UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 22-1976 (JEB) REPLY IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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October 3, 2022

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I. INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") demonstrated in its Motion to Dismiss (Docket No. 13) that the decision not to pursue plaintiff's administrative complaint is not subject to judicial review under D.C. Circuit precedent because it was based in whole or part on an exercise of prosecutorial discretion. In its Opposition (Docket No. 15), plaintiff first argues that prosecutorial discretion was not actually exercised here because a specific vote to dismiss on that basis did not garner a majority of four FEC Commissioner votes, even though the controlling group of three Commissioners who declined to go forward with the administrative matter at issue clearly cited it as a basis for their decision. Plaintiff's argument is inconsistent with the way the D.C. Circuit has analyzed cases under 52 U.S.C. § 30109(a)(8), which establishes that judicial review is not available where (as here) the votes of the Commissioners who declined to go forward — even if there are less than four of them — were 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*").

Plaintiff further argues that the Court should disregard the controlling group's invocation of prosecutorial discretion because its explanatory statement also included discussion of the applicable legal landscape, but binding precedent is equally clear that even a limited invocation of prosecutorial discretion in a statement that includes a lengthy statutory interpretation falls squarely within the rule of unreviewability. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 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). And here the grounds provided for the exercise of that discretion, including concerns about limited agency resources and the reliability of the relevant factual record, as well as the likelihood of success if the Commission were to act, constitute traditional discretionary rationales that are beyond the scope of judicial review.

In addition, plaintiff claims that dismissal is inappropriate because plaintiff might discover further evidence to support its case in a review of the full administrative record, but it points to no specific document or type of document that it needs in opposing this motion that is not present among the many related materials essential to decision-making already posted on the FEC website. Finally, plaintiff argues that *New Models* was wrongly decided and might be changed, noting that it is the subject of a long-pending petition for en banc review, but that argument cannot be accepted by a district court.

The Commission's motion to dismiss should be granted.

II. ARGUMENT

A. The Controlling Group's Exercise of Prosecutorial Discretion Is Unreviewable Because It Is Clearly Covered by *Commission on Hope* and *New Models*

The FEC has shown that under D.C. Circuit precedent, judicial review of a dismissal of an administrative complaint is not available where the reasoning of the controlling group of FEC Commissioners is based at least in part on prosecutorial discretion. (FEC's Mem. of P. & A. in Supp. of Mot. to Dismiss ("FEC Mem.") at 10-13 (Sept. 12, 2022) (Docket No. 13).) In response, plaintiff first argues that the decisions in *Commission on Hope* and *New Models* do not apply here because the Commission held a series of votes on Matter Under Review ("MUR") 7784, and that series included a vote to invoke prosecutorial discretion that did not garner four votes. (Pl.'s Mem. of P. & A. in Opp'n to Mot. to Dismiss ("Opp.") at 14-20 (Sept. 26, 2022) (Docket No. 15).) Plaintiff contends that this earlier vote, in which Commissioners divided 3-3, was the operative vote resolving the prosecutorial discretion question. (*Id.* at 14-15) And plaintiff argues that later votes, including another equally divided 3-3 vote to find reason to believe a violation of the Federal Election Campaign Act ("FECA") occurred, do not matter because even though "three Commissioners may have *purported* to justify their no-reason-to-

believe votes on the ground of prosecutorial discretion, they had no power to do so." (*Id.* at 14.) Plaintiff's argument is inconsistent with Circuit precedent, which sets forth both when FECA requires four affirmative votes and what constitutes a "controlling" group of Commissioners in a dismissal case. Because that precedent takes a functional approach by looking at the actual reasoning of the Commissioners who declined to move forward, rather than the type of formalistic approach plaintiff proposes, judicial review is unavailable in this case.

Plaintiff's claim (Opp. at 14-15) that under FECA the controlling group of Commissioners here cannot rely on prosecutorial discretion in explaining their decision to dismiss the complaint amounts to an argument that four Commissioners must concur not only in going forward with enforcement, but also in declining to go forward, at least when there is a distinct vote that is explicitly about prosecutorial discretion. That claim is contrary to binding precedent. The D.C. Circuit has explained that FECA requires four affirmative votes only "to initiate," "defend," "or appeal any civil action." 52 U.S.C. § 30107(a)(6); *see New Models*, 993 F.3d at 891 (noting that "the statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list"). Thus, as noted in *New Models*, "[a] decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners" under the statute. *Id.* Moreover, "[t]hat FECA does not allow courts to also review dismissals based on enforcement discretion is simply a function of the 'contrary to law' standard." *Id*.

