EN BANC ARGUMENT SCHEDULED FOR FEBRUARY 25, 2025

No. 22-5277

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

NEW REPUBLICAN PAC,
Intervenor-Appellee.

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

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APPELLEE FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee Federal Election Commission ("FEC" or "Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. End Citizens United PAC is the plaintiff in the district court and appellant in this Court. The Commission is the defendant in the district court and appellee in this Court. Before the district court New Republican PAC was the intervenor-defendant and in this Court the appellee. In this Court for the appellant, Citizens for Responsibility and Ethics in Washington, Professors of Administrative Law, and the Brennan Center for Justice and Election Law Scholars are participating as amici. For the appellee, the National Republican Senatorial Committee and the National Republican Congressional Committee are participating as amici.

(B) ***Rulings Under Review***. End Citizens United appeals the September 16, 2022 memorandum opinion and order of the United States District Court for the District of Columbia (Leon, J.) granting New Republican's Cross-Motion for Summary Judgment and denying End Citizens United's Motion for Default Judgment, or, in the Alternative, for Summary Judgment. The September 16, 2022 opinion is not published in the federal reporter but is available at *End Citizens United PAC v. FEC*, No. 21-2128, 2022

WL 4289654 (D.D.C. Sept. 16, 2022), and can be found in the Joint Appendix at JA097-113.

On January 19, 2024, a panel of this Court affirmed the District Court's September 16, 2022 judgment in an opinion that was published in the federal reporter at *End Citizens United PAC v. FEC*, 90 F.4th 1172 (D.C. Cir. 2024). On October 15, 2024, this Court issued a per curiam order vacating the panel's January 19, 2024 judgment and granting End Citizens United's petition for rehearing en banc.

(C) ***Related Cases***. This case was not previously before this Court or any other court. *Campaign Legal Center v. FEC*, No. 22-5339 (D.C. Cir.), is being held in abeyance pending the en banc Court's disposition of this case.

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INTRODUCTION

The fundamental question before this Court is whether the Commission acts contrary to law when it dismisses an administrative complaint as a matter of prosecutorial discretion. Recognizing the number of pragmatic considerations within the agency's competency, and that the agency is "far better equipped" than courts to handle the complicated balancing of the "many variables involved in the proper ordering of its priorities," *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court has repeatedly made clear that FEC dismissals of administrative complaints based on prosecutorial discretion are not subject to judicial review. *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 884 (D.C. Cir. 2021) ("*New Models*"), *pet. for reh'g en banc denied*, 55 F.4th 918, 919 (D.C. Cir. 2022) (per curiam); *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("*Commission on Hope*"), *pet. for reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019). Here, the district court similarly found the FEC's dismissal of the administrative complaint unreviewable because the controlling bloc of commissioners, those that voted against enforcement, invoked prosecutorial discretion. *See End Citizens United PAC v. FEC*, 90 F.4th 1172, 1188 (D.C. Cir. 2024).

Collectively, these panel decisions distinguished between dismissals justified in whole or in part by prosecutorial discretion and those "based entirely on

[the Commission's] interpretation of" the Federal Election Campaign Act ("FECA"). *Comm'n on Hope*, 892 F.3d at 441 n.11. Those latter dismissals are subject to review under the text of FECA; the former are not. The reasons for this are sound, and do not conflict with any decision of the Supreme Court or this Circuit. Indeed, the panel decisions are rooted in *Heckler*'s long-established principle that judicial review of an agency action is unavailable where there is "no law to apply." *New Models*, 993 F.3d at 885 (quoting *Comm'n on Hope*, 892 F.3d at 440). Congress determined that judicial review of FEC dismissals would be available only to the extent the dismissals were "contrary to law." 52 U.S.C. § 30109(a)(8)(C). But, as the panel decisions correctly recognized, FECA does not provide standards or guidance for a court to determine whether a particular enforcement action "fits the agency's overall policies" or is within the agency's budget. *Heckler*, 470 U.S. at 831; *see also New Models*, 993 F.3d at 885; *Comm'n on Hope*, 892 F.3d at 439 n.7.

This Court's decision in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) fits firmly within this precedent. If a dismissal decision rests entirely on a determination that there was no reason or probable cause to believe that FECA had been violated, courts can in those cases turn to an examination of whether the dismissal was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." 795 F.2d at 161.

This is consistent with *Heckler* and its articulation of basic administrative law principles. The panel decisions and the district court's judgment in this case should be affirmed.

COUNTERSTATEMENT OF JURISDICTION

On September 16, 2022, the district court issued a final order granting summary judgment to New Republican PAC, the defendant-intervenor in the district court. (J.A. 97-115.) The district court had jurisdiction under 28 U.S.C. § 1331. Complainant timely appealed on October 17, 2022. (J.A. 116.) This Court has jurisdiction to hear the appeal from that final judgment under 28 U.S.C. §§ 1291, 1294(1).[1]

COUNTERSTATEMENT OF THE ISSUES

The issues presented for review:

1. Whether the decision under review in this case correctly applied established Circuit law in determining the FEC's dismissal of an administrative complaint alleging violations of FECA, as an exercise of prosecutorial discretion, is not subject to judicial review under 52 U.S.C. § 30109(a)(8)(C).

2. Whether the text of FECA alters the general presumption against judicial review of the FEC's dismissal of an administrative complaint as an

[1] The Complainants have argued their standing to bring this case (Br. at 18-19), which the FEC has not disputed.

exercise of prosecutorial discretion, as distinct from a decision on the merits of the complainant's claims.

3. Whether *Orloski v. FEC* correctly held that an FEC decision is contrary to law under 52 U.S.C. § 30109(a)(8)(C) if (a) the FEC dismissed the complaint as a result of an impermissible interpretation of FECA, or (b) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.

STATUTES AND RULES

The relevant provisions are included in the Addendum to the November 18, 2024 Appellant's En Banc [Opening] Brief ("Br.").

