ORAL ARGUMENT SCHEDULED FOR FEBRUARY 13, 2023

No. 22-5176

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court for
the District of Columbia
No. 1:21-cv-01665-TJK, Hon. Timothy J. Kelly

BRIEF OF DAVID W. CASAZZA AS COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), court-appointed *amicus curiae* certifies the following:

(a) Parties and *Amici*. End Citizens United PAC was Plaintiff in the district court and is Appellant before this Court.

The Federal Election Commission was Defendant in the district court and is Appellee before this Court, but has not appeared in either.

On November 1, 2022, this Court appointed David W. Casazza as *amicus curiae* to "present arguments in favor of the district court's April 18, 2022 memorandum opinion and order."

(b) Rulings Under Review. End Citizens United appeals the district court's April 18, 2022 memorandum opinion and order denying Plaintiff's motion for default judgment and dismissing the case for lack of subject matter jurisdiction. The memorandum opinion and order is unpublished, but is available at 2022 WL 1136062, and it is reproduced in the Appendix, App. at 41-47.

(c) Related Cases. The ruling under review has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which *amicus* is aware.

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STATEMENTS OF IDENTITY, AUTHORITY TO FILE, AND AUTHORSHIP

Amicus curiae David W. Casazza is an attorney who was appointed by this Court on November 1, 2022 to "present arguments in favor of the district court's April 18, 2022 memorandum opinion and order."[1]

INTRODUCTION

The Federal Election Campaign Act ("the Act") permits members of the public to initiate investigations of potential campaign finance violations by making reports to the Federal Election Commission ("the Commission"). In certain circumstances, the complainant may challenge the Commission's decision not to pursue enforcement by bringing a lawsuit against the Commission in federal court. 52 U.S.C. § 30109(a)(8). If the complainant shows that the Commission acted "contrary to law," the complainant can enforce the Act through civil litigation. *Id*.

[1] This Court ordered that amicus's brief be filed by December 16, 2022. No party nor party's counsel authored this brief in whole or in part; no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no other person—other than amicus—contributed money that was intended to fund preparing or submitting this brief.

cess, Federal Election Commission, at 5 (May 2012) (hereinafter *Guidebook for Complainants*). The four vote requirement demands a bipartisan consensus and also permits deadlock, or even a minority of the Commissioners in the event of a recusal or vacancy, to block enforcement actions.

The Act also permits "[a]ny person who believes a violation of this Act … has occurred" to "file a complaint with the Commission." *Id.* § 30109(a)(1). Upon receiving a complaint, the Commission conducts a multi-stage review of the alleged violation. Typically, a complaint is first reviewed by the Commission's Office of General Counsel, which will invite a response from the campaign or committee accused of wrongdoing and will advise the Commission regarding whether there is a "reason to believe" a violation occurred. *Guidebook for Complainants* at 12. The Commission will then vote on whether there is a "reason to believe" those allegations. 52 U.S.C. § 30109(a)(2). When voting, the Commissioners may consider not only the General Counsel's report, but also "the complaint, the respondent's reply, [and] relevant committee reports on the public record." *Guidebook for Complainants* at 12.

II. Background and Agency History

End Citizens United is a political action committee that filed a complaint with the Commission making seven allegations against then-President Donald Trump's 2020 campaign committee, Donald J. Trump for President, Inc., and related individuals. App. at 48-55.

The Commission's General Counsel recommended that the Commission dismiss all but one of the allegations. App. at 60. With respect to the final allegation, the General Counsel recommended that the Commission should "find reason to believe" that the campaign violated the Act "[b]y soliciting and directing contributions to [the campaign's primary political action committee] without regard to [the Act's] amount limits and source prohibitions." App. at 55. This is the only allegation at issue in this appeal.

The Commission met for an executive session in April 2021 to deliberate on the seven allegations. The Commissioners voted on a total of four related proposals dealing with End Citizens United's complaint. App. at 86-91. (One Commissioner was recused. *Id.*) On the first ballot, the Commission voted on whether there was a "reason to believe" several of the allegations. Three Commissioners voted to find reason to believe

App. at 92-94. Two weeks later, on June 25, 2021, Vice Chair Dickerson and Commissioner Cooksey released a statement of reasons explaining their vote "to dismiss this allegation under our prosecutorial discretion." App. at 95.

These two controlling Commissioners explained that these votes took place "shortly after the Commission had reacquired a quorum and faced a substantial backlog of hundreds of Matters—many of which were imperiled by the statute of limitations." App. at 97. Observing that the General Counsel's recommended penalty was "a sum unlikely to exceed the Commission's expenses in obtaining it," the controlling Commissioners "concluded the Commission's scarce resources would be best spent elsewhere." *Id.* The controlling Commissioners also argued that "[e]nforcement against this statement could have risked opening our regulation, which purports to police 'indirect' 'clear messages,' to a judicial challenge predicated on 'the constitutional requirement of definiteness." App. at 98 (quoting *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)). As a result, the controlling Commissioners "elected to exercise [their] prosecutorial discretion" and voted not to proceed with the investigation. App. at 98.

