No. 17-5049

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,
Plaintiffs-Appellants,
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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page***

Statutes

Other Authorities

STATEMENT

The Supreme Court and this Court have consistently held that the Federal Election Commission ("FEC" or "Commission") retains prosecutorial discretion not to pursue allegations of campaign finance violations. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). As a general matter, administrative agency nonenforcement decisions — whether as a matter of discretion or due to legal determinations that the conduct is lawful — are presumptively unreviewable due to the lack of manageable standards by which to judge the exercise of that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985). The panel decision in this case involves a direct application of that principle to one category of Commission nonenforcement decisions: those based on prosecutorial discretion. Finding nothing in the Administrative Procedure Act ("APA") or the Federal Election Campaign Act ("FECA") that provides "law to apply" to that category of decisions, the panel held that they are unreviewable. Because that decision was consistent with Supreme Court and circuit precedent, the petition of Citizens for Responsibility and Ethics in Washington ("CREW") should be denied.

1. CREW filed an administrative complaint with the Commission alleging that a group had failed to register as a political committee under FECA and make other required statements and disclosures. FECA permits "[a]ny person" to file

such a complaint and sets forth detailed enforcement procedures the Commission must follow in its consideration. 52 U.S.C. § 30109(a)(1)-(12). The statute requires obtaining the "affirmative vote of 4" Commissioners to proceed through certain points in the enforcement process; 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. *Id.* § 30109(a)(2), (a)(4)(A)(i). Assuming conciliation with the respondent fails, the Commission "*may* . . . institute a civil action for relief," a decision which also requires four affirmative votes. *Id.* § 30109(a)(6)(A) (emphasis added). The first two of these 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.").

2.a. Upon initial consideration of CREW's complaint, the Commission unanimously found reason to believe the group had failed to file certain reports and make required disclaimers in public communications, but three Commissioners voted against finding reason to believe the group was a political committee.

(J.A. 473-74.) These Commissioners later explained that the "information available at the time" was insufficiently clear for them to make such a finding. (J.A. 768.) Because the Commission's reason to believe findings on the other allegations authorized further investigation, however, those Commissioners "anticipated being able to make a finding regarding" the political committee allegations at the conclusion of that inquiry. (*Id.*)

After conducting an investigation, the Commission's Office of General Counsel again recommended that the Commission find reason to believe that the group had violated FECA's disclaimer and disclosure provisions, and the Office requested authority to conciliate. (J.A. 641-58, 719-45.) The Commission divided equally on whether to accept that recommendation, with three Commissioners voting to approve and three Commissioners opposed. (J.A. 757-58.) Lacking the necessary four votes to continue enforcement proceedings, the Commission voted to close the matter. (J.A. 758.)

b. The three Commissioners who voted against proceeding issued a statement of reasons which, under long-standing circuit law, "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). Those Commissioners jointly explained that while the Commission's investigation had uncovered some "obvious disclosure" violations, other alleged violations were less apparent and, in any

event, practical considerations ultimately militated against continuing to pursue enforcement. (J.A. 766-70.) Those reasons included the concern that the statute of limitations had expired on some claims, and was about to expire on others; that the group at issue was "defunct" with "no money" to pay any civil fine and "no people acting on its behalf," rendering "any conciliation effort" a "futile" exercise; and that further action against the group would raise "novel legal issues that the Commission had no briefing or time to decide." (J.A. 769.)

In light of those considerations, these Commissioners "concluded that this case did not warrant the further use of Commission resources" and that the "most prudent course" was to dismiss the matter "consistent with the Commission's exercise of its discretion in similar matters." (J.A. 766, 769).

3. CREW sought judicial review. FECA permits any "party aggrieved" by a Commission dismissal to file a petition with the United States District Court for the District of Columbia, but the statute limits judicial review to a determination whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). If a court so declares, FECA affords the Commission thirty days to conform with that declaration, absent which the original complainant may file a civil action on its own behalf. *Id.* § 30109(a)(8)(C).

