ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5339

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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April 28, 2023

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

Pursuant to this Court's Order of December 23, 2022, and 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***. Campaign Legal Center 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.

(B) ***Rulings Under Review***. Campaign Legal Center appeals the December 8, 2022, memorandum opinion and order of the United States District Court for the District of Columbia (Boasberg, J.) granting the Commission's Motion to Dismiss. The December 8, 2022, opinion is not published in the federal reporter but is available at 2022 WL 17496211.

(C) ***Related Cases***. The Commission knows of no related cases.

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INTRODUCTION

Appellant Campaign Legal Center ("Complainant") challenges the dismissal of an administrative complaint it filed with the Federal Election Commission ("FEC" or "Commission") alleging violations of the Federal Election Campaign Act ("FECA"), but as the district court concluded, under controlling precedent judicial review is unavailable because the dismissal was an exercise of prosecutorial discretion. After considering the administrative complaint, the Commission did not approve pursuing the matter further by the requisite votes and thereafter voted to close its file. The controlling statement of reasons providing the rationale for that decision relied explicitly on prosecutorial discretion as an independent basis for the dismissal, citing several well-established grounds for the exercise of that discretion, even though the statement also contained significant legal analysis. This Court has repeatedly made clear, as the district court noted, that FEC dismissals of administrative complaints based *even in part* on prosecutorial discretion are not subject to judicial review. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880, 884 ("*New Models*") (D.C. Cir. 2021), *pet. for reh'g en banc denied*, 55 F.4th 918, 919 (D.C. Cir. 2022) (per curiam); *Citizens for Responsibility & 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).

Complainant argues that review is still available here because the prosecutorial discretion rationale in the controlling statement of reasons was allegedly "inseparable" from its application of FECA. But that claim cannot be reconciled with the controlling statement's distinct and detailed reliance on the traditional considerations involved in the exercise of prosecutorial discretion, including reasoning that the district court found was "independent of pure legal inquiry" (Joint Appendix ("J.A.") 47), or with the controlling precedent above, which makes clear that only dismissals based *solely* on statutory interpretation are subject to review. And the preclusive effect of the *Commission on Hope* and *New Models* decisions on the claims here is only underscored by Complainant's own alternative argument, which must fail, that those cases were wrongly decided and should be disregarded.

Because judicial review is plainly unavailable here, this Court should affirm the district court's decision.

COUNTERSTATEMENT OF JURISDICTION

On December 8, 2022, the district court issued a final order granting the Commission's Motion to Dismiss, finding the dismissal of the administrative complaint unreviewable because it was within the agency's prosecutorial discretion and therefore outside the reach of judicial review. (J.A. 31-49.) The district court had jurisdiction under 28 U.S.C. § 1331. Complainant timely appealed on

December 21, 2022. (J.A. 4.) This Court has jurisdiction to hear the appeal from that final judgment under 28 U.S.C. §§ 1291, 1294(1).

COUNTERSTATEMENT OF THE ISSUES

The issue presented for review is whether the dismissal of an FEC administrative complaint explained as an exercise of prosecutorial discretion is reviewable under 52 U.S.C. § 30109(a)(8)(C).

STATUTES AND RULES

The relevant provisions are included in the Addendum to Appellant's Opening Brief ("Br.").

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Commission

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

B. Enforcement and Judicial Review

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

If the Commission dismisses 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); *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." *Commission 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) (discussing the Commission's prosecutorial discretion). In *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), the D.C. Circuit concluded that the

Commission is entitled to decide whether to begin an investigation even where that decision is based on a "subjective evaluation of claims." 795 F.2d at 168. "It 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.

