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

RESPONSE TO PETITION FOR REHEARING EN BANC

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March 8, 2024

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GLOSSARY

APA	Administrative Procedure Act
Complainant	Campaign Legal Center
Committees	Donald J. Trump for President, Inc. (later Make America Great Again PAC) and Trump Make America Great Again Committee
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

STATEMENT OF THE CASE

The petition for rehearing *en banc* (Doc. No. 2041412) fails to compellingly identify any conflict with decisions of this Court or the Supreme Court or new question of exceptional importance. It should be denied. After considering the administrative complaint, the Federal Election Commission ("FEC" or "Commission") did not approve pursuing the administrative matter further by the requisite votes and thereafter voted to close its file. The statement of reasons issued by the controlling group of commissioners, which provided the rationale for that decision, relied explicitly on prosecutorial discretion as an independent basis for the dismissal, citing several well-established grounds for its exercise.

This Court has repeatedly held that, when the FEC dismisses an administrative complaint based in whole or in part on prosecutorial discretion, that dismissal is 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); *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); *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1178 (D.C. Cir. 2024) ("*End Citizens United*") (applying precedent from *New Models* and *Commission on Hope*).

Here, the unanimous panel decision applied this precedent and held that the

controlling group of Commissioners' explicit reliance on prosecutorial discretion was unreviewable. *Campaign Legal Ctr. v. FEC*, 89 F.4th 936, 941 (D.C. Cir. 2024). Because the petition for *en banc* review evidences no lack of uniformity in this Circuit's decisions or an exceptional legal issue, it fails to justify such an extraordinary process.

STATEMENT OF FACTS

A. The Administrative Process and Judicial Review

The Campaign Legal Center ("Complainant") filed an administrative complaint with the Commission alleging that Donald J. Trump for President, Inc. (which later became Make America Great Again PAC) and one of its authorized joint fundraising committees, Trump Make America Great Again Committee (collectively, the "Committees"), had violated the disclosure provisions in 52 U.S.C. § 30104(b) by failing to properly disclose the ultimate payees it made through vendors. (Joint Appendix ("J.A.") 51-120.)

The Federal Election Campaign Act ("FECA") permits any person to file an administrative complaint alleging a violation 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 another 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).

When the Commission considered the administrative complaint here, it voted 3-3 on whether to find there was reason to believe a violation had occurred, as well as 3-3 on whether to dismiss the complaint as a matter of prosecutorial discretion pursuant to *Heckler v. Chaney*. (J.A. 35.) Without satisfying the four-vote threshold necessary to find reason to believe, the Commission subsequently voted 4-2 to close the file. (*Id.*) Under long-standing Circuit law, the Commissioners who voted against proceeding "constitute a controlling group" whose rationale "necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

The controlling group explained that they declined to find reason to believe that the Committees violated the Act and voted to dismiss the complaint on the basis of prosecutorial discretion 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 (J.A. 224-36).)

These Commissioners wrote that they did not believe "the Commission would ultimately be successful in pursuing [the matter]." (J.A. 235.) The three Commissioners stated that the case 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.*) They 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 controlling group of Commissioners stated that the relevant regulatory environment was uncertain at best — with a rulemaking petition on sub-vendor reporting pending before the Commission — and also factored in past campaign vendor arrangements that were not pursued in enforcement proceedings. (J.A. 235.)

Commissioners Broussard and Weintraub separately issued a statement articulating their conclusion that there was reason to believe violations had been committed. (*See* Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub (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 made to certain vendors in violation of FECA. (*Id.*) Commissioner Weintraub also provided a supplemental statement contending that the controlling group did not properly invoke prosecutorial

discretion and had instead utilized a merits-based analysis. (*See* Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub (J.A. 242-46).)

B. District Court Decision

After the Complainant sought judicial review, the district court granted the Commission's motion to dismiss, ruling that judicial review was unavailable because the administrative complaint had been dismissed based in part on 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 observed that the controlling statement of reasons in this matter had specifically relied on discretionary considerations, including the availability of agency resources for the scope of the investigation that would be required, as well as concerns about litigation risk and the available evidence of violations. (J.A. 47-48.)

Responding to Complainant's argument that prosecutorial discretion was not an "independent" rationale for dismissal, the court observed that at least some of the Commissioners' invocation of discretion particularly regarded the "size and

scope of the proposed investigation."[1] (J.A. 47.) 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.)

C. D.C. Circuit Panel Decision

Complainant then appealed the district court's ruling to this Court. The panel unanimously found the controlling group's invocation of prosecutorial discretion was unreviewable. *Campaign Legal Ctr.*, 89 F.4th at 941. The Court found that the controlling statement explicitly rested on prudential and discretionary considerations. *Id.* The Court also rejected Complainant's argument that the prosecutorial discretion considerations were intertwined with reviewable legal analysis, again observing that the size and scope of the investigation were practical concerns that were not necessarily premised on a theoretically

[1] The district court found the prosecutorial discretion rationale was "independent of pure legal inquiry," and it 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" separate from legal or merits-based analysis. (J.A. 47-48.)

reviewable legal inquiry. *Id.* at 942.

