IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE,
CAMPAIGN FOR ACCOUNTABILITY,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 22-cv-666-CKK

ORAL HEARING REQUESTED

MEMORANDUM IN OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

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TABLE OF CONTENTS

INTRODUCTION **1**

STATEMENT OF FACTS **4**

I. Statutory and Regulatory Background **4**

A. Political spending by foreign nationals 4

B. Disclosure requirements 5

II. Factual Background **6**

A. Russian interference in the 2016 U.S. elections 7

1. Russian Federation hacked opposition email accounts and ran deceptive social media accounts to benefit the Trump Campaign 7

2. Trump Campaign solicited in-kind and foreign contributions from the Russian Federation and WikiLeaks 9

3. Trump Campaign attempted to obstruct investigations into Russian interference in 2016 election 11

III. Procedural History **11**

A. The administrative complaint 11

B. FEC response to the administrative complaint 13

LEGAL STANDARDS **18**

ARGUMENT **20**

I. The FEC's Dismissal is Reviewable Because the Full Commission Specifically Refused to Dismiss the Trump Campaign As a Matter of Prosecutorial Discretion **20**

A. The FEC expressly considered *and rejected* a motion to exercise its prosecutorial discretion to dismiss the Trump Campaign 20

B. The reasoning of the three Commissioners who voted in favor of exercising prosecutorial discretion should not be accorded deference by this Court and does not render the case judicially unreviewable. 24

C. The present case is distinguishable from *New Models* and *Commission on Hope* because in those cases, the Commission did not expressly reject prosecutorial discretion as grounds for dismissal 27

II. Arguments Preserved for Further Review 30

A. A non-majority bloc cannot assert authority to exercise prosecutorial discretion 30

B. The Commission's dismissal of the claims against the Russian Federation were contrary to law 32

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 18

Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017) 7

Bernal v. Fainter, 467 U.S. 216, 220 (1984) 34

Bluewater Network v. Envtl. Prot. Agency, 370 F.3d 1 (D.C. Cir. 2004) 19

Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) 5, 34

Buckley v. Valeo, 424 U.S. 1, 66 (1976) 35

Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n ("New Models"), D.C. Cir. No. 19-5161 (D.C. Cir.) ECF No. 1903510 (petition for en banc review filed June 23, 2021) 30, 32

* *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 993 F.3d 880, 883 (D.C. Cir. 2021) ("New Models") ..... passim

* *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, 892 F.3d 434 (D.C. Cir. 2018) ("Commission on Hope") ..... passim

Common Cause v. Federal Election Comm'n, 842 F.2d 436 (D.C. Cir. 1988) 21, 24

Democratic Congressional Campaign Committee v. Fed. Election Comm'n, 831 F.2d 1131 (D.C. Cir. 1987) 19, 24, 25

Fed. Election Comm'n v. Dem. Senatorial Campaign Comm., 454 U.S. 27 (1981) ... 19

Fed. Election Comm'n v. John A. Dramesi for Congress Comm., 640 F. Supp. 985 (D.N.J. 1986) 4

Fed. Election Comm'n v. Malenick, 310 F. Supp. 2d 230 (D.D.C. 2004) 4

Fed. Election Comm'n v. Nat'l Republican Senatorial Comm., 966 F.2d 1471 (D.C. Cir. 1992) 3, 24, 25, 26

* *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) 22, 29, 32, 35

Free Speech For People v. Fed. Election Comm'n, No. 21-cv-3206 (D.D.C filed Dec. 8, 2021) 17

Harris v. D.C. Water & Sewer Auth., 791 F.3d 65 (D.C. Cir. 2015) 18

Heckler v. Chaney, 470 U.S. 821 (1985) 16, 22, 30, 31

Orloski v. Fed. Election Comm'n, 795 F.2d 156 (D.C. Cir. 1986) 19, 33

Sierra Club v. Jackson, 648 F.3d 848 (D.C. Cir. 2011) 18, 30

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) 18

United States v. Mead Corp., 533 U.S. 218 (2001) 27

Statutes

22 U.S.C. § 611(b) 12

26 U.S.C. § 95 20

26 U.S.C.§ 96 20

5 U.S.C. § 706(2)(A) 33

52 U.S.C. § 30101(9)(A) 4

52 U.S.C. § 30106(a) 20

52 U.S.C. § 30106(c) 3, 20, 22, 31

52 U.S.C. § 30107(a) 20, 35

52 U.S.C. § 30109(a) ..... passim

52 U.S.C. § 30109(a)(1) 11

52 U.S.C. § 30109(a)(2) 14, 32

52 U.S.C. § 30109(a)(3) 15

52 U.S.C. § 30109(a)(4) 15

52 U.S.C. § 30109(a)(5)(C) 33

52 U.S.C. § 30109(a)(6)(A) 33

52 U.S.C. § 30109(a)(8)(A) 18, 19

52 U.S.C. § 30109(a)(8)(C) 18, 33, 34

52 U.S.C. § 30121(a)(1) ..... passim

52 U.S.C. § 30121(a)(1)(A) 12, 14

52 U.S.C. § 30121(a)(2) 4, 12, 15

52 U.S.C. § 30121(b)(1) 12

Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, 116 Stat. 81 4

Federal Election Campaign Act, 52 U.S.C. §§ 30101 et seq ..... passim

Rules and Regulations

11 C.F.R. § 104.3 ..... 6, 13

11 C.F.R. § 104.8 6

11 C.F.R. § 104.9 6

11 C.F.R. § 109.10(b) 5, 12, 13, 14

11 C.F.R. § 109.10(c) 5, 12, 13

11 C.F.R. § 109.20 5

11 C.F.R. § 109.20(b) 6, 12

11 C.F.R. § 109.21(b)(1) 5

11 C.F.R. § 109.21(b)(2) 5

11 C.F.R. § 109.21(b)(3) 13

11 C.F.R. § 109.22 12

11 C.F.R. § 110.20(b) 14

11 C.F.R. § 110.20(f) 12, 13, 14

11 C.F.R. § 110.20(g) 4, 12, 15

11 C.F.R. § 111.18(d) 15

11 C.F.R. § 111.4 11

11 C.F.R. § 111.9 ..... 15, 21

Fed. R. Civ. P. 12(b)(1) 18

Fed. R. Civ. P. 12(b)(6) 18

Other Authorities

Fed. Election Comm'n, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), *available at* https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf 22