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.*; *Commission 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 Provision Requiring Disclosure of Payees of Political Committees

FECA and Commission regulations require political committees to report the name and address of each person to whom they make expenditures or other disbursements aggregating more than $200 per calendar year, or per election cycle for authorized federal candidate committees, as well as the date, amount, and purpose of such payments. 52 U.S.C. § 30104(b)(5), (6); 11 C.F.R. § 104.3(b)(4)(i), (vi) (authorized committees); *id.* § 104.9(a), (b) (all political committees). The reporting requirements are intended to ensure public disclosure of "where political campaign money comes from and how it is spent." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam); *see also Citizens United v. FEC*, 558 U.S. 310, 369-71 (2010). Disclosure requirements also "deter[] and help[] expose violations" of FECA and Commission regulations. *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc); *see also Buckley*, 424 U.S. at 67-68 (explaining that disclosure requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the

light" and that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of the Act); *McConnell v. FEC*, 540 U.S. 93, 196 (2003). The FEC has explained that the reporting of a disbursement payee, in conjunction with the description of purpose of that disbursement, should allow "a person not associated with the committee [to] easily discern why the disbursement was made when reading the name of the recipient and the purpose." FEC, Statement of Policy: "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887, 888 (Jan. 9, 2007).

D. Initial Administrative Proceedings

On July 28, 2020, Campaign Legal Center filed an administrative complaint with the Commission against former President and 2020 presidential candidate Donald J. Trump's authorized campaign committee, Donald J. Trump for President, Inc. (which later became Make America Great Again PAC), and one of his authorized joint fundraising committees, Trump Make America Great Again Committee (collectively referenced here as "Committees"). (J.A. 5, 51-120.) The administrative complaint, which was designated Matter Under Review ("MUR") 7784, alleged that the Committees had violated 52 U.S.C. § 30104(b) by failing to properly disclose the ultimate payees and other aspects of payments to entities made through American Made Media Consultants, LLC and Parscale Strategy, LLC. (J.A. 5-6 (citing Administrative Complaint ("Admin. Compl."), MUR 7784,

July 24, 2020 (J.A. 51-120).) In particular, the administrative complaint alleged that the Committees had disbursed hundreds of millions of dollars without disclosing the ultimate payees or purposes of the payments and that in some instances the payments to Parscale Strategy, LLC were used as a way to pay staff salaries, without accurately disclosing the details or purposes of the transactions. (J.A. 6.) The administrative complaint sought, among other things, a finding that there was reason to believe that the Committees had violated section 30104(b) by failing to properly itemize and report their disbursements. (J.A. 6-7.)

E. The FEC's Consideration and Disposition of the Administrative Complaint

When the Commission considered the administrative complaint filed by Complainant, it voted 3-3 on whether there was reason to believe a violation had occurred, without the four votes needed to proceed with an investigation into the alleged violations. (J.A. 7, 221-23.) The Commission subsequently voted 4-2 to close the file. (*Id.*)

On July 15, 2022, the Commission publicly released the file in MUR 7784. Thus, documents including administrative complaints, respondents' statements, certifications, and a report from the Office of General Counsel are on the public record. *See* Closed Matters Under Review, MUR 7784, https://www.fec.gov/data/legal/matter-under-review/7784/.

Because there were not four votes to proceed with the complaints against the Committees, the three Commissioners who voted against proceeding with enforcement constitute the controlling group for purposes of judicial review, and statements of reasons were issued by Commissioners to explain their votes. In a Statement of Reasons dated June 9, 2022, these Commissioners explained that they declined to find reason to believe that the Committees violated the Act and voted to dismiss the complaint pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). (*See* Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III ("Dickerson, Cooksey and Trainor Statement") (J.A. 224-36).)

In their statement, the controlling Commissioners explained that they found insufficient factual and legal support for enforcement, particularly noting that they did not believe the Commission would ultimately be successful in pursuing the matter. (J.A. 235.) The Commissioners stated that pursuing enforcement would be "predicated upon factual assumptions about which the record is — at the very best — ambiguous and, to a material extent, based upon anonymous sources in press reports." *Id.* The Commissioners also perceived litigation risk in pursuing this matter and noted that the "size and scope of the proposed investigation" could quickly "consume an outsized share of the resources available to the Commission." (J.A. 235-36.) The Commissioners stated that the relevant regulatory environment

was uncertain at best, with a rulemaking petition on sub-vendor reporting pending before the Commission, and they also took into consideration in their explanation certain vendor arrangements for other past campaigns that the Commission did not pursue in enforcement proceedings. (J.A. 235.)

