UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 22-cv-666 (CKK) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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

Plaintiffs Free Speech for People and Campaign for Accountability challenge the Federal Election Commission's ("Commission" or "FEC") dismissal of a 2016 administrative complaint seeking enforcement of provisions of the Federal Election Campaign Act ("FECA") that restrict efforts by foreign nationals to influence a federal election. (*See* Pls' Compl. for Declaratory and Injunctive Relief ("Compl." ¶¶ 2-4 (Docket No. 1).) Plaintiffs alleged that the Government of the Russian Federation ("Russian Federation") and the campaign of Donald J. Trump ("Trump Campaign") violated FECA in a variety of ways based upon the Russian Federation's interference in the 2016 U.S. presidential election. After duly considering plaintiffs' allegations, the Commission did not approve pursuing the matter further as to those administrative respondents. Instead, relying on prosecutorial discretion, a majority of Commissioners voted to dismiss as to the Russian Federation, and a controlling group of Commissioners voted to dismiss as to the Trump Campaign. Plaintiffs now seek review of those dismissals, but they cannot prevail. Under binding D.C. Circuit precedent, judicial review is not available where, as here, the rationales for the votes of Commissioners were explicitly based on prosecutorial discretion. *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.*), plaintiffs have failed to state a claim for relief that can be granted, and their court complaint must be dismissed.

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) (emphasis in original). 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 superintendance

[sic] 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)).

Should the court find the Commission's dismissal 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's Prohibition of Foreign National Contributions and Expenditures, and Related Reporting Requirements

FECA and Commission regulations prohibit any foreign national from "directly or indirectly" making "a contribution or donation of money or other thing of value," "an express or implied promise to make a contribution or donation," or "an expenditure, independent expenditure, or disbursement for an electioneering communication," in connection with a federal, state, or local election. 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). FECA

further prohibits any person from knowingly soliciting, accepting, or receiving a contribution or donation from a foreign national. 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g). A contribution is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). FECA similarly defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing an election." *Id.* § 30101(9)(A)(i).

Certain disclosures are also required for any person that is not a political committee and makes independent expenditures exceeding $250 for a particular election in a calendar year, and certain aggregated expenditures that exceed $10,000 per election. *See* 11 C.F.R. 109.10(b), (c). In addition, when expenditures are made "in cooperation, consultation or in concert with" a candidate or campaign, such "coordinated" expenditures are considered to be contributions to the campaign, are generally only permissible to the extent that a contribution from that person would be permissible, and the campaign is required to make certain disclosures regarding the contributions. 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. §§ 109.20-21.

III. FACTUAL BACKGROUND

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

On December 16, 2016, plaintiffs filed an administrative complaint with the Commission against the Russian Federation and the Trump Campaign, alleging violations of FECA during the 2016 election. (Compl. ¶ 2.) Plaintiffs alleged that "for the purpose of influencing the 2016 presidential election, the Russian Federation had: paid hackers to hack into Democratic National Committee ("DNC") servers and leak the hacked information; paid people to make social media posts; and paid for political advertisements." (*Id.* ¶ 4.) Plaintiffs also alleged that the Russian

Federation "did not disclose any of this spending," and that some of the Russian Federation's political spending was "coordinated" with the Trump Campaign. (*Id*.) Consequently, plaintiffs alleged that the Russian Federation violated FECA's prohibition on any foreign national "directly or indirectly" making a "contribution or donation of money or other thing of value," or "an expenditure" in connection with the 2016 election, Administrative Complaint ("Admin. Compl."), MUR 7207, Dec. 19, 2016, ¶¶ 23, 32, 34, https://www.fec.gov/files/legal/murs/7207/7207_01.pdf, (citing 52 U.S.C. § 30121(a)(1)(A), (a)(1)(C) and 11 C.F.R. § 110.20 (b), (f)), and FECA's requirement to report these expenditures, (*id.* ¶¶ 24, 40 (citing C.F.R. § 109.10(b)).) Plaintiffs further claimed that the Trump Campaign cooperated in this interference by soliciting or receiving prohibited contributions. (*Id.* ¶ 46 (citing 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g)).) Plaintiffs submitted amendments to their administrative complaint in May and June 2017. Amendment to the Admin. Compl., MUR 7207, May 4, 2017, https://www.fec.gov/files/legal/murs/7207/7207_05.pdf; Second Amendment to the Admin. Compl., MUR 7207, June 2, 2017, https://www.fec.gov/files/legal/murs/7207/7207_10.pdf.