In particular, four votes are required if the Commission chooses to find that there is "reason to believe" an administrative respondent committed a violation of FECA or find that there is "probable cause to believe" a violation occurred. 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i); *compare id*. § 30106(c) (majority vote). These two stages are framed as conditional. That is,

"[i]f" the Commission makes the relevant determination, it "shall" take a specified act. *Id.* § 30109(a)(2) ("If the Commission [determines] that it has reason to believe . . . the Commission shall . . . notify the person [and] shall make an investigation."); *id.* § 30109(a)(4)(A)(i) (requiring that "the Commission shall attempt" to conciliate "if the Commission determines . . . that there is probable cause to believe."). After satisfying all other procedural requirements, the Commission "may . . . institute a civil action for relief," a decision which also requires four affirmative votes. *Id.* § 30109(a)(6)(A). *See Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm. v. FEC* ("*DCCC*"), 831 F.2d 1131, 1133 (D.C. Cir. 1987) (noting the possibility of judicial review of "a dismissal due to a deadlock").

However, if the Commissioners deadlock on a "reason to believe" vote, they may take a customary vote to close the file and terminate the matter associated with the applicable administrative complaint.[1] Commissioners who voted not to proceed with the matter (the "controlling Commissioners") must issue a statement explaining their reasons. *New Models*, 993

[1] Plaintiff suggests that the earlier split vote regarding prosecutorial discretion establishes that the Commission made a determination not to exercise that discretion. (*See* Opp. at 16-17 (citing 52 U.S.C. § 30106(c)).) But that is not how the D.C. Circuit has interpreted the statute. The *New Models* Court explained its view of the difference between the use of the word "shall" and "may" in the statute. The Court noted that "[o]nly after four commissioners make [the] discretionary decision" to determine whether there is reason to believe a violation has occurred "'shall' the Commission 'make an investigation.'" *New Models*, 993 F.3d at 892. And "FECA's mandatory duties do not 'constrain the Commission's discretion whether to make those legal determinations in the first instance.'" *Id.* (citing *Commission on Hope*, 892 F.3d at 439). The "obligations that follow a discretionary decision to proceed with enforcement cannot somehow transform the enforcement decision into a mandatory one." *Id.* Thus, the court did not read the statute to require four votes to *decline to* proceed with enforcement. *See id*. *Cf.* FEC, *Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enf't Process*, 72 Fed. Reg. 12,545, 12,546 (2007) ("Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter . . . when the Commission lacks majority support for proceeding with a matter."). Accordingly, there is no barrier to reviewing the Statements of Reasons issued by the declining to proceed Commissioners.

F.3d at 883 & n.3 ("When the Commission lacks four votes to proceed, the commissioners who voted against enforcement must 'state their reasons why'") (quoting *DCCC*, 831 F.2d at 1135). If three or more Commissioners vote against moving forward, this controlling group must provide a statement of reasons for that decision. *DCCC*, 831 F.2d at 1137. The rationale of the Commissioners who voted against proceeding with enforcement "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).

In the matter under review here, a motion to find reason to believe that the committees had violated FECA failed by a vote of 3-3. The Commission then split 3-3 on a vote to dismiss the committees on the basis of prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). Lacking the necessary four votes to continue enforcement proceedings, the Commission voted 4-2 to close its file. (Cert. for MUR 7784, May 10, 2022 (Docket No. 15-2).) The three Commissioners that voted to dismiss the committees are the controlling group for purposes of review of the agency's reason not to proceed, not the three Commissioners that desired to move forward with enforcement and *against* dismissal. *See Common Cause*, 842 F.2d at 449 (referring to the requirement of a statement of reasons by the "declining-to-go-ahead Commissioners at the time when a deadlock vote results in an order of dismissal"); *see also Commission on Hope*, 892 F.3d at 437 ("[I]f the Commission fails to muster four votes in favor of initiating an enforcement proceeding, the Commissioners who voted against taking that action should issue a statement explaining their votes"). *Commission on Hope* specifically refers to the "three naysayers on the Commission" that "placed their judgment squarely on the ground of prosecutorial discretion," whose analysis the Court looks to "as if they were expressing the Commission's rationale for dismissal." *Commission on Hope*, 892 F.3d at 439. In sum, the Court of Appeals held that the

rationale of three Commissioners explains the reasons for exercise of the "prerogative not to proceed with enforcement," and "[t]here is no doubt the Commission possesses such prosecutorial discretion." *Id.* at 438. And "[n]othing in the substantive statute overcomes the presumption against judicial review." *Id.* at 439. *See also, e.g.*, *DCCC*, 831 F.2d at 1135; *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