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The 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. 52 U.S.C. § 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, it then moves to the next step in the administrative process where it can conduct an investigation, consider conciliation, or consider 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 an administrative enforcement matter, a party "aggrieved" by the dismissal may file suit to obtain judicial review to determine whether the decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). By statute, the judicial task in such an action "is limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (describing 52 U.S.C. § 30109(a)(8) (formerly

§ 437g(a)(8))). As the Supreme Court has explained, the Commission "has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred" and "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"); *see Citizens for Resp. & Ethics in Wash, v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("[J]udicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

In particular, "a Commission nonenforcement decision is reviewable only if the decision rests *solely* on" interpretation of FECA, and not if a basis for dismissal was the agency's prosecutorial discretion. *New Models*, 993 F.3d at 884; *Comm'n on Hope*, 892 F.3d at 438. It is well established that "federal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *Comm'n on Hope*, 892 F.3d at 438 (citations omitted). The Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988); *see also Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133-34 (D.C. Cir. 1987) ("*DCCC*") (discussing the Commission's prosecutorial discretion). In

Orloski v. FEC, the D.C. Circuit concluded that the Commission is entitled to decide whether to make a reason to believe finding even where that decision is based on a "subjective evaluation of claims." 795 F.2d at 168. The Commission itself recently issued a policy statement setting standards for actions at the point of determining whether to open an investigation or to enter into conciliation with respondents prior to a finding of probable cause to believe. *See* FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729 (Mar. 20, 2024).

This Court has explained that "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted. [Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986). If a dismissal decision rests entirely on a determination that there was no reason or probable cause to believe that FECA had been violated, courts can in those cases turn to an examination of whether the dismissal was contrary to law. *See New Models*, 993 F.3d at 884 (noting FECA's "unusual provision that allows for judicial review of nonenforcement decisions to determine if a dismissal is 'contrary to law'") (citing 52 U.S.C. § 30109(a)(8)(C)).

In cases where an administrative enforcement matter is dismissed after Commissioners divided evenly as to whether to proceed, the "Commissioners who

voted to dismiss must provide a statement of their reasons" in order "to make judicial review a meaningful exercise." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.*; *Comm'n on Hope*, 892 F.3d at 437-38 (explaining that under Circuit precedent, "for purposes of judicial review, the statement or statements of those naysayers — the so-called 'controlling Commissioners' — will be treated as if they were expressing the Commission's rationale for dismissal" (quoting *Common Cause*, 842 F.2d at 449)).

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 the Commission fails to conform, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

C. FECA Provisions

An individual becomes a candidate under the Act if they receive contributions or makes expenditures in excess of $5,000, or give consent to another person to receive contributions or make expenditures on their behalf. 52 U.S.C. § 30101(2). Once the $5,000 threshold has been met, the candidate has fifteen days to designate a principal campaign committee by filing a Statement of Candidacy.

52 U.S.C. § 30102(e)(1). The principal campaign committee must then file a Statement of Organization within ten days of its designation, 52 U.S.C. § 30103(a), and must file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).

The Commission has established limited "testing the waters" exemptions that permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act. 11 C.F.R. §§ 100.72 and 100.131. These exemptions exclude from the definitions of "contribution" and "expenditure" those funds received and payments made solely to determine whether an individual should become a candidate. 11 C.F.R. §§ 100.72(a); 100.131(a).

An individual who is testing the waters need not register or file disclosure reports with the Commission unless and until the individual subsequently decides to run for federal office. 11 C.F.R. §§ 100.72(a); 100.131(a). However, an individual who tests the waters must keep financial records and, if he or she becomes a candidate, all funds received or payments made in connection with testing the waters become contributions and expenditures under the Act and must be reported as such in the first report filed by the candidate's principal campaign committee. 11 C.F.R. § 101.3.

The Commission, in deciding whether an individual is no longer testing the waters and has made a decision to run for federal office, assesses an individual's objectively deliberate actions to discern whether and when an individual decided to become a candidate. 11 C.F.R. §§ 100.72(a); 100.131(a).

FECA permits any person to file an administrative complaint alleging violations and sets forth detailed enforcement procedures the Commission must follow when considering such allegations. 52 U.S.C. § 30109(a). The statute requires obtaining the affirmative vote of four Commissioners to proceed through each stage in the enforcement process: four or more votes are required for the Commission to find that there is "reason to believe" an administrative respondent committed (or is about to commit) a violation of FECA, and then four or more votes are required to find that there is "probable cause to believe" a violation occurred. *Id.* § 30109(a)(2), (a)(4)(A)(i). After satisfying all other procedural requirements, the Commission "*may* . . . institute a civil action for relief," a decision which also requires four or more affirmative votes. *Id.* § 30109(a)(6)(A) (emphasis added).

II. PROCEDURAL BACKGROUND

A. Initial Administrative Proceedings

End Citizens United PAC ("Complainant") filed two administrative complaints with the Commission in 2018 alleging that Senator Rick Scott, his

campaign, and New Republican PAC ("New Republican") violated several requirements of FECA during the 2018 Florida Senate race. (Admin. Compl., MUR 7370, April 23, 2018 (J.A. 118-43)[2]; Admin. Compl., MUR 7496, Sept. 14, 2018 (J.A. 175-82).) The first administrative complaint, MUR 7370 ("First Administrative Complaint"), alleged that Scott failed to file a timely statement of candidacy, Rick Scott for Florida failed to timely file a statement of organization and required reports, and New Republican unlawfully accepted prohibited campaign funds while controlled by Scott. (*See* J.A. 118-22.) The second administrative complaint, MUR 7496, alleged that New Republican impermissibly coordinated expenditures with Rick Scott for Florida, resulting in excessive in-kind contributions.[3] (*See* J.A. 175-82.)

