

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<hr/>)	
CAMPAIGN LEGAL CENTER,)	
)	
Plaintiff,)	Civ. No. 22-1976 (JEB)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION)	
1050 First Street, NE)	
Washington, DC 20463,)	MOTION TO DISMISS
)	
Defendant.)	
<hr/>)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
MOTION TO DISMISS**

Defendant Federal Election Commission (“Commission”) hereby moves this Court for an order dismissing plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff brings this action against the Commission for declaratory and injunctive relief pursuant to the Federal Election Campaign Act’s judicial review provision, 52 U.S.C. § 30109(a)(8)(A). However, plaintiff fails to state a claim on which relief can be granted because the challenged agency action was based on prosecutorial discretion and is not subject to judicial review. Accordingly, this case should be dismissed with prejudice. In support of this motion, the Commission is filing a memorandum of points and authorities and a proposed order.

Respectfully submitted,

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September 12, 2022

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FEDERAL ELECTION COMMISSION,)	MEMORANDUM IN SUPPORT OF
)	MOTION TO DISMISS
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Defendant.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

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I. INTRODUCTION

Plaintiff Campaign Legal Center challenges the Federal Election Commission's ("Commission" or "FEC") dismissal of a 2020 administrative complaint seeking enforcement of certain provisions of the Federal Election Campaign Act ("FECA"). (*See* Pl's Compl. for Declaratory and Injunctive Relief ("Compl.") ¶¶ 2-4 (ECF No. 1).) But plaintiff's challenge must fail, because the dismissal of its administrative complaint was the result of an exercise of unreviewable prosecutorial discretion.

In its administrative complaint, plaintiff alleged that former President and 2020 presidential candidate Donald J. Trump's authorized campaign committee, Donald J. Trump for President, Inc. (later the Make America Great Again PAC), and one of his authorized joint fundraising committees, Trump Make America Great Again Committee (all collectively referenced here as the "Committees"), violated provisions of FECA that require political committees to report certain information regarding disbursements. 52 U.S.C. § 30104(b)(5), (6). After duly considering the administrative complaint, however, the Commission did not approve pursuing the matter. Specifically, the agency was equally divided, 3-3, as to whether to find reason to believe that a FECA violation had occurred, which is the prerequisite to opening an investigation under the statute, and thereafter the matter was dismissed.

Plaintiff now challenges the FEC's decision not to pursue this matter further, but under binding D.C. Circuit precedent, judicial review is not available where, as here, the votes of the Commissioners who declined to go forward were explicitly based on prosecutorial discretion. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("*Commission on Hope*"). And because this was an exercise of "unreviewable prosecutorial discretion," *id.*, plaintiff has failed to state a claim for relief that can be granted. Plaintiff's court complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

II. STATUTORY BACKGROUND

A. The FEC and FECA's Administrative Enforcement Process

1. The Commission

The FEC is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. *See* Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101-46. Congress authorized the Commission to “formulate policy” with respect to FECA, *id.* § 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 violations of FECA, *id.* § 30109(a)(1)-(2). FECA requires the Commission to make decisions through majority votes and, for certain actions, including the advancement of enforcement matters, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

2. FECA's Administrative Enforcement and Judicial-Review Provisions

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the statute. 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 conducts an investigation to determine whether there is “probable cause to believe” that FECA was violated. *Id.* § 30109(a)(2), (4). If the Commission so finds, it must attempt conciliation before pursuing the matter in court. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, the FEC may institute a *de novo* civil enforcement action in federal district court. *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), (4)(A), (6)(A).

If the Commission dismisses an administrative enforcement matter, the complainant may file suit to obtain judicial review to determine whether the agency's dismissal 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 Washington 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. *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 993 F.3d 880, 884 ("*New Models*") (D.C. Cir. 2021), *pet. for reh'g en banc filed*, Doc. No. 1903510 (D.C. Cir. June 23, 2021). That is because "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 not even to begin an investigation 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[er]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).

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) (“*NRSC*”). “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 the controlling statement 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. *New Models*, 993 F.3d at 884.

Should the court find a Commission dismissal in such a case to be unlawful, FECA requires the court to “direct the Commission to conform” with the court’s ruling “within 30 days.” 52 U.S.C. § 30109(a)(8)(C). If the Commission fails to conform within that time period, the complainant may bring “a civil action to remedy the violation involved in the original [administrative] complaint.” *Id.*

B. FECA Provision Requiring Disclosure of Payees of Political Committees

The Act 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 under the Act and Commission regulations 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 the Act 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 Commission has explained that the reporting of a disbursement payee, in conjunction with the description of purpose of that disbursement, should be sufficient to 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.” Statement of Policy: “Purpose of Disbursement” Entries for Filings with the Commission, 72 Fed. Reg. 887, 888 (Jan. 9, 2007).