i. The Russian Federation

Specifically, plaintiffs alleged that the Russian Federation sought to influence the 2016 election by conducting a social media campaign and by engaging in a "phishing" attack which permitted hackers to gain access to internal DNC and campaign emails, including those of presidential candidate Hillary Clinton's campaign chairman. Plaintiffs alleged that the hackers then transmitted these hacked emails to WikiLeaks, which released the information in the summer of 2016, just prior to the Democratic National Convention. (Compl. ¶ 39.) The aim of this release, plaintiffs alleged, was to harm Clinton's electoral chances to the benefit of candidate

Trump. (*Id.*) Plaintiffs asserted that the Russian Federation paid actors to post propaganda on social media websites, and also paid for political advertisements on these websites to urge the election of candidate Trump. (*Id.* ¶ 43.)

ii. The Trump Campaign

Plaintiffs alleged that the Trump Campaign solicited an impermissible foreign national in-kind contribution when then-candidate Trump made a statement about Clinton's emails directed towards the Russian Federation at a campaign press conference: "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing." (Compl. ¶ 48.) Additionally, they alleged that "agents" of the Trump Campaign, specifically Roger J. Stone, had "advance knowledge" of WikiLeaks' release of the emails, and that Paul J. Manafort, the Chairman and Chief Strategist of the Trump Campaign, had "direct and unusual" communications with senior Russian Federation officials about the campaign's strategy. (*Id.* ¶ 50.)

iii. The Office of General Counsel's Report

On February 23, 2021, the FEC's Office of General Counsel ("OGC") issued its First General Counsel's Report, which consolidated plaintiffs' complaint with complaints made by unrelated parties against various entities. (Compl. ¶ 56.) The Report recommended that the Commission find reason to believe that the Russian Federation violated FECA by making prohibited foreign contributions and expenditures and failing to report these expenditures, but that the FEC take no further action against the Russian Federation. *Id.* ¶¶ 63-64; *see also* Federal Election Commission First General Counsel's Report ("OGC Report") at 94, https://www.fec.gov/files/legal/murs/7207/7207_17.pdf. Although entities not named in plaintiffs' administrative complaint, a Russian LLC known as the Internet Research Agency

("IRA") was identified in the Report as having been used by the Russian Federation to conduct the social media campaign against Clinton, and a Russian military agency, the Main Intelligence Directorate of the General Staff of the Russian Army ("GRU"), was identified as conducting the DNC email hack operation. OGC Report at 1-2.

Concerning the allegations against the Trump Campaign, OGC's recommendations included that the Commission find reason to believe that this respondent violated FECA by knowingly soliciting, accepting or receiving in-kind contributions from the Russian Federation and Wikileaks. Compl. ¶ 71; OGC Report at 94. Another conclusion of the Report was that Trump's "Russia, if you're listening" statement constituted a prohibited solicitation of a foreign national contribution and that it was "coordination" within the meaning of the statute. Compl. ¶ 66; OGC Report at 40.

The Report also made recommendations as to additional entities subject to allegations by other complainants. Among the Report's recommendations were that the Commission find reason to believe that Trump and Paul Manafort individually, and Bradley T. Crate in his official capacity as treasurer for the Trump Campaign, violated FECA by knowingly soliciting, accepting or receiving certain respective in-kind contributions from the Russian Federation. OGC Report at 94. The Report also recommended that the Commission find reason to believe that an unknown candidate, later revealed to be H. Russell Taub, a 2016 candidate for Rhode Island's 1st Congressional District, requested and received stolen documents from the Russian Federation related to his opponent. *Id*. In addition, the Report examined a complaint against Cambridge Analytica, LLC, a former political consulting company, that allegedly provided illegally sourced social profiles to the Russian Federation. The Report found the allegation against Cambridge Analytica to be "vague, speculative, and unsupported by the available information," and

therefore it recommended that the Commission dismiss that complaint. *Id.* at 95. Lastly, the Report recommended that the Commission find reason to believe that the IRA violated FECA by making prohibited foreign national and independent expenditures, but that the Commission take no further action as to this entity. *Id.* at 94-95.