B. Plaintiff's Proposed Approach to Review of FEC Dismissals Is Inconsistent with Controlling Precedent

In review of FEC dismissals, it makes no difference that there were several different votes prior to the Commission closing the file. Plaintiff erroneously focuses on the Commission's separate votes in MUR 7784 on whether there was reason to believe the Committees had violated FECA and whether to dismiss that matter as a matter of prosecutorial discretion, asserting that four votes were needed to exercise such discretion, and that because the vote sequences in *New Models* and *Commission on Hope* did not include these separate votes, those cases are inapplicable here. (Opp. at 14-17.) However, a variation in the Commission's formal voting structure or sequence does not materially distinguish this case from *Commission on Hope* and *New Models* when the bottom line does not vary. Whether a dismissal is supported by a statement of reasons citing prosecutorial discretion that follows a 3-3 vote on finding reason to believe, on the one hand, or one that follows separate votes on reason to believe and a prosecutorial discretion dismissal, on the other hand, the controlling reasoning remains the same under the law.

In fact, the Court of Appeals has never parsed Commission vote sequences in the manner that the plaintiff requests that this Court do here. At the reason to believe stage, the agency has at least three options: find reason to believe, find no reason to believe, or dismiss the matter pursuant to an exercise of prosecutorial discretion. *See, e.g.*, *Hagelin v. FEC*, 411 F.3d 237, 239-

40 (D.C. Cir. 2005) (reviewing "no reason to believe" finding); *La Botz v. FEC*, 61 F. Supp. 3d 21, 27 (D.D.C. 2014) (affirming Commission exercise of discretion). In cases where controlling Commissioners provide a statement of their reasons for declining to go forward, courts look to those statements, not to a formalistic parsing of the sequencing of the votes that were held, to determine the reasons for the agency's action. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 (holding that "the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting"). Given varied potential grounds for the agency's decision, the Court has required the controlling group of Commissioners to provide a statement of reasons when it does not accept staff recommendations to proceed with enforcement. *See Common Cause*, 842 F.2d at 449-50. Circuit law makes clear that judicial review depends on this explanation, not the sometimes-complex course of particular Commission votes. *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

Indeed, in a recent decision this Court specifically rejected the same argument plaintiff makes here that four votes are needed for the Commission to exercise prosecutorial discretion. In *End Citizens United PAC v. Federal Election Commission*, No. 21-2128, 2022 WL 4289654 (D.D.C. Sept. 16, 2022), the Court held that "[t]he FEC's exercise of its prosecutorial discretion to decline to investigate" FECA allegations "is an absolute bar to the Court's exercise of jurisdiction over a challenge to the FEC's decision." *Id.* at *5 (citing *New Models*, 993 F.3d at 889). There, as in this case, the Commission had deadlocked 3-3 on whether to investigate the allegations in the administrative complaint, and the three Commissioners "who voted against an enforcement action issued a Statement of Reasons explaining the Commission's decision not to act." *Id.* at 3. Importantly, the Court determined that the plaintiff's argument "that only a four Commissioner majority may exercise the FEC's power of prosecutorial discretion cannot be

reconciled with our Circuit Court's requirement that the Statement of Reasons filed by the deciding Commissioners reflect the basis for the FEC's action." *Id.* at 5 (citing *Common Cause*, 842 F.2d at 449). It was "beyond dispute that the FEC chose not to act in this case, and that the Statement of Reasons expressly referenced the FEC's prosecutorial discretion in deciding on that course of action." *Id.* As the Court noted, "[t]hat is sufficient!" *Id.*

