the FEC determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2). If the Commission so finds, then it conducts "an investigation of such alleged violation" to determine whether there is "probable cause to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2), (4). If probable cause is found, the Commission is required to attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA provides that the agency "may" institute a *de novo* civil enforcement action. *Id.* § 30109(a)(6)(A). At each stage, the affirmative vote of at least four Commissioners is required for the agency to proceed. *Id.* § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

If the Commission dismisses the complaint, FECA provides a cause of

action for "aggrieved" administrative complainants to seek judicial review. *Id.* § 30109(a)(8)(A); *but see Comm'n on Hope*, 892 F.3d at 438 (holding that the FEC has "unreviewable prosecutorial discretion to determine whether to bring an enforcement action"). In instances where a dismissal results from a split vote, the "Commissioners who voted to dismiss" "constitute a controlling group," since "their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") (discussing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133-35 (D.C. Cir. 1987) ("*DCCC*")).

If a court finds a reviewable dismissal decision to be "contrary to law," the court can "direct the Commission to conform" with its ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C). If, and only if, the Commission fails to conform, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

C. Regulation of "Political Committees"

FECA imposes distinct disclosure requirements on organizations qualifying as a "political committee." Such groups must, *inter alia*, register with the Commission, appoint a treasurer, file periodic reports identifying those who have contributed in excess of $200 to the organization, and meet other organizational, record-keeping, and public filing requirements. *Id.* §§ 30102, 30103, 30104(a)-(b).

Once an organization becomes a political committee, its ability to terminate its status as a political committee is restricted. *Id.* § 30103(d)(1); 11 C.F.R. §§ 102.3(a)(1), 102.4.

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). "This broad definition, however, is less universally encompassing than at first it may seem, for [FECA's] definitional subsections limit" the scope of "the key terms 'contribution' and 'expenditure.'" *FEC v. Akins*, 524 U.S. 11, 15 (1998). Those terms cover "only those contributions and expenditures that are made 'for the purpose of influencing any election for Federal office.'" *Id.* (quoting statutory definitions recodified at 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)). Concerned that the bare statutory definition might reach too far into protected First Amendment activity by covering "groups engaged purely in issue discussion," the Supreme Court further limited the definition of political committee so that it would "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

Buckley, however, provided only limited guidance regarding the key

question of how to determine an organization's "major purpose." To fill this gap, the Commission has adopted a multi-factored, case-by-case approach. *Rules & Regulations: Political Comm. Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J"); *see also Free Speech v. FEC*, 720 F.3d 788, 797 (10th Cir. 2013) (upholding the FEC's approach); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) (same). When determining an organization's major purpose, the Commission conducts a fact-specific analysis, which can include considering, *inter alia*: (a) an "organization's spending on Federal campaign activity, as well as any other spending"; (b) its "public statements"; (c) "fundraising appeals"; (d) "internal documents about an organization's mission"; and (e) public filings. Supplemental E&J, 72 Fed. Reg. at 5601, 5605.

II. FACTUAL BACKGROUND

In an administrative complaint filed in September 2014, Complainants alleged that "New Models' major purpose in 2012 was the nomination or election of federal candidates," and that, consequently, New Models had violated FECA by failing to register and report as a "political committee." (JA23-26.) In its response, New Models did not dispute that it made more than $1,000 in "contributions" in 2012; but denied that it then, or ever, had the "major purpose" of nominating or electing federal candidates. (JA66.)

In November 2017, the Commission, by a vote of 2-2, with one recusal, did not find reason to believe that New Models violated FECA. (JA101.) Commissioners Hunter and Goodman voted against finding reason to believe, and thus constitute the "controlling group," while Commissioners Walther and Weintraub voted for finding reason to believe. (*Id.*) The Commission voted 4-0 to close its file. (JA102.) The controlling group and Commissioner Weintraub issued statements of reasons. (JA103-37.)

The controlling Commissioners found that, examining New Models' "public statements, organizational documents, and overall spending history" and applying "agency expertise," New Models was not a political committee. (JA103-04.) Based on facts which were not materially disputed, they analyzed the group's central organizational purpose, public statements, and its federal campaign spending as compared to their other spending, and concluded that New Models had not "violated the Act by failing to register and report as a political committee." (JA133.) "For these reasons, and in exercise of our prosecutorial discretion," these Commissioners voted in favor of dismissing the matter. (*Id.*)

A. New Models

New Models was a tax-exempt social welfare organization established in 2000 under section 501(c)(4) of the Internal Revenue Code. (JA106.) Its Form 990 tax returns from 2004 through 2015 consistently described New Models'

"primary purpose" as "studying and advocating policy issues of national importance." (*Id.*) The year 2012 was no exception. (*Id.*)

The description of the organization's activities on reports filed with the Internal Revenue Service and the organization's website provided some confirmation that New Models had pursued its stated mission by conducting and making available issue-related polling results, sponsoring and making available research papers, publishing information about public policy on its website, and making grants to other organizations. (JA107.) In 2012, for example, New Models conducted issue-related focus groups and polling, as well as gave a grant for "[i]ssue advocacy on the economy and jobs." (JA30.)

New Models did not make any independent expenditures in 2012 or any other year.[1] (JA105.) It did, however, make contributions to several independent-expenditure-only political committees, also known as super PACs, in 2012 — all of which were publicly disclosed. (JA108 (totaling approximately $3.1 million or 68.7% of relative spending for 2012).) Other than a single, relatively modest amount given in 2010,[2] New Models did not make any other contributions between

[1] An "independent expenditure" is a communication "expressly advocating the election or defeat of a clearly identified candidate" and that is made without coordinating with the candidate or a political party. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

[2] New Models gave $265,000 to Citizens for a Working America PAC in 2010. There was conflicting evidence in the record regarding whether this 2010

2000 and 2015. (JA107-08 (19.5% of overall relative spending); *see also infra* p.56 (chart summary).)

B. The Controlling Analysis

The controlling Commissioners concluded that New Models was not a political committee for two independent reasons. (JA120; JA122-23 n.95.) First, they concluded that New Models did not meet the statutory threshold requirement for a political committee of receiving $1,000 in contributions or making $1,000 in expenditures. (*Id.*) Second, they found that New Models did not have the major purpose of nominating or electing federal candidates. (*Id.*)

1. Statutory Threshold

The controlling Commissioners concluded that New Models did not receive "contributions" or make "expenditures" and thus did not satisfy the statutory threshold requirement for being a political committee. (JA120-22.) While both terms are defined to include a gift of money "made . . . for the purpose of influencing any election for Federal office," they found that the Supreme Court had interpreted this phrase narrowly.

The term "contribution," they reasoned, was limited to (1) direct donations to candidates, parties, or campaign committees, (2) coordinated expenditures, and

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payment was election-related or for issue advocacy. (JA107 n.23.) Because its inclusion did not alter their conclusion, the controlling group included it as a contribution. (*Id.*)

(3) donations to non-candidate or party groups but "'earmarked for political purposes.'" (JA121 (quoting *Buckley*, 424 U.S. at 23 n.24, 78).) Because the Commissioners found that New Models did not make any expenditures, coordinated or otherwise, they concluded that "none of its funding seems earmarked for a political purpose" and thus would not constitute "contributions." (*Id.*)

The term "expenditure," they reasoned, was limited to reach only express advocacy of a clearly identified candidate. (*Id.* (citing *Buckley*, 424 U.S. at 79-80).) There were no allegations that New Models itself made any independent expenditures, only that New Models donated money to political committees who themselves made independent expenditures. (JA121-22.) The controlling Commissioners found that contributions to these super PACs would indicate New Models' support for those groups, "but not necessarily any particular candidate." (JA122.) They ultimately concluded that New Models did not "make expenditures" so did not satisfy the statutory threshold to be deemed a political committee. (*Id.*)

2. Major Purpose

Even if New Models met the statutory threshold, the controlling group also concluded that the organization did not have the requisite major purpose. (*Id.*) To reach this conclusion, they considered (a) New Models' organizational purpose, (b)

public statements, and (c) spending, as well as (d) "the First Amendment implications" of classifying an organization as a political committee "based solely on a handful of contributions in a brief snapshot in time." (JA123.)