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

The Commission considered the First General Counsel's Report and the other materials submitted to it. Ultimately, the following actions, among others, were taken as to the respondents in the matter.[1]

i. The Russian Federation

On April 22, 2021, the Commission voted 3-3 on whether there was reason to believe that the Russian Federation had violated FECA. (Compl. ¶ 73.) Then-Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor voted against finding reason to believe, while then-Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub voted for finding reason to believe. (*Id.*) After that lack of consensus to find reason to believe, the Commission then affirmatively voted by a majority of Commissioners, 4-2, to dismiss claims against the Russian Federation pursuant to *Heckler v. Chaney*, on the basis of prosecutorial discretion. (*Id.* ¶ 74.) Chair Broussard, Vice Chair Dickerson, and Commissioners Walther and Weintraub voted affirmatively for that decision, while Commissioners Cooksey and Trainor dissented. Certification for MURs 7207, 7268, 7274 and 7623, Apr. 22, 2021 ("Apr. 22 Certification"), at 4, https://www.fec.gov/files/legal/murs/7207/7207_18.pdf. The Commission voted 6-0 to close the file as to this respondent. (Compl. ¶ 75.)

[1] Additional votes were also taken regarding whether the Commission would make certain communications with the U.S. Department of State regarding the matter.

ii. The Trump Campaign

The Commission also voted 3-3 on whether there was reason to believe that the Trump Campaign had violated FECA. (Compl. ¶ 73.) Chair Broussard and Commissioners Walther and Weintraub voted affirmatively to find reason to believe, while Vice Chair Dickerson and Commissioners Cooksey and Trainor dissented. (*Id.*) The Commission then voted 3-3 to dismiss the Trump Campaign on the basis of prosecutorial discretion under *Heckler v. Chaney*. Vice Chair Dickerson and Commissioners Cooksey and Trainor voted affirmatively, while Chair Broussard and Commissioners Walther and Weintraub dissented. (*Id.* ¶ 74.) The Commission then voted 6-0 to close the file as to the Trump Campaign. (*Id.* ¶ 75.)

iii. Other Respondents

On April 22, 2021, the Commission also voted on allegations regarding respondents that were not the subject of plaintiffs' administrative complaint. Apr. 22 Certification at 2-3. The Commission voted 3-3 on whether there was reason to believe that the IRA had made and failed to report prohibited foreign expenditures, and also voted 3-3 on whether there was reason to believe that Trump, Manafort, and Bradley Crate in his official capacity as treasurer of the Trump campaign committee violated FECA. *Id.* at 2. Regarding Russell H. Taub, who was identified as the then-unknown congressional candidate, the Commission voted 4-2 to find reason to believe that Taub solicited, accepted, or received a foreign national contribution. *Id.* at 3. On August 10, 2021, the Commission also voted 4-2 to accept a conciliation agreement with Taub. In addition, the Commission voted 6-0 to dismiss Cambridge Analytica. *Id.* at 4.

iv. Release of the File and the Commissioners' Statements of Reasons

On February 18, 2022, the Commission publicly released the file in this matter.[2] Thus, documents including administrative complaints, respondents' statements, certifications, and the First General Counsel's Report with some redactions are all on the public record. *See* Closed Matters Under Review, MUR 7207, https://www.fec.gov/data/legal/matter-under-review/7207/.

Because there were not four votes to proceed with the complaints against the Trump Campaign, the Russian Federation, or certain other respondents, the Commissioners that voted against proceeding with enforcement constituted a majority or controlling group as to each respective respondent, and multiple statements of reasons were issued by Commissioners to explain their votes. In a Statement of Reasons dated November 22, 2021, Vice Chair Dickerson and Commissioners Cooksey and Trainor explained that they voted to dismiss the Trump Campaign and certain other respondents "as an exercise of prosecutorial discretion for two principal reasons." Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III ("Dickerson, Cooksey and Trainor Statement"), at 2, https://www.fec.gov/files/legal/murs/7207/7207_48.pdf. First, because the Commission awaited the completion of the investigations into the respondents by the Department of Justice and others, the "Commission's ability to resolve these matters within the [five-year] statute of limitations," was undermined. *Id.* In particular, because the Office of General Counsel's Report was not completed until more than four years after the initial administrative