III. Procedural History

End Citizens United filed this action seeking to challenge the Commission's nonenforcement decision. App. at 3, 14. The group filed its complaint on June 21, 2021, ten days after Commissioner Weintraub's statement and four days before the controlling Commissioners' statement. App. at 94-98. The Commission did not notice an appearance before the district court or otherwise answer the complaint, and the Clerk of Court declared the Commission in default. App. at 17. End Citizens United moved for default judgment and argued that the controlling Commissioners had "failed to offer a contemporaneous explanation of their decision, as required by circuit precedent and basic principles of administrative law," thus rendering the Commission's failure to further investigate the complaint "contrary to law." App. at 26, 29-33. The controlling Commissioners' Statement, End Citizens United argued, was an impermissible "*post hoc* rationalization" of agency action. App. at 31-32.

The district court disagreed. The district court concluded that it could properly consider the controlling Commissioners' Statement because it had been written by "the very decisionmakers responsible for the

agency action" and because it was "the only explanation these Commissioners [had] ever offered for their decision." App. at 44. The court also noted that it made little sense to ignore the Statement because the court would be "free to consider it" after a remand to the Commission. App. at 45. The court then concluded that it "lack[ed] authority to review the [Commission's] dismissal" because the controlling Commissioners had acted on their prosecutorial discretion. App. at 47. The district court thus denied End Citizens United's motion for a default judgment and dismissed the complaint for lack of subject matter jurisdiction. App. at 40. End Citizens United appealed. App. at 02.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order denying End Citizens United's motion for default judgment and dismissing the action for lack of jurisdiction. The controlling Commissioners invoked their prosecutorial discretion, leaving the district court with no basis to review the nonenforcement decision. Because reviewability is a jurisdictional issue, the district court correctly dismissed End Citizens United's claim for lack of subject matter jurisdiction.

B. Even if the Statement were untimely, remand would not be appropriate. Any remand would simply direct the controlling Commissioners to provide the basis for their votes, *see DCCC*, 831 F.2d at 1135, and they have already provided that in the *Heckler* vote and Statement. Remand is unnecessary where, as here, there is "not the slightest uncertainty as to the outcome of a proceeding on remand." *Manin v. Nat'l Trans. Safety Bd.*, 627 F.3d 1239, 1243 n.1 (D.C. Cir. 2011).

II. The district court also properly dismissed for lack of jurisdiction. A decision of the Commission to decline enforcement grounded in prosecutorial discretion is a decision "committed to agency discretion by law" and therefore not subject to judicial review. 5 U.S.C. § 701(a)(2); *Commission on Hope*, 892 F.3d 434, 438-39 (2018). The Supreme Court has made clear that this statutory provision functions as a "limitation to … [federal] jurisdiction." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs.*, 482 U.S. 270, 282 (1987). Applying *Brotherhood of Locomotive Engineers*, this Court has established as the law of this Circuit that matters committed to agency discretion by law—like exercises of prosecutorial discretion—should be dismissed "for lack of jurisdiction." *Entravision Holdings, LLC v. Fed. Commc'ns Comm'n*, 202 F.3d 311, 313

1. The Statement satisfied this Court's requirement.

The Act does not contain a requirement that the Commission must give its reasons for declining to bring an enforcement based on a complaint. But this Court has concluded that courts cannot "intelligently determine whether the Commission is acting 'contrary to law'" if the Commission does not explain its decision. *Democratic Congressional Campaign Comm. v. Fed. Elec. Comm'n*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) (citing 2 U.S.C. § 437g(a)(8)(A)). Accordingly, this Court's precedents provide that where, as here, "the Commission fails to muster four votes in favor of initiating an enforcement proceeding, the Commissioners who voted against taking that action should issue a statement explaining their votes." *Commission on Hope*, 892 F.3d 434, 437 (D.C. Cir. 2018) (citing *Common Cause v. Fed. Elec. Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

As this Court has explained, the statement requirement serves "simply to assure meaningful judicial review," and a "statement of reasons need only be adequate to fulfil that function." *Common Cause*, 842 F.2d at 449 n.33 (citing *DCCC*, 831 F.2d at 1135 n.5). This Court has cautioned that a statement of reasons should be issued "at the time" of

the Commission's vote. *Id.* at 449. But it has not placed a firm deadline on when the controlling Commissioners must issue a statement of reasons. Indeed, it is questionable whether the Court could impose a strict deadline as "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Vt. Yankee Nuclear Power Co. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978); *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015) (imposing procedural "obligation[s] is the responsibility of Congress or the administrative agencies, not the court").

Given the function of the *DCCC* requirement, and the inherent limitations on a court's ability to impose procedural requirements beyond those expressed by Congress, it is unsurprising that this Court has *never* "declined to consider the only explanation provided by the 'controlling Commissioners' … simply because it was not provided at the time they voted." App. at 45.