In another recent case, this Court held that *New Models* and *Commission on Hope* precluded judicial review in a similar multi-vote situation with some of the same respondents as the instant case. *See End Citizens United PAC v. FEC*, Civ. No. 21-1665, 2022 WL 1136062, at *3 (D.D.C. Apr. 18, 2022). In the underlying administrative complaint at issue in that case, the Commission had voted 3-3 on whether to find reason to believe that the Committees violated FECA provisions related to the raising and spending of soft money, and thereby declining to find reason to believe. *See* Cert. for MURs 7340 and 7609 (Apr. 20, 2021), https://www.fec.gov/files/legal/murs/7340/7340_44.pdf. Three Commissioners voted affirmatively for the motion to find reason to believe, while two Commissioners dissented, and one was recused and did not vote. *See id.* Two days later, the Commission voted 2-3 on whether to dismiss those same respondents under *Heckler v. Chaney*, that is, as a matter of prosecutorial discretion. *See* Cert. for MURs 7340 and 7609 (Apr. 22, 2021), https://www.fec.gov/files/legal/murs/7340/7340_45.pdf. Two Commissioners voted affirmatively for the motion to dismiss under *Heckler*, whereas three Commissioners dissented. One Commissioner was recused and did not vote. As was the case here, the Commissioners that voted *against* finding reason to believe and *in favor* of dismissal as an exercise of prosecutorial discretion provided a Statement of Reasons explaining their votes. *See* Statement of Reasons of Vice Chair Allen Dickerson and Commissioner Sean J. Cooksey, June 25, 2021,

https://www.fec.gov/files/legal/murs/7340/7340_56.pdf. Denying the plaintiff's request for summary judgment, the Court held that it could "consider the Statement of Reasons issued by the Commissioners who voted against enforcement, and their explanation 'explicitly relies on prosecutorial discretion' to dismiss End Citizen United's [judicial] complaint." *End Citizens United*, 2022 WL 1136062, at *3 (quoting *New Models*, 993 F.3d at 885). As a result, the Court held that it lacked authority to review the MUR dismissal. *Id.* That there were multiple votes had no bearing on the Court's decision that *New Models* precluded judicial review, and the same is true of the action underlying this lawsuit.

C. The Controlling Group of Commissioners' Exercise of Prosecutorial Discretion Is Not Subject to Judicial Review Because It Was Explicit and Based on Traditional Grounds, Even Though the Statement of Reasons Included Statutory Interpretation

Plaintiff argues 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 because their stated rationale depended entirely on erroneous interpretations of law." (Opp. at 20-25.) However, this argument too is inconsistent with controlling precedent, under which even a limited exercise of prosecutorial discretion that is made alongside extensive analysis regarding whether FECA was violated remains beyond judicial review under *Commission on Hope* and *New Models*. And here, the controlling group's exercise of prosecutorial discretion was substantial and relied on multiple grounds that are traditional bases for such discretion.

In *Commission on Hope*, the Court clearly distinguished between dismissals "based *entirely* on [the Commission's] interpretation of the statute," which are reviewable, and dismissals justified in whole or in part by prosecutorial discretion, which are not. 892 F.3d at 441 n.11 (emphasis added). The Court explained that "even if some statutory interpretation could be teased out of the Commissioners' statement of reasons, [t]he law of this circuit 'rejects

the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *Id.* at 441–42 (citing cases). Later, in *New Models*, the Court again made clear that "a Commission decision based even in part on prosecutorial discretion is not reviewable." 993 F.3d at 882. That was so even though the statement of the controlling group in that case had "featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis." *Id*. at 883. The Court emphasized that the judiciary is "unable to review the Commission's exercise of its enforcement discretion, irrespective of the length of [any] legal analysis" included with that exercise of discretion. *Id*. at 887.

In this case, as explained in the opening brief (FEC Mem. at 13-15), the reliance on prosecutorial discretion in the controlling group's Statement of Reasons was extensive and detailed, constituting far more than a "brief mention" and citing specific grounds that are traditional bases for the exercise of that discretion. The controlling group expressly stated that it had declined to pursue enforcement "as an exercise of prosecutorial discretion under *Heckler*." Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 13 (Docket No. 13-1); https://www.fec.gov/files/legal/murs/7784/7784_42.pdf. To be sure, the controlling group included 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." (*Id*. at 12.) But those are traditional considerations regarding prosecutorial discretion. Indeed, *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." (Dickerson, Cooksey and Trainor Statement at 12 (quoting *Heckler*, 470 U.S. at 831).) Thus, the concerns in the Statement of Reasons do not depend entirely on interpretations of the statute, as plaintiff claims, as they do not stem from a definitive determination that there was no reason to believe that FECA had been violated.