Report of the Select Committee on Intelligence on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, S. Rep. No. 116-290, v. 1-5 (2019), *available at* https://www.intelligence.senate.gov/publications/report-select-committee-intelligence-united-states-senate-russian-active-measures 6, 8, 9

Robert S. Mueller III, U.S. Dep't of Justice, *Report on the Investigation Into Russian Interference In The 2016 Presidential Election*, v. 1-2 (2019), *available at* https://www.justice.gov/storage/report_volume1.pdf and https://www.justice.gov/storage/report_volume2.pdf 6, 8

Administrative Proceedings

In the Matter of Commission on Hope, Growth and Opportunity, Amended Certification, MURs 6391 and 6471 (Sept. 25, 2014), *available at* https://www.fec.gov/files/legal/murs/6391/15044380114.pdf 28

In the Matter of Commission on Hope, Growth and Opportunity, Certification, MURs 6391 and 6471 (Oct. 2, 2015), *available at* https://www.fec.gov/files/legal/murs/6391/15044380175.pdf 28

In the Matter of New Models, Certification, MUR 6872 (Nov. 16, 2017), *available at* https://www.fec.gov/files/legal/murs/6872/17044432619.pdf 28

INTRODUCTION

In 2016, Plaintiffs Free Speech For People ("FSFP") and Campaign for Accountability ("CfA") filed an administrative complaint before the Defendant Federal Election Commission ("FEC" or "Commission"), asking the FEC to conduct an immediate investigation into whether the Russian Federation's spending of resources to influence the 2016 presidential election in favor of Donald Trump and the solicitation and coordination of that activity by the Trump Campaign violated the Federal Election Campaign Act, 52 U.S.C. §§ 30101 *et seq.* ("FECA").[1] After five years of delay, and contrary to the recommendations of its own Office of General Counsel that it find reason to believe that both the Trump Campaign and the Russian Federation violated FECA, the FEC dismissed the administrative complaint. Plaintiffs then filed this action seeking a declaratory judgment that the FEC's dismissal of the administrative complaint was "contrary to law."

The FEC now seeks to dismiss the Complaint, not on the merits of its decision, but on the purported ground that its dismissal of the administrative complaint was an exercise of prosecutorial discretion and, as such, not subject to judicial review. The FEC's motion should be denied because it is (1) contrary to the record below, which demonstrates that the FEC considered but explicitly voted *against* dismissing the administrative complaint on the basis of prosecutorial discretion by a 3-3 vote, (2) contrary to the statutory requirement that the FEC can

[1] An investigation—well within the FEC's mandate—likely would have uncovered critical information about these unlawful foreign expenditures: who paid, how much, to whom, and when.

only take action by a majority vote, and (3) contrary to controlling precedent of the D.C. Circuit.

In reviewing Plaintiffs' administrative complaint, the FEC's Office of General Counsel ("OGC") concluded that there was reason to believe that the Trump Campaign and the Russian Federation violated FECA's strict prohibition against foreign contributions or solicitation thereof and violated FECA's disclosure requirements. Administrative Record ("AR") 99-100. The OGC recommended proceeding on the administrative complaint with respect to the Trump Campaign, and, with respect to the Russian Federation, entering a finding of reason to believe but proceeding no further.[2] AR 101. Going against advice of its own OGC, the FEC failed to take any investigatory or enforcement action. The FEC took multiple votes to determine both how and why it would—or rather, would not—proceed. First, the Commission voted on a motion to find reason to believe that the Russian Federation and the Trump Campaign violated FECA. The "reason to believe" motion failed by a 3-3 deadlocked vote. AR 269-70. The Commission then considered two additional motions: whether to dismiss the Russian Federation pursuant to the Commission's prosecutorial discretion, and whether to dismiss the Trump Campaign pursuant to prosecutorial discretion. The first vote garnered majority support, but the second motion failed by a deadlocked 3-3 vote. AR 270-71.

[2] The OGC also concluded that there was reason to believe that several other respondents in the consolidated administrative complaints, including Trump himself, violated FECA's strict prohibition against soliciting or accepting foreign contributions. AR 99-100. Because these respondents were not named in plaintiffs' administrative complaint, we do not summarize these findings here.

Despite its explicit failure to vote to dismiss the administrative complaint with respect to the Trump Campaign, the FEC now seeks to rewrite the procedural history, insisting that it *did*, in fact, exercise prosecutorial discretion with regard to *both* respondents named in Plaintiffs' administrative complaint. Aside from defying the record, the FEC's position is directly contrary to long-standing controlling precedent in the Court of the Appeals for the D.C. Circuit, establishing that, where the Commission declines to take an action because of a deadlocked vote, the Commissioners who voted *against* the action are treated as the controlling group of Commissioners for purpose of judicial review. *See Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, 892 F.3d 434, 437 (D.C. Cir. 2018) [hereinafter "*Commission on Hope*"]; *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) [hereinafter "*NRSC*"]. It is also contrary to the controlling statute: the Commission lacks authority to exercise its duties and powers *except by majority vote*. 52 U.S.C. § 30106(c).

Because the Commission expressly considered *and rejected* a motion to assert prosecutorial discretion to dismiss the claims against the Trump Campaign and failed to investigate those claims solely because of a deadlocked reason-to-believe vote, it cannot now defend its failure to act by claiming that the failure rested on prosecutorial discretion that it voted not to invoke.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Political spending by foreign nationals

Under the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, § 303, 116 Stat. 81, 96, it is unlawful for "a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election," or to make "an expenditure, independent expenditure, or disbursement for an electioneering communications." 52 U.S.C. §§ 30121(a)(1). An expenditure is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift 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(9)(A).

It also is unlawful for any person "to solicit, accept, or receive a contribution or donation" from a foreign national. 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g). Such solicitation must be knowing, but it is not necessary that the person have "knowledge that one is violating the law"; the person must have merely "an intent to act." *Fed. Election Comm'n v. Malenick*, 310 F. Supp. 2d 230, 237 n.9 (D.D.C. 2004) (quoting *Fed. Election Comm'n v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986)), *rev'd in other part on reconsideration*, No. Civ. A. 02-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005).