Here, the district court concluded that the dismissal was a "rational exercise of prosecutorial discretion" that the Court was "not in a position to second-guess." *CREW v. FEC*, 236 F. Supp. 3d 378, 397 (D.D.C. 2017).

On appeal, CREW conceded that "the FEC . . . dismissed the complaint in an exercise of prosecutorial discretion." (Appellants' Br. at 18 (internal quotation marks omitted); *id.* at 26 (arguing that the FEC did "not reach the merits but dismisse[d] based on its prosecutorial discretion"); *id.* at 30-31 (arguing that the FEC did "not find [the] complaint lacks merit, and dismisse[d] based solely on a choice to preserve its resources"); *see also* Panel Op. at 8; Dissent at 4, 19.) Instead, CREW argued for a bright-line rule that *all* Commission dismissals based on prosecutorial discretion are contrary to law under the statute, thus triggering the private right of action under FECA. (*See* Appellants' Br. at 22-23.)

A panel of this Court affirmed the district court and held that the controlling Commissioners' invocation of prosecutorial discretion was not subject to judicial review. As the panel explained, *Chaney* established that an agency's decision not to enforce is generally committed to an agency's absolute discretion and is therefore unreviewable pursuant to the APA, 5 U.S.C. § 701(a)(2). (Panel Op. at 6-7 (citing *Chaney*, 470 U.S. at 831-33).) The panel recognized that *Chaney* held that such decisions were only "'presumptively unreviewable'" and that the presumption could be rebutted by the substantive statute. (Panel Op. at 7 (quoting

Chaney, 470 U.S. at 832-33).) However, the panel found no "meaningful standard against which to judge the [Commission's] exercise of discretion." *Id.* at 7-8 (quoting *Chaney*, 470 U.S. at 830). The panel observed that FECA contains a judicial review provision that permits a district court to "declare" that a Commission dismissal is "contrary to law." *Id*. at 2-3 (quoting 52 U.S.C. § 30109(a)(8)(C)). But that provision provides no standards to apply to a nonenforcement decision that invokes prosecutorial discretion like the one at issue here, the panel found. (*Id*. at 8.) The panel recognized that judicial review remains available where "the agency's action was based entirely on its interpretation of the statute" (*id*. at 11 n.11) and possibly where the agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" (*id*. at 9 n.9 (quoting *Chaney*, 470 U.S. at 833 n.4)).

ARGUMENT

The panel decision in this case applied longstanding principles regarding the unreviewability of agency nonenforcement decisions to the closing of a Commission matter based on prosecutorial discretion. Rehearing *en banc* is "not favored" and ordinarily available only where *en banc* determination is "necessary" to "maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

Because the panel decision did not conflict with any prior decisions of this Court or the Supreme Court, CREW has failed to meet the standards for *en banc* review and its petition for rehearing should be denied.

I. THE PANEL OPINION CORRECTLY CONCLUDED THAT THE COMMISSION RETAINS PROSECUTORIAL DISCRETION

The controlling Commissioners explained that their decision was predicated on a discretionary judgment about the value and risks of proceeding, not a judgment on the merits of CREW's claims. Until now, CREW accepted this fact, but argued that this discretionary judgment should be deemed to be contrary to law under FECA and create a private right of action for the administrative complainant. The panel likewise noted that the controlling Commissioners "would have exercised the agency's prerogative not to proceed with enforcement." (Panel Op. at 5; *see also* Dissent at 4 (citing CREW's characterizations of the dismissal).)

Now, in seeking rehearing, CREW changes course and suggests that the controlling Commissioners made a legal determination that there was "no 'reason to believe'" the activity at issue violated FECA. (Petition at 1, 2, 14.) That position is at odds with the record and the law.