STANDARD OF REVIEW

Rehearing *en banc* "is not favored" and "ordinarily will not be ordered unless" a petitioner demonstrates it "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Petitions for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." *Id.* at 40(a)(2).

The Supreme Court has long recognized that a federal 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. Those considerations led the Court to the conclusion that agency decisions not to enforce are presumptively unreviewable absent clear direction from Congress. *Id*. at 832. Additionally, FECA specifically limits judicial review to a determination of whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A),(C).

Subsequently, this Court has held in a series of recent decisions, beginning in 2018, that "a Commission nonenforcement decision is reviewable only if the decision rests solely on" interpretation of FECA, and not if based in whole or in part on the agency's exercise of prosecutorial discretion. *See New Models*, 993

F.3d at 884; *Comm'n on Hope*, 892 F.3d at 438; *End Citizens United*, 90 F.4th at 1178-79. Furthermore, this Circuit has long held that 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); *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("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.").

ARGUMENT

I. THE PANEL'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR THIS COURT

A. The Panel's Decision Does Not Conflict with the Supreme Court's Holding in *FEC v. Akins*

Complainant's reliance on the Supreme Court's discussion of prosecutorial discretion in *FEC v. Akins*, 524 U.S. 11 (1998), overstates the extent of any conflict between the panel's decision and *Akins*. In *Akins*, the Supreme Court rejected the Commission's argument that *all* Commission decisions "not to undertake an enforcement action" were unreviewable on the basis that FECA "indicates the contrary." *Id.* at 26. However, that case did not evaluate a dismissal

based on prosecutorial discretion, but instead considered whether the administrative complainants had standing to sue regarding dismissal of an allegation that was based solely on a legal determination of the merits.

Complainant argues that, under *Akins*, "reason to believe" assessments under FECA are expressly exempted from the general presumption of unreviewability of prosecutorial discretion decisions. (Pet. 8.) However, the Supreme Court's decision in *Akins* regarding the review of agency legal conclusions provides scant basis for such reasoning. 524 U.S. at 25-26.

In *Akins*, the FEC's declination of action at issue was solely based on the legal determination that the organization at issue "was not subject to the disclosure requirements" because it did not meet the legal definition of a "political committee." *Id*. at 18. As this Court subsequently described it, the Commission decision in *Akins* was "based . . . entirely on legal grounds," which 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 distinction in *Akins* between reviewable legal conclusions and unreviewable invocations of prosecutorial discretion is crucial. In *Akins*, the Court reasoned that the mere possibility of a prosecutorial-discretion dismissal did not defeat standing because the Court could not "know that the FEC would have

exercised its prosecutorial discretion [that] way." 524 U.S. at 25. Here, by contrast, the controlling Commissioners expressly invoked prosecutorial discretion when explaining their votes against finding reason to believe.

Given its focus, *Akins* is not, as Complainant contends, a blanket rejection of the unreviewability of the FEC's prosecutorial discretion. The Supreme Court subsequently confirmed that permissible 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 also 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"). Complainant argues that the Commission invoked prosecutorial discretion in *Akins* as a basis for its dismissal decision (Pet. 10), but the cited footnote argued 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*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8.

Akins, thus, involved evaluation of the degree of deference, but it was within the context of a reviewable legal decision. The Supreme Court did not have occasion to consider a dismissal based on prosecutorial discretion.

B. The Panel's Decision Does Not Deviate from This Circuit's Precedent Regarding Prosecutorial Discretion

En banc review is unwarranted because there is no conflict between the panel decision and the Circuit authority Complainant relies on. (*See* Pet. 9-10.) Of the operative 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*. *New Models*, 993 F.3d at 885, 894; *Commission on Hope*, 892 F.3d at 438; *DCCC*, 831 F.2d at 1133 (reviewing an unexplained Commission dismissal); *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (reviewing a challenge to a Commission rule); *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986) (reviewing a dismissal based on a "no reason to believe" finding). Complainant has thus failed to identify any conflicting authority that would support its petition for *en banc* review.

Complainant argues that *DCCC* stands for the proposition that judicial review is not limited to actions on the merits. (Pet. at 9.) However, in *DCCC*, this Court instead held that a split vote by the Commission was not itself an act of prosecutorial discretion and 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." 831 F.2d at 1133. It was because the controlling Commissioners had not explained the rationale for their vote in the matter at issue that this Court remanded the case for an explanation. *Id*. at 1133.

As this Court has recognized, *DCCC* did not "'answer . . . for all cases' the question of whether a Commission dismissal due to deadlock is 'amenable to judicial review.'" *New Models*, 993 F.3d at 894 (quoting *DCCC*, 831 F.2d at 1132). Unlike *DCCC*, the controlling Commissioners here, in *Commission on Hope*, and in *New Models*, expressly invoked prosecutorial discretion.