Here, the Commissioners voted 3-3 on a motion to find there was reason to believe that Scott, his campaign, and New Republican violated FECA as set forth in the First Administrative Complaint and to take no action on the second administrative complaint, falling one vote short of the four votes necessary to

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[2] Complainant also filed a supplement to the first complaint. (Supp. Admin. Compl., MUR 7370, Apr. 23, 2018 (J.A. 144-51).)

[3] Complainant does not challenge this or the district court's conclusion that the FEC's dismissal of the second administrative complaint (MUR 7496) was reasonable. (Br. at 13, n.4.) The Commission thus focuses on the First Administrative Complaint, providing background on the second administrative complaint only where necessary for context.

authorize an investigation or otherwise proceed with the matter that was the subject of the First Administrative Complaint. (J.A. 270-71.) Thereafter, the Commission voted 3-3 on whether to dismiss the complaints pursuant to the agency's prosecutorial discretion and, finally, voted 5-1 to close the file in these matters. (J.A. 272-73.)

Under long-standing Circuit law, the three Commissioners who voted against finding reason to believe "constitute a controlling group" whose rationale "necessarily states the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. The controlling group of Commissioners issued a July 21, 2021, statement of reasons explaining their votes in this matter. (*See* Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III (J.A. 281-91).)

Following an analysis of the merits of the administrative complaint, the controlling group of Commissioners expressly concluded the matters "merited the invocation of . . . prosecutorial discretion." (J.A.290; *see also* J.A. 282 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985).) "To probe [Scott's] subjective intent [to become a candidate] during this period," the three Commissioners reasoned, "would have necessitated a wide-ranging, costly, and invasive investigation into both Scott and New Republican's activities during that period of time, and possibly after." (J.A. 290.) They highlighted the need to make "difficult decisions" about

which investigations to pursue "while the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum" and concluded that they were "unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed." (*Id.*)

Commissioners Broussard and Weintraub separately issued a statement of reasons, dated July 15, 2021, articulating their conclusion that there was reason to believe violations had occurred. (*See* Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub (J.A. 274-80).) In their statement, these Commissioners set forth their view that the weight of the evidence supported a finding of reason to believe that Scott had failed to file a timely candidacy statement and New Republican had violated FECA. (*See id.*)

B. District Court Decision

Complainant sought judicial review on August 9, 2021. Because the Commission did not authorize defense of this lawsuit, *see* 52 U.S.C. §§ 30106(c), 30107(a)(6), the Commission did not appear in the case, though it did file the administrative record pursuant to the district court's order. (*See* J.A. 3-4.) The district court permitted New Republican to intervene as of right. (J.A. 3.)

The district court granted New Republican's summary-judgment motion, ruling that the Commission's dismissal of the First Administrative Complaint was

unreviewable as an exercise of prosecutorial discretion under *Heckler v. Chaney* and *New Models*. (*See* J.A. 97-115.) Because the controlling group of Commissioners' statement of reasons specifically invoked prosecutorial discretion in declining to investigate the timing of Scott's candidacy announcement and related alleged FECA violations, the district court concluded it was barred from reviewing any challenge. (J.A. 107-10.)

C. D.C. Circuit Panel Decision

Complainant appealed to this Court. Here, the panel majority affirmed the district court, holding that the dismissal of the First Administrative Complaint was not reviewable because the controlling Commissioners relied on prosecutorial discretion. *End Citizens United*, 90 F.4th at 1175, 1178-81. The Court explained that the controlling statement rested on prudential considerations, including the limited time and resources available for an investigation and the Commission's sizeable case backlog, which are "quintessential elements of prosecutorial discretion." *Id.* at 1178-79. The Court explained that the statement "cited [*Heckler*] repeatedly, discussed the time and expense an investigation would involve, and mentioned the Commission's 'substantial backlog of cases.'" *Id.* at 1178.

The Court rejected End Citizens United's argument that the controlling group of Commissioners' discretionary considerations were subject to judicial

review because they were intertwined with a reviewable legal analysis of FECA. *See id.* at 1179. It explained that, though "[n]onenforcement decisions often turn on both discretionary factors and legal determinations . . . a dismissal is entirely unreviewable if it depends *even in part*" on traditional, prudential enforcement considerations. *See id.* (emphasis added). The Court also refused Complainant's request to reconsider the decisions in *Commission on Hope* and *New Models* as "conflict[ing]" with earlier decisions. It noted that End Citizens United's arguments had been recently addressed by the Court in *New Models*, which explained in detail how that decision "was consistent with the text and structure of FECA" as well as "prior case law," and that *New Models* is binding on the panel. *Id.* at 1180. Judge Pillard dissented in part.

SUMMARY OF ARGUMENT

Heckler v. Chaney established that agency decisions invoking prosecutorial discretion are presumptively unreviewable. The Court recognized that enforcement decisions involve complex, practical considerations, such as resource allocation and the likelihood of success, which courts should leave to the agency.

Under FECA Circuit precedent, the FEC has prosecutorial discretion to decide whether to pursue enforcement actions, and this discretion is insulated from judicial review, absent clear direction and workable standards from Congress that are not present here. These precedents are hardly novel, as nearly every other

federal agency enjoys prosecutorial discretion. *Comm'n on Hope*, 892 F.3d at 441 (citing *Drake v. FAA*, 291 F.3d 59, 69–72 (D.C. Cir. 2002)); *Steenholdt v. FAA*, 314 F.3d 633, 638–39 (D.C. Cir. 2003); *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006); *Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1031–33 (D.C. Cir. 2007); and *Sierra Club v. Jackson*, 648 F.3d 848, 855–56 (D.C. Cir. 2011)). Indeed, what is unusual is that, unlike other agencies, Commission nonenforcement decisions remain subject to judicial review when based solely on an interpretation of FECA. *End Citizens United*, 90 F.4th at 1181-83 (reviewing dismissal based on legal determinations, without reliance on prosecutorial discretion). The panel decisions here reflect a harmonized application of these principles: providing for judicial review to prevent legal errors while respecting agency discretion over practical considerations it is best positioned to evaluate and weigh.