The controlling group's rationale for dismissal was also explicitly rooted in the concerns about the reliability and clarity of the available factual record, as well as the agency resources that would be necessary and available for an investigation. (FEC Mem. at 13-15.) These are also traditional grounds for the exercise of prosecutorial discretion under *Heckler*. 470 U.S. 821, 831-32 (1985) Perhaps most notably, the controlling group specifically stated that in its view the "size and scope of the proposed investigation could quickly consume an outsized share of the resources available to the Commission." (Dickerson, Cooksey and Trainor Statement at 12.) Clearly, this assessment was not rooted in a conclusion about whether FECA had been violated, but rather was an evaluation of the nature of the investigation of the administrative respondents that had been proposed by the General Counsel's Office. It was not, as plaintiff argues, "entirely dependent on (and coterminous with) their assessment of legal merits" (Opp. at 21), and that particular controlling group rationale would apply even assuming the legal validity of the approach to enforcement that was under consideration. Whatever the merits of the allegations in the administrative complaint, the controlling group did not elect to allocate the necessary agency resources to them, a classic exercise of prosecutorial discretion. Thus, the "Commission's decision here explicitly relies on enforcement discretion—discretion that turns on practical concerns about agency resources and the viability of an enforcement claim. Such discretion does

not turn on legal grounds and therefore is not judicially reviewable under FECA's 'contrary to law' standard." *New Models*, 993 F.3d at 895.

Accordingly, recent district court cases have reached the same conclusion: FEC administrative enforcement matters dismissed on prosecutorial discretion grounds are unreviewable even when those grounds are mixed with analysis regarding whether FECA was violated. *See End Citizens United PAC*, 2022 WL 4289654, at *5 (explaining that "under our Circuit Court's precedent, the FEC's reliance on prosecutorial discretion to dismiss a complaint, even in part, divests a reviewing court of jurisdiction to second-guess the FEC's decision"); *End Citizens United PAC*, 2022 WL 1136062, at *3 (explaining that the "Commissioners justified their nonenforcement decision by citing concerns that are obvious hallmarks of prosecutorial discretion—factors like the agency's 'scarce resources,'. . . . Simply put, these justifications do not rely on factual and legal conclusions that are contrary to law. Moreover, even to the extent the Commissioners relied on legal analysis for some part of their exercise of discretion, their decision remains unreviewable."); *CREW v. Am. Action Network*, No. 18-945, 2022 WL 612655, at *7 (D.D.C. Mar. 2, 2022) (holding that a decision that rests even in part on prosecutorial discretion is not subject to judicial review).

D. Plaintiff's Remaining Arguments That It Needs to See the Administrative Record and That *New Models* Was Wrongly Decided Are Insufficient to Avoid Dismissal

Plaintiff briefly includes additional arguments that the case should not be dismissed, but they lack merit. First, plaintiff argues that it has not had the opportunity to review the full administrative record and speculates that "it can be assumed that that the record will reveal aspects of the agency's decision-making that support plaintiff's arguments." (Opp. at 26-27.) But plaintiff cites no authority to support the idea that mere speculation or assumptions about

what an administrative record might contain can defeat a motion to dismiss. Furthermore, this argument appears to be at odds with plaintiff's position on the FEC's Motion to Defer Transmission of the Administrative Record (Sept. 12, 2022) (ECF No. 14). As the FEC noted, "plaintiff conditionally consent[ed], provided [that] all administrative record documents relevant to the Commission's motion to dismiss or plaintiff's response appear in the public MUR file or are otherwise made available to plaintiff." (*Id.* at 1) And this Court's Minute Order of September 13, 2022, granted deferral of the submission of the record "pending the Court's disposition of the Defendant's Motion to Dismiss." Plaintiff has not identified any documents or even types of documents relevant to the FEC's motion to dismiss or plaintiff's response that it needs, beyond what has already been posted on the FEC website under the agency's ordinary disclosure policy. This case can and should be resolved based on the FEC's motion to dismiss.

Finally, plaintiff argues that *New Models* was wrongly decided and that a petition for rehearing *en banc* is pending, so the decision "remains subject to possible revision by the en banc court." (Opp. at 28.) However, the Court cannot accept this argument, since *New Models* and *Commission on Hope* are binding precedent. And because prosecutorial discretion was a distinct basis for the dismissal in the matter at issue here, judicial review is precluded. Speculation that the law could change, in particular in reliance on a petition that has been pending since June 2021, is not a legitimate or practical basis for denying this motion. Despite plaintiff's desire to see an enforcement action pursued against these respondents, the decision not to do so cannot be the subject of judicial review. *See New Models*, 993 F.3d at 893.

III. CONCLUSION

Because the dismissal of plaintiff's administrative complaint is unreviewable under D.C.

Circuit precedent, 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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October 3, 2022