The prohibitions against foreign contributions to U.S. elections and against solicitation of such contributions have evolved "[a]s money became more

important to the election process" in the latter half of the twentieth century. *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). The law responded to "concern . . . that foreign entities and citizens might try to influence the outcome of U.S. elections." *Id.*

B. Disclosure requirements

FECA and FEC regulations also impose reporting requirements for political spending. Any person that is not a political committee and which makes an independent expenditure exceeding $250 for a particular election in a calendar year shall disclose details regarding such expenditures by "fil[ing] a verified statement or report on FEC Form 5 in accordance with CFR 104.4(e)." 11 C.F.R. § 109.10(b). If that person's aggregated independent expenditures exceed $10,000 per election for a particular election up to and including the 20th day before an election, the person making the independent expenditures must similarly disclose details related to the expenditures by "report[ing] the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18." 11 C.F.R. § 109.10(c).

Expenditures that qualify either as "coordinated communication" under 11 C.F.R. § 109.21 or that are "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee," which "includes an agent thereof," must also be reported by the candidate whom the expenditure was intended to benefit. 11 C.F.R. §§ 109.20, 109.21(b)(1)-(2). Such expenditures are deemed, except in

specific circumstances, to be an in-kind contribution to that candidate.

11 C.F.R. § 109.20(b).

Any political committee, including a candidate committee, that receives a contribution, including the value of an in-kind contribution, exceeding $200 must report that receipt. 11 C.F.R. §§ 104.3, 104.8. Political committees, including candidate committees, must similarly report expenditures exceeding $200, including expenditures made by others that are considered by law to be made by the campaign because they are coordinated. 11 C.F.R. §§ 104.3, 104.9.

II. Factual Background

The following facts are set forth in the Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Compl.")[3] and in the Report of the FEC's Office of the General Counsel (OGC) as found in the FEC's Administrative Record.[4] At the

[3] There are two complaints referenced in this brief. "Complaint" refers to the Complaint for Declaratory and Injunctive Relief filed before this Court in this action. "Administrative Complaint" and abbreviations thereof refers to the amended administrative complaint filed by the Plaintiffs before the FEC, MUR 7207.

[4] The OGC Report utilized the U.S. Department of Justice and the Senate Intelligence Committee investigations into the Russian Federation's interference in the 2016 elections. *See* Robert S. Mueller III, U.S. Dep't of Justice, *Report on the Investigation Into Russian Interference In The 2016 Presidential Election*, v. 1-2 (2019), *available at* https://www.justice.gov/storage/report_volume1.pdf and https://www.justice.gov/storage/report_volume2.pdf [hereinafter "Special Counsel's Report"]; *Report of the Select Committee on Intelligence on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, S. Rep. No. 116-290, v. 1-5 (2019), *available at* https://www.intelligence.senate.gov/publications/report-select-committee-intelligence-united-states-senate-russian-active-measures.

motion to dismiss stage, "factual allegations in the complaint are assumed to be true." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017).

A. Russian interference in the 2016 U.S. elections

1. Russian Federation hacked opposition email accounts and ran deceptive social media accounts to benefit the Trump Campaign

In the run-up to the 2016 U.S. presidential election, the Russian Federation spent substantial resources to influence the outcome of the election in Donald Trump's favor. It did so sometimes in unlawful coordination with the Trump Campaign and with the solicitation of the Trump campaign, which failed to disclose the in-kind contributions it received from the Russian Federation. Complaint, Dkt. No. 1, ¶ 4 ("Compl.").

In 2016, the Russian Federation, via a Russian military intelligence agency called the GRU, carried out a campaign to hack computer networks and email accounts related to Trump's opposition. AR 110; Compl. ¶ 39-40. The GRU targeted key members of the Democratic National Committee ("DNC"), the Democratic Congressional Campaign Committee ("DCCC"), and the campaign of Hillary Clinton (Trump's opponent) in "phishing" attacks. AR 110-11. The "phishing attack" involved hackers transmitting communications directly to their targets in the United States. The hackers obtained information from these phishing attacks, which they then used to gain access to thousands of internal Democratic Party and campaign emails. AR 110-11; Compl. ¶ 39. The GRU also gained access to DNC and DCCC computer servers, from which it stole thousands of documents critical to its

campaigns, "including emails, strategy memos, analyses of congressional races, fundraising information, and opposition research." AR 112. The GRU released emails and documents to WikiLeaks for publication and posted some onto a GRU-operated website called "DCLeaks" and a GRU-controlled blog. AR 111-15; Compl. ¶¶ 39-40. It also shared emails with news reporters and with at least one congressional candidate on request. AR 110, 112-15. The email release was "designed and timed to interfere with the 2016 U.S. presidential election and undermine the Clinton campaign." AR 111 (quoting Special Counsel's Report at 36).

The Russian Federation also used the Internet Research Agency (IRA), a "quasi-governmental entity that operated 'at the direction of the Kremlin,'" AR 102 (quoting S. Rep. No. 116-290, v. 2 at 32), to influence the 2016 election using paid advertisements and by creating false accounts to post pro-Trump and anti-Clinton election-related content on social media websites. AR 102-08; Compl. ¶ 43.

The IRA's efforts to interfere in the election can be traced back at least to 2014, when IRA employees carried out at least two intelligence-gathering missions in at least ten U.S. states. AR 103. Afterwards, the IRA began to track and study groups on U.S. social media sites. AR 103.