The panel's decision was also consistent with *Chamber of Commerce*. In that case, the Court posited a hypothetical challenge to a dismissal of an administrative complaint predicated on a controlling Commissioner's explanation that her vote was based on her view that the regulation was legally unenforceable, not prosecutorial discretion. 69 F.3d at 603; Statement of Comm'r Lee Ann Elliott Regarding Advisory Op. Req. 1994-4 (Oct. 26, 1994), https://www.fec.gov/files/legal/aos/1994-04/1079290.pdf (explaining that membership rule was "without statutory support"). Thus, this hypothetical dismissal was based solely on a legal determination, not in any part the exercise of prosecutorial discretion. As such, there exists no conflict between this reasoning and the panel's ruling in this case.

There is likewise no conflict between the panel's decision in this case and *Orloski*. *Orloski* did not, as Complainant contends, affirm that FEC nonenforcement decisions based on prosecutorial discretion are reviewable. (Pet. 9.) Nor could it, because the FEC dismissal in that case was based entirely on the Commission's reviewable legal interpretation of FECA. *Orloski*, 795 F.2d. at 160-61; *see also New Models*, 993 F.3d at 894-99. In short, the Court in *Orloski* had no occasion to consider prosecutorial discretion and made no ruling on that matter. As the panel decision recognized, *Orloski* merely 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 [Administrative Procedure Act ("APA")]." *New Models*, 993 F.3d at 894; *see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (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)).

C. The Panel Decision Is Consistent with Current Concepts of Administrative Law

The *New Models* and *Commission on Hope* decisions 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). *Heckler* emphasized that a court generally has no "meaningful standards"

by which to review an agency exercise of prosecutorial discretion. 470 U.S. at 834. Such decisions are, therefore, generally "committed to agency discretion by law" under the APA. *Id*. at 835. And 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).

While it is also true that Congress may provide meaningful limits on an agency's prosecutorial discretion by statute, which could be enforced by judicial review, *see id*., 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 authority or guidance to a

court in determining whether a particular enforcement action "fits the agency's overall policies" or is within the agency's budget. *Heckler*, 470 U.S. at 831.

Complainant's argument that the panel decision is not consonant with administrative law precedent (Pet. 13-14) suggests that a reader must glean a prudential consideration from the controlling Commissioners' statement. But the statement explicitly invoked prosecutorial discretion, relying on prudential concerns regarding the size and scope of the investigation. *Campaign Legal Ctr.*, 89 F.4th at 941. The controlling Commissioners plainly intended to dismiss the case at least in part as a matter of prosecutorial discretion related to these articulated considerations. *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 the absence of an alternative ground).

II. COMPLAINANT FAILS TO RAISE A NEW LEGAL QUESTION OF EXCEPTIONAL IMPORTANCE

En banc review is warranted in instances where a petitioner raises a legal question of exceptional importance. Complainant has failed to articulate such a case here. Complainant's remaining arguments (Pet. 15-17) raise policy concerns resulting from the panel's decision and concerns about judicial oversight of Commission enforcement decisions.

The petition does not raise a new issue of law that has not been already repeatedly heard by this Circuit in the aforementioned cases. The panel's decision in this case straightforwardly reiterates the same deference to the Commission's prosecutorial discretion in accordance with Circuit precedent. Unlike other agencies, however, judicial review remains available for nonenforcement decisions based on Commission interpretations of FECA. *Campaign Legal Ctr.*, 89 F.4th 938-39.

The petition's speculative suggestion that the panel opinion has or will "empower[] a partisan-aligned minority faction" to make pretextual claims of prosecutorial discretion (Pet. 15) is discordant with the presumption of regularity. Agency officials are accorded the "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). To the extent that Complainant suggests that certain Commissioners might be tempted to "tack on" a discretionary ground to defeat judicial review (Pet. 16), courts "must presume an agency acts in good faith," absent strong evidence to the contrary. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008). A recognition that there will be competing views about the legality and advisability of applying FECA to specific instances of alleged violations is reflected in Congress's choice to structure the agency with Commissioners from different political parties who must agree to go forward with such cases.

This Court has repeatedly concluded that, when the FEC dismisses an administrative complaint based in part on prosecutorial discretion, it is not subject to judicial review. Complainant has not presented any new issue of importance that has not already been addressed by this Circuit in order to justify relitigating the question.

CONCLUSION

For the foregoing reasons, Complainant's petition should be denied.

Respectfully submitted,

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March 8, 2024

CERTIFICATE OF COMPLIANCE

This document complies with the word limit set forth in the Court's February 22, 2024, Order (Doc. No. 2041870) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,582 words.

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.

/s/ Greg J. Mueller
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2024, 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 document to be filed with the Clerk.

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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.

The panel's Opinion is available at 89 F.4th 936.

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