Here, the controlling Commissioners' statement of reasons—issued approximately two months after the Commission voted to dismiss—is adequate to facilitate meaningful review and thus satisfies the function of

DCCC's request for a statement of reasons. Time and time again, this Court has reviewed Commission decisions in cases with a similar interval of one to two months between a vote to dismiss and the release of a statement of reasons. For example, in *Campaign Legal Center v. Federal Election Commission*, the Commission voted to dismiss the underlying allegations on June 4, 2019, and the controlling Commissioners released their statement of reasons two and a half months later on August 21, 2019. 3 F.4th 781, No. 21-5081, J.A. at 252-73 (D.C. Cir. 2022). Likewise, in *Campaign Legal Center & Democracy 21 v. Federal Election Commission*, the Commission voted to dismiss on February 23, 2016, with the controlling Commissioners' statement of reasons following two months later on April 1, 2016. 952 F.3d 352, No. 18-5239, J.A. at 137-39, 147-61 (D.C. Cir. 2020). Other examples abound. *See Campaign Legal Center v. Fed. Elec. Comm'n*, 860 F. App'x 1 (D.C. Cir. 2021) (two months); *New Models*, 993 F.3d 880 (D.C. Cir. 2021) (five weeks); *Doe, 1 v. Fed. Elec. Comm'n*, 920 F.3d 886 (D.C. Cir. 2019) (three months); *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) (three months).

True, the plaintiffs in those cases do not appear to have challenged, and thus this Court did not expressly consider, whether the statements

were timely. Nevertheless in all of those cases, the Commission's statements allowed this Court to conduct "meaningful judicial review," and thus satisfied the statement requirement. *Common Cause*, 842 F.2d at 449 n.33 (citing *DCCC*, 831 F.2d at 1135 n.5). The same is true here.

End Citizens United ignores this body of precedent, and the Commission's sustained, unchallenged practice, and instead rests its argument on a passing statement in *Common Cause* that the statement of reasons should be issued "at the time" of the deadlock, 842 F.2d at 449, and on a footnote *Commission on Hope*, 982 F.3d at 438 n.5. *See* Opening Br. at 21. These cases cannot bear the weight End Citizens United places on them.

Common Cause merely observed in passing that, by pushing the Commission to issue a "statement of reasons" "at the time when a deadlock vote results in an order of dismissal," the decision in *DCCC* "ensures reflection and creates an opportunity for self-correction." 842 F.2d at 449. But there was no statement of reasons for this Court to consider in *Common Cause*—timely or otherwise. This Court's "at the time" remark was not the determinative holding—and, because it had no bearing on the outcome, was not a holding at all. It thus offers little guidance because,

as the Supreme Court "has long stressed[,] 'the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.'" *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

Commission on Hope similarly falls short of the mark. There, this Court declined to consider a statement issued by a *non-controlling* Commissioner that was issued more than *five months* after the Commission's vote, and nearly *four months* after the complaint had been filed in district court. 892 F.3d at 438 n.5. That interval is more than twice as long as the one here. More importantly, the untimely statement in *Commission on Hope* was irrelevant because "for purposes of judicial review, the statement or statements of the … *controlling Commissioners*[]will be treated as if they were expressing the Commission's rationale for dismissal." *Commission on Hope*, 892 F.3d at 437 (emphasis added). A statement of reasons released by a Commissioner who voted in favor of enforcement has little if any relevance for judicial review.

The critical aspect of *Commission on Hope* is its embrace of the statement published by the *controlling* Commissioners, not its dismissal—in a footnote—of statements offered by a Commissioner who voted

to proceed with the investigation. Crucially, in *Commission on Hope*, this Court's holding rested on a statement by the controlling Commissioners more than a month after the Commission's vote, and only a few weeks before the complainant filed the lawsuit.[2] *See Commission on Hope*, No. 17-5049, J.A. 3, 757-58, 766-70 (D.C. Cir. 2018) (vote on October 1, 2015; controlling Commissioners' statement of reasons issued on November 6, 2015; complaint in district court filed November 23, 2015). Just as that statement from the controlling Commissioners was a proper basis for the Court's review, so too is the Statement issued here.

[2] The authorities cited in *Commission on Hope*'s footnote do not preclude consideration of the Statement here. Neither *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422 (1971), nor the APA generally supports a strict time limit on the documentation requirement that this Court has imposed on the agency. *See infra* I.A.3. *United States v. Hallford* is even further afield. 816 F.3d 850, 858 n.4 (D.C. Cir. 2016). That case declined to consider an opinion written by a district court months after a notice of appeal had been filed. *Id.* The filing of a notice of appeal is an event of jurisdictional significance and divests the district court of authority to revise the judgment as to the issues on appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Litigation challenging agency action does not similarly divest the agency of power to act—the agency remains free to alter its position even if the change moots the litigation. *See, e.g., Planned-Parenthood of Wisconsin, Inc. v. Azar*, 942 F.3d 512, 515 (D.C. Cir. 2019) (agency's revision of challenged regulation and payment of funds, both made while litigation was pending, mooted appeal).