Orloski v. FEC is consistent with the understanding that judicial review of Commission legal decisions resulting in dismissal is limited by design. *Orloski* identifies the "established principle that courts may review an agency's statutory interpretation," and further that "the Commission cannot apply an otherwise permissible interpretation of FECA in an unreasonable way." *New Models*, 993 F.3d at 894 (citing *Orloski*, 795 F.3d at 161). In either instance, the nonenforcement decision is based entirely on legal interpretation. The panel

decisions providing that judicial review is unavailable for dismissals based on prosecutorial discretion are in harmony with *Orloski*. The district court's decision, and the panel decisions by extension, should be affirmed.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment ruling *de novo* and may affirm on any ground. *Judicial Watch, Inc. v. U. S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013); *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

ARGUMENT

I. AGENCY PROSECUTORIAL DISCRETION IS PRESUMPTIVELY UNREVIEWABLE

Heckler v. Chaney established that "agency decisions not to institute enforcement proceedings" are presumptively unreviewable. *Heckler*, 470 U.S. at 832-33. 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 [in FECA] overcomes the presumption against judicial review" of FEC dismissals based on prosecutorial discretion. *Comm'n on Hope*, 892 F.3d at 439.

There are good reasons such discretionary dismissals are not subject to judicial review. The Supreme Court has long recognized that a federal law enforcement agency is "far better equipped" than the judiciary to analyze practical factors that attend a particular decision about whether to bring an enforcement

action. *Heckler*, 470 U.S. at 831. The Court observed that "[t]his recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* The agency's balancing of factors includes consideration not only about "whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* Those considerations led the Court to the conclusion that agency decisions not to enforce are presumptively unreviewable absent clear direction from Congress. *Id.*

This Court has correctly and repeatedly confirmed that FEC dismissals of administrative complaints based on prosecutorial discretion are not subject to judicial review. *Comm'n on Hope*, 892 F.3d at 438; *New Models*, 993 F.3d 880, 884, 889; *Campaign Legal Ctr. v. FEC*, 89 F.4th 936, 941 (D.C. Cir. 2024). This Circuit observed in *Commission on Hope* that "federal 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 *Heckler*, 470 U.S. at 831, and *FEC v. Akins*, 524 U.S. 11, 25 (1998)). And in *New Models*, the court confirmed that *Commission on Hope*

"forecloses review" of the reasoning of a controlling group of FEC Commissioners that invoked prosecutorial discretion as a basis for dismissing a complaint. *New Models*, 993 F.3d at 889. An opinion concurring in the denial of a petition for *en banc* review of *New Models* explained:

> In our structure of separated powers, "an agency's refusal to institute proceedings" falls within "the special province of the Executive Branch" — a province the judiciary cannot invade. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); U.S. Const. art. II, § 1. The Administrative Procedure Act ("APA") enshrines this principle by explicitly withholding judicial review of matters "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Federal Election Campaign Act ("FECA") leaves such executive discretion in place, consistent with the Constitution and the APA. FECA importantly provides for judicial review of decisions "contrary to law," 52 U.S.C. § 30109(a)(8)(C), but the Commission may decline to move forward with an enforcement action for reasons of prosecutorial discretion and such decisions cannot be reviewed by this court.

55 F.4th 918, 919 (D.C. Cir. 2022) (Rao, J. concurring, joined by Henderson, J., Katsas, J., and Walker, J.) ("Concurrence"). Thus, *Commission on Hope* and *New Models* properly concluded that the Commission's prosecutorial discretion remains well within the scope of discretion traditionally afforded to federal law enforcement agencies.

Commission on Hope arose from an FEC enforcement matter involving alleged violations of FECA's disclosure provisions, specifically allegations that an entity was a "political committee" under FECA and thus subject to the accompanying legal requirements. 892 F.3d at 441. The district court reviewed a

split-vote dismissal decision in which a controlling group of 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 court summarized the statement from the controlling group of Commissioners explaining they "were concerned that the statute of limitations had expired or was about to; that the association named in CREW's complaint no longer existed; that the association had filed termination papers with the IRS four years earlier; that it had no money; that its counsel had resigned; that the 'defunct' association no longer had any agents who could legally bind it; and that any action against the association would raise 'novel legal issues that the Commission had no briefing or time to decide.'" *Comm'n on Hope*, 892 F.3d at 438 (citing statement of reasons).

New Models likewise found an administrative dismissal to be unreviewable based on the controlling bloc of commissioners' discussion of prosecutorial discretion in their statement of reasons. The *New Models* court determined that "the [FEC] Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss [the administrative] complaint," and courts "lack the authority to second guess a dismissal based even in part on enforcement discretion." 993 F.3d at 882. The court noted that the controlling statement relied on discretionary considerations at the heart of *Heckler*'s holding, such as concerns about resource

allocation, enforcing a judgment, and availability of evidence. *See id*. at 885 (citing *Heckler*, 470 U.S. at 831-32). The Statement of Reasons explained "'[g]iven 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.'" *New Models,* 993 F.3d at 883 (quoting Statement of Reasons). The statement emphasized *New Models* had "liquidated, terminated, dissolved, or otherwise ceased operations" in 2015. *Id.* The court in *New Models* explained that the controlling group "exercised its expertise in weighing these factors, factors courts are ill-equipped to review in the absence of identifiable legal standards." *Id. See Heckler*, 470 U.S. at 831–32. Thus, the dismissal here was not subject to review.