Commissioners Broussard and Weintraub separately issued a statement of reasons, dated June 15, 2022, concluding that there was reason to believe violations had been committed. (*See* Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub ("Broussard and Weintraub Statement") (J.A. 237-41).) In their statement, these Commissioners explained their view that there was sufficient reason to believe that the Committees had failed to properly report disbursements to AAMC and Parscale Strategy, in violation of FECA. (*Id.*) Commissioner Weintraub also provided a Supplemental Statement of Reasons on July 14, 2022. (*See* Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub ("Weintraub Statement") (J.A. 242-46).) In this statement, Commissioner Weintraub contended that the Dickerson, Cooksey and Trainor Statement did not properly invoke prosecutorial discretion and that the statement was instead a merits-based analysis. (J.A. 242-43.)

F. District Court Proceedings

The district court granted the Commission's motion to dismiss, ruling that judicial review was unavailable because the administrative complaint at issue had

been dismissed in part on the basis of prosecutorial discretion. (J.A. 31-49.) In particular, the district court concluded that "Circuit precedent provides an unequivocal answer" that this case is unreviewable, a result that is "foreordained by *Commission on Hope* and [*New Models*]." (J.A. 45.)

The district court began by determining that the statement of reasons issued by the three Commissioners who had voted against finding reason to believe a violation had occurred stated the basis for dismissal of the administrative complaint under longstanding D.C. Circuit precedent. (J.A. 39-45.) The court rejected plaintiff's argument that it could not consider that rationale because there had been a separate 3-3 vote specifically on whether to dismiss under *Heckler v. Chaney*. (J.A. 41-44.) Appellant has not raised that claim on appeal.

Next, the district court determined that the dismissal of plaintiff's complaint was not judicially reviewable, under the D.C. Circuit's decisions in *Commission on Hope* and *New Models*. (J.A. 45-49.) Under that precedent, the court explained, FEC dismissals are not reviewable if the controlling group of Commissioners relies even in part on prosecutorial discretion. (J.A. 47.) The court observed that the controlling statement of reasons in this matter had specifically relied on discretionary considerations, including the availability of agency resources for an investigation of the scope that would be required, as well as concerns about litigation risk and the available evidence of violations. (J.A. 47-48.) In response

to plaintiff's argument that prosecutorial discretion was not an "independent" rationale for dismissal, the court noted that at least some of the controlling group's invocation of discretion did appear to be independent, particularly its concern regarding the "size and scope of the proposed investigation." (J.A. 47.) In addition, the court stated that it was not persuaded that *New Models* actually required the invocation of prosecutorial discretion to be an "independent" ground for dismissal, pointing out that the reliance on discretionary factors by the controlling statement in this case was actually more clearly independent than the one approved in *New Models*. (J.A. 48.) Finally, the court stated that it hesitated to even try to separate invocations of prosecutorial discretion that depend on legal analysis from those that did not, noting that "certain quintessential considerations in the exercise of that discretion are inherently inseparable from legal conclusions," such as the likelihood of successful enforcement, which *New Models* had specifically found to be within the exercise of such discretion. (J.A. 48-49.) Thus, the court rejected plaintiff's claim that prosecutorial discretion was not an independent ground for dismissal, and it concluded that judicial review is unavailable here. (J.A. 48.)

SUMMARY OF ARGUMENT

The district court's decision to dismiss this case was correct. Because the controlling group of FEC Commissioners voted not to pursue the administrative

complaint at issue in part as an exercise of prosecutorial discretion, this Court's opinions in *Commission on Hope* and *New Models* establish that the decision is not subject to judicial review. As those precedents also make clear, the controlling statement's inclusion of discussion about the application of FECA to the facts here does not alter that result. The controlling group's invocation of prosecutorial discretion was a distinct basis for its decision to dismiss, and the group explicitly relied on well-established grounds for the exercise of that discretion, including concerns about litigation risk and the agency resources that an investigation would consume. Reviewable decisions about whether FECA was violated cannot be carved out from the middle of unreviewable prosecutorial discretion decisions.

Complainant's alternative argument that *Commission on Hope* and *New Models* were wrongly decided and so this Court should effectively disregard them also fails. As the recent denial of rehearing in *New Models* made clear, those precedents clearly represent the law of the Circuit and this Court is bound to apply them here. Complainant argues that doing so would create conflict and disharmony, but on the contrary, that would be the result if they were not followed. These precedents are hardly novel, as nearly every other federal agency enjoys

prosecutorial discretion; indeed, what is unusual is that Commission dismissal decisions remain reviewable when based solely on an interpretation of FECA.