II. FACTUAL BACKGROUND

A. The Administrative Complaint and the General Counsel's Report

On January 28, 2021, plaintiff 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"). (Compl. ¶ 1.) The administrative complaint 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 ("AMMC") and Parscale Strategy, LLC. (Compl. ¶ 2 (citing Administrative Complaint ("Admin. Compl.") MUR 7784 July 24, 2020 (ECF No. 1-1).) 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. (Compl. ¶ 3.) 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. (Compl. ¶ 4.)

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

When the Commission considered the administrative complaint, 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. (Compl. ¶ 6 (citing Certification at 1-3, MUR 7784 (dated May 11, 2022), https://www.fec.gov/files/legal/murs/7784/7784_32.pdf.) The

Commission subsequently voted 4-2 to close the file, dismissing the administrative complaint. (*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*. *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") at 12, attached as Exhibit 1; https://www.fec.gov/files/legal/murs/7784/7784_42.pdf. First, the 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. (*Id.*) 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." (*Id.* at 12-13.) 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 in their explanation certain vendor arrangements for other past campaigns that the Commission did not pursue in enforcement proceedings.

(*Id.* at 12.)

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”), attached as Exhibit 2;

https://www.fec.gov/files/legal/murs/7784/7784_43.pdf. In their statement, the 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.

(Broussard and Weintraub Statement at 1-5.)

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”), attached as Exhibit 3;

https://www.fec.gov/files/legal/murs/7784/7784_44.pdf. In this statement, Commissioner Weintraub contended that the Dickerson, Cooksey and Trainor Statement did not properly invoke prosecutorial discretion and was instead a merits-based analysis. (*Id.* at 1-2.)

IV. ARGUMENT

Plaintiff’s court complaint should be dismissed for failure to state a claim. As explained below, judicial review of dismissals of administrative complaints is not available where the reasoning of the controlling group of FEC Commissioners is based at least in part on prosecutorial discretion. Such decisions are presumptively unreviewable under clear D.C.

Circuit law. In this case, because the controlling group expressly invoked prosecutorial discretion as an independent basis for its vote preventing the agency from going forward with MUR 7784, plaintiff is unable to obtain judicial review of that decision.

A. Standard of Review

Dismissal of a judicial complaint is appropriate where, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in a plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim must be dismissed “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief.” *Bell Atl. Corp.*, 550 U.S. at 558. Though the Court “must liberally construe the complaint in favor of the plaintiff and must grant the plaintiff ‘the benefit of all inferences that can be derived from the facts alleged,’ . . . a court need not ‘accept as true a legal conclusion couched as a factual allegation.’” *Chatman v. U.S. Dep’t of Def.*, 270 F. Supp. 3d 184, 188 (D.D.C. 2017) (quoting *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 787 F.3d 524, 529 (D.C. Cir. 2015)). “A complaint seeking review of agency action ‘committed to agency discretion by law’ has failed to state a claim . . . and therefore should be dismissed under Rule 12(b)(6), not under the jurisdictional provision of Rule 12(b)(1).” *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (citations omitted).

In evaluating a motion to dismiss for failure to state a claim, “a court may consider ‘the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,’ or ‘documents upon which the plaintiff’s complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to

dismiss.” *United States ex rel. Scott v. Pac. Architects & Eng’rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017) (quoting *Ward v. D.C. Dep’t of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

B. Dismissals Based on Prosecutorial Discretion Are Unreviewable Under Established D.C. Circuit Precedent

In the context of a decision about whether to bring an enforcement action, the Supreme Court has recognized that a federal law enforcement agency is generally “far better equipped” than the judiciary to analyze practical factors that attend a particular matter. *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.*

Following the precedent established in *Heckler*, in *Commission on Hope* a panel of the D.C. Circuit held: “[F]ederal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action.” 892 F.3d at 438 (citing *Chaney*, 470 U.S. at 831, and *FEC v.*

Akins, 524 U.S. 11, 25 (1998)). *Commission on Hope* arose from an FEC enforcement matter involving allegations that an entity was a “political committee” under FECA and thus subject to the accompanying legal requirements. *Id.* at 441. Similar to the disposition as to the Committees in the instant case, the court considered 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 controlling group reasoned, *inter alia*, that “the association named in [the] complaint no longer existed” and had “filed termination papers with the IRS four years earlier.” *Id.*

The D.C. Circuit held that this dismissal was judicially unreviewable, even if it may have been based in part on “a misinterpretation[] of ‘political committee’ as used in FECA.” 892 F.3d at 441. Because there is a “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. As the majority explained, when a complaint is dismissed based on prosecutorial discretion, the dismissal is based on “not only . . . whether a violation has occurred,” but also, *inter alia*, “whether agency resources are best spent on this violation or another.” *Id.* at 439 n.7 (quoting *Chaney*, 470 U.S. at 831-832). Put simply, the agency may dismiss *even though* the matter may otherwise have merit.