2. The *Heckler* vote provides an adequate basis to affirm the district court, and the Statement may be considered because it is an elaboration of that vote.

The *Heckler* vote also provides two independent bases to affirm the district court's decision. First, taken by itself and without reference to the Statement, the vote by the controlling Commissioners to "[d]ismiss under *Heckler v. Chaney*" was a sufficient expression of their reasoning. Second, because the Statement merely elaborated on the reason given by the controlling Commissioners in the *Heckler* vote, it was proper for the court to consider the Statement.[3]

On April 22, 2021, two Commissioners voted to "[d]ismiss [the allegation] under *Heckler v. Chaney*" and three voted against dismissing. App. at 90. Although a majority did not agree to dismiss under *Heckler*, this vote expressed the controlling Commissioners' reason for declining to pursue End Citizens United's allegation: prosecutorial discretion. This

[3] The district court's opinion did not cite these grounds for declining to review the Commission's dismissal. But this Court can nevertheless affirm the district court's judgment on either of these grounds. *See Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("A prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*."); *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009) ("[W]e may affirm a judgment on any ground the record supports.").

vote was not a *post hoc* rationalization—to the contrary it *preceded* the action that End Citizens United challenges, the subsequent unanimous vote taken later the same day to "[c]lose the file," App. at 91, which effectively dismissed the complaint and is the basis for this litigation, *see* 52 U.S.C. § 30109(a)(8)(A) (allowing litigation following "an order of the Commission dismissing a complaint").

No further explanation was required. *Heckler* is the leading case recognizing the long-established rule that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. 821, 831 (1985). By invoking *Heckler*, the controlling Commissioners' vote expressed their decision not to proceed as an exercise of that absolute discretion. The message conveyed by that vote was sufficient. As this Court has held, the length of the Commissioners' explanation is not "dispositive or even particularly relevant." *New Models*, 993 F.3d at 887 n.5; *see also Citizens for Responsibility & Ethics in Washington v. Am. Action Network*, 590 F. Supp. 3d 164, 174 (D.D.C. 2022) (applying *New Models*). In *New Models*, this Court concluded that the Commission exercised its prosecutorial discretion based on "a dependent clause with

seven magic words" "tossed … into the final sentence" of a statement of reasons. 993 F.3d at 896 (Millett, J., dissenting). That was sufficient even though that sentence contained the only mention of prosecutorial discretion in a memorandum of more than 30 pages. *Id.* So too the explanation given by the controlling Commissioners in the *Heckler* vote to dismiss is sufficient to demonstrate the exercise of unreviewable prosecutorial discretion.

In any event, the reliance on *Heckler* in the April 22 vote also provided a further basis for the district court to consider the controlling Commissioners' Statement. The Statement was simply an elaboration on the invocation of prosecutorial discretion made in the *Heckler* vote. It notes on three separate occasions that the controlling Commissioners had "voted to dismiss … pursuant to [their] prosecutorial discretion under *Heckler v. Chaney*." App. at 98, 95, 96; *compare* App. at 90 (vote to "[d]ismiss under *Heckler v. Chaney*"). Even End Citizens United appears to accept that the Statement presents itself as an elaboration of the votes already taken, observing that "[a]ccording to the Statement, the two [con-

trolling] Commissioners *had voted* to reject the General Counsel's recommendation as a matter of prosecutorial discretion." Opening Br. at 13 (emphasis added).

As End Citizens United's own leading authority explains, "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason." *Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*)). In *Regents*, the Court was confronted with two memoranda justifying an agency action—one issued with the initial decision and another issued as a renewed justification for the same action after a remand from the district court. 140 S. Ct. at 1908. The Court considered the reason offered in the initial memorandum (that agency policy had to change because its past practice was unlawful). *Id.* at 1910. And it did not reject the second memorandum's attempt to elaborate on this reason, but only its attempt to inject additional reasons "nowhere to be found in the [first] Memorandum." *Id.* at 1908. Here, the same reason (prosecutorial discretion) is found in both the *Heckler* vote and the Statement.

That elaboration is perfectly permissible. The restriction on *post hoc* rationalization "is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (quoting *Local 814, Int' Bhd. Of Teamsters, Chauffeurs, Warehousemen v. Nat'l Labor Relations Bd.*, 546 F.2d 989, 992 (D.C. Cir. 1976)). To the contrary, courts have "authority to consider a supplemental explanation" provided by the "proper decisionmakers." *Alpharma*, 460 F.3d at 6.