The district court's decision should be affirmed.

STANDARDS OF REVIEW

This Court reviews the district court's dismissal ruling *de novo*. *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 579 (2023).

ARGUMENT

I. THIS PROSECUTORIAL-DISCRETION DISMISSAL IS NOT JUDICIALLY REVIEWABLE

A. The District Court Correctly Found That *Commission on Hope* and *New Models* Control the Outcome Here

This Court has repeatedly confirmed that FEC dismissals of administrative complaints based even in part 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. And despite Complainant's arguments, that is what happened here.[1]

[1] Complainant also argued before the district court that because the Commission conducted multiple votes, including a vote to invoke prosecutorial discretion that did not garner four votes, the controlling statement of reasons could not be considered as the rationale supporting the dismissal of the administrative complaint. That argument was correctly rejected by the district court (J.A. 9-10) and Complainant has not raised it here.

The Supreme Court has long recognized that a federal law enforcement agency is generally "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. In *Heckler*, the Court rearticulated the bases for an agency's discretion not to prosecute or enforce. *Id.* (collecting cases). 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," setting forth the "many" reasons for "this general unsuitability" and noting that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id*. The relevant balancing 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.*

More recently, 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. Recently, 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"). Under the *Commission on Hope* and *New Models* precedents the Commission's prosecutorial discretion remains well within the scope of discretion traditionally afforded to federal law enforcement agencies.

Like this case, *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. There as here, 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 more recent decision in *New Models* carries even more force in the current case, because it found a dismissal to be unreviewable even though the controlling statement's discussion of the prosecutorial discretion basis was far less comprehensive than the one at issue here. Nevertheless, 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 there 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). *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 ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities"). Thus, the dismissal was not subject to judicial review. 993 F.3d at 895.

Recent decisions by courts in this district have followed this established precedent, even when reviewing FEC dismissal decisions that include discussion regarding whether a FECA violation was committed. In *Public Citizen v. Federal Election Commission*, 547 F. Supp. 3d 51 (D.D.C. 2021), plaintiffs sought judicial review of a decision not to further investigate whether an organization violated FECA by failing to register as a political committee. The district court held that "regardless of the *merits* of OGC's legal theories, the Controlling Commissioners' decision not to proceed relied upon prudential concerns well within its expertise." *Id.* at 57. As a result, "having exercised their prosecutorial discretion to dismiss this matter, the Controlling Commissioners' analysis is not subject to judicial review." *See also Citizens for Responsibility & Ethics in Wash. v. Am. Action Network*, 590 F. Supp. 3d 164, 173 (D.D.C. 2022) (dismissal of FEC complaint based on prosecutorial discretion was not subject to judicial review under *New Models*, even though the controlling statement also included a "thoroughgoing legal analysis"); *End Citizens United PAC v. FEC*, No. 21-1665, 2022 WL

1136062, at *3 (D.D.C. Apr. 18, 2022) (denying plaintiff's motion for default judgment, and dismissing for lack of jurisdiction, where the Commissioners who voted against enforcement invoked prosecutorial discretion and therefore the court "lack[ed] the authority to review the FEC's dismissal") (citing cases).

B. The District Court Correctly Found That the Dismissal of the Administrative Complaint Here Was an Unreviewable Exercise of Prosecutorial Discretion

The district court properly determined that *Commission on Hope* and *New Models* are dispositive here, because the controlling statement of reasons expressly stated that the controlling FEC Commissioners had declined to pursue enforcement "as an exercise of prosecutorial discretion under *Heckler*." (J.A. 236.)

1. The Controlling Statement's Reliance on Prosecutorial Discretion Was Explicit, Detailed, and Consistent with Precedent

The controlling group explained in detail its reliance on prosecutorial discretion in dismissing the administrative complaint at issue in this case. (J.A. 235-36.) Specifically, the group pointed to what it described as the "insufficient factual or legal support" for pursuing enforcement and noted that it did "not believe the Commission would ultimately be successful in pursuing it." The controlling group emphasized its view that enforcement would be "predicated upon factual assumptions about which the record is — *at the very best* — ambiguous and, to a material extent, based upon anonymous sources in press reports." *Id*.