[2] On September 28, 2021, the Commission voted to reopen the matter for further consideration in light of issues that necessitated additional review prior to publicly releasing the file. *See* Certification for MURs 7207, 7268, 7274 and 7623, Sept. 28, 2021, at 2, https://www.fec.gov/files/legal/murs/7207/7207_37.pdf; *see also* Certification for MURs 7207, 7268, 7274, and 7623, Jan. 13, 2022, https://www.fec.gov/files/legal/murs/7207/7207_41.pdf (recording unanimous vote in the matter of the "First General Counsel's Report in [the] Public File" of the MURs and then closing the file).

complaint was filed, "mere months remained on the statute of limitations for the latest conduct once the Commission had considered the matters, while other conduct was already outside of the five-year window." *Id.* As a result, "there was no reasonable chance for the Commission to bring an investigation and enforcement action to fruition in the time remaining," and legal obstacles, "including issues of privilege and sovereign immunity," would have further delayed action and required "expending significant resources." *Id.*

Second, this group of Commissioners wrote that "we believe that the Commission's interests have already been vindicated by the investigations conducted by other parts of the federal government," Dickerson, Cooksey and Trainor Statement at 2, and found it "an imprudent use of resources to duplicate other agencies' work," *id.* at 2-3. Specifically, "[i]n addition to the Special Counsel—who ultimately issued a thorough report on the relevant facts and criminally convicted Paul Manafort, among others, as part of his work—thorough investigations were undertaken by relevant committees of the U.S. Senate and U.S. House of Representatives, as well as the Office of the Director of National Intelligence." *Id.* at 2. This group of Commissioners further noted that the First General Counsel's Report was "largely derivative of these other reports." *Id.*

Commissioners Broussard and Weintraub separately issued a statement of reasons dated February 15, 2022. *See* Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub ("Broussard and Weintraub Statement"), https://www.fec.gov/files/legal/murs/7207/7207_47.pdf. In their statement, the Commissioners explained that they supported OGC's recommendations to find reason to believe against the Russian Federation for making, and the Trump Campaign for knowingly soliciting or accepting, prohibited foreign national contributions. Broussard and Weintraub Statement at 1. These Commissioners also

explained why they voted with the majority of the Commission to dismiss the Russian Federation as an exercise of prosecutorial discretion. The Commissioners conveyed their concerns regarding whether proceeding against the Russian Federation would be an appropriate allocation of agency resources, and they stated that "[o]ur vote to find reason to believe they violated [FECA] as described above but to take no further action was influenced by the knowledge that other parts of the government were better situated to address these serious attacks on our national sovereignty and were taking steps to do so." *Id.* at 5.

Vice Chair Dickerson also provided a supplemental Statement of Reasons on September 16, 2021. *See* Supplemental Statement of Reasons of Vice Chair Allen Dickerson ("Dickerson Statement"), https://www.fec.gov/files/legal/murs/7207/7207_49.pdf. Writing separately, the Vice Chair explained his decision to vote against finding reason to believe that the Russian Federation violated FECA, but also to agree with three other Commissioners to vote to dismiss the Russian Federation as a matter of prosecutorial discretion. Vice Chair Dickerson explained that although he was in fact persuaded that there was reason to believe the Russian Federation had violated FECA, and he was prepared to "let the courts judge" the Russian Federation's actions, including "Russia's claims of immunity," the Commission in his view could "not act alone" on the matter, and he did not find it appropriate to take action without first involving the U.S. Department of State. Dickerson Statement at 3. Because a majority of the Commission did not agree to do that in a manner he deemed satisfactory, the Vice Chair determined dismissal based on prosecutorial discretion was "the best remaining course." *Id.* at 4 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

IV. ARGUMENT

Plaintiffs' court complaint should be dismissed for failure to state a claim. Though plaintiffs may disagree with the dismissal of their administrative complaint against the Russian Federation and the Trump Campaign, judicial review is not available where, as here, the voted motion and controlling statements providing the agency's rationale on the respective respondents include an independent justification based on prosecutorial discretion. Such decisions are presumptively unreviewable under clear D.C. Circuit law. In this case, because the respective majority and controlling groups of Commissioners expressly invoked and exercised their prosecutorial discretion as an independent basis for their votes to dismiss, plaintiffs are unable to obtain judicial review of those decisions.[3]