In short, the controlling statement found that New Models' "isolated contributions to three Super PACs" did not demonstrate a fundamental shift in the organization's major purpose. (JA129; *see also* JA132.) Based upon the controlling Commissioners' "review of New Models' spending, nominating or defeating a federal candidate may have been *a* purpose of the organization in 2012, but was not *the* major purpose of the organization." (JA129; *see also* JA132 (discussing example where an organization's "foremost [policy] issue becomes highly visible in a federal election," so the organization temporarily devotes its resources to campaign-related spending but then resumes its issue focus).)

Viewing all the evidence together, and weighing heavily New Models' public statements, the controlling group concluded that New Models "is an issue discussion organization that made sporadic contributions to independent expenditure-only committees," and thus "is precisely the type of group [that] *Buckley* . . . sought to exclude from the definition of political committee through the major purpose limitation." (JA129.)

C. Dismissal on the Basis of Prosecutorial Discretion

The controlling group also voted not to pursue the New Models matter

further "in exercise of [their] prosecutorial discretion." (JA133 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).) They noted that New Models indicated in its 2015 tax form that it had "liquidated, terminated, dissolved, or otherwise ceased operations." (JA109 & n.32.) They also considered the age of the allegedly problematic expenditures, which occurred approximately five years prior. (JA104.) Because "the organization appears no longer active," as well as "the age of the activity," the controlling Commissioners concluded that "proceeding further would not be an appropriate use of Commission resources." (JA133 n.139.)

III. DISTRICT COURT PROCEEDINGS

Complainants sought judicial review. (JA6-18.) They subsequently filed a motion for summary judgment seeking judicial review on the merits of the controlling Commissioners' analysis. (Dkt. 12.) In response, the Commission cross-filed for summary judgment, arguing that judicial review was unavailable and that summary judgment was appropriate in its favor on the merits as well. (Dkt. 13-1.) The parties then filed reply briefs in support of their respective motions and addressing both issues. (Dkts. 16 & 20.)

The district court granted summary judgment and entered an order in the Commission's favor. (JA138-61.) The court held that *Commission on Hope* was "directly on point here." (JA152.) It concluded that Complainants "strain[ed], unsuccessfully, to extricate this case from [*Commission on Hope*'s] holding."

(JA154.) It found that "the Controlling Commissioners' invocation of prosecutorial discretion here did not rely on their interpretation of FECA or case law." (JA156.) Although it also noted: "[I]f, as [Complainants'] claim, the Court *could* evaluate the Controlling Commissioners' reasons for invoking prosecutorial discretion, the Commissioners' factual bases for their decision are generally considered rational." (JA155 n.11.) The court also rejected Complainants' "theor[ies]" that "*Heckler*'s presumption of non-reviewability" did not apply here because the Commission had not abdicated its enforcement responsibilities. (JA156; *see also* JA157-59.) Instead, it found: "The Commission fulfilled its statutory responsibility to investigate New Models, it simply reached a difference conclusion than [Complainants] preferred." (JA160 (internal citation omitted).) The district court recognized that this Court had "reject[ed] the notion that a court may 'carv[e] reviewable legal rulings out from the middle of non-reviewable actions.'" (JA154 (quoting *Comm'n on Hope*, 892 F.3d at 441-42)); *see also* JA155 ("[*Commission on Hope*] holds that the Controlling Commissioners' legal analyses are reviewable only if they are the *sole reason* for the dismissal[.]").) And since the controlling Commissioners' exercise of prosecutorial discretion constituted "a 'non-reviewable' action under [*Commission on Hope*]," the court could not "evaluate the 'reviewable legal rulings' contained in [their] statement of reasons." (JA154.) Accordingly, "[u]nder binding Circuit law," the court

concluded that judicial review was unavailable. (JA153.)

SUMMARY OF THE ARGUMENT

This Court's recent opinion in *Commission on Hope* establishes that the controlling Commissioners' decision here is not subject to judicial review. The Court held that FEC dismissal decisions based in whole or in part on prosecutorial discretion are unreviewable. Because the controlling Commissioners expressly invoked and exercised their prosecutorial discretion as a distinct basis for their decision to dismiss Complainants' administrative complaint against New Models, Complainants are unable to obtain judicial review of that decision.

Commission on Hope concluded that a limited version of the unreviewability of prosecutorial discretion enjoyed by nearly every other federal agency was applicable to the Commission. And unlike those other agencies, judicial review remains available for decisions solely concluding that the statute had not been violated. Complainants fail to establish that *Commission on Hope* should be disregarded as inconsistent with prior holdings of the Supreme Court and this Court. Rather, it is *Complainants* who urge positions inconsistent with precedent, contesting decades of authority providing (1) that courts should accord deference to controlling Commissioners who provide the rationale for Commission dismissals, and (2) that the Commission possesses prosecutorial discretion to dismiss administrative complaints. Indeed, on that latter point, Complainants

advance the position that in this First Amendment-sensitive area the Commission is *required* to investigate every apparent violation no matter how *de minimis*, stale, or inadvertent. No authority supports this drastic proposed overhaul of federal campaign finance regulation.

In the alternative, even if reviewable, this Court should affirm the dismissal, which readily survives the deferential standard of review. The rationale of the Commissioners who voted not to find reason to believe that New Models violated FECA reflects their thorough review of the records before the Commission, including careful analyses of the organization's documents, statements, and financial activities. It also accords with courts' instructions that FECA be interpreted in a manner that is sensitive to the speech activity regulated by the statute. Those Commissioners' analysis was reasonable and concerns an area in which the Commission's inquiry is necessarily both flexible and accorded heightened deference.

Accordingly, the district court's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews district court orders granting summary judgment *de novo*, and may affirm on any ground. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C.

Cir. 2005); *Jenkins v. Wash. Convention Ctr.*, 236 F.3d 6, 8 n.3 (D.C. Cir. 2001).

II. THIS PROSECUTORIAL-DISCRETION DISMISSAL IS NOT JUDICIALLY REVIEWABLE

A. The District Court Correctly Found that the Controlling Exercise of Prosecutorial Discretion Was Discernible and Covered By *Commission on Hope*

In *Commission on Hope*, this Court held: "[F]ederal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." 892 F.3d at 438 (citing *Chaney*, 470 U.S. at 831, and *Akins*, 524 U.S. at 25). This decision is dispositive here.

Commission on Hope likewise arose from an FEC enforcement matter involving political committee allegations. *Id.* at 441. And it also considered a split-vote dismissal decision in which the controlling Commissioners had determined that the matter "did not warrant further use of Commission resources" and voted against proceeding further on the basis of prosecutorial discretion. *Id.* at 438. The controlling group reasoned, *inter alia*, that "the association named in [the] complaint no longer existed" and had "filed termination papers with the IRS four years earlier." *Id.*

Similarly, the controlling Commissioners here expressly invoked prosecutorial discretion as a distinct basis for the dismissal. (JA133 & n.139; JA156 ("[T]he Controlling Commissioners' invocation of prosecutorial discretion

here did not rely on their interpretation of FECA or case law.").) And they likewise did not merely invoke purported "magic words" (Br. at 18-20), but rather demonstrated that their decision to exercise prosecutorial discretion was based on "a complicated balancing of a number of factors which are peculiarly within its expertise,'" such as "whether agency resources are best spent on this violation or another." *Comm'n on Hope*, 892 F.3d at 439 n.7 (quoting *Chaney*, 470 U.S. at 831).

The controlling Commissioners explained that "proceeding further would not be an appropriate use of Commission resources" for two reasons — both of which are independent of the merits, are supported by the record, and are recognized as appropriate bases for exercising prosecutorial discretion. (JA133 n.139.) First, they found that prosecutorial discretion was warranted due to "the age of the activity" at issue. (*Id.*) Citing the applicable five-year statute of limitations (JA133 n.139 (citing 28 U.S.C. § 2462)), the Commissioners conveyed their staleness concerns about the transactions underlying Complainants' political committee claims, which occurred between January 11, 2012 and October 26, 2012 (JA53, 56, 57, 60, 74, 108 & nn. 24, 28). *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 392-93 (D.D.C. 2017) ("*Hope Below*") (finding that impending statute of limitations was a rational basis for exercising prosecutorial discretion), *aff'd*, 892 F.3d 434 (D.C. Cir. 2018). The

Commissioners also expressly indicated their specific concern about the "staleness of evidence." JA133 n.139 (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 65-66 (D.D.C. 2011)); *see also Nader*, 823 F. Supp. 2d at 66 ("The passage of time, even within the period, will obviously impair investigations.").