The group foresaw "significant litigation risk" in acting on such reports and "decline[d] to permit the investigatory resources of the federal government to be mobilized on such a basis." *Id*. The group found that that was particularly so "where the size and scope of the proposed investigation could quickly consume an outsized share of the resources available to the Commission." *Id*. Further, the controlling group stated that the relevant "regulatory environment is uncertain at best," citing in part what it viewed as prior FEC decisions not to pursue enforcement in comparable contexts. *Id.* The controlling group concluded: "Given the thin legal and factual support for enforcement and the Commission's past acquiescence in similar circumstances, we concluded that this matter did not warrant further use of the Commission's limited resources." (J.A. 235-36.)

Thus, as the district court found (J.A. 47-48), the controlling group here relied on the very type of practical and prudential considerations that this Court's precedents have established are not subject to judicial review, as they are traditional grounds for exercising prosecutorial discretion under *Heckler*. In particular, the controlling group relied heavily on concerns related to the factual support available for the agency to pursue an investigation in this matter, as well as the litigation risk entailed in doing so. (J.A. 235-36.) Thus, the group relied on "a complicated balancing of a number of factors which are peculiarly within its expertise," such as "whether agency resources are best spent on this violation or

another." *Comm'n on Hope*, 892 F.3d at 439 n.7 (quoting *Heckler*, 470 U.S. at 831-832). The controlling group's detailed explanation of its reliance on discretionary factors reflected a "quintessential exercise of 'prosecutorial discretion.'" *Citizens for Responsibility & Ethics in Wash.*, 590 F. Supp. 3d at 173. Because the controlling Commissioners here expressly invoked prosecutorial discretion as a distinct basis for the dismissal, that decision is unreviewable.

2. Judicial Review Is Unavailable Even Though the Controlling Statement Also Included Substantial Discussion of the Application of FECA

Complainant argues that judicial review is still available because the controlling group's invocation of prosecutorial discretion is "bound up with reviewable legal conclusions." (Br. at 26; *see id*. at 26-35.) But as the district court determined, the fact that the controlling statement also included substantial discussion about whether there was an apparent FECA violation does not change this result. (J.A. 48-49.)

Discussion of legal issues that arise in the context of prosecutorial discretion decisions is not subject to judicial review. The controlling cases have limited review to interpretations of FECA that lead to determinations that there is no reason or probable cause to believe the statute has been violated. *See Commission on Hope*, 892 F.3d at 441 n.11 ("[I]f the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's

decision is subject to judicial review . . . ."); *id.* at 441-42 ("[E]ven if some statutory interpretation could be teased out of the Commissioners' statement of reasons, the dissent would still be mistaken in subjecting the dismissal of [plaintiff's] complaint to judicial review."); *New Models*, 993 F.3d at 883 (even "robust statutory analysis" would not justify review if accompanied by mention of prosecutorial discretion); *id*. at 884 ("a Commission nonenforcement decision is reviewable only if the decision rests *solely* on legal interpretation."). Complainant cannot show that the controlling statement's explanation of the dismissal here was limited to an interpretation of FECA leading to a determination that there was no apparent violation at the relevant stage (here, no reason to believe violations occurred). The statement contains explicit, detailed reliance on well-established elements of prosecutorial discretion demonstrating otherwise. Complainant appears to misconstrue the "legal analysis" shorthand this Court has employed for no-enforcement FECA interpretations, s*ee, e.g.* Br. at 2, to include merits-related discussion of legal issues that inherently occurs in discretionary decisions analyzing factors such as likelihood of success and litigation risk.

Moreover, the relative time the controlling statement spent on discussion of FECA application as opposed to prosecutorial discretion, even assuming those two categories are distinct, is not determinative. Indeed, the court in *New Models* explicitly rejected an argument that the controlling group's statement in that case

included "only a brief mention of prosecutorial discretion alongside a robust statutory analysis," concluding that judicial review was still precluded. 993 F.3d at 883. And the recent Concurrence in the denial of rehearing in *New Models* reaffirmed that the "Commission's non-enforcement discretion is . . . unreviewable, irrespective of how many pages the controlling commissioners devote to legal analysis and how many to explaining the exercise of prosecutorial discretion." 55 F.4th at 919–20.