Then, during the 2016 election, IRA employees set up fake accounts on U.S. social media sites, deceptively and carefully establishing false personas as U.S. citizens or grassroots organization to post election-related content. AR 104-05; Compl. ¶ 43. IRA employees established approximately 3,800 accounts on Twitter, 470 on Facebook, and 170 on Facebook-owned Instagram. AR 105. Some of these

accounts amassed hundreds of thousands of followers; in aggregate the false IRA accounts claimed millions of followers and millions more "engagements" with their political posts. AR 106. Some of these accounts also paid for advertisements related to the U.S. elections. AR 107. The paid and non-paid "organic" content by the deceptive IRA-controlled accounts carried out a targeted pro-Trump, anti-Clinton campaign. AR 107-08; Compl. ¶ 45. The IRA also pursued voter suppression messaging, primarily targeting Black voters, by urging them to boycott the election or spreading incorrect voting instructions. Although the Senate Intelligence Committee has determined that the IRA's operation to interfere with the U.S. election was a "'multi-million dollar' effort," exact figures—who or what spent how much, when, for what purposes—are still unknown. AR 102 (quoting S. Rep. No. 116-290, v. 2 at 22-23); Compl. ¶ 99 (detailing information that Plaintiffs still lack about contributions that the Russian Federation and/or the Trump Campaign were obliged, but failed, to disclose to the FEC).

2. Trump Campaign solicited in-kind and foreign contributions from the Russian Federation and WikiLeaks

In the lead-up to the 2016 election, Trump, the Trump campaign, and agents of the campaign solicited and accepted foreign in-kind contributions. On July 27, 2016, soon after WikiLeaks first published documents obtained through the Russian Federation's hack of the DNC—a hack and publication that intended to, and did, help Trump's campaign—Trump solicited additional in-kind contributions during a televised press conference. He stated: "I will tell you this—Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing. I think you

will probably be rewarded mightily by our press. Let's see if that happens. That'll be next." AR 116; Compl. ¶ 48.

Trump was referring to emails allegedly erased from Clinton's personal email server while she served as Secretary of State. Within five hours of Trump making this public statement, the GRU began phishing attacks on email accounts associated with Clinton's personal office. AR 117. These alleged missing emails, though they ultimately were never publicly released, were a major campaign issue for the Trump campaign; the Trump campaign prepared a press strategy and messaging based on their potential release. AR 117. As then-White House Press Secretary Joshua Earnest later articulated, in relation to Trump's public request that Russia hack Hilary Clinton's emails, "Mr. Trump obviously knew that Russia was engaged in malicious cyberactivity that was helping him and hurting Hillary Clinton's campaign." AR 47 (Amended Administrative Complaint, MUR 7207, ¶ 30).

Close associates of the Trump Campaign appeared to have information about the hacked documents before they became public, notably Roger Stone Jr., a Trump Campaign official until August 2015 who maintained close ties with Trump and the Trump Campaign throughout the election cycle. AR 118-26; Compl. ¶ 49. Furthermore, multiple high-level members of (and surrogates for) the Trump Campaign had direct communications with senior Russian Federation officials throughout the campaign period. AR 132; Compl. ¶ 150.

3. Trump Campaign attempted to obstruct investigations into Russian interference in 2016 election

Both during and after the 2016 elections, the Russian Federation and Trump Campaign attempted to conceal their FECA violations. Trump attempted to prevent then-Attorney General Jeff Sessions from recusing himself from an investigation into Russian activities during the 2016 election and potential coordination with the Trump Campaign. Trump also fired the Director of the Federal Bureau of Investigation, again in an attempt to protect himself from the investigation. Compl. ¶ 46. Trump also repeatedly attempted to interfere in and obstruct Special Counsel Robert Mueller's investigation. *Id.*

III. Procedural History

A. The administrative complaint

On December 16, 2016, Plaintiffs filed an administrative complaint before the FEC, pursuant to 52 U.S.C. § 30109(a)(1) and 11 C.F.R. § 111.4, seeking an investigation into the Russian Federation and the Trump Campaign, alleging violations of FECA during the 2016 campaign, 52 U.S.C. §§ 30101 *et seq*. AR 2-17. Plaintiffs filed two amendments, on May 4 and June 2, 2017, to provide new information. AR 35-59, 73-77.[5] As amended, the administrative complaint alleged six separate counts of violations of FECA:

[5] Plaintiffs' administrative complaint was consolidated with three other administrative complaints filed by unrelated complainants: MUR 7268, 7274, and 7623. The parts of the Administrative Record, including the Office of the General Counsel reports and the record of the Commission's votes, that involve facts and respondents not related to this case are not summarized in this procedural history.

a. Count I: The Russian Federation, a "foreign national" under 52 U.S.C. § 30121(b)(1) and 22 U.S.C. § 611(b), paid money to computer hackers to gain access to Democratic National Committee emails and to transmit those emails to WikiLeaks for the purpose of public distribution, for the purpose of influencing the outcome of the 2016 presidential election, in violation of 52 U.S.C. § 30121(a)(1)(C) and 11 C.F.R. § 110.20(f).

b. Count II: The Russian Federation paid money to individuals operating on social media to post material on others' web sites to promote the candidacy of Mr. Trump and/or oppose the candidacy of Secretary Clinton, in violation of 52 U.S.C. § 30121(a)(1)(C) and 11 C.F.R. § 110.20(f).

c. Count III: The Russian Federation failed to file any FEC disclosure reports regarding its independent expenditures, in violation of 11 C.F.R. §§ 109.10(b) and (c).

d. Count IV: The Russian Federation and the Trump Campaign engaged in "coordinated communications" in violation of 52 U.S.C. § 30121(a)(1)(A) and 11 C.F.R. §§ 110.20(b) and 109.22 on the part of the Russian Federation, and 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) on the part of the Trump Campaign; further, the Trump Campaign failed to report such communications as in-

kind contributions, in violation of 11 C.F.R. §§ 104.3(a)-(b) and 109.21(b)(3).

e. Count V: The Russian Federation paid money to buy advertisements on Facebook for the purpose of influencing the election, in violation of 52 U.S.C § 30121(a)(1)(C) and 11 C.F.R. § 110.20(f).

f. Count VI: The Russian Federation failed to file disclosure reports for monies spent on political advertisements on Facebook that may constitute independent expenditures, in violation of 11 C.F.R. §§ 109.10(b) and (c).