End Citizens United's other cases only fortify this point. These cases not only show that *post hoc* elaborations of reasons *explicitly* given are permissible. *See Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (Although "[t]he Vara Declaration is a *post-hoc* account," it "furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review."); *Appeal of Bolden*, 848 F.2d 201, 207 (D.C. Cir. 1988) (holding that the district court properly considered an agency memorandum, developed after litigation commenced, that "merely confirms" the "pre-decisional record"). They also show that agen-

cies may even elaborate on "reasons" that are merely "*implicit* in the administrative record," *Consumer Fed'n of Am. & Pub. Citizen v. Health & Human Servs.*, 83 F.3d 1497, 1506-07 (D.C. Cir. 1996) (emphasis added). Here, the district court could consider the Statement because it elaborated on the controlling Commissioners' *explicit* reason for voting to dismiss.

3. The prohibition on *post hoc* rationalizations does not apply here.

Lacking support in the Act or this Court's precedents relating specifically to the Commission, End Citizens United argues that the district court's consideration of the Statement conflicts with "basic principles of administrative law." Opening Br. at 28. This argument fares no better.

The APA imposes a substantive requirement that an agency may not act in an "arbitrary or capricious" fashion. 5 U.S.C. § 706(2)(A). This "requires agencies to engage in 'reasoned decisionmaking,' and directs that agency actions be 'set aside' if they are arbitrary or capricious." *Regents*, 140 S. Ct. at 1905. The scope of review is "narrow" and "a court is not to substitute its judgment for that of the agency." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Ordinarily, this review involves a court assessment of whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions including 'a rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 158 (1962)). To facilitate that review, "an agency must cogently explain why it has exercised its discretion in a given manner." *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (quoting *State Farm*, 463 U.S. at 48). The court then reviews the *substance* of the agency's explanation to determine whether the agency's explanations are reasonable and responsive to the information before the agency. *See, e.g.*, *Regents*, 140 S. Ct. at 1912-14 (assessing legal reasoning offered in agency memorandum); *A.L. Pharma*, 62 F.3d at 1491 (assessing whether agency confronted expert evidence in the record). And that review is based on "what the Commission did, not [on] what it might have done." *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). In that context, the prohibition on *post hoc* explanations follows from the nature of the legal question the court is reviewing: A court cannot conclude that an agency's decision was

reasonable and reasonably explained when the agency provided no or insufficient reasoning. And an agency cannot backfill its reasons after the fact.

Under this Court's precedents, that review is different in kind from what takes place here. Once the Commission invokes its prosecutorial discretion, the court's review is at an end. A reviewing court cannot assess the substantive reasonableness of the Commission's invocation of prosecutorial discretion or even the substance of other reasons offered alongside the assertion of prosecutorial discretion. *New Models*, 993 F.3d at 887 (court must "[d]eclin[e] to review the Commission's exercise of prosecutorial discretion"); *Commission on Hope*, 892 F.3d at 442 ("The law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" (quoting *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994))). Thus once the controlling Commissioners invoke prosecutorial discretion, as occurred here in the vote, there is no purpose in a further explanation, nor does a belated release of a statement of reasons impede judicial review.

In all events, the district court correctly based its review on "the grounds that the agency invoked when it took the action." *Regents*, 140 S. Ct. at 1907; *see also AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987). The controlling Commissioners voted against finding reason to believe a violation had occurred and voted to "[d]ismiss under *Heckler v. Chaney*." App. at 90. These controlling Commissioners then further explained their votes, only two months later, in their Statement. End Citizens United identifies no authority suggesting that a temporal gap of such length precludes consideration of an explanation issued by the agency decisionmaker into the administrative record in the ordinary course of the agency's operations.

As the district court recognized (App. at 44-45), the rule against *post hoc* rationalizations grounded in *Overton Park* "applies to rationalizations offered for the first time in litigation affidavits and arguments of counsel," not "rationales offered by … the proper decisionmakers." *Loc. 814*, 546 F.2d at 992. Here, because the controlling Commissioners are "proper decisionmaker[s]," and their Statement "is neither a mere 'litigation affidavit[,]' nor an 'argument[ ] of counsel,'" "an examination of its

contents is perfectly appropriate." *Alpharma*, 460 F.3d at 7 (quoting *Local 814*, 546 F.2d at 992) (first alteration added); *see also Menkes v. Dep't of Homeland Security*, 637 F.3d 319, 337 (D.C. Cir. 2011) ("Because Wasserman is a 'proper decisionmaker,' his declaration—which explains [the agency's decision]—is not an impermissible *post hoc* rationalization.").

Supreme Court precedent confirms that the *post hoc* rationalization rule is primarily concerned with litigation documents (or even bare assertions by counsel) raising novel *post hoc* rationalizations. In *Overton Park*, the Supreme Court declined to consider conflicting "affidavits, prepared specifically for th[e] litigation." 401 U.S. at 409. And in *State Farm*, the Court held that where an agency "submitted no reason[] at all" for a decision, "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." 463 U.S. at 50. The Court has reiterated this point on numerous other occasions. *See*, *e.g.*, *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (same); *Nat'l Lab. Rel. Bd. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965) (same); *Burlington Truck Lines*, 371 U.S. at 168-69 (same); *see also Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("[T]he *post hoc* justification doctrine merely requires that courts

assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced by agency lawyers during litigation (or by judges).").