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 (2014) (affirming Commission exercise of discretion); *supra* at p. 2. A Commissioner's vote against a finding of reason to believe does not necessarily mean that the Commissioner would affirmatively vote that there is no reason to believe the administrative complaint alleged FECA violations. Such a vote may instead indicate that the Commissioner would exercise discretion not to pursue the matter at that time due to weak evidence, the age of the alleged conduct, or other non-merits considerations.

Given these varied potential grounds for the agency's decision, this Court has understandably required the controlling group of Commissioners to provide a statement of reasons when it does not accept staff recommendations. *See Common Cause v. FEC*, 842 F.2d 436, 449-50 (D.C. Cir. 1988). 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.

CREW's apparent new position that a Commissioner's vote against a reason to believe finding necessarily equates with a finding of no reason to believe is also inconsistent with FECA. (*See* Petition at 11 (positing that FECA "directs the Commission to render a decision on the merits of the complaint").) FECA does not require the Commission to rule definitively on whether there is or is not reason

to believe that the law has been violated in every case. (*See* Panel Op. at 7-8.)[1] 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 such a determination in the first instance." *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 774 (D.C. Cir. 1992); *cf. Dunlop v. Bachowski*, 421 U.S. 560, 563 n.2, 572 (1975) (stating that an agency subject to a statute directing that the agency "shall" bring a civil action "if [it] finds probable cause to believe that a violation" had occurred "is not required to sue . . . whenever the proofs . . . suggest the suit might be successful").

In fact, it is CREW's position that is in serious conflict with circuit precedent. CREW argues that any Commission dismissal explained by a wish not "to devote resources to an investigation" is necessarily "contrary to law" because it is not rationally connected to the merits of a probable cause or reason to believe decision. (Petition at 11-12.) But that argument conflicts with the clear statements of the Supreme Court and this Court that the Commission "retains prosecutorial discretion." *CREW v. FEC*, 475 F.3d at 340 (citing *Akins*, 524 U.S. at 25).

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[1] If it did, then even a unanimous vote dismissing an administrative complaint without determining that there was or was not reason to believe would be inconsistent with the statute. Not even the dissenting judge in this case took that position. (*See* Dissent at 17 (describing the Commission's "third option").)

II. THERE IS NO CONFLICT BETWEEN THE PANEL DECISION AND ANY DECISION OF THIS COURT OR THE SUPREME COURT

In this case, the controlling Commissioners voted against finding reason to believe as an exercise of prosecutorial discretion. None of the authorities CREW cites involved review of a nonenforcement decision that controlling Commissioners contemporaneously justified as an exercise of prosecutorial discretion. Similarly, none points to judicially manageable standards in FECA that would overcome the presumption against review of prosecutorial discretion. CREW has thus failed to identify any conflicting authority that would support its petition for *en banc* review.

A. The Panel's Decision Does Not Conflict with *FEC v. Akins*

CREW argues that the *Akins* decision broadly permits judicial review of any Commission dismissal, regardless of the basis of that dismissal (Petition at 5-6), but the Supreme Court's discussion of prosecutorial discretion in that case was much more limited. *Akins*, 524 U.S. at 25-26. Like CREW's administrative claim here, *Akins* involved allegations that a group met the definition of a political committee under FECA and was subject to comprehensive reporting requirements. *Id.* at 14-16. In dismissing that claim, the Commission concluded that the group "was not subject to the disclosure requirements" because the definition of "'political committee'" under FECA "includes only those organizations that have

as a 'major purpose' the nomination or election of candidates." *Id.* at 18. The Commission's dismissal there was predicated entirely on its interpretation of the statute — a legal determination that a reviewing court could evaluate under FECA's "contrary to law" judicial standard. The dismissal did not invoke prosecutorial discretion.