Second, the controlling Commissioners found that exercising prosecutorial discretion was also warranted due to "the fact that the organization appears no longer active." (JA133 n.139.) The record supported their finding that New Models ceased operating in 2015 (JA109 & n.32), and the difficulties attendant to investigating and obtaining recovery from a defunct entity are valid reasons for exercising prosecutorial discretion. JA133 n.139 (citing *Nader*, 823 F. Supp. 2d at 65-66 (noting an investigation of an "essentially defunct" organization would, *inter alia*, "encounter difficulties with obtaining relevant documents" (alteration omitted))); *see also Hope Below*, 236 F. Supp. 3d at 396 (recognizing that the defunct nature of an organization is a rational and proper basis for the Commission's exercise of prosecutorial discretion). While Complainants criticize the controlling Commissioners for not explaining in more detail why New Models' defunct nature "blocked relief" (Br. at 20 n.7), it is "common sense" that "the FEC has limited resources, and may have little interest in punishing a group that it knows is unlikely to violate FECA again and possibly could not defray the costs of litigation through the payment of a fine." *Hope Below*, 236 F. Supp. 3d at 396

(discussing *Nader*, 823 F. Supp. 2d at 65); *see also* JA133 n.139 (citing *Nader*, 823 F. Supp. 2d at 65-66).

Indeed, the court below recognized that, if it could "evaluate the Controlling Commissioners' reasons for invoking prosecutorial discretion, the Commissioners' factual bases for their decision are generally considered rational." (JA155.)

That the controlling group's analysis was set forth in a footnote is irrelevant. The Commissioners expressly "exercise[d] . . . [their] prosecutorial discretion" as a basis for their votes not to pursue enforcement and stated their reasons why, which were consistent with the Commission's approach in other matters. (JA133 & n.139 (citing similar concerns from other matters).) This is a legally sufficient invocation of their discretion. Even where, unlike here, an FEC decision is "of less than ideal clarity," *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990), "[i]t is enough that a reviewing court can reasonably discern the agency's analytical path," *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016). While "[d]ivergence from agency precedent demands an explanation," where a reviewing court "can ascertain that the agency has not in fact diverged from past decisions, the need for a comprehensive and explicit statement of its current rationale is less pressing." *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989); *see also ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 408 (D.C. Cir. 2002) ("While the Order does not explicitly invoke the . . . exception, we can reasonably discern the path

from its reasoning and citations.")

And two district courts have agreed that the controlling Commissioners here did not merely recite the "magic words" "prosecutorial discretion" (Br. at 18-20), but rather exercised their prosecutorial discretion based on traditional, appropriate prudential considerations. JA153-56 & n.11; *Citizens for Responsibility & Ethics in Wash. v. Am. Action Network*, No. 18-cv-945 (CRC), --- F. Supp. 3d ---, 2019 WL 4750248, at *10 (D.D.C. Sept. 30, 2019) (finding this case to be one where there was "not a talismanic recitation of the phrase 'prosecutorial discretion,' but reliance by the FEC . . . [on] prudential concerns").

The controlling group's exercise of prosecutorial discretion, as well as the basis therefor, can be readily discerned. The district court correctly held that *Commission on Hope* "is directly on point" and precludes judicial review. (JA152.)

B. The District Court Correctly Rejected Complainants' Attempt to Distinguish *Commission on Hope*

Interpreting FECA and the Administrative Procedure Act ("APA") together, *Commission on Hope* explained a categorical rule: FEC dismissals are generally committed to the agency's unreviewable prosecutorial discretion except for those dismissals based entirely on the FEC's interpretation of FECA, which are reviewable under FECA's judicial review provision. *Comm'n on Hope*, 892 F.3d at 438-442 & nn.6, 11. Applying this binding rule here requires finding the

dismissal unreviewable. Complainants' attempt to escape this inevitable conclusion is unavailing.

First, Complainants argue that the dismissal here is different because the controlling Commissioners explained that they voted against finding reason to believe not only "in exercise of our prosecutorial discretion," but also because they determined "New Models was not a political committee." (JA104, 133.) This is a distinction without a difference.

When the Commission dismisses a complaint based entirely on its determination that no violation occurred, that dismissal is judicially reviewable. *Comm'n on Hope*, 892 F.2d at 441 n.11. But when dismissing based on prosecutorial discretion, the FEC dismisses based on "not only . . . whether a violation has occurred," but also, *inter alia*, "whether agency resources are best spent on this violation or another." *Id.* at 439 n.7 (quoting *Chaney*, 470 U.S. at 831, 832). Put simply, the Commission dismisses *even though* the matter may otherwise have merit.

Here, the controlling group stated: "Given the age of the activity and the fact that the organization appears no longer active, *proceeding further* would not be an appropriate use of Commission resources." (JA133 n.139 (emphasis added).) Obviously there would be nothing to "proceed further" with unless they were referring to an alternative scenario where they instead found reason to believe. In

other words, the controlling Commissioners held in the alternative that, even if they decided the underlying legal determinations differently and found reason to believe that New Models violated FECA, they still would have exercised their prosecutorial discretion to dismiss.

It is clear as a result that whether the controlling Commissioners' exercise of prosecutorial discretion was influenced by their view that a lawsuit alleging that the underlying conduct violated FECA was unlikely to succeed is immaterial. If the controlling Commissioners' decision to exercise prosecutorial discretion was wholly unrelated to their decision on the merits, this Court does in fact know that, even if the Commissioners had agreed with Complainants on the underlying legal determinations, the Commissioners would have nonetheless voted to dismiss based solely on the basis of prosecutorial discretion. And Complainants admit that such a decision is unreviewable under *Commission on Hope*. (Br. at 15.)

If, on the other hand, the controlling Commissioners' view of the merits impacted their decision to exercise prosecutorial discretion, *Commission on Hope* still bars judicial review. Complainants are "not entitled to have the court evaluate . . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." 892 F.3d at 441. Rather, "[t]he law of this circuit rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable action." *Id.* at 442 (quoting *Crowley*

Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 676 (D.C. Cir. 1994)). *Commission on Hope* forecloses review of both *Chaney* dismissals and mixed merits/*Chaney* determinations.

Second, Complainants' argument that all FEC dismissals remain "[r]eviewable agency action" since *Commission on Hope* "only limited review of certain FEC dismissal *reasons*" (Br. at 17, 37-38) reflects an apparent misunderstanding of that decision. Although this Court agreed that the relevant "agency action" is the dismissal of an administrative complaint, from there it parts ways with Complainants' position. *Comm'n on Hope*, 892 F.3d at 437 (citing 52 U.S.C. § 30109(a)(8)(A)).

Chaney established that "agency decisions not to institute enforcement proceedings" are presumptively unreviewable. *Id.* at 439. Since FECA grants the FEC prosecutorial discretion to determine whether to initiate enforcement proceedings, but does not provide a "meaningful standard" to judge the exercise of that discretion, this Court found that "[n]othing . . . overcomes the presumption against judicial review" of FEC dismissals. *Id.* Accordingly, this Court held that FEC dismissals, "to the extent they are committed to agency discretion," are unreviewable agency action. *Id.* at 441. Since "[t]he interpretation an agency gives to a statute is not committed to the agency's unrevewiable discretion," however, the Court explained that FEC dismissals "based entirely" on the agency's

interpretation of FECA are "subject to judicial review to determine whether it is 'contrary to law.'" *Id.* at 441 n.11. In sum, FEC dismissals "based entirely" on the agency's interpretation of FECA constitute reviewable "agency action," but all other FEC dismissals constitute unreviewable agency action. *Id.* at 439-42 & n.11.

Since the dismissal here was not "based entirely" on the controlling Commissioners' interpretation of FECA, that dismissal is a "non-reviewable action." (JA154.) Under *Commission on Hope*, *Crowley*, and other binding authority, the Court thus cannot carve out the controlling Commissioners' FECA determinations for judicial review. *Comm'n on Hope*, 892 F.3d at 442. And *Chaney* does not mandate a different result. (*Contra* Br. at 37-38.) Indeed, *Chaney* itself involved an agency's legal conclusion that it lack jurisdiction to pursue enforcement and a holding in the alternative that, even if it had jurisdiction, it would exercise its prosecutorial discretion. 470 U.S. at 824, 828.