Complainant argues that the text of FECA itself shows Congress intended for courts to set aside dismissals that are "contrary to law" for any reason. (Br. at 5, 22-26.) But since the text of FECA grants the FEC discretion to determine whether to initiate enforcement proceedings, and also does not provide a "meaningful standard" to judge the exercise of that discretion, nothing in FECA overcomes the presumption against judicial review under *Heckler*. *See New Models*, 993 F.3d at 890 (referencing *Heckler* to explain that "FECA provides only that nonenforcement decisions made 'contrary to law' may be subject to judicial review. Standing alone this provision does not provide a legal standard for judicial

review of discretionary decisions, which, by definition, are not based on 'law' and therefore cannot be reviewed under the 'contrary to law' standard."). Accordingly, FEC dismissals on the agency's legal interpretation of FECA constitute reviewable agency action, but dismissals based on prosecutorial discretion do not.

Since the dismissal here was not based on the controlling Commissioners' interpretation of FECA, and the controlling group of Commissioners cited "multiple factors … in exercising their prosecutorial discretion," that dismissal is a non-reviewable action. (JA 97-98, 109.) Under *Commission on Hope* and other precedent, the Court cannot carve out the controlling Commissioners' FECA determinations for judicial review. *Comm'n on Hope*, 892 F.3d at 442. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (holding that agency's prosecutorial discretion "could not be evaded by 'artificially carving out this antecedent legal issue' from the basic request for enforcement"). And *Heckler* does not mandate a different result. (*Contra* Br. at 21-22-38.) Indeed, *Heckler* itself involved an agency's legal conclusion that it lacked 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 ("For us, this case turns on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed.") (emphasis in original).

II. THIS COURT'S PANEL DECISIONS ARE SUPPORTED BY SUPREME COURT AND PRIOR CIRCUIT PRECEDENT

The panel decision here, and by extension *New Models* and *Commission on Hope*, are not undermined by any of the decisions on which Complainant relies. (Br. at 26-29.) Of the opinions Complainant cites, none reviewed a Commission decision not to proceed with an enforcement matter "when the controlling Commissioners provide[d] a statement of reasons explaining the dismissal turned in whole or in part on enforcement discretion" or invoked the "practical enforcement considerations" that underlie *Heckler*, as the panel decisions recognized. *New Models*, 993 F.3d at 885, 894; *see also Akins*, 524 U.S. at 18, 25 (reviewing a dismissal based on a "no probable cause to believe" finding); *DCCC*, 831 F.2d at 1133 ((reviewing an unexplained Commission dismissal); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (reviewing a challenge to a Commission rule); *Orloski*, 795 F.2d at 160 (reviewing a dismissal based on a "no reason to believe" finding). Complainant has thus failed to identify any authority supporting its position that prosecutorial discretion is reviewable in these circumstances.

A. The Panel Decisions Are Consistent with *FEC v. Akins*

Complainant argues that *Akins* stands for the proposition that FECA provides for judicial review of any Commission dismissal "notwithstanding

Heckler" (Br. 26), but the Supreme Court's discussion of prosecutorial discretion was much more limited and did not reach that question. *Akins*, 524 U.S. at 25-26. In *Akins*, the Commission found no probable cause regarding the respondents' first claim for violation of political committee requirements and found probable cause regarding their second claim for prohibited corporate contributions, but nonetheless, it 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)). The Court noted that the first claim — the only one considered by the Supreme Court — was agency action "based entirely on its interpretation of the statute." 892 F.3d at 441 n.11.

The Commission had declined to proceed on the sole administrative claim at issue in *Akins* based on its conclusion that the group at issue "was not subject to the disclosure requirements" because it did not meet the legal definition of a "political committee" under FECA. 524 U.S. at 18. That is the Commission "based its decision entirely on legal grounds" that a reviewing court could evaluate under FECA's contrary-to-law standard. *New Models*, 993 F.3d at 893 (citing *Akins*, 524 U.S. at 25); *see also Comm'n on Hope*, 892 F.3d at 441 n.11. The Commission argued that the respondents 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 respondents' other claim. *Akins*, 524 U.S. at 25. And while Complainant here argues that the Commission invoked prosecutorial discretion in *Akins* as a basis for its dismissal decision in its briefing to the Court, (Br. at 29), that is incorrect. The cited footnote in the FEC's brief argued that the Commission "should be accorded deference" for the "discretionary judgment" about how to apply the "major purpose test" — a reviewable legal determination. Reply Br. for Pet'r, *FEC v. Akins*, No. 96-1590, 1997 WL 675443, at *9 n.8 (S. Ct. Oct. 30, 1997). The dismissal of *that* claim did not invoke prosecutorial discretion, and thus the Supreme Court had no occasion to consider the availability of judicial review of such a dismissal.

Thus, the *only* question addressed by the Supreme Court involved the administrative complainants' standing to sue. *Akins*, 524 U.S. at 18, 22. The Commission argued that the respondents' injury was not fairly traceable to the Commission's alleged legal error because it was "possible" that the FEC *could have* declined to pursue enforcement in exercise of its prosecutorial discretion "even had [it] agreed with [the complainants'] view of the law." *Id.* at 25. In rejecting that argument, the Court reasoned that this 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). Here, by contrast, the controlling Commissioners "expressly" invoked prosecutorial discretion when explaining their votes against pursuing enforcement. *New Models*, 993 F.3d at 893-94. Thus, while the *Akins* Court did reject the FEC's argument that all its nonenforcement decisions were unreviewable, the Court never went as far to assert the opposite was true — that all decisions were reviewable. Moreover, it did so only to answer the question of standing. To be sure, *Akins* also rejected the Commission's argument that *all* Commission decisions "not to undertake an enforcement action" were unreviewable under *Heckler* because FECA "explicitly indicates" that review is available. *Akins*, 524 U.S. at 26. The Court confirmed, however, that judicial review to correct legal errors did not eliminate the Commission's authority to "decid[e] to exercise prosecutorial discretion" and cited *Heckler* for that view. *Id.* at 25; *see New Models*, 993 F.3d at 895 (noting that *Akins* "emphasized that the reviewability of the Commission's action depended on the existence of a legal ground of decision"). And significantly, while *Akins* distinguished *Heckler* when finding the dismissal at issue judicially reviewable, it *favorably* cited *Heckler* 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 [*Heckler*], and 'take no further action' on § 441b allegation against [respondent]).").