A. Standard of Review

Dismissal of a 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

[3] Because plaintiffs' administrative complaint did not allege violations by any respondents other than the Russian Federation and the Trump Campaign, as plaintiffs concede, other respondents are beyond the scope of this case, and the Court lacks jurisdiction over these respondents. *See* 52 U.S.C. § 30109(a)(8)(A) (granting jurisdiction for the filing of petitions by "[a]ny party aggrieved by an order of the Commission dismissing a[n administrative] complaint filed by such party"); *see also Citizens for Resp. & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33, 40 (D.D.C. 2018) (finding that judicial review is limited to "the four corners of the administrative complaint" and dismissing review petition regarding persons not named in the underlying complaint); *cf. Citizens for Resp. & Ethics in Wash. v. Am. Action Network*, 410 F. Supp. 3d 1, 20 (D.D.C. 2019), *on reconsideration,* No. 18-CV-945 (CRC), 2022 WL 612655 (D.D.C. Mar. 2, 2022) (dismissing certain claims not included in administrative complaint as outside of provision for private suits under section 30109(a)(8)(C)). Here, plaintiffs' administrative complaint alleged FECA violations only by the Trump Campaign and the Russian Federation, and plaintiffs' court complaint admits as much. *See* Compl. ¶ 75 (the Russian Federation and the Trump Campaign were "the only respondents identified in Plaintiffs' administrative complaint"); *see also id*. ¶¶ 2, 34-37 (describing administrative complaint as against the Russian Federation and Trump Campaign); *id.* ¶ 58 (noting that plaintiffs' complaint was considered together with others by unrelated parties); Admin. Compl., MUR 7207, Dec. 19, 2016, https://www.fec.gov/files/legal/murs/7207/7207_01.pdf.

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)).

When reviewing an administrative agency's action, *see* LCvR 7(n), the "district judge sits as an appellate tribunal," *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001), and the "entire case on review is a question of law and only a question of law," *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). "[B]ecause a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Id*. 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 Trump Campaign 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 holding, because "the [FEC] Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss [the administrative] complaint,

and we lack the authority to second guess a dismissal based even in part on enforcement discretion." 993 F.3d at 882 (D.C. Cir. 2021). 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 884. As a result, the controlling decision was not subject to judicial review under FECA's '"contrary to law"' standard." *Id.* (citing 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, the dismissal was not subject to judicial review, and the Court 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 *Pub. Citizen v. FEC*, 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 to dismiss plaintiffs' complaint and therefore the court "lack[ed] the authority to review the FEC's dismissal") (citing *New Models*, 993 F.3d at 886; *Commission on Hope*, 892 F.3d at 442).

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

Heckler and *Commission on Hope* are dispositive as to the dismissal of plaintiffs' complaint against the two respondents at issue here. The Commission voted by a four-vote majority to "[d]ismiss the Russian Federation and Internet Research Agency pursuant to *Heckler v. Chaney*." Apr. 22 Certification at 4. Commissioners Broussard and Weintraub explained in detail that the dismissal as to the Russian Federation was an exercise of prosecutorial discretion in their statement of reasons. The Commissioners noted that "the likelihood of success in obtaining a collectible judgment through litigation [with the Russian Federation] was low," and

furthermore, that other parts of government were "better situated to address these serious attacks on our national sovereignty and were taking steps to do so." Broussard and Weintraub Statement at 5. The Commissioners pointed to recent sanctions against the Russian government by the U.S. Department of the Treasury, as well as investigations by the FBI and others. *Id*. Vice Chair Dickerson expressed a similar prudential concern in his supplemental statement, stating that the "Commission lacks the resources, access, and expertise to meaningfully supplement the work already taken at the highest levels of government." Dickerson Statement of Reasons at 2. Although Commissioner Dickerson was "persuaded that there is reason to believe the Russian Federation violated [FECA]," he nevertheless concluded that "dismissal pursuant to our prosecutorial discretion was the best remaining course" when the Commission could not agree on the next steps involving the State Department that he deemed appropriate. *Id.* at 4.