Complainants' reliance on *UAW v. Brock*, 783 F.2d 237 (D.C. Cir. 1986) (Br. at 17, 18, 30), to argue otherwise is misplaced. As *Crowley* recognized, an intervening Supreme Court decision, *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), effectively overruled *Brock* in relevant part. *Crowley*, 37 F.3d at 676; *see also AFL-CIO v. Pope*, 808 F. Supp. 2d 99, 109 (D.D.C. 2011) (recognizing "[s]ubsequent D.C. Circuit and Supreme Court decisions have substantially narrowed the viability of [*Brock*]"), *aff'd*, No. 11-

5308, 2012 WL 1450584 (D.C. Cir. Apr. 12, 2012). While *Crowley* recognized that an enforcement decision announcing a broad, generally applicable agency enforcement policy may be judicially reviewable, it held that, for "single-shot non-enforcement decision[s]," *ICC* required holding that the Court cannot "carv[e] reviewable legal rulings out from the middle of non-reviewable actions." *Crowley*, 37 F.3d at 676 (emphasis omitted); *see also Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 343 (D.C. Cir. 2002) ("[T]hat a district court might have jurisdiction over an agency's articulation of its general enforcement policy, [does not] support the . . . argument that district courts may review any agency legal interpretation made in the context of otherwise unreviewable individual adjudications.").

There can be no serious argument that the instant matter was anything other than just such a single-shot non-enforcement decision. While the controlling Commissioners are "treated as if they were expressing the Commission's rationale for dismissal" "for purposes of judicial review" in a particular matter, *Commission on Hope*, 892 F.3d at 437, the controlling statement of reasons is not binding on the Commission in future enforcement matters, *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). And a single enforcement decision certainly does not establish a pattern or practice. Moreover, as the district court held, "the Controlling Commissioners expressly rejected the imposition of bright line rules in

the political committee context." (JA157-58.) Notably, future respondents could not evade liability by relying on this single controlling statement. *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1039 (D.C. Cir. 2008); *ATT v. FCC*, 454 F.3d 329, 332-34 (D.C. Cir. 2006).

Judicial review does remain available if the agency "consciously and expressly adopt[s] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," *Commission on Hope*, 892 F.2d at 440 n.9 (quoting *Chaney*, 470 U.S. at 833 n.4), but Complainants conspicuously have not even asserted that the dismissal here was part of such an abdication. Nor could they prove one. *Commission on Hope* rejected Complainants' assertion that the Commission has abdicated enforcing political committee regulations, finding that Complainants' "own submissions show that the Commission routinely enforces the election law violations alleged in [their] administrative complaint." *Id.* The district court here did so as well. (JA158-59.) And the Commission has in the interim enforced against an entity for violation of FECA's political committee requirements through entry of a conciliation agreement.[3]

Third and finally, Complainants argue that, when conducting its careful analysis of whether *Commission on Hope* applied here, the district merely applied

[3] Matter Under Review ("MUR") 6538R (Americans for Job Security) (Sept. 9, 2019), https://www.fec.gov/files/legal/murs/6538R/19044477418.pdf.

"dicta in a footnote." (Br. at 16.) The district court's analysis, however, belies this assertion, and footnotes are no less binding than text in subsequent cases. *E.g.*, *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 840-41 (2009) (reversing lower court for failing to accord footnote in prior Supreme Court opinion binding effect). The portions of *Commission on Hope* that the court below relied on to conclude that judicial review was unavailable here did not address questions "merely lurk[ing] in the [*Commission on Hope*] record, neither brought to the attention of the court nor ruled upon." *Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye*, 828 F.3d 969, 975 (D.C. Cir. 2016) (internal quotation marks omitted). Those portions responded to and ruled upon questions expressly raised by the plaintiffs there, the decision below in that case, and the dissent. This Court's description of the categorical rule in the opinion is binding. The Court found that describing in detail the operation of the rule was necessary to its resolution of the appeal. *E.g.*, *Comm'n on Hope*, 892 F.3d at 440 (finding that "several additional subjects *need* to be addressed" (emphasis added)). It would be an odd state of affairs if, when explaining what the Court's holding actually is, that discussion is deemed unnecessary dicta.

Because *Commission on Hope* is not distinguishable, it applies and bars judicial review of the dismissal here.

C. *Commission on Hope* Does Not Conflict with Any Decision by the Supreme Court or This Court

Complainants argue that, even if *Commission on Hope* applies here, this

Court must nevertheless disregard it because it conflicts with prior Supreme Court and Circuit precedent. (Br. at 21.) However, "courts must be careful when invoking this principle, lest they too readily discard a later precedent that distinguished—or is distinguishable from—an earlier decision." *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011).

None of the authorities Complainants cite made a binding holding that a dismissal decision based on prosecutorial discretion is judicially reviewable. (Br. at 21-27 (discussing *Akins*, *DCCC*, *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)).) The conflict required to permit disregarding an earlier opinion must arise from the prior decision's holdings. *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1105 (D.C. Cir. 2017) ("[B]inding circuit law comes only from the *holdings* of a prior panel," not dicta. (internal quotation marks omitted)).

1. *Commission on Hope* Does Not Conflict with *Akins*

Commission on Hope is consistent with *Akins*. In *Akins*, the Commission found no probable cause to believe regarding the complainant's first claim for violation of political committee requirements, and found probable cause to believe regarding their second claim for prohibited corporate contributions but nonetheless exercised prosecutorial discretion and dismissed the complaint. 524 U.S. at 16-17; *Comm'n on Hope*, 892 F.3d at 438 n.6 (citing *Akins*, 524 U.S. at 25; *Akins v. FEC*,

736 F. Supp. 2d 9, 13-15 (D.D.C. 2010)). As this Court noted, the first claim — which was the only one considered by the Supreme Court — was agency action "based entirely on its interpretation of the statute." *Id.* at 441 n.11. The Commission argued that the complainants lacked standing because, rather than dismissing their claim based on a legal finding it was not meritorious, the agency *could have* found that claim meritorious and nonetheless exercised its prosecutorial discretion like it did for the complainants' other claim. *Akins*, 524 U.S. at 25.

While recognizing the FEC could lawfully dismiss a meritorious claim in exercise of its prosecutorial discretion, the Supreme Court held "that fact does not destroy" complainants' standing to challenge the dismissal of the claim actually before the Court, which was based exclusively on the Commission's determination that claim was not meritorious. *Id.* And it did so specifically because "we cannot know that the FEC *would have* exercised its prosecutorial discretion in this way." *Id.* (emphasis added). In *Commission on Hope* (as here), by contrast, the Commission already had exercised its prosecutorial discretion precisely in that way on the claim before the Court. The Supreme Court expressly distinguishing *Commission on Hope*-type dismissals as a basis for finding standing to challenge the dismissal before it underscores that *Akins* did not make a binding holding regarding prosecutorial discretion dismissals.

When finding complainants had standing to challenge the claim actually

before the Court, *Akins* reasoned that aggrieved persons generally have standing to challenge "discretionary" agency action predicated on legal error. 524 U.S. at 25. And because FECA provides for judicial review to determine whether a dismissal was "contrary to law," there was no exception under *Chaney* merely because "this case involves an agency's decision not to undertake an enforcement action." *Id.* at 26. The Supreme Court did not purport to address whether judicial review would be available for the dismissal of a meritorious claim based on *prosecutorial* discretion. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedents." (internal quotation marks omitted)). Even if such a dismissal was unreviewable, the *Akins* complainants' injury was still potentially redressable because the Commission could instead decide on remand to pursue enforcement against the respondents.

Significantly, while *Akins* distinguished *Chaney* when finding the dismissal at issue judicially reviewable, it favorably cited *Chaney* in the context of Commission dismissals of meritorious claims based on prosecutorial discretion. *Akins*, 524 U.S. at 25 ("Cf. App. to Pet. for Cert. 98a (deciding to exercise prosecutorial discretion, see [*Chaney*], and 'take no further action' on § 441b allegation against [respondent]).").

But even if *Akins* did somehow find such prosecutorial discretion dismissals

reviewable, this would not constitute the binding holding necessary before this Court can disregard *Commission on Hope*, which, unlike *Akins*, did have such a dismissal before it. (Br. at 16 (citing *Gersman v. Grp. Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992)).)

2. *Commission on Hope* Does Not Conflict with Circuit Precedent

For similar reasons, Complainants also fail to establish that the circuit authority they cite conflicts with *Commission on Hope*. (Br. at 21 (citing *DCCC*, *Chamber of Commerce*, and *Orloski*).) None of those cases reviewed a Commission decision not to proceed with an enforcement matter that was explained as an exercise of prosecutorial discretion. *DCCC*, 831 F.2d at 1133 (reviewing an unexplained Commission dismissal); *Chamber of Commerce*, 69 F.3d at 603 (reviewing a challenge to a Commission rule); *Orloski*, 795 F.2d at 160 (reviewing a dismissal based on a "no reason to believe" finding). Therefore, none decided the precise issue addressed in *Commission on Hope*.