B. The Panel Decisions Are Consistent with Circuit Precedent

By this same token, Circuit authority does not conflict with the panel decisions here. None of the authorities Complainant cites made a binding holding that a dismissal decision based on prosecutorial discretion is judicially reviewable. In *DCCC*, for example, the Court explained that while prosecutorial discretion will not be implied, it did nothing to undermine its force when invoked explicitly. There, 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. This Court rejected the Commission's argument that dismissals resulting from the inability of any position to garner four Commission votes are *per se* "immunized from judicial review because they are simply exercises of prosecutorial discretion." *Id.* at 1133. The Court reasoned that the mere fact that a split vote occurred did not necessarily mean that the Commission intended to invoke its prosecutorial discretion. *Id.* at 1133-35. Because the controlling Commissioners had not explained the rationale for their vote in the matter at issue, this Court remanded the case for an explanation. *Id.* at 1133.

As such, *DCCC* did not establish a rule that a prosecutorial discretion dismissal is reviewable as the Complainant here claims. (Br. at 27.) 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.* at 1134; *see also id.* at 1135 n.5 ("arguendo, assuming reviewability"). As the panel decision in *New Models* recognized, *DCCC* did not "'answer . . . for all cases' the question of whether a Commission dismissal due to deadlock is 'amenable to judicial review.'" 993 F.3d at 894 (quoting *DCCC*, 831 F.2d at 1132). And unlike *DCCC*, the controlling Commissioners here expressly invoked prosecutorial discretion.

The decisions are also consistent 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 because there was no "present danger of an enforcement proceeding." 69 F.3d at 603. The Court held that the threat of enforcement remained because nothing prevented "the Commission from enforcing its rule at any time." *Id.* The Court also posited a hypothetical challenge to a dismissal of an administrative complaint against the group, which could be successful because the "refusal to enforce would be based . . . on the Commission's unwillingness to enforce its own rule." *Id.* But that hypothetical was predicated on a controlling

Commissioner's explanation that her vote was based on her view that the regulation was legally unenforceable, not prosecutorial discretion. *Id.* at 603; Statement of Commissioner Lee Ann Elliott Regarding Advisory Op. Req. 1994-4 (Oct. 26, 1994), https://www.fec.gov/files/legal/aos/1994-04/1079290.pdf at 1 (explaining that membership rule was "without statutory support"). This hypothetical dismissal thus was based solely on a legal determination and also reviewable under the panel decisions' logic.

III. FECA PROVIDES FOR REVIEW OF LEGAL DECISIONS, AND PROSECUTORIAL DISCRETION DISMISSALS ARE CONSISTENT WITH BASIC ADMINISTRATIVE LAW PRINCIPLES

The panel decisions here, in *New Models,* and *Commission on Hope* are rooted in the principle that judicial review of an agency action is unavailable where there is "no law to apply." *New Models*, 993 F.3d at 885 (quoting *Comm'n on Hope*, 892 F.3d at 440). Because a court generally has no "meaningful standards" by which to review an agency exercise of prosecutorial discretion, *Heckler*, 470 U.S. at 834, such decisions are, therefore, generally "committed to agency discretion by law" under the APA. *Id.* at 835. Courts have applied *Heckler* even when, like FECA, the underlying statute provides procedures for judicial review separate from the APA. *E.g., Steenholdt v. FAA*, 314 F.3d 633, 638-39 (D.C. Cir. 2003) (statutory judicial review, but unreviewable discretion in areas where there are no standards for reviewing court to apply).

Complainant argues that FECA itself limits agency prosecutorial discretion. (Br. at 22-26.) While it is true that Congress may by statute provide meaningful limits on an agency's prosecutorial discretion that could be enforced by judicial review, FECA's text does not "set substantive enforcement priorities nor does it establish standards to guide enforcement discretion." *New Models*, 993 F.3d at 890; *see also Comm'n on Hope*, 892 F.3d at 440. Rather, FECA simply directs that the Commission "shall" take specific actions "[i]f" it makes certain predicate legal determinations, 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i); it does not require the Commission "to make those legal determinations in the first instance." *Comm'n on Hope*, 892 F.3d at 439. And its ultimate decision whether to institute a civil enforcement action "is explicitly vested in the Commission's discretion" by providing only that the "'Commission *may*'" file suit. *New Models*, 993 F.3d at 890 (quoting 52 U.S.C. § 30109(a)(6)(A)). Congress determined that challenges to FEC dismissals would be available only to the extent the dismissals were "contrary to law." 52 U.S.C. § 30109(a)(8)(C). But it provides no guidance to a court in determining whether a particular enforcement action "fits the agency's overall policies" or within the agency's budget. *Heckler*, 470 U.S. at 831.

Fundamentally, Complainant's 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 applying an

interpretation of FECA, the FEC determines whether the agency *should* pursue a particular enforcement claim based on practical considerations. That latter determination is in the heartland of the FEC's expertise and regulatory authority. *Heckler*, 470 U.S. at 831-32. By considering each case individually and pursuing enforcement matters where four or more Commissioners deem it appropriate, the Commission operates as *Heckler* 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 Heckler*, 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." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000) (emphasis added). By providing in FECA that it takes four Commissioner votes to proceed on an enforcement matter, 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). A dismissal resulting from the absence of four or more Commissioners voting to proceed furthers the Congressional intent of requiring that any federal campaign finance enforcement be the product of the Commissioners' bipartisan expertise.