The question presented involved the administrative complainants' standing to sue. *Akins*, 524 U.S. at 18. The Commission argued that the complainants' harm was not fairly traceable to the Commission's alleged legal error because the Commission *could* have reached the same result — dismissal — by exercising its prosecutorial discretion even had it interpreted the law in the way the complainants requested. *Id.* at 25. In rejecting that argument, the Supreme Court reasoned that the mere *possibility* of a discretionary dismissal did not break the chain of causation for Article III standing purposes. *Id.* Even then, however, the Court strongly suggested that a non-merits discretionary dismissal would be permissible. *Id.* (noting that "it is possible" that the Commission would "have decided in the exercise of its discretion not to" enforce FECA in that case). Indeed, the only question the Court specifically identified in the review of such a case was whether "the agency misinterpreted the law," *id.*, which is consistent with the panel opinion's ruling that prosecutorial discretion dismissals are unreviewable.

To be sure, *Akins* also rejected the Commission's argument that the case was unreviewable under *Chaney* because it involved "an agency's decision not to undertake an enforcement action." *Id.* at 26. The Court did so because FECA "explicitly indicates" that judicial review is available. *Id.* However, the Court confirmed that the availability of judicial review to correct legal errors did not eliminate the Commission's authority to "decid[e] to exercise prosecutorial discretion" and the Court cited *Chaney* for that view. *Id.* at 25.

CREW relies on the fact that the Supreme Court and the vacated *en banc* opinion of this Court in *Akins* drew no distinction between dismissals based on interpretations of FECA and those based on prosecutorial discretion to contend that all dismissals are reviewable to the same extent. (Petition at 6-7.) But the fact that the Supreme Court did not expressly rule on the availability of review of prosecutorial discretion instead indicates that the Court did not decide that question. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (internal quotation marks omitted)). The only question *Akins* actually decided was the plaintiffs' standing, not whether a prosecutorial discretion dismissal was reviewable. *Akins*, 524 U.S. at 25-26.

B. The Panel's Decision Does Not Disturb the Uniformity of This Circuit's Decisions

For similar reasons, the circuit authority CREW cites does not conflict with the panel ruling here. (*See* Petition at 8-12 (citing *Chamber of Commerce of the U.S. v. FEC*, 69 F.3d 600 (D.C. Cir. 1995) and *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987)).) Neither of those cases reviewed a Commission decision not to proceed with an enforcement matter that was explained as an exercise of prosecutorial discretion. *See Chamber of Commerce*, 69 F.3d at 603 (reviewing a challenge to a Commission rule); *DCCC*, 831 F.2d at 1133 (reviewing an unexplained Commission dismissal). Neither, therefore, decided the precise issue before the panel here.

In *DCCC*, this Court held that an FEC dismissal that was the result of an evenly divided Commission vote was judicially reviewable. 831 F.2d at 1133. Because the Commission had failed to explain its basis for dismissing the administrative complaint over a contrary staff recommendation, the Court remanded the case so that the Commissioners could "explain coherently the path they are taking." *Id.* The Commission argued in that case that dismissals resulting from evenly divided votes should be viewed as "simpl[e] exercises of prosecutorial discretion." *Id.* In rejecting that argument, the Court reasoned that the mere fact that such a vote occurred did not necessarily mean that the Commission intended to invoke its prosecutorial discretion. *Id.* at 1134-35. As the Court explained, a "6-0

decision not to initiate an enforcement action" might "represent a firmer exercise of prosecutorial discretion than a 3-2-1 division." *Id.* at 1134. Although *DCCC* "presum[ed]" that a properly explained decision invoking prosecutorial discretion would be reviewable, it did not definitively conclude that was the case. *Id.*; *see also id.* at 1135 n.5 ("arguendo, assuming reviewability").

The *DCCC* opinion, moreover, cautioned against conflating "two analytically discrete issues: (1) the threshold question whether a complaint dismissal is reviewable at all; (2) the respect that the reviewing court must accord to the Commission's disposition." *Id.* Of course, all Commission dismissals are "reviewable" in the sense that they must be explained in a manner sufficient to permit the reviewing court to "discern" the "agency's path." *Common Cause v. FEC*, 906 F.2d 705, 706-07 (D.C. Cir. 1990). That is all that the *DCCC* Court determined, *see* 831 F.2d at 1135, and the panel opinion here is consistent with that holding. (Panel Op. at 3-4 (citing *DCCC*).)