B. FEC response to the administrative complaint

The FEC did not take any action in the case for nearly four years. While the case languished in the FEC, the U.S. Department of Justice and the Senate Intelligence Committee each carried out an investigation into the Russian Federation's interference in the 2016 elections—processes that then-President Trump repeatedly attempted to impede and obstruct. Compl. ¶ 46. Neither investigation specifically examined FECA violations or sought to answer the types of questions that the FEC would pursue in a FECA enforcement investigation, related to sources, date, and amounts of money, or "coordination" as defined under FECA. And while both reports provided important insight into the Russian Federation's interference in the 2016 election and the Trump Campaign's coordination with the Russian Federation, critically important questions about

unlawful foreign in-kind contributions and coordination remain unanswered. *See* Compl. ¶¶ 68, 99 (detailing factual questions that could have been addressed by an FEC investigation).

The Office of the General Counsel (OGC) submitted its first report on February 23, 2021, AR 89, recommending in relevant part that the Commission find "reason to believe" under 52 U.S.C. § 30109(a)(2) that the Russian Federation and the Trump Campaign violated FECA as alleged in Plaintiffs' amended administrative complaint. In relevant part, the OGC recommended that the Commission:

- Find reason to believe that the Russian Federation made prohibited foreign national expenditures and independent expenditures in connection with the influence campaign targeting the 2016 election in violation of 52 U.S.C. § 30121(a)(1)(C) and 11 C.F.R. § 110.20(f), made a prohibited in-kind contribution to the Trump campaign and a prohibited in-kind foreign national contribution in violation of 52 U.S.C. § 30121(a)(1)(A) and 11 C.F.R. § 110.20(b), and failed to report its contributions, including prohibited in-kind contributions to the Trump Campaign in violation of 52 U.S.C. § 30104(c) and 11 C.F.R. § 109.10(b);
- Find reason to believe that Trump and the Trump Campaign knowingly solicited, accepted, or received an in-kind contribution from the Russian Federation in connection with Trump's press conference

statement and from WikiLeaks, and that they knowingly solicited a prohibited in-kind foreign national contribution, in violation of § 30121(a)(2) and 11 C.F.R. § 110.20(g);

- Take no further action as to the Russian Federation and the Internet Research Agency; and
- Authorize OGC to engage in pre-probable cause conciliation with Trump, the Trump Campaign, and its agents. AR 187-88.[6]

On April 22, 2021, the FEC convened to vote on how to proceed with the allegations. Rather than decide how to proceed via a single vote on a single motion under 11 C.F.R. § 111.9, the FEC took several distinct votes. Specifically, the FEC took three separate votes on whether or not there was reason to believe a FECA violation occurred, and on whether to dismiss on the basis of prosecutorial discretion. AR 269-71. This multi-step procedure is critical to understanding the posture of this case and the basis for judicial review in this Court.

First, the Commission failed by a deadlocked 3-3 vote on a motion (designated by the FEC on its certification as item 3) to find reason to believe that the Trump Campaign committed the alleged FECA violations; to find reason to believe that the Russian Federation and the IRA committed the alleged FECA violations; to take no further action as to the Russian Federation and the IRA; to

[6] Pre-probable cause conciliation refers to attempts to settle with respondents and bring them into compliance *before* the Commission undertakes further investigation that may lead to a vote on whether there is "probable cause" to believe that a violation occurred. *See* 52 U.S.C. §§ 30109(a)(3)-(4); 11 C.F.R. § 111.18(d).

approve the Factual and Legal Analysis as recommended in the First General Counsel's Report subject to edits circulated by Commissioner Weintraub's Office on April 19, 2021; and to approve pre-probable cause conciliation with the Trump campaign. AR 269-70. Commissioners Broussard, Walther, and Weintraub voted affirmatively for the motion, while Commissioners Cooksey, Dickerson, and Trainor dissented. AR 270.

The Commission then took two additional votes specifically on whether the Commission should exercise its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). First, the Commission voted by 4-2 majority on a motion (item 4) to dismiss the Russian Federation and IRA pursuant to the Commission's prosecutorial discretion. AR 270-71.

Next, the Commission took another separate vote (item 5) on whether to dismiss the Trump Campaign pursuant to the Commission's prosecutorial discretion. This vote failed by a 3-3 deadlock. In a reversal of roles from the failed reason-to-believe motion, Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the prosecutorial discretion motion, while Commissioners Broussard, Walther, and Weintraub dissented. AR 271.

Only after taking these distinct votes did the Commission vote 6-0 to close the file as to all relevant respondents. AR 271-72.

On September 29, 2021 the Commission voted to reopen the matter. AR 336. On December 8, 2021, Plaintiffs filed a lawsuit, asserting that the FEC's delay of case was contrary to law. *See Free Speech For People v. Fed. Election Comm'n*,

Complaint, No. 21-cv-3206 (D.D.C. filed Dec. 8, 2021). On January 14, 2022, the Commission voted to close the matter again, without explanation and without taking any intervening actions. AR 345-46.[7]

Vice Chair Dickerson and Commissioners Cooksey and Trainor submitted a Statement of Reasons, in which they acknowledged that the Commission voted to dismiss the foreign respondents as a matter of prosecutorial discretion but "could not agree by the required four votes . . . on how to proceed with regard to . . . the Trump Committee." AR 342. Their statements explained *only* why they voted to dismiss the respondents as an exercise of prosecutorial discretion. AR 343 ("We voted to dismiss these Respondents as an exercise of prosecutorial discretion for two principal reasons . . . ."). They did not provide any legal or factual basis for their separate vote against the motion (item 3) to find reason to believe that the respondents committed the alleged FECA violations. AR 342-44. For example, they did not cite any factual lacunae or legal concerns about whether the alleged misconduct violated FECA or not.

Vice Chair Dickerson also wrote a separate supplemental Statement of Reasons pertaining to his vote to dismiss the Russian Federation and IRA pursuant to the Commission's prosecutorial discretion. AR 326-35.

[7] After the FEC voted again to close the matter, Plaintiffs voluntarily dismissed the delay case.

Finally, Commissioners Broussard and Weintraub submitted a Statement of Reasons explaining why they voted to find reason to believe the administrative respondents committed the alleged FECA violations. AR 352-57.