To be sure, the controlling group in this case included in its statement substantial discussion of aspects of the legal landscape, including what it found to be "significant litigation risk" and a "regulatory environment [that] is uncertain at best." (J.A. 235.) But those are traditional considerations in exercising prosecutorial discretion. *New Models* specifically cited the "viability of an enforcement claim" as one basis for an exercise of prosecutorial discretion that "does not turn on legal grounds" and so is not judicially reviewable. 993 F.3d at 895. In this case, the controlling group connected the view that going forward would involve pursuing a "tenuous legal theory" with the understanding that exercising prosecutorial discretion under *Heckler* involves, among other things, "whether agency resources are best spent on this violation or another" and "whether the agency is likely to succeed if it acts." (J.A. 235.) Thus, the concerns

in the controlling statement plainly do not depend entirely on interpretations of the statute, as Complainant claims.

Complainant's argument amounts to a request that this Court carve a reviewable legal interpretation out of an unreviewable prosecutorial discretion dismissal, but the district court properly rejected that request. First, the district court concluded that "at least some, even if not all, of the controlling Commissioners' invocation of *Heckler* appears to have been independent of pure legal inquiry." (J.A. 47.) In particular, the controlling group observed that the size and scope of the contemplated investigation could quickly consume the agency resources available. The district court reasoned that that "is a quintessential consideration in the exercise of prosecutorial discretion, and it stands apart from the legal questions in this case." *Id.* at 47-48. And the Complainant "ma[de] no effort to dispute that the size and scope of the investigation would be significant, nor does it explain how such practical concerns stem from legal conclusions." *Id.* at 48. Second, the district court concluded that it was "clearer in this case than it was in *New Models* that the Commissioners invoked their discretion as an independent reason for dismissal." *Id.* Third, the district court properly relied on *New Models* in concluding that "certain quintessential considerations in the exercise of that discretion are inherently inseparable from legal conclusions." (J.A. 48.) It explained, for example, that an agency's view of the likelihood of success

on the merits of an enforcement action was such a decision, and it was within the discretion that the Court in *New Models* found unreviewable. *See* 993 F.3d at 895.

Under *Commission on Hope,* a statement explaining nonenforcement that relies in part on prosecutorial discretion like the one at issue here would not be judicially reviewable even if the statement also included some interpretation of FECA suggesting there was no reason or probable cause to believe violations occurred. 892 F.3d at 441. Because of the "firmly-established principle" against "carving reviewable legal rulings out from the middle of non-reviewable actions," an administrative complainant "is not entitled to have the court evaluate . . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at 441-42. The scope of review that Complainant urges this Court to undertake is simply irreconcilable with the above precedent, and it could easily extend to virtually any prosecutorial discretion dismissal, no matter how little the dismissal depended on statutory interpretation. *See Commission on Hope*, 892 F.3d at 441 n.11 (only dismissals "based entirely on [the Commission's] interpretation of the statute" are reviewable); s*ee also New Models* 55 F.4th at 919–20 ("the Supreme Court has repeatedly admonished [that] courts cannot simply pluck out legal questions from nonreviewable decisions." (citing cases)). Indeed, Complainant appears to argue, relying on a small portion of language from the *New Models* concurrence, that a controlling statement is

reviewable if it has so much as a "reference" to FECA application (J.A. 29). Such a vastly expanded scope of review is clearly inconsistent with the decisions in *Commission on Hope* and *New Models*, as explained above. The district court voiced a similar concern about the reach of Complainant's claims here. (*See* J.A. 49 (Complainant's "attempt to limit the scope of *New Models* might risk swallowing the rule").)

In short, the dismissal decision here was based at least in part on prosecutorial discretion, and so under controlling precedent it is not subject to judicial review.