End Citizens United's cases have little to say about a statement released by the agency decisionmakers through agency process. In both *AT&T Information Systems* and *Costle*, this Court declined to consider explanations for agency decisions that were contained in affidavits filed during briefing on summary judgment. *See AT&T Info. Sys., Inc.*, 810 F.2d at 1236; *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285-86 (D.C. Cir. 1981) (noting also that "none of the four affiants … had participated in the pertinent agency actions"). And in *Christopher v. SmithKline Beecham Corp.*, the Supreme Court withheld *Auer* deference because the agency asserted a new rationale for its interpretation of a regulation in an *amicus* brief at the Supreme Court—years after the litigation began. 567 U.S. 142, 154-55 (2012). In these cases, the courts rightly declined to consider explanations for agency action that were developed by lawyers or were advanced in the litigation rather than before the agency. Here, the controlling Commissioners released a statement of reasons on the Commission's docket—not in federal court.

Regents declined to consider a supplemental memorandum offered by the agency decisionmaker, but it did so in a far different context. There, litigants challenging agency policy prevailed in multiple district courts and obtained nationwide injunctions against the agency's action. 140 S. Ct. at 1904. After these losses, the agency decisionmaker—a new officer who had replaced the original decisionmaker—issued a new memorandum offering a variety of bases for the original action that were "nowhere to be found" in the initial justification. *Id.* at 1908. Given the change in officeholder, the entirely novel justifications, and the intervening orders against the agency from numerous federal courts, the Supreme Court was skeptical of the novel memorandum. Yet this decision did not, as End Citizens United's reading suggests, upend decades of case law permitting supplementation or elaboration by the agency decisionmaker. Far from it—the Court *expressly acknowledged* that the agency decisionmaker could issue further explanations "elaborating on [the agency's] prior reasoning." *Id.* at 1908.

The rationale offered in the Statement was issued by the proper agency decisionmakers—the controlling Commissioners. And it was not offered in "litigation affidavits and arguments of counsel," *Loc. 814,* 546

F.2d at 992, but as a standard agency document issued shortly after the agency vote. Unlike the second memorandum rejected in *Regents*, the Statement was not released in response to any adverse judicial rulings. Accordingly, the district court's decision to review the Statement does not contradict "basic principles of administrative law." Opening Br. at 28.

B. Even if the Statement were untimely, remand is inappropriate and would waste judicial resources.

Finally, even if the Statement were a *post hoc* rationalization, remand would not be appropriate. Remand would only waste judicial and party resources with no change in the outcome for End Citizens United: dismissal of the complaint based on the agency's assertion of prosecutorial discretion.

End Citizens United argues that remand is warranted in spite of these considerations. Opening Br. at 33. But this Court need not ignore reality. Even if this Court disregards the Statement, the result would simply be an order directing the Commission to issue a more satisfactory explanation. 52 U.S.C. § 30109(a)(8)(A)(C); *see DCCC*, 831 F.2d at 1135 (remanding because the "Commission or the individual Commissioners should first be afforded an opportunity to say why DCCC's complaint was dismissed"). End Citizens United offers no serious argument that, were

such a remand ordered, the controlling Commissioners could not or would not issue the same statement expressing the same basis for their votes.

This Court's precedents, including those following *Regents*, do not demand such pointless remands. Even when the substance of the agency's reasoning is at issue, "when there is not the slightest uncertainty as to the outcome of a proceeding on remand, courts can affirm an agency decision on grounds other than those provided in the agency decision." *Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999). The Court need not order remand with a pre-ordained outcome; such orders transform "judicial review of agency action into a ping-pong game." *Prohibition Juice Co. v. United States Food & Drug Admin.*, 45 F.4th 8, 24-25 (D.C. Cir. 2022) (quoting *Nat'l Lab. Rel. Bd. v. Wyman-Gordon Co.*, 349 U.S. 759, 766 n.6 (1969)). That is all the more true here, where the question is not whether the controlling Commissioners' reasons were reasonable, but simply what those reasons were.

II. The District Court Properly Dismissed for Lack of Jurisdiction.

Given the controlling Commissioners' exercise of prosecutorial discretion, the district court lacked authority to adjudicate End Citizens

United's claim and thus properly dismissed for lack of subject matter jurisdiction.

The principle that courts lack authority to review Commission non-enforcement decisions grounded on prosecutorial discretion stems from the APA and "the Constitution's separation of powers." *New Models*, 993 F.3d at 888. The APA does not empower courts to question "agency action … committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and thus "recogniz[es] that [such] matters"—like an agency's "decision not to bring an administrative enforcement action"—"are not subject to judicial review." *New Models*, 993 F.3d at 888. And that statutory principle reflects the background constitutional rule that "[i]n our system of separated powers, an agency's decision not to enforce the law is an exercise of executive discretion and therefore generally unreviewable by the courts." *Id.* at 882; *see also Heckler*, 470 U.S. at 830.