After the FEC closed the file, Plaintiffs filed the present action, asking this Court to declare that the FEC's dismissal of Plaintiffs' administrative complaint was contrary to law under 52 U.S.C. § 30109(a)(8)(C), and order the FEC to conform with this declaration within 30 days, under 52 U.S.C. §§ 30109(a)(8)(A)-(C). Compl. ¶¶ 1, 111-12. Defendants moved to dismiss, asserting that judicial review is not available where the Commission exercises prosecutorial discretion and claiming that, in this case, the Commission has properly exercised prosecutorial discretion.

LEGAL STANDARDS

Where, as here, Defendants assert that a complaint should be dismissed because the agency's decision was discretionary, such a motion should be analyzed under Fed. R. Civ. P. 12(b)(6) and not under the jurisdictional standards of Fed. R. Civ. P. 12(b)(1). *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011). A complaint survives a Rule 12(b)(6) motion to dismiss where it "'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 68 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). On a Rule 12(b)(6) motion, the Court may examine the judicial complaint as well as documents incorporated into the complaint by reference and matters of which it may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

FECA's judicial review provision permits a private complainant aggrieved by a Commission's dismissal to file a petition for judicial review, and authorizes the court to "declare that the dismissal of the complaint or the failure to act is contrary to law." *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 993 F.3d 880, 883 (D.C. Cir. 2021)) [hereinafter "*New Models*"] (quoting 52 U.S.C. § 30109(a)(8)(A), (C)). Dismissal is "'contrary to law' if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. Fed. Election Comm'n*, 795 F.2d 156, 161 (D.C. Cir. 1986).

With regard to the arbitrary or capricious test, the court must be provided with a "reasonable explanation of the specific analysis and evidence upon which the [a]gency relied." *Bluewater Network v. Envtl. Prot. Agency*, 370 F.3d 1, 21 (D.C. Cir. 2004); *see also Democratic Congressional Campaign Committee v. Fed. Election Comm'n*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) [hereinafter "*DCCC*"] (courts should defer to a Commission disposition if "the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition") (citing *Fed. Election Comm'n v. Dem. Senatorial Campaign Comm.*, 454 U.S. 27, 38 n.19 (1981)).

ARGUMENT

I. The FEC's Dismissal is Reviewable Because the Full Commission Specifically Refused to Dismiss the Trump Campaign As a Matter of Prosecutorial Discretion

A. The FEC expressly considered *and rejected* a motion to exercise its prosecutorial discretion to dismiss the Trump Campaign

This Court should reject the FEC's current litigation position that it dismissed the claims against the Trump campaign on the basis of prosecutorial discretion because it is contrary to the record below, the controlling statute, and controlling circuit precedent. Far from exercising prosecutorial discretion to dismiss those claims, the full Commission expressly *declined* to dismiss Trump, the Trump Campaign, or its agents pursuant to prosecutorial discretion. AR 271.

Congress has established that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of [FECA] shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c). This rule applies for every duty and power except those expressly identified in 52 U.S.C. §§ 30107(a)(6)-(9) and 26 U.S.C. §§ 95-96, including the power to conduct investigations and hearings or to proceed in conciliation or civil enforcement; for these powers, four votes are required. 52 U.S.C. §§ 30106(c); 30107(a); 30109(a).[8]

[8] As a practical matter, the majority rule and the four-vote rule will be the same when six members of the Commission have been appointed and have voted on the matters at issue. *See* 52 U.S.C. § 30106(a) (establishing a six-member Commission).

In some cases, the Commission has merged into a single vote two very different questions: (1) whether there is "reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction" under 11 C.F.R. § 111.9(a), and (2) whether the Commission should exercise its prosecutorial discretion notwithstanding any reason to believe a FECA violation has occurred. In those situations, when courts have been tasked with determining whether the Commission has exercised its prosecutorial discretion authority—which the D.C. Circuit has determined would preclude judicial review of that decision—circuit precedent instructs courts to fall back on a legal fiction. Where a 3-3 deadlock vote causes a reason-to-believe motion to fail and the Commission then votes by majority to dismiss the case, courts consider the rationale of the three Commissioners who voted against the reason-to-believe motion to be controlling, as their votes prevented the Commission from taking action. *See New Models*, 993 F.3d at 897-98; *Commission on Hope*, 892 F.3d at 437; *Common Cause v. Federal Election Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988).

But that is not what happened here. In this case, no such legal fiction is required (or justified) to determine whether the Commission exercised its prosecutorial discretion. The Commission held one vote on whether to find reason to believe FECA violations had occurred (item 3), then two separate, specific votes (items 4 and 5) on motions to exercise prosecutorial discretion to dismiss particular respondents. Where the Commission votes on whether to exercise prosecutorial discretion, that motion must garner a majority vote if the Commission is to exercise

its power, just as the Commission must garner a majority vote to exercise its authority in other matters. 52 U.S.C. § 30106(c); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (explaining that the FEC may exercise prosecutorial discretion provided it does not "base[] its decision upon an improper legal ground"); *see also* Fed. Election Comm'n, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf ("Pursuant to an exercise of its prosecutorial discretion, the Commission may dismiss a matter when, *in the opinion of at least four Commissioners*, the matter does not merit further use of Commission resources." (emphasis added)).

With regard to the Trump Campaign claims, the FEC did not obtain a majority vote to dismiss pursuant to prosecutorial discretion. After it deadlocked on a vote (item 3) to find reason to believe that the Trump Campaign unlawfully and knowingly solicited, accepted, or received an in-kind contribution from the Russian Federation or from WikiLeaks and knowingly solicited a prohibited in-kind foreign national contribution, AR 269-70,[9] the Commission deadlocked on a separate vote (item 5) to dismiss the Trump Campaign pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). AR 270. Both votes failed for the same reason: each failed to capture a majority vote. Congress

[9] In this same vote, the Commission also deadlocked on whether to approve the First General Counsel's Report, to authorize pre-probable cause conciliation with Trump or the Trump campaign, or approve the Conciliation Agreements recommended by the First General Counsel's Report. AR 269-70.

established that a majority vote is required before the Commission may exercise its authority, whether to investigate an allegation or to exercise prosecutorial discretion.