In *DCCC*, for example, this Court considered an unexplained dismissal from a split vote, finding the mere fact that such a vote occurred did not necessarily mean that the Commission intended to invoke its prosecutorial discretion. 831 F.2d at 1133-35. In *Commission on Hope*, by contrast, the dismissal was expressly based on an invocation of prosecutorial discretion and adequately explained. Although *DCCC* "presum[ed]" that a properly explained decision invoking

prosecutorial discretion would be reviewable, it did not definitively conclude that was the case. *Id.*; *see also id.* at 1135 n.5 ("arguendo, assuming reviewability"). *DCCC*'s holding was that Commission dismissals must be sufficiently explained so courts can discern the agency's path, *id.* at 1134; the case determined that they are "reviewable" only in that sense. *Commission on Hope* is consistent with that holding.

Complainants are similarly mistaken in arguing that *Commission on Hope* conflicts with *Chamber of Commerce*. That case considered whether a 3-to-3 vote on a draft advisory opinion regarding an FEC regulation deprived a plaintiff of standing for a pre-enforcement court challenge to the regulation. 69 F.3d at 603. According to the explanations for their advisory opinion votes, four Commissioners believed the proposed activity would violate the regulation, but one of them "believed [the regulation] should be withdrawn," and two Commissioners believed the proposed activity did not violate the regulation. *Id.* Because the Commission lacked the four votes necessary to issue an advisory opinion, the FEC's briefs argued that the appellants lacked standing for their pre-enforcement challenge because there was no "present danger" of the Commission pursuing enforcement against appellants, which likewise required four votes. *Id.*

Since the regulation nonetheless remained in force, however, this Court held that the threat of enforcement remained due to the possibility Commissioners could

change their mind and enforce the regulation against appellants. *Id.* This fact, combined with the appellants already altering their behavior to conform to the regulation and the FEC admitting it did not recommend violating the regulation, "seem[ed] to confer standing on appellants." *Id.*

In addition, this Court found that the possibility of a theoretical administrative complainant challenging a theoretical Commission dismissal for the reasons stated in the Commissioners' explanations of their advisory opinion votes further supported finding standing for appellants' pre-enforcement challenge. *Id.* The Court reasoned "it would be easy to establish that such agency action was contrary to law" because "the Commission's refusal to enforce would be based not on a dispute over the meaning or applicability of the rule's clear terms, but on the Commission's unwillingness to enforce its own rule." *Id.* So "even without a Commission enforcement decision," the Court found appellants were potentially "subject to litigation challenging the legality of their actions if contrary to the Commission's rule." *Id.*

The Commissioner statement this Court specifically relied on explained the view that the regulation was *legally unenforceable* — not that the Commissioner was exercising "prosecutorial discretion" as in *Commission in Hope*. Statement of Comm'r Lee Ann Elliott Regarding Advisory Op. Request 1994-4 (Oct. 26, 1994), https://www.fec.gov/files/legal/aos/1994-04/1079290.pdf. A dismissal based only

on her belief the regulation was legally unenforceable because the Commission lacked the statutory authority for the regulation and enforcing it against appellants would violate the Constitution is, *a fortiorari*, a dismissal based entirely on a legal determination that a claim under the regulation lacked merit — which *Commission on Hope* agreed would be judicially reviewable.

To the extent *Chamber of Commerce* can nonetheless be read as holding that any actual exercise of prosecutorial discretion to dismiss a meritorious complaint is "*per se* 'contrary to law'" (Br. at 25), subsequent Supreme Court authority expressly recognized the Commission could lawfully exercise prosecutorial discretion to dismiss a meritorious claim. *Akins*, 524 U.S. at 25; *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("*Am. for Tax Reform*") ("The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion."). And "it is black letter law that a circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988).

Finally, *Orloski* also does not conflict with *Commission on Hope*. It did not "recognize[] that all FEC dismissals are subject to review to determine whether they are contrary to law." (Br. at 25.) *Orloski* involved a dismissal based on a unanimous vote that "there was 'no reason to believe that the Act had been

violated.'" 795 F.2d at 160. It did not even mention a dismissal of a potentially meritorious claim based on *prosecutorial* discretion, much less make any binding holdings regarding judicial review of such dismissals.

In addition, *Commission on Hope* expressly found: "FECAs 'contrary to law' formulation . . . reflects APA § 706(2)(A), which requires the court to 'hold unlawful and set aside agency action' that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]'" *Comm'n on Hope*, 892 F.3d at 437. And the Court expressly cited *Orloski*, as well as *Hagelin*, as the basis for its finding. *Comm'n on Hope*, 892 F.3d at 437 n.3. Yet *Hagelin* exclusively reviewed for "abuse of discretion" a Commission finding of "no reason to believe" the respondent violated FECA based solely on the Commission's specific application of an otherwise permissible interpretation of the statute. A dismissal based on a finding that there is "no reason to believe" or "no probable cause to believe" based on application and interpretation of FECA is simply not the same as a finding that the respondents likely did violate the law but the matter should nevertheless be dismissed for prosecutorial discretion. (*Contra* Br. at 25-26.)

Accordingly, when *Commission on Hope* was drawing a distinction between prosecutorial discretion dismissals not subject to "abuse of discretion" review and dismissals based entirely on the Commission's "interpretation of FECA" that were subject to that review, the latter category merely pertained to dismissals based

entirely on a Commission finding that there was "no reason to believe" or "no probable cause to believe" that the respondent violated the Act (as in *Orloski* and *Hagelin*) — not on whether *that* determination was, in turn, itself based only on the Commission's impermissible statutory interpretation or, as in *Hagelin*, based only on the Commission's specific application of an otherwise permissible interpretation of the Act. Accordingly, not only did *Orloski* fail to make the requisite binding holding, *Commission on Hope* did not even conflict with *Orloski*'s dicta.

In sum, Complainants have not cited any precedent that conflicts with *Commission on Hope*, which thus remains binding here.

D. Complainants' Arguments that *Commission on Hope* Was Wrongly Decided Are Misplaced

Complainants devote the majority of their brief to arguing that *Commission on Hope* was wrongly decided. (Br. at 27-53.) But even if the panel here would have elected a different approach if writing on a blank slate, it remains bound by *Commission on Hope*. "One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996); *see also United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) ("Whatever the clean-slate merits of the [appellants'] construction, we as a panel are not at liberty to adopt it" since "one panel cannot overrule another." (internal citations omitted)). In any event, Complainants'

arguments regarding deference, the First Amendment, purported Commissioner bad faith, and FECA's structure fail to provide grounds for departing from this Court's previous ruling.

1. Complainants' Position Is Contrary to the Well-Established Deference Accorded Controlling Groups

It is Complainants' position, not the court below, that is in serious conflict with circuit precedent. Their argument that a controlling statement of reasons in a split-vote dismissal does not provide the agency's reasoning (Br. 28-30 & n.14) runs contrary to long-standing circuit precedent. While true that a controlling statement does not bind the agency in future matters, *Common Cause*, 842 F.2d at 449 n.32, "[s]ince those Commissioners constitute a controlling group for purposes of the decision [at issue], their rationale necessarily states the *agency*'s reasons for acting as it did." *NRSC*, 966 F.2d at 1476 (emphasis added). This Court has reiterated that for nearly three decades. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016); *FEC v. NRA*, 254 F.3d 173, 185-86 (D.C. Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000) ("*Sealed Case*"); *Common Cause*, 842 F.2d at 449; *DCCC*, 831 F.2d at 1134-35.

In addition to *Commission on Hope*, Complainants explicitly ask this Court to overrule *Sealed Case* and *NRSC* (Br. at 29 n.14), which both held that a controlling statement deserves deference, even though it is not joined by four or more Commissioners. *Sealed Case*, 223 F.3d at 780; *NRSC*, 966 F.2d at 1476.

While Complainants rely upon *Kisor v. Wilkie* (Br. at 29 n.14), *Kisor* expressly held that a regulatory interpretation does *not* need to be binding in future cases to warrant deference. 139 S. Ct. 2400, 2416-17 & n.6 (2019). Complainants also cite *United States v. Mead Corp.*, 533 U.S. 218 (2001), but this Court has already reaffirmed the validity of *Sealed Case* in a post-*Mead* decision. *NRA*, 254 F.3d at 184-86.