CREW is similarly mistaken in arguing that the panel opinion conflicts with *Chamber of Commerce*. That case involved whether an evenly divided Commission vote on whether to issue an advisory opinion regarding an FEC regulation deprived a plaintiff of standing to challenge that regulation because there was no "present danger of an enforcement proceeding." 69 F.3d at 603. The Court held that the threat of enforcement remained because the regulation

remained in force as Commission precedent and nothing prevented "the Commission from enforcing its rule at any time." *Id.* The Court also posited the hypothetical situation in which a "political competitor" could challenge a future Commission dismissal of an enforcement action because the "refusal to enforce would be based . . . on the Commission's unwillingness to enforce its own rule." *Id.* But that hypothetical followed an individual Commissioner's explanation of her vote against a draft advisory opinion "solely because she had reconsidered her earlier support for the final rule and believed it should be withdrawn." *Id.* A dismissal resulting from a Commissioner's failure to accept prevailing law is a far cry from a dismissal based on prosecutorial discretion. *Chamber of Commerce* did not address the situation at issue here.

III. CREW'S CLAIMS ABOUT THE EFFECTS ON FUTURE COMMISSION DISMISSALS DISTORT THE PANEL DECISION AND IMPROPERLY ASSUME BAD FAITH BY COMMISSIONERS

CREW's remaining arguments exaggerate the implications of the panel decision or improperly presume the bad faith of certain Commissioners in future enforcement actions. First, CREW asserts that the panel opinion will place Commission decisions "beyond the correction of any branch of government." (Petition at 13.) But that opinion merely extended a limited version of the same principles of judicial non-review of discretionary dismissals enjoyed by nearly every other federal agency. And unlike the situation for those other agencies,

judicial review remains available for other types of Commission actions, including nonenforcement decisions predicated on the Commission's interpretation of FECA, as the panel explained. (Panel Op. at 11 n.11.)

Second, CREW's suggestion that certain Commissioners will use prosecutorial discretion as a pretense to "end enforcement of campaign finance law" (Petition at 13) improperly presumes that those Commissioners will act in bad faith. The "prosecutorial decisions" of Executive Branch appointees are usually afforded a "'presumption of regularity,'" and "'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). CREW essentially advocates the opposite presumption: that the availability of unreviewable prosecutorial discretion will cause Commissioners to misrepresent the bases for their votes.

Nor would the panel opinion place a Commission decision to cease enforcing campaign finance law beyond review. *Chaney* left undisturbed this Circuit's cases permitting review where an agency had "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)). The panel opinion noted that same

exception and therefore would not preclude review of such a policy (Panel Op. at 9 n.9), as a district court opinion has already recognized. *See CREW v. FEC*, No. 16-259, 2018 WL 3719268, at *49 (D.D.C. Aug. 3, 2018).[2]

Finally, the unrelated statements of reasons CREW cites in its petition are not under review here. Any arguments that the rule adopted in this case should be distinguished or otherwise refined can be addressed by future panels of this Court.[3]

CONCLUSION

For the foregoing reasons, CREW's petition for *en banc* rehearing should be denied.

Respectfully submitted,

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[2] As the panel determined, "the Commission routinely enforces the election law violations alleged in CREW's administrative complaint." (Panel Op. at 9 n.9.)

[3] CREW relies heavily on a statement a single Commissioner issued after the panel decision in this case. As this Court has long recognized, however, the views of one member of a commission do not constitute agency action. *See Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's August 3, 2018 Order because the brief contains 3,829 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 20th day of August, 2018, I electronically filed the Federal Election Commission's Response to Petition for Rehearing En Banc with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

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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