The FEC now claims that "the respective majority and controlling groups of Commissioners expressly invoked and exercised their prosecutorial discretion as an independent basis for their votes to dismiss." Def. Mem. in Support of Mot. Dismiss, Dkt. No. 13-1, at 14. But the record below demonstrates that, to the contrary, the Commission explicitly voted on whether to invoke prosecutorial discretion to dismiss the Trump Campaign and that vote *failed* to muster a majority of Commissioners. The FEC's litigation counsel cannot assert prosecutorial discretion as grounds to dismiss when the Commission itself explicitly opted *not* to exercise prosecutorial discretion. Prosecutorial discretion cannot "shield the Commission's decision from judicial review [where] the Commission has not relied on it." *New Models*, 993 F.3d at 893-94 (differentiating *New Models* from two prior cases in which the FEC might have, but declined to, exercise its prosecutorial discretion).

The Commission's own action with respect to the Russian Federation illustrates the difference. The Commission *did* affirmatively vote, by a 4-2 majority, to dismiss the Russian Federation and IRA pursuant to the Commission's prosecutorial discretion. AR 270-71 (item 4). In other words, the Commission knew exactly how to exercise its power to dismiss a respondent based on prosecutorial discretion. But it declined to do so with respect to the Trump Campaign.

B. The reasoning of the three Commissioners who voted in favor of exercising prosecutorial discretion should not be accorded deference by this Court and does not render the case judicially unreviewable.

Despite the fact that the vote to dismiss the Trump Campaign on the basis of prosecutorial discretion failed, the FEC now asks this Court to defer to the rationale of the three Commissioners who wanted the vote to succeed. This contradicts the well-established rule of the D.C. Circuit: when a motion fails at the FEC, the opponents of the motion are deemed to be the controlling Commissioners, and their opinion supplies the rationale which the court examines on judicial review. *See NRSC*, 966 F.2d at 1476; *DCCC*, 831 F.2d at 1134-35.

When the FEC votes to close a case, it can only take this action by majority. Dismissals are subject to judicial review, but because the FEC traditionally does not offer reasons for its decision to dismiss a case, the Court will instead look to the rationale provided by the Commission for the vote or votes that precipitated dismissal. *See NRSC*, 966 F.2d at 1476; *Common Cause*, 842 F.2d at 449 (requiring the "declining-to-go-ahead Commissioners" to issue a Statement of Reasons explaining their decision).

The Court will look to these reasons even where the precipitating vote failed because of a deadlock. The D.C. Circuit has held that where a deadlocked vote on a motion blocks a Commission enforcement action, the Commissioners who voted against the motion—and therefore prevented the action—"constitute a controlling group for purposes of the decision, [and] their rationale necessarily states the

agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476 (citing *DCCC*, 831 F.2d at 1134-35).

"[F]or 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." *Commission on Hope*, 892 F.3d at 437; *see also New Models*, 993 F.3d at 897-98 (noting that where "a deadlocked Commission fails to follow the General Counsel's recommendation, those who voted to reject that recommendation—often referred to as the 'controlling commissioners'—determine the final position of the Commission on the matter"). In short, under D.C. Circuit precedent, when courts review the rationale for the FEC's failure to adopt a motion by a 3-3 deadlock, the FEC's rationale is deemed to be that of the three commissioners who *opposed* the motion.

The Commission, in the administrative proceedings here, took two deadlocked votes pertaining to the Trump Campaign. The rules set down by the D.C. Circuit are clear: these motions failed, and so the three *opponents* of each motion are deemed to be the controlling Commissioners. *Commission on Hope*, 892 F.3d at 437; *NRSC*, 966 F.2d at 1476. The FEC now asks this Court to bypass that rule with regard to the prosecutorial discretion vote. The FEC would have this Court consider the Statement of Reasons authored by Commissioners Cooksey, Dickerson, and Trainor to control the Commission's decision for both the reason-to-believe vote (in which their dissent blocked agency action) *and* for the prosecutorial

discretion vote (in which their votes in favor exercising such discretionary action were blocked by the three dissenting Commissioners).

The FEC's argument is inconsistent with the Court's precedent and indeed lacks internal consistency. The Commission's deadlocked vote on prosecutorial discretion must be analyzed under the same standard as the other deadlocked vote in this case. The Commission expressly declined to exercise its prosecutorial discretion with respect to the Trump Campaign, and the Commissioners who voted to *reject* the motion represent the controlling rationale on this issue. *See Commission on Hope*, 892 F.3d at 437; *NRSC*, 966 F.2d at 1476. For the purposes of the question of whether the FEC should exercise its prosecutorial discretion with respect to the Trump Campaign (item 5), the controlling group are the dissenting Commissioners for *that* motion: Broussard, Walther, and Weintraub.

The rationale of the three Commissioners who voted in favor of the prosecutorial discretion motion is irrelevant because the motion failed and the Commission did not exercise its prosecutorial discretion to dismiss. The reason-to-believe naysayers have submitted two Statements of Reasons that only explain why they would have asserted prosecutorial discretion to dismiss the respondents—but their reasoning as to prosecutorial discretion is not controlling because that vote failed. Their reasoning cannot be accorded deference where, as here, the action they preferred the Commission to take has already been subject to a separate and failed vote. In other words, the writings of Commissioners Cooksey, Dickerson, and Trainor (who were *not* the controlling bloc on the question of prosecutorial

discretion) supply neither a basis to explain why the FEC decided *not* to exercise prosecutorial discretion (since they lost that vote) *nor* why the FEC deadlocked on whether to find reason to believe a FECA violation had occurred (since nothing they wrote pertains to that question).

The Supreme Court has held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that agency interpretation claiming deference was promulgated *in the exercise of that authority*." *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001) (emphasis added). The FEC can only exercise prosecutorial discretion with a majority vote, which, with regard to the Trump campaign, it failed to obtain. Therefore, it did not exercise its authority to utilize its prosecutorial discretion in choosing not to pursue enforcement against the Trump Campaign.