The dismissal here deserves deference because it was "analogous to a formal adjudication." *Sealed Case*, 223 F.3d at 780; *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013) ("What the [Complainants] need[], and [have] fail[ed] to produce, is a single case in which a general conferral of rulemaking or *adjudicative authority* has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." (emphasis added)). In any event, the dismissal here has legal force, despite the split vote, because it resolved the underlying matter and precludes further enforcement proceedings against New Models. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316, 319 (D.C. Cir. 2015).

Sealed Case and *NRSC* thus remain good law. *Citizens for Responsibility & Ethics in Wash v. FEC*, 209 F. Supp. 3d 77, 85 n.5 (D.D.C. 2016) ("*Am. Action Network*"). Complainants' position is predicated upon overruling multiple prior decisions and obviously out-of-step with this Court's jurisprudence.

2. Complainants Fail to Establish that FEC Commissioners Rotely Cite Prosecutorial Discretion in Bad Faith

Complainants' assertion that Commissioners will use prosecutorial discretion as a pretext to improperly immunize dismissals from judicial review (Br. at 12, 18, 30, 31, 45) lacks legal and factual support. As a matter of law, their arguments contravene the well-established "presumption of honesty and integrity in those serving as [agency] adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Complainants advocate the opposite presumption: that the unreviewability of prosecutorial discretion will cause Commissioners to purposefully misrepresent the bases for their votes. However, this Court has held: "We *must* presume an agency acts in good faith." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("prosecutorial decisions" of Executive Branch appointees are afforded a "presumption of regularity"); *PETA v. Dep't of Ag.*, 918 F.3d 151, 157 (D.C. Cir. 2019); *Friedman v. FAA*, 841 F.3d 537, 541 n.1 (D.C. Cir. 2016).

That certain Commissioners have exercised their prosecutorial discretion when dismissing some matters since *Commission on Hope* (Br. at 30-31 nn.16-17) does not demonstrate that they did so in bad faith. The Supreme Court and this Court previously held that the Commission could lawfully exercise its prosecutorial discretion. *Akins*, 524 U.S. at 25; *Am. for Tax Reform*, 475 F.3d at 340. Moreover, the Commission has continued to pursue enforcement of political

committee and other violations. Indeed, in the 2019 fiscal year after *Commission on Hope*, the FEC obtained agreements or settlements or imposed fines in 192 enforcement matters for over $2.7 million in civil penalties, the highest amount in over 10 years.[4] The Commission has also continued to dismiss matters based solely on a "no reason to believe" finding, which are judicially reviewable under *Commission on Hope*, including in matters with political-committee issues.[5] Contrary to Complainants' suggestion (Br. at 30-31 & n.17) that two particular Commissioners will immunize statutory interpretation, that group of Commissioners justified dismissal of at least thirteen matters after *Commission on Hope* without relying on prosecutorial discretion.[6]

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[4] FEC, *FEC Enforcement Statistics 1997-2019* (last updated Oct. 17, 2019), https://transition.fec.gov/press/bkgnd/documents/enforcementstats1975to2019_001.pdf. Any matters currently under investigation cannot be disclosed. 52 U.S.C. § 30109(a)(12).

[5] *See* MURs 7309/7399 (Crowdpac, Inc.) (June 7, 2019), https://www.fec.gov/files/legal/murs/7309/19044417414.pdf; MUR 7345 (Providence Democratic Comm.) (Feb.8, 2019), https://www.fec.gov/files/legal/murs/7345/19044456613.pdf.

[6] *See* Statements of Reasons of Comm'rs Matthew Petersen and Caroline Hunter in MUR 6848 at 2 n.7 (Friends of George Demos) (Aug. 30, 2019), https://eqs.fec.gov/eqsdocsMUR/6848_2.pdf; MUR 6932 (Hillary Rodham Clinton) (Aug. 30, 2019), https://eqs.fec.gov/eqsdocsMUR/6932_1.pdf; MUR 7006 (Heaney for Cong.) (Aug. 30, 2019), https://eqs.fec.gov/eqsdocsMUR/7006_2.pdf; MURs 7304/7331 (Hillary Victory Fund) (Aug. 30, 2019), https://eqs.fec.gov/eqsdocsMUR/7331_2.pdf; MUR 7432 (John James for Senate, Inc.) (Aug. 30, 2019), https://eqs.fec.gov/eqsdocsMUR/7432_2.pdf; MUR 7416 (Unknown Respondent) (Aug. 29, 2019), https://eqs.fec.gov/eqsdocsMUR/7416_1.pdf; MURs 6789 (Zinke

Significantly, as discussed above, *Commission on Hope* recognized that, if the Commission did cease to enforce campaign law in the future (Br. at 18, 30), judicial review would be available. *Comm'n on Hope*, 892 F.3d at 440 n.9 (review available where an agency had "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." (quoting *Chaney*, 470 U.S. at 833 n.4)).

It also bears repeating that, despite Complainants' repeated attestations to the contrary (Br. at 12, 18, 34), *Commission on Hope* does *not* bar all future review of FEC dismissals. Unlike most agencies' non-enforcement decisions, FEC dismissals based entirely on a no-violation determination are reviewable. *Comm'n on Hope*, 892 F.3d at 411 n.11. So FECA's very limited private cause of action provision continues to apply where appropriate. (*Contra* Br. at 32.)

Accordingly, Complainants fail to substantiate their assertion that *Commission on Hope* is the harbinger of unmitigated nonenforcement.

3. Discretionary FEC Dismissals Do Not Violate Complainants' First Amendment Rights

Complainants' argument that they have a First Amendment right to receive

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for Cong.) and 6852 (Special Operations for Am.) (May 28, 2019), https://eqs.fec.gov/eqsdocsMUR/6789_1.pdf; MURs 6781/6786/6802 (Nat'l Republican Cong. Comm.) (May 22, 2019), https://eqs.fec.gov/eqsdocsMUR/6781_2.pdf; MUR 6928 (Richard John "Rick" Santorum) (May 20, 2019), https://eqs.fec.gov/eqsdocsMUR/6928_2.pdf.

information required to be disclosed under FECA, which the Commission then violates when exercising its prosecutorial discretion, is also unfounded. (Br. at 50-53.) Though FECA's disclosure provisions further the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace," *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (internal quotation marks omitted), Complainants claim a right to information whose availability under FECA is a matter of dispute. Whether the FEC's decision was contrary to law is the question before the Court and the answer to that question determines whether Complainants or the public were potentially deprived of information to which they were entitled, not the other way around. *See Van Hollen*, 811 F.3d at 494 ("Just because one of [the statute]'s purposes (even chief purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive."). Complainants' backwards, results-oriented approach places the cart before the horse. The controlling group reasonably concluded here that the subject organization did not trigger the public disclosure regime. *See infra* Part III. Complainants' approach perversely purports to require investigations of all speakers to comply with the First Amendment and should be rejected. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981) (holding that, because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute); *cf. Van*

Hollen, 811 F.3d at 499 ("By tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate.").[7]

The cases involving other contexts cited by Complainants are inapposite. While the First Amendment may protect the right to receive information from government interference in certain circumstances, that right "presupposes a willing speaker." *Gregg v. Barrett*, 771 F.2d 539, 547 (D.C. Cir. 1985) (quoting *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). A dismissal based on prosecutorial discretion in no way prevents or otherwise interferes with a person's ability to provide information voluntarily. The prior restraint cases Complainants rely on are thus inapposite, as are those involving government interference, in a public forum or otherwise, with communications between a willing speaker and a willing listener. *E.g.*, *compare* Br. at 50-52, *with Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989)

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[7] The vacated decision in *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated* 524 U.S. 11 (1998), does not support Complainants' position either. (Br. at 50, 53.) When that decision mentioned potential "First Amendment concerns," it was referring to an aspect of the Commission's interpretation of what constitutes a "political committee," which focused the major purpose inquiry on the purpose of the organization itself not merely the purpose of particular disbursements. *Akins*, 101 F.3d at 744. The Commission's ability to occasionally exercise its prosecutorial discretion due to the particularized circumstances of an individual case was not referenced. Notably, aspects of the Commission's major purpose interpretation that were rejected in the vacated *Akins* opinion have since been widely upheld, *e.g.*, *Real Truth*, 681 F.3d at 556, and were uncontested below.