In dismissing the complaint as to the Trump Campaign, the three controlling Commissioners similarly relied on the very type of practical and prudential considerations that D.C. Circuit precedent has established are not subject to judicial review. As in *Commission on Hope*, the "three naysayers on the Commission placed their judgment squarely on the ground of prosecutorial discretion." 892 F.3d at 439. Specifically, the controlling group of Commissioners pointed to the "waning [five-year statute of] limitations period," the prospect of "expending significant resources," and the "vanishing odds of successful enforcement," at "enormous costs to the agency," as reasons counseling a dismissal based on the agency's prosecutorial discretion. Dickerson, Cooksey and Trainor Statement at 2. Indeed, all of the grounds cited by the controlling group are traditional grounds for prosecutorial discretion that are specifically referenced in *Chaney*, and each is plainly independent of the merits. And the controlling group explicitly linked its decision to "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 as to the Trump Campaign, that decision is unreviewable.

Plaintiffs erroneously attempt to focus on what the Commissioners' statements purportedly did not say. Plaintiffs criticize the three Commissioners who voted against finding reason to believe as to the Russian Federation and the Trump Campaign because they "did not address why they voted *against* finding reason to believe" that these respondents "had violated FECA in the first place" (Compl. ¶ 91) (emphasis in original). For the Russian Federation, Vice Chair Dickerson explained that he was persuaded that there was reason to believe that this respondent had violated FECA, but he emphasized that in his view dismissal was warranted for prudential reasons. As to the Trump Campaign, although neither Vice Chair Dickerson's Supplemental Statement nor his joint Statement with Commissioners Cooksey and Trainor address the reasons these Commissioners voted against finding reason to believe as to this respondent, there is no requirement that Commissioners that voted not to proceed provide such an explanation where a dismissal was ultimately based on prosecutorial discretion. Indeed, complainants are not even "entitled to have the court evaluate. . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Commission on Hope*, 892 F.3d at 441. *See also Pub. Citizen*, 547 F. Supp. 3d at 57 (emphasis in original) ("regardless of the *merits* of OGC's legal theories, the Controlling Commissioners' decision not to proceed relied upon prudential concerns well within its expertise.").

In this matter, Commissioners did provide substantial and detailed explanations for their votes to dismiss based on prosecutorial discretion. This is thus a much easier case than *New Models*, where the controlling Commissioners' statement of reasons included a lengthy legal analysis of the claims under FECA, with only a "fleeting" reference to prosecutorial discretion in the last sentence of the statement and an accompanying footnote. 993 F.3d at 896, 899–900 (Millett, J., dissenting). In *New Models*, Judge Millet's dissent noted that the Commission had "devoted 31 single-spaced pages and 138 footnotes to a full-throated analysis of the legal question" as to whether New Models was a political committee within the meaning of FECA. *Id.* at 895-96. The majority opinion, in Judge Millet's view, set aside the Commission's "robust legal analysis" because "the Commission's decision tossed a dependent clause with seven magic words into the final sentence of its statement," asserting prosecutorial discretion. *Id.* at 896. Judge Millet argued that this analysis with "detailed findings and legal determinations" set forth a determination that should have been reviewed by the Court, *id.* at 900, and that the majority's ruling would permit the FEC to shield any dismissal from judicial scrutiny "with just a rhetorical wink to prosecution discretion," *id*. at 896.

But that concern is simply inapplicable here. The majority decision to dismiss the Russian Federation was clearly and solely based on the Commission's prosecutorial discretion, with no lengthy accompanying statements grounded in applications of FECA. *See* Apr. 22, 2021 Certification, at 4 (dismissing Russian Federation pursuant to *Heckler v. Chaney*). Indeed, several Commissioners noted their view that there was in fact reason to believe the Russian Federation had violated FECA, but explained that they had voted to dismiss anyway because of specific prudential considerations. *See* supra pp. 12-13. Similarly, the controlling group of Commissioners' statement as to their decision to dismiss the Trump Campaign was not simply a

recitation of "magic words," but a detailed explanation reflecting a "quintessential exercise of 'prosecutorial discretion.'" *Citizens for Resp. & Ethics in Wash.*, 2022 WL 612655, at *6.

In any event, even to the extent the statements under review here did include some analysis of the merits of the administrative complaint along with the exercise of prosecutorial discretion, 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").

V. CONCLUSION

Because the FEC's dismissal of plaintiffs' administrative complaint is unreviewable under D.C. Circuit precedent, the Court should dismiss plaintiffs' 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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