Complainant's arguments that the panel decisions are not consonant with administrative law precedent (Br. 4, 23-24) simply misstate the record. The controlling Commissioners' statement (J.A. 282, 290) invoked prosecutorial discretion and based its analysis "squarely on prudential and discretionary considerations" separate from the merits of the legal question at issue. *New Models*, 993 F.3d at 886; *see also Citizens for Resp. & Ethics in Wash. v. FEC*, , 380 F. Supp. 3d 30, 42 (D.D.C. 2019) ("[T]he Controlling Commissioners' invocation of prosecutorial discretion here did not rely on their interpretation of FECA or case law."). The controlling Commissioners plainly intended to dismiss based on prosecutorial discretion. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (reviewing court will affirm so long as one independent ground for decision is valid, unless it is demonstrated that the agency would not have acted on that basis in absence of alternative ground).

Since the Commission routinely takes votes to determine whether there is "reason to believe" a violation occurred under FECA, and when that decision is based on a legal conclusion, it is reviewable. But a Commissioner's vote against

finding reason to believe does not necessarily mean that the Commissioner has concluded that no FECA violation occurred. Such a vote may instead indicate that the Commissioner would exercise discretion not to pursue the matter due to agency priorities, the age of the alleged conduct, or other non-merits considerations. At this stage the Commission can also vote to dismiss an action for either legal or discretionary reasons.

Given these varied potential grounds for the agency's decision, this Court has understandably required the controlling group of Commissioners to provide a statement of reasons when it does not accept staff recommendations. *Common Cause*, 842 F.2d at 449-50. Circuit law makes clear that this explanation "necessarily states the agency's reasons for acting," even when provided by a non-majority of Commissioners. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. Complainants' argument that a Commission invocation of prosecutorial discretion must command four Commissioner votes (Br. 34-36) is inconsistent with this Circuit's guidance.

IV. PROSECUTORIAL DISCRETION IS REASONABLE PART OF THE FEC'S BIPARTISAIN ENFORCEMENT PROCESS

The FEC's determination as to whether there is "reason to believe" or "probable cause" to believe the law has been violated in a Matter Under Review follows a statutorily-mandated set of procedures that require evaluation of evidence presented by complainants and respondents, and the Commission's expert

interpretation and application of the relevant law. The statutory membership limitation prevents the six-person Commission from falling under the domination of any one political party. *See Common Cause*, 842 F.2d at 448. Thus, that some complaints will ultimately be dismissed as a matter of prosecutorial discretion is a natural byproduct of the Commission's bipartisan enforcement process.

That Commissioners have at times exercised their prosecutorial discretion when dismissing some matters since *Commission on Hope* and *New Models* (Br. at 34) does not demonstrate that they did so in bad faith. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith."). Furthermore, the Commission has continued to pursue enforcement of FECA violations since these panel decisions. *See, e.g.*, FEC, FEC Enforcement Statistics 1997-2025 (last updated Nov. 19, 2024), https://www.fec.gov/resources/cmscontent/documents/enforcementstats1977to2025.pdf (detailing enforcement statics for closed matters for the period since *Commission on Hope* and *New Models* was decided, from 2021 through October of 2024). The Commission has also continued to dismiss matters without relying on prosecutorial discretion, and thus based solely on a legal determination that the record fails to give rise to a reasonable inference that a violation has occurred, which is judicially reviewable under this Circuit's precedent. *See* FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,

89 Fed. Reg. 19729 (Mar. 20, 2024).[4] Of course, the FEC's prosecutorial discretion, like that of any law enforcement agency, has an outer limit. Significantly, as discussed above, *Commission on Hope* and *New Models* recognized that, if the Commission did cease to enforce campaign law in the future (Br. at 31-33), judicial review would remain 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 *Heckler*, 470 U.S. at 833 n.4)).

It also bears repeating that, despite Complainant's repeated attestations to the contrary (Br. at 34-36), *Commission on Hope* and *New Models* do *not* bar all future review of FEC dismissals. Unlike most agencies' nonenforcement decisions, FEC dismissals based entirely on a FECA determination are reviewable.

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[4] *See, e.g.*, MUR 7800 (Kanye 2020, et al.) (Aug. 16, 2024); https://www.fec.gov/files/legal/murs/7800/7800_15.pdf; MUR 8144 (Keith Gross for Florida and Jason D. Boles) (Aug. 15, 2024); https://www.fec.gov/files/legal/murs/8144/8144_09.pdf; MURs 7951 & 8003 (Kistner for Congress) (Jan. 27, 2023), https://www.fec.gov/files/legal/murs/7951/7951_06.pdf; 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.

Comm'n on Hope, 892 F.3d at 411 n.11. As such, FECA's very limited private cause of action provision continues to apply where appropriate.

(*Contra* Br. at 36-38.)[5]

V. THE PANEL DECISIONS DO NOT CONFLICT WITH *ORLOSKI*

The panel decisions here are supported by *Orloski* and do not conflict with the "contrary to law" standard under 52 U.S.C. § 30109(a)(8)(C). It has long been established that judicial review of Commission dismissal decisions under FECA is "limited." *Common Cause*, 842 F.2d at 448; *CREW v. FEC*, 475 F.3d at 340. The court's review is "[h]ighly deferential," "presumes the validity of agency action[,] and permits reversal only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin v. FEC*, 411 F.3d at 242. Accordingly, a court may only set aside a dismissal decision, where that decision is reviewable at all, if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). This means that the Commission's decision cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was

[5] While a complainant 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 the court finds the dismissal rationale to be contrary to law and the Commission fails to conform, the administrative complainant may institute a private right of action against respondents. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161; *see also DSCC*, 454 U.S. at 31. Chapter 7 of the APA, which contains the judicial review provisions, is consistent with FECA's contrary to law formulation. *See* 5 U.S.C. §§ 701–706; *see also New Models*, 993 F.3d at 894 ("*Orloski* recognizes the Commission cannot apply an otherwise permissible interpretation of FECA in an unreasonable way — which is the same review that courts regularly conduct under Section 706 of the APA."); *Comm'n on Hope*, 892 F.3d at 437 n.3 (*Orloski*'s "contrary to law" standard "repeated this language from the APA"). The panel decisions should be read in accord with *Orloski*. The panels themselves took pains to place Orloski and its progeny within the framework of their analyses.[6]