("[T]he regulations we have found invalid as prior restraints . . . gave public officials the power to deny use of a forum in advance of actual expression."). Moreover, judicial review may be available for an as-applied challenge if a complainant was a victim of unconstitutional selective prosecution. *See Wayte v. United States*, 470 U.S. 598, 608 (1985).

4. FECA Does Not Mandate Investigations of Every Apparent Violation

FECA does not withdraw all prosecutorial discretion from the Commission until after an investigation has been completed and the agency is on the cusp of initiating a civil action. It simply directs that the Commission "shall" take specific actions "***if***" it "determines, by an affirmative vote of 4" or more Commissioners, to make certain predicate legal determinations. 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i) (emphasis added). Complainants remarkably contend that the Commission *must* proceed just short of filing a civil action, through an investigation, contested briefing, and conciliation efforts, for every apparent violation. (Br. at 29-30 nn.13 & 15, 39-40.) No matter how small-scale, inconsequential, or difficult to prove the allegations, or how blameless a respondent may be. But FECA's direction that the Commission "shall" undertake actions if it makes determinations at various junctures does not "constrain the Commission's discretion whether to make those legal determinations in the first instance." *Comm'n on Hope*, 892 F.3d at 439. FECA simply does not compel the Commission to pursue all potentially

meritorious allegations of campaign finance violations. *Akins*, 524 U.S. at 25; *Am. for Tax Reform*, 475 F.3d at 340.

Ultimately, FECA provides "the Commission *may* . . . institute a civil action[.]" 52 U.S.C. § 30109(a)(6)(A). "To state the obvious, the word 'may' imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action." *Comm'n on Hope*, 892 F.3d at 439. FECA thus does not cabin the Commission's prosecutorial discretion in the manner Complainants suggest.

By way of contrast, *Chaney* distinguished *Dunlop v. Bachowski*, 421 U.S. 560 (1975), where the Supreme Court found the agency's decision not to enforce judicially reviewable because, *inter alia*, "[t]he statute being administered quite clearly withdrew discretion from the agency" to decline to pursue certain meritorious complaints, *i.e.* removed the agency's prosecutorial discretion in certain cases. *Chaney*, 470 U.S. at 834.[8]

Nor can FECA's "contrary to law" standard provide the requisite "law to apply" in the discretionary dismissal context. Complainants' arguments to the contrary (Br. at 42) "confuse[] the presence of a standard of review with the existence of law to apply." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003).

[8] *Dunlop*, 421 U.S. at 563 n.2 ("The Secretary *shall*" in certain circumstances "bring a civil action[.]" (quoting 29 U.S.C. § 482(b)) (emphasis added)).

If such a general review provision provided the requisite meaningful limitation and standard for overcoming the presumption against reviewability of agency non-enforcement decisions, then "no agency action could even be committed to agency discretion by law." *Id.*; *also compare* 52 U.S.C. § 30109(a)(8)(A), *with* 5 U.S.C. § 706(2)(A).

Fundamentally, Complainants' argument misconceives the relative domains of expertise of the FEC and the courts. While courts may have expertise in determining whether the FEC *may* proceed with an enforcement claim, the FEC determines whether the agency *should* pursue a particular enforcement claim. That latter determination is in the heartland of the FEC's expertise and regulatory authority. *Chaney*, 470 U.S. at 831-32. By considering each case individually and pursuing enforcement matters where appropriate, the Commission operates as *Chaney* intended.

With the four-vote requirement, Congress was generally guarding *against* the risk of partisan or ill-considered use of enforcement powers. *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); *Pub. Citizen*, 839 F.3d at 1171 (explaining that "unlike other agencies — where deadlocks are rather atypical — [the Commission] will regularly deadlock as part of its *modus operandi*"); *see also Chaney*, 470 U.S. at 832 ("[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's

liberty or property rights."). "Congress vested enforcement power in the FEC, carefully establishing rules that tend to *preclude* coercive Commission action in a partisan situation, where the Commission, itself statutorily balanced between the major parties, . . . is evenly split." *Sealed Case*, 223 F.3d at 780 (emphasis added). By providing in FECA that it takes four Commissioner votes to proceed on an enforcement matter, but only three to cause a file to be closed, Congress sought to ensure that the agency would not "provide room for partisan misuse." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). Whether that design is considered a feature, as Congress understood it, or a defect, as Complainants do, a dismissal resulting from an absence of a majority furthers the Congressional intent of requiring that any federal campaign finance enforcement be the product of the Commissioners' bipartisan expertise.

Given its emphasis on bipartisan consensus, Congress likely did not intend for potentially politically-motivated administrative complainants to act as co-equal enforcers of federal campaign finance law, which governs constitutionally-protected political activity. Complainants thus greatly overstate their role under FECA. (*E.g.*, Br. at 32-33.) Had Congress intended to provide for citizen suits upon the mere election of the FEC not to proceed as a matter of prosecutorial discretion, it could easily have done so. Many other federal statutes permit citizen suits upon the mere declination of the relevant federal agency to pursue

enforcement. *E.g.*, 42 U.S.C. § 2000e-5(f)(1) (Equal Employment Opportunity Commission); 33 U.S.C. § 1365 (Environmental Protection Agency); 31 U.S.C. § 3730 (False Claims Act). Complainants' reliance on statutory schemes providing for "[e]nforcement by private attorneys general" merely underscores, rather than undercuts, how divorced their arguments are from FECA's actual text.

In stark contrast to private attorneys general provisions, FECA vests the Commission with "exclusive jurisdiction with respect to the civil enforcement of [the Act]." 52 U.S.C. § 30106(b)(1). Private parties cannot seek relief for an alleged FECA violation directly in court, but rather are required to file a complaint with the Commission, upon which the Commission determines whether to proceed. *Perot v. FEC*, 97 F.3d 553, 557-59 (D.C. Cir. 1996). The agency has the unreviewable authority to conciliate with all respondents identified in administrative complaints. *E.g.*, *Citizens for Responsibility & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33, 40-44 (D.D.C. 2018). And while complainants can seek judicial review of a dismissal, the sole remedy the Court may grant is a declaration "that the dismissal of the complaint or the failure to act is contrary to law" and an order "direct[ing] the [FEC] to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If — and only if — the court finds the dismissal rationale to be contrary to law *and* the Commission fails to conform, does Congress then grant the administrative complainant a private right of action against

respondents. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

These numerous procedural steps set a very high bar in contrast to more extensive private attorneys general provisions, thereby demonstrating that Congress intended private FECA suits to be extremely rare. This is with good reason. The FEC is not like the other agencies cited by Complainants. (*E.g.*, Br. at 44.) "Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). While the Constitution requires the FEC to conduct enforcement proceedings in a manner sensitive to respondents' First Amendment rights, *e.g.*, *id.*, as private individuals, complainants are not so bound. FECA's private cause of action thus must be narrowly construed to avoid "political opponents . . . fil[ing] charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage." *Id.* at 178 (internal quotation marks omitted). Complainants worry that private claims may not be brought if the Commission "lawfully decides a complaint lacks merit" (Br. at 48), but preventing private partisans from filing meritless complaints against each other was the statutory design.

Finally, Complainants' argument that the FEC acts as a complete adjudicator, not a prosecutor runs contrary to FECA. (Br. at 48.) The Commission has no authority to impose penalties or any other remedy on its own through its ordinary enforcement procedures. If the Commission is unable to enter into a conciliation agreement, it must file a *de novo* civil action. 52 U.S.C. § 30109(a)(6)(A). Moreover, although an enforcement matter may be initiated by the filing of an administrative complaint, the FEC does not purport to be acting on a complainants' behalf in enforcement proceedings or in any subsequent civil enforcement action. The Commission was not here engaging in "determining the merits of a legal controversy among adverse parties," like the adjudication between "pipelines" and "producers" in *Burlington Resources Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008). The FEC was instead reviewing for potential public enforcement an allegation of violation that could lead at most to a "widely shared" injury. *Akins*, 524 U.S. at 24-25.

* * *

The court below correctly found the controlling statement was unreviewable under *Commission on Hope*.