Faced with similar circumstances just last year in *New Models*, another majority panel of the D.C. Circuit reached a similar conclusion, holding that because “the [FEC] Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss [the administrative]

complaint,” courts thus “lack the authority to second guess a dismissal based even in part on enforcement discretion.” 993 F.3d at 882. Although the complainant in *New Models* attempted to distinguish *Commission on Hope* because the statement of reasons under review “featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis,” whereas the statement of reasons in *Commission on Hope* rested exclusively on prosecutorial discretion, the Court nevertheless found that it was “not materially distinguishable from *Commission on Hope*.” *Id.* at 883-84. As a result, the controlling decision was not subject to judicial review “under FECA’s ‘contrary to law’ standard.” *Id.* (quoting 52 U.S.C. § 30109(a)(8)(C)).

Reviewing the statement of reasons issued by the controlling Commissioners, the court in *New Models* noted that the statement “expresses discretionary considerations at the heart of *Chaney*’s holding, such as concerns about resource allocation, the fact that *New Models* is now defunct and likely judgment proof, and the fact that the events at issue occurred many years prior, leading to potential evidentiary and statute of limitations hurdles.” 993 F.3d at 885 (citing *Chaney*, 470 U.S. at 831-32). The court stated that the Commission “exercised its expertise in weighing these factors, factors courts are ill-equipped to review in the absence of identifiable legal standards.” *Id.* See *Chaney*, 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.”). Because the controlling Commissioners relied on prosecutorial discretion when dismissing the administrative complaint in *New Models*, the dismissal was not subject to judicial review, and the Court of Appeals affirmed the district court’s grant of summary judgment to the Commission. 993 F.3d at 895.

Recent decisions by courts in this district have followed this established precedent. 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 Resp. & Ethics in Wash. v. Am. Action Network*, No. 18-cv-945 (CRC), 2022 WL 612655, at *7 (D.D.C. Mar. 2, 2022) (granting motion for reconsideration and dismissing action in light of *New Models* decision, upon finding that precedent precluded judicial review of the agency’s dismissal on the basis of prosecutorial discretion); *see also End Citizens United PAC v. FEC*, No. 21-1665 (TJK), 2022 WL 1136062 at *3 (D.D.C. Apr. 18, 2022) (denying plaintiff’s motion for default judgment against FEC, 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).

C. The Dismissal of Plaintiff’s Administrative Complaint Was an Unreviewable Exercise of the Commission’s Prosecutorial Discretion

Heckler and *Commission on Hope* are dispositive as to plaintiff’s complaint here. Because there were not four votes to proceed against the committees named in plaintiff’s administrative complaint, the Commissioners who voted against proceeding with enforcement constitute a controlling group, and a statement of reasons was issued by those Commissioners to explain their votes.

The controlling group of Commissioners here expressly stated that they had declined to pursue enforcement “as an exercise of prosecutorial discretion under *Heckler*.” Dickerson, Cooksey and Trainor Statement at 13. The controlling group explained its reliance on that

discretion in some detail. *Id.* at 12-13. Specifically, the group pointed to what it described as the “insufficient factual and 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 on 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.” *Id.* at 12-13.

The controlling group here thus relied on the very type of practical and prudential considerations that D.C. Circuit precedent has established are not subject to judicial review, as they are traditional grounds for exercising prosecutorial discretion under *Chaney*. 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, including that the potential size of the investigation could “quickly consume an outsized share” of the agency’s “limited resources.” Dickerson, Cooksey and Trainor Statement at 12-13. 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 *Chaney*, 470 U.S. at 831-832). Because the controlling group of Commissioners here expressly invoked prosecutorial discretion as a distinct basis for the dismissal, that decision is unreviewable.

The fact that the controlling statement also included extensive legal discussion does not change this result. The controlling group’s statement as to its reliance on discretionary factors constituted a detailed explanation reflecting a “quintessential exercise of ‘prosecutorial discretion.’” *Citizens for Resp. & Ethics in Wash.*, 2022 WL 612655, at *6. Therefore, the decision remains unreviewable. *See Commission on Hope*, 892 F.3d at 441-42 (“[E]ven if some statutory interpretation could be teased out of the Commissioner’s 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 886 n.4 (“It is the nature of the decision not to prosecute that matters, not whether legal interpretation underlay the decision”). 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. In any case, here the controlling group’s explanation of its exercise of prosecutorial discretion was comprehensive and detailed.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiff's court complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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