Because the issue of reviewability goes to courts' *power* to adjudicate disputes, it is jurisdictional. Indeed, over three decades ago, the Supreme Court made clear that the APA's committed-to-agency-discretion-by-law provision, 5 U.S.C. § 701(a)(2), is a "limitation to … [federal] jurisdiction." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*,

482 U.S. 270, 282 (1987). After some initial disarray, this Court clarified—via *Irons* footnote, *see Irons v. Diamond*, 670 F.2d 265, 267-68 & n.11 (D.C. Cir. 1981)—that "nonreviewability under *Brotherhood of Locomotive Engineers*" compels dismissal "for lack of jurisdiction" and "disapproved" of its prior cases treating such nonreviewability as "nonjurisdictional." *Entravision Holdings, LLC v. Fed. Commc'ns Comm'n*, 202 F.3d 311, 313 & n. ** (D.C. Cir. 2000).[4] In so doing, this Court expressly disapproved prior panel decisions that "treat nonreviewability under *Brotherhood of Locomotive Engineers* as nonjurisdictional." *Id.*

True, *Brotherhood of Locomotive Engineers* and *Entravision* involved a different type of question committed to agency discretion, *i.e.*, the agency's discretion to reconsider its own decision. But there is no basis for treating that question differently than an exercise of prosecutorial discretion. *See Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 357 (D.C. Cir. 2000) (noting that *Entravision* involved "nonreviewability of a similar kind of agency decision" to a decision not to settle an enforcement

[4] *See* Policy Statement on *En Banc* Endorsement of Panel Decisions (*Irons* Footnote Policy) at 1 (Jan. 17, 1996) ("[A] panel of the court may seek for its proposed decision the endorsement of the *en banc* court, and announce that endorsement in a footnote to the panel's opinion.").

action). Both are unreviewable because of section 701(a)(2)'s limitation on reviewing questions committed to agency discretion. And *Brotherhood of Locomotive Engineers* expressly based its reasoning on *Heckler*, which it described as an application of section 701(a)(2)'s "limitation" of federal question jurisdiction. 482 U.S. at 282.

After *Entravision*, this Court has repeatedly held that "[t]he ban on judicial review of actions 'committed to agency discretion by law' is jurisdictional." *Baltimore Gas & Elec. Co. v. Fed. Energy Reg. Comm'n*, 252 F.3d 456, 458 (D.C. Cir. 2001); *see also Ass'n of Irritated Residents v. Env't Prot. Agency*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("subject matter jurisdiction turns on whether" the agency action is an "enforcement proceeding initiated at the agency's discretion and not reviewable by this court"); *Fort Sumter*, 202 F.3d at 357 ("[N]onreviewability … is not simply a question of deference to agency discretion, but of the absence of jurisdiction.").

Other circuits have similarly treated section 701(a)(2) nonreviewability as a jurisdictional limitation, in cases involving a variety of agencies. *See*, *e.g.*, *Animal Legal Def. Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1214 (11th Cir. 2015); *Pacific Gas & Elec. Co. v. Fed. Energy Reg. Comm'n*, 464 F.3d 861, 866 (9th Cir. 2006); *Gulf Restoration Network v.*

McCarthy, 783 F.3d 227, 238 (5th Cir. 2015); *Vela-Estrada v. Lynch*, 817 F.3d 69, 71 (2d Cir. 2016).

That principle controls here. The controlling Commissioners decision not to enforce based on their prosecutorial discretion was "committed to [their] absolute discretion." *Heckler*, 470 U.S. at 831. The Act "provides 'no law to apply' in reviewing the Commission's weighing of practical enforcement considerations, so a court has no basis on which to assess whether it is 'contrary to law.'" *New Models*, 993 F.3d at 885 (quoting *Commission on Hope*, 892 F.3d at 440). Instead, the Act directs only that the Commission "may" take certain actions, which does not limit its discretion. *Id.*; *see also Ass'n of Irritated Residents*, 494 F.3d at 1032 (use of "may" in a variety of environmental statutes provides no metric to review nonenforcement discretion). Thus, the court has "no jurisdiction under 5 U.S.C. § 701(a)(2) as illuminated by *Heckler*" to review a decision "committed to agency discretion by law," and the complaint must be dismissed. *Baltimore Gas*, 252 F.3d at 461-62.