III. IN THE ALTERNATIVE, THE DISMISSAL WAS NOT CONTRARY TO LAW

A. If Reviewable, This Court Should Address the Merits

In the unlikely event this Court deems the dismissal reviewable, a remand

would not be necessary. The merits were fully briefed below, and "[t]he agency record is before [this Court] now just as it would be before the district court on remand." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 n.* (D.C. Cir. 2012). "[T]he district court has no comparative advantage in reviewing agency action for arbitrariness and capriciousness," *id.*; and "[this Court's] review of the district court's decision post-remand would be *de novo*," *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 n.4 (D.C. Cir. 2013). Accordingly, if review is appropriate, it is so now for purposes of efficiency. *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

B. Deferential Contrary to Law Review

Dismissal of an administrative complaint cannot be disturbed unless it was "contrary to law," 52 U.S.C. § 30109(a)(8)(C), *i.e.*, based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. This standard simply requires that the Commission's decision was "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981).

C. The Dismissal Was Not Contrary to Law

Even if, *arguendo*, judicial review is appropriate in this case, dismissing the administrative complaint was not contrary to law and thus must be affirmed. Since the controlling Commissioners' analysis rested on two independent grounds (JA122 n.95) — the dismissal should be affirmed if either basis is found reasonable.

1. The Controlling Commissioners' Interpretation of FECA's Statutory Threshold Was Reasonable

An organization is a "political committee" only if it "receives contributions" or "makes expenditures" in excess of $1,000 in a calendar year.[9] 52 U.S.C. § 30101(4)(A). The term "political committee," as well as the phrase "for the purpose of . . . influencing" included in FECA's definitions of "contribution" and "expenditure," are ambiguous. *Buckley*, 424 U.S. at 77, 79, 80. The controlling Commissioners' interpretation that making "contributions" to independent-expenditure-only political committees should not be treated as making

[9] Complainants did not contest, and thus have waived the right to challenge, the controlling Commissioners' conclusion that New Models did not "receive[] contributions" in excess of $1,000 (JA120-21). *Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018). Only New Models' contributions to other groups are at issue.

"expenditures" for purposes of the statutory threshold for "political committees" was reasonable.

First, the controlling Commissioners recognized that, despite their similar definitions, "the Act differentiates between 'contributions' and 'expenditures' throughout its provisions." (JA122.) Rather than finding "contributions" to super PACs to be "expenditures," they thought "the better course is to maintain the distinction between [the terms] that exists throughout the Act, Commission regulations, and case law." (*Id.* & n.93.) FECA's coordinated expenditure provisions support the controlling Commissioners' conclusion that a single transaction should not be deemed both an expenditure and a contribution by the same entity. 52 U.S.C. § 30116(a)(7)(C)(ii).

Second, the First Amendment concerns for regulating contributions and expenditures have been viewed as different. *Buckley*, 424 U.S. at 21. And since super PACs do not make contributions to candidates and instead make independent expenditures, which "do not give rise to corruption or appearance of corruption," any potential corruption concern from contributions to such groups is further attenuated. (JA122 n.92 (quoting *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)).)

Third, the controlling Commissioners reasonably interpreted FECA's $1,000 expenditure threshold for political committees to serve as a dividing line "to

distinguish between ordinary contributors and political committees" (JA120), and is consistent with *Buckley*, which explained:

> Some partisan committees groups within the control of the candidate or primarily organized for political activities will fall within [the disclosure provision governing non-political committees] because their contributions and expenditures fall in the $100-to-$1,000 range. Groups of this sort that do not have contributions and expenditures over $1,000 are not "political committees" within the definition in § 431(d) [(now § 30101(4)(A))] . . . .

424 U.S. at 79 n.107. Since the Supreme Court interpreted "expenditure" for purposes of the disclosure provision for non-political committees to only reach independent expenditures, *id.* at 80, "expenditure" for purposes of the statutory definition of "political committee" reasonably could be interpreted in the same way, *i.e.*, to apply only to independent expenditures.

2. The Controlling Commissioners Reasonably Applied the Major Purpose Test

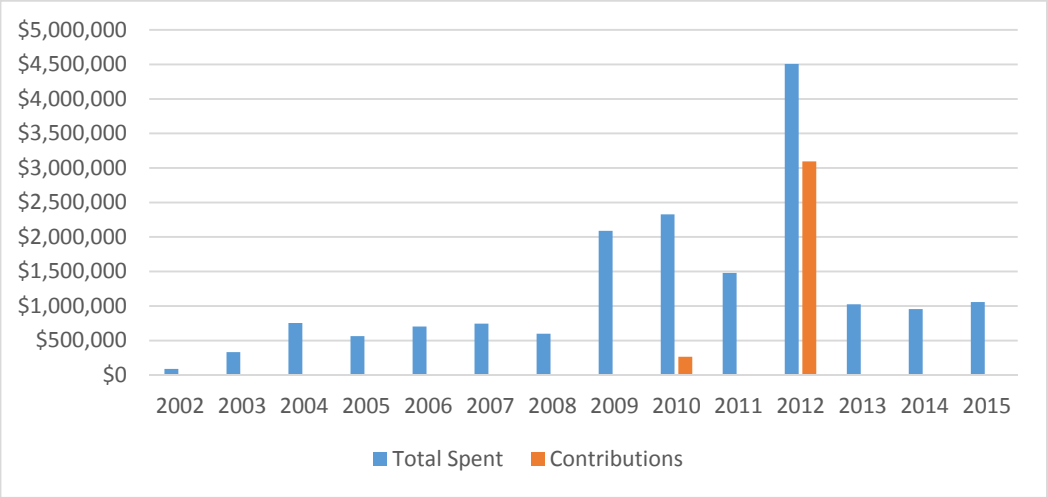
The controlling group's thorough analysis readily satisfies the highly deferential standard of review. They considered New Models' organizational documents (JA123-24), public statements (JA124-26), as well as its spending in both 2012 and in other years (JA126-33). *See* Supplemental E&J, 72 Fed. Reg. at 5601. And their conclusion that New Models did not have the requisite major purpose ultimately rested upon *all* these factors. (JA133; JA120.)

In focusing exclusively on New Models' relative spending below, Complainants conceded that the controlling Commissioners' conclusion as to first

two of the three factors was reasonable. This concession is particularly important because the Commissioners' finding regarding New Models' public statements was crucial to their ultimate conclusion. (JA126.) They noted: "The Complaint does not identify *a single statement* in over 15 years where a representative of New Models indicated the major purpose of the organization was to nominate or elect federal candidates." (JA125-26 (emphasis added).) They also reviewed New Models' website and the documents accessible thereon, searched Commission archives, and considered New Models' response and accompanying sworn declaration, which confirmed their independent findings. (*Id.*) The controlling group reasonably expected that, if New Models was changing its primary focus from issue-based advocacy and research to nominating or electing federal candidates, there would be at least some statement indicating that this was the case. Yet there was not a single one.

As to New Models' spending, the controlling Commissioners reasonably found that, when viewed "in the context of the organization's history[] before and after" 2012, New Models' 2012 spending alone did not demonstrate that it had the requisite major purpose. (JA133; *see also* JA123.) The controlling group expressly considered whether New Models' extensive 2012 election-related spending indicated that the group's major purpose had changed. (JA127 n.114; JA129 n.123.) Rather than signaling a fundamental shift in the group's major

purpose, however, they concluded that 2012 was an outlier. (JA127 n.114; JA129 n.123.) This conclusion is well-supported by the record, as the following graphical representation of New Models' relative spending illustrates:



(JA109; *see also* JA127 n.114 (citing chart).) And while the controlling Commissioners discussed New Models' relative lifetime spending as *a* consideration, they nowhere indicated that it was their *only*, or even the dispositive, consideration in determining New Models' major purpose. *Compare Am. Action Network*, 209 F. Supp. at 94.

Complainants' arguments below relied extensively on a mischaracterization of both a recent district court decision and the Commissioners' rationale and thus do not satisfy their heavy burden to establish that the controlling group's analysis was contrary to law. *See id.* (holding that considering "a particular organization's full spending history as relevant" was not "*per se* unreasonable"). Further, by advocating for a bright-line spending rule, Complainants wrongfully disregarded

the numerous cases upholding the Commission's case-by-case approach, as well as the well-recognized discretion the Commission has in this area. Whatever the merits of their argument, Complainants cannot demonstrate that the controlling Commissioners' alternative approach is contrary to law.

CONCLUSION

The Commission respectfully requests that the district court's judgment be affirmed.

Respectfully submitted,

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/s/ *Haven G. Ward*
Haven G. Ward

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I hereby certify that on this 26th day of November, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Haven G. Ward*
Haven G. Ward