II. COMPLAINANT'S ALTERNATIVE ARGUMENT THAT THE COURT SHOULD NOT FOLLOW *NEW MODELS* AND *COMMISSION ON HOPE* BECAUSE THEY ALLEGEDLY CONFLICT WITH PRIOR PRECEDENT MUST FAIL

Complainant argues in the alternative that even if the controlling group of Commissioners did have the power to invoke prosecutorial discretion in this matter, the exercise of that discretion is still reviewable, regardless of *Commission on Hope* and *New Models*, because those decisions conflict with prior decisions, including *Akins*, under which review would have been permitted. (Br. at 36-41.) However, Complainant fails to identify any true conflict, and even if it could, it does not claim that the panels in *Commission on Hope* and *New Models* were unaware of those prior decisions; in fact, the panels in those cases discussed the prior decisions in their opinions. The limitation on judicial review of FEC

dismissal decisions to those based solely on FECA interpretation is reflected in multiple panel opinions for which rehearing was denied and has been the law of this Circuit for years at this point. Panels of the Court are not free to disregard it.

First, of the prior 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 *New Models* itself emphasized. 993 F.3d at 885, 894; *see also Akins*, 524 U.S. at 25-26 (reviewing a dismissal based on a "no probable cause to believe" finding); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*") (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 directly conflicting holding that supports its argument.

Complainant argues in particular that *Akins* stands for the proposition that FECA provides for judicial review of any Commission dismissal (Br. at 37-38), but the Supreme Court's discussion of prosecutorial discretion was much more limited. *Akins*, 524 U.S. at 25-26. In that case, the Commission had declined to

proceed on the sole administrative claim at issue based on its conclusion that the group in question "was not subject to the disclosure requirements" because it did not meet the legal definition of a "political committee" under FECA. *Id.* 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 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. The only question addressed by the Court involved the administrative complainants' standing to sue. *Akins*, 524 U.S. at 18. By contrast, the controlling group's exercise of prosecutorial discretion in the current case was substantial and relied on multiple grounds that are traditional bases for such discretion, as explained above.

Even if Complainant had identified any potential tension with older cases, that would be no basis for this Court to disregard what is clearly the law of the Circuit. *See United States v. Bell*, 795 F.3d 88, 103 n.17 (D.C. Cir. 2015) (panel decisions bind court unless or until overturned by *en banc* court or higher court); *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014). That is particularly the case here since the panels in *Commission on Hope* and *New Models* were plainly aware of *Akins* and the other prior decisions on which Complainant

relies. The panels themselves took pains to place those decisions within the framework of their analyses. *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 Commission 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 "the basic rule" that "courts cannot simply pluck out legal questions from nonreviewable decisions").

Complainant's arguments to the contrary are unavailing. Complainant relies on *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011), for the proposition that a later panel of this Court cannot overrule an earlier panel. (Br. at 23-24, 37, 41.) But again, Complainant has failed to show that the decisions at issue here are

really inconsistent. This Court can and should, like *Commission on Hope* and *New Models* themselves, "read these cases in harmony." *See Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005). Nor has Complainant identified any intervening decision that might justify a departure from the controlling precedent above. *See Chambers v. Dist. of Columbia*, 35 F.4th 870, 879 (D.C. Cir. 2022) (*en banc*) (Circuit court sitting *en banc* can only reexamine panel decision if there was a fundamental flaw or an intervening Supreme Court decision); *Allegheny Def. Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) (en banc) (same).

Finally, Complainant argues that following *Commission on Hope* and *New Models* here would create conflict and disharmony in light of the prior decisions it cites (J.A. 39-40), but in fact, recent decisions have followed the approach to judicial review of FEC dismissals set forth in those cases with no such results, as explained above. *See* supra pp. 19-20. However, disharmony and confusion could easily result if this Court were to disregard such plainly controlling Circuit precedent, as Complainant now urges. There is no basis to do so here.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision below in its entirety. "The Supreme Court and our circuit have affirmed that the Federal Election Commission retains prosecutorial discretion. When such discretion is invoked as an independent basis for a non-enforcement decision, it cannot be

reviewed by this court." *New Models*, 55 F.4th at 922 (concurrence in denial of rehearing *en banc*). The dismissal at issue here was just such a decision, and it is not subject to judicial review.

Respectfully submitted,

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April 28, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 7,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 28th day of April 2023, I electronically filed the 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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