Some panels of this Court have nonetheless remarked that "reviewability is not a jurisdictional issue." *Campaign Legal Center & Democ-*

racy 21 v. Fed. Elec. Comm'n, 952 F.3d 352, 356 (D.C. Cir. 2020) (*per curiam*)); *see* Opening Br. 34.[5] That passing statement rests on a line of authority that, with no mention of *Entravision* or *Brotherhood of Locomotive Engineers*, has held that "§ 701(a)(2)" "goes not to whether the court has jurisdiction but to whether the plaintiff has a cause of action." *Oryszak v. Sullivan*, 576 F.3d 522, 525 n.2 (D.C. Cir. 2009); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 183-84 (D.C. Cir. 2006). *But see Ass'n of Irritated Residents*, 494 F.3d at 1030 (nonenforcement based on prosecutorial discretion results in lack of subject-matter jurisdiction). But this line of cases begins *after* the decision in *Entravision* and cannot supersede *Entravision*, which received "the endorsement of the en banc court."

[5] The more robust discussion of jurisdiction in *Democracy 21* appears in a single-judge concurrence, but the panel did not adopt that discussion. The concurrence's discussion rests on a reading of *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), that is in tension with *Commission on Hope* and was rejected in *New Models*. *Compare Democracy 21*, 952 F.3d at 361 (Edwards, J., concurring) ("*Akins* could not be clearer in saying that the presumption of nonreviewability under *Heckler v. Chaney* has no application in actions arising under the FECA") *with New Models*, 993 F.3d at 893-95 (*Akins* recognizes that Commission "in the exercise of its discretion" may decline to pursue enforcement).

See Oakey v. U.S. Airways Pilots Disability Income Plan, 723 F.3d 227, 232 n.1 (D.C. Cir. 2013) (describing *Irons* footnote).[6]

Even setting aside this Court's precedent, reason suggests that an exercise of prosecutorial discretion is outside the jurisdiction of the court.[7] "[T]he concept of justiciability … expresses the jurisdictional lim-

[6] *Sierra Club* itself understood this rule and recognized that there were conflicting panel opinions, *see* 648 F.3d at 854-55 (collecting cases), but it mistakenly viewed *Trudeau* as the earliest-in-time pronouncement addressing the jurisdictional impact of reviewability under section 701(a)(2). But *Brotherhood of Locomotive Engineers*, *Entravision*, and *Baltimore Gas* all predate *Trudeau* and all conclude that the limitation on review of questions committed to agency discretion is jurisdictional. *See Bhd. of Locomotive Engineers*, 482 U.S. at 280, 287 (directing court to "dismiss … for lack of jurisdiction" petitions challenging issue falling under section 701(a)(2)); *Entravision*, 202 F.3d at n.** (disapproving, via *Irons* footnote, cases treating "nonreviewability under *Brotherhood of Locomotive Engineers* as nonjurisdictional"); *Baltimore Gas*, 252 F.3d at 462 ("nonreviewable discretion to settle [agency's] enforcement action" left court without "jurisdiction to consider BG&E's challenge" and required dismissal).

[7] Even if the Court concludes that reviewability is *not* jurisdictional, remand is not necessary. As this Court has "previously held, '[a]lthough the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Sierra Club*, 648 F.3d at 854 (quoting *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)).

itations imposed upon federal courts by the 'case or controversy' requirement of Art. III." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974).[8] Agency decisions grounded in prosecutorial discretion are not reviewable because there is *no law* to apply at all. *Heckler*, 470 U.S. at 830 (courts lack any "meaningful standard against which to judge the agency's exercise of discretion"). Where there is "a lack of judicially discoverable and manageable standards for resolving" the case, "a court lacks the authority to decide the dispute." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). The absence of jurisdiction, therefore, does not rest solely on section 701(a)(2), but also on the separation of powers and the capacity of "the judicial power" to question the exercise of the executive's absolute discretion.

Accordingly, courts have held in a range of cases that inability to discern manageable "legal standards" to guide judicial decisionmaking is a basis for dismissal "for lack of jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (partisan gerrymandering); *Lin v. United*

[8] The Supreme Court too has taken both sides of the jurisdictional nature of justiciability. *Compare Schlesinger*, 418 U.S. at 215 (justiciability is jurisdictional) *with Baker v. Carr*, 369 U.S. 186, 200 (1962) (distinguishing "nonjusticiability" from "lack of jurisdiction").

States, 561 F.3d 502, 505 (D.C. Cir. 2009) (recognition of foreign sovereign). Such dismissals are "jurisdictional" rulings under "Rule 12(b)(1)." *Schneider v. Kissinger*, 412 F.3d 190, 201, 194-96 (D.C. Cir. 2005) (no jurisdiction over issue lacking "discoverable and manageable standards" and that was "textually committed to a coordinate branch"). The district court properly applied these principles here.

CONCLUSION

This Court should affirm the district court's judgment.

Dated: December 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2022, I served a copy of the foregoing brief on all counsel of record via this Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,409 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, New Century Schoolbook font.

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ADDENDUM OF AUTHORITIES

Contents

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

52 U.S.C. § 30109 (excerpted)

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel.

Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

. . .

(5)(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

. . .

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the

district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

. . .

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

. . .

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

. . .