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[6] *New Models* explicitly referenced "*Akins*, *DCCC*, *Chamber of Commerce*, and *Orloski*," and it found that "*Commission on Hope* readily conforms with [these] earlier cases." 993 F.3d at 893 (D.C. Cir. 2021). *See Comm'n on Hope*, 892 F.3d at 437-38 & n.3 (D.C. Cir. 2018) (relying on *Akins* and *Orloski* for proposition that agency has prosecutorial discretion); *New Models,* 993 F.3d at 891 (relying on *Orloski* to observe that the "citizen suit provision remains fully operative when the agency has declined to act based on legal reasons" and noting that dismissals "based solely on judicially reviewable legal determinations" remain reviewable); *id*. (citing *Chamber of Commerce* and noting that "[i]n reconciling" FECA's judicial review provision with *Heckler*'s holding, "we concluded that a Commission nonenforcement decision is reviewable only if the decision rests *solely* on legal interpretation"); *New Models*, 55 F.4th at 919–20 (concurrence in denial of rehearing *en banc*) (citing *Akins* for proposition that FECA does not alter "this basic rule" that "courts cannot simply pluck out legal questions from nonreviewable decisions").

A. Judicial Review Under *Orloski* Based on an "Impermissible Interpretation" of FECA Has Not Been Undermined

The first part of *Orloski* sets forth "the established principle that courts may review an agency's statutory interpretation." *New Models*, 993 F.3d at 894. *Orloski* has not, as Complainants contend, been "undermined" by the panel decisions here (Br. at 18.) Nor could it, because the FEC dismissal under review in *Orloski* was based entirely on the Commission's interpretation of FECA. *Orloski*, 795 F.2d. at 160-61; *see also New Models*, 993 F.3d at 894-95. *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. This necessarily fits within the understanding that "FECA provides no legal criteria a court could use to review an exercise of prosecutorial discretion under the 'contrary to law' standard." *New Models*, 993 F.3d at 885.

As such, and despite Complainant's arguments otherwise, the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) does not alter this landscape, and there is no need for the Court to address a *Loper* argument here. *Loper* considered only statutory interpretation whereas *Heckler* and the panel decisions do not. The statement of reasons at issue in this case, issued by the controlling group of FEC Commissioners, relied *explicitly* on

prosecutorial discretion as an independent basis for the dismissal and cited several well-established grounds for its exercise, including the availability of agency resources for the scope of the investigation that would be required. *See supra* pp. 12-13. *Loper Bright* addressed none of these considerations, and was concerned only with judicial review of an agency's *statutory* interpretation. *See* 144 S. Ct. at 2256-57. In overruling *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Court held that the Administrative Procedure Act requires courts to independently decide whether an agency has acted within its statutory authority, and courts may not defer to an agency's interpretation simply because a statute is ambiguous. *Loper Bright*, 144 S. Ct. at 2273. Complainant's arguments regarding "reviewability" (*see* Br. at 45), are thus inapplicable. *Loper Bright* involved the degree of deference that should be given to an agency's *statutory* interpretation within the context of a reviewable legal decision. 144 S. Ct. at 2262-63. The dismissal decision here instead implicates an entirely separate type of deference: the deference the Commission receives when it exercises its prosecutorial discretion not to conduct an enforcement investigation, or to take no additional action after an investigation has been conducted. The Supreme Court did not therefore have the occasion to consider the *distinct* doctrine of a dismissal based on prosecutorial discretion, which this Circuit has repeatedly held precludes judicial review without regard to how to resolve questions of statutory ambiguity.

B. Judicial Review Under *Orloski* Based on a Dismissal That is "Arbitrary, Capricious or Abuse of Discretion" Has Not Been Undermined

As the panel decisions rightly recognized, *Orloski* stands for the proposition that "the Commission cannot apply an otherwise permissible interpretation of FECA in an unreasonable way — which is the same review that courts regularly conduct under Section 706 of the APA." *New Models*, 993 F.3d at 894; *see also Hagelin*, 411 F.3d at 242 (considering whether the Commission's application of FECA to respondent's conduct was "arbitrary or capricious, or an abuse of discretion" (quoting *Orloski*, 795 F.2d at 161)). *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 thus based on a finding that there is "no reason to believe" or "no probable cause to believe" under an interpretation of FECA is far different than a finding that the matter should be dismissed for prosecutorial discretion.

As the panel decisions have explained, *Orloski* did not involve a situation in which the Commission relied on enforcement discretion, and *Orloski* explicitly stated that "abuse of discretion" review occurs in the application of an otherwise "permissible interpretation of the statute." 795 F.2d at 161. "This statement echoed [*Heckler*'s] conclusion that nonenforcement decisions may be reviewed for

abuse of discretion only when there is 'law to apply.'" *New Models*, 993 F.3d at 894-95 (quoting *Heckler*, 470 U.S. at 834-35). *Orloski* flows from *Heckler* and is "perfectly consistent" with the panel decisions. *New Models*, 993 F.3d at 895.[7]

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision below in its entirety based on a correct application of *Heckler v. Chaney* and this Court's precedent. Like other federal agencies, the FEC retains prosecutorial discretion. When such discretion is invoked as a basis for a nonenforcement decision it is not subject to judicial review.

Respectfully submitted,

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[7] Additionally, this Court's precedent does not suggest the far-reaching implication that the Commission is entitled to *no* prosecutorial discretion. Thus, while the panel decisions and the decision below in this case are consistent with *Orloski* and should be affirmed, if this Court decides otherwise, dismissals based upon prosecutorial discretion should, at a minimum, remain subject to a reasonableness review and, at most, be subject to reversal only if they are arbitrary or capricious, or an abuse of discretion.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2024, I electronically filed the En Banc Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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