C. The present case is distinguishable from *New Models* and *Commission on Hope* because in those cases, the Commission did not expressly reject prosecutorial discretion as grounds for dismissal

The question of whether to dismiss for prosecutorial discretion was put to a vote before the Commission, and those three Commissioners who wanted to dismiss on those grounds *lost*. The Commission explicitly opted *not* to exercise prosecutorial discretion. *See* AR 270-71. For this reason, both *Commission on Hope*, 892 F.3d 434, and *New Models*, 993 F.3d 880, are inapposite.

In both *Commission on Hope* and *New Models*, the FEC merged consideration of these questions—it did not take a separate vote on prosecutorial discretion. In

both cases, the FEC deadlocked on motions to find reason to believe that the respondents had violated FECA, and then closed the case. *See In the Matter of Commission on Hope, Growth and Opportunity*, Amended Certification, MURs 6391 and 6471 (Sept. 25, 2014), *available at* https://www.fec.gov/files/legal/murs/6391/15044380114.pdf; *In the Matter of Commission on Hope, Growth and Opportunity*, Certification, MURs 6391 and 6471 (Oct. 2, 2015), *available at* https://www.fec.gov/files/legal/murs/6391/15044380175.pdf; *In the Matter of New Models*, Certification, MUR 6872 (Nov. 16, 2017), *available at* https://www.fec.gov/files/legal/murs/6872/17044432619.pdf.[10] In both cases, the Statement of Reasons issued by the Commissioners who voted against the reason-to-believe motion referenced prosecutorial discretion as at least part of the rationale for their decision.

In *Commission on Hope*, the D.C. Circuit held that the FEC's exercise of prosecutorial discretion was unreviewable, a position it affirmed in *New Models*.

[10] During the *Commission on Hope* proceedings, the FEC voted on three separate reason-to-believe motions over two different voting dates. In September 2014, the FEC voted on two motions: one reason-to-believe vote failed, and a second reason-to-believe vote obtained majority support. In October 2015, the FEC voted on a third reason-to-believe vote that failed, and then on the same day voted by majority to close the case. None of these motions addressed prosecutorial discretion. *See In the Matter of Commission on Hope, Growth and Opportunity*, Amended Certification, MURs 6391 and 6471 (Sept. 25, 2014), *available at* https://www.fec.gov/files/legal/murs/6391/15044380114.pdf; *In the Matter of Commission on Hope, Growth and Opportunity*, Certification, MURs 6391 and 6471 (Oct. 2, 2015), *available at* https://www.fec.gov/files/legal/murs/6391/15044380175.pdf.

New Models, 993 F.3d at 894-95; *Commission on Hope*, 892 F.3d at 438-39. But in neither case did the FEC take an explicit vote to consider the prosecutorial discretion question, so in both cases the D.C. Circuit turned to the reasoning of the naysayers to discern the reasons for the FEC's inaction. This is at best an imperfect option: treating the rationale of the naysayers who defeated the reason-to-believe vote "as if they were expressing the Commission's rationale for dismissal [is] a rather apparent fiction raising problems of its own." *Commission on Hope*, 892 F.3d at 437-38.

Here, however, there is no need—nor any proper basis—to fall back on the "apparent fiction" that the naysayers' vote serves as a stand-in for the Commission's position on prosecutorial discretion. It is clear from the vote taken by the FEC that the Commission *did not* exercise prosecutorial discretion with respect to the Trump Campaign. The Commission considered that option, but decided against it. It needed a majority vote to exercise its discretion, which it did not obtain. In this regard, the present case is more analogous to *Akins*, 524 U.S. at 25, than to either *Commission on Hope* or *New Models*.

Indeed, in this case it is even clearer that the Commission failed to exercise prosecutorial discretion than in *Akins*. In *Akins,* the Court concluded that it did not know if the agency exercised its prosecutorial discretion and so did not have reason to find the matter unreviewable. *See* 524 U.S. at 25. Here, the FEC's vote confirms that the agency definitely did *not* exercise its prosecutorial discretion. If the FEC's dismissal was reviewable in *Akins* where it was not clear if the Commission had

exercised prosecutorial discretion, it follows *a fortiori* that the agency's decision to dismiss and close the case, while explicitly failing to exercise prosecutorial discretion, is reviewable, and Plaintiffs have asserted a claim upon which relief can be granted. *Sierra Club*, 648 F.3d at 853.

II. Arguments Preserved for Further Review

Plaintiffs preserve the following two arguments for further review, recognizing that current D.C. Circuit panel precedent (with a petition for en banc pending) may foreclose them as of the date of this filing.

A. A non-majority bloc cannot assert authority to exercise prosecutorial discretion

Regardless of whether the FEC has held a separate vote on whether to dismiss on prosecutorial discretion, a non-majority bloc of FEC Commissioners cannot assert authority under *Heckler*, 470 U.S. 821, to exercise prosecutorial discretion and thereby deprive the Court of judicial review of FEC decisions. Plaintiffs recognize that the D.C. Circuit has held that where the Commission relies on prosecutorial discretion to dismiss a complaint, that dismissal is not subject to judicial review, even where only a non-majority bloc of Commissioners assert prosecutorial discretion. *See New Models*, 993 F.3d at 895; *Commission on Hope*, 892 F.3d at 438-39. A petition for en banc review has been filed in *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n* ("New Models"), D.C. Cir. No. 19-5161 (D.C. Cir.) ECF No. 1903510 (petition for en banc review filed June 23, 2021), and Plaintiffs preserve this argument because an *en banc* reconsideration of *New*

Models may alter the D.C. Circuit's framework for reviewing assertions of prosecutorial discretion by the Commission.

As established above, prosecutorial discretion—to the extent that the agency possesses the power—can be exercised only by a majority of the Commission. 52 U.S.C. § 30106(c). The Statement of Reasons submitted by the three Commissioners who declined to vote in favor of a reason-to-believe motion should not, for the purposes of determining whether the *full Commission* chose to exercise prosecutorial discretion, stand in for the will of the Commission majority that voted separately on a motion to close the file. As the D.C. Circuit has recognized—and as noted above—the Court's treatment of the rationale of the naysayers who defeated the reason-to-believe vote "as if they were expressing the Commission's rationale for dismissal [is] a rather apparent fiction raising problems of its own." *Commission on Hope,* 892 F.3d at 437-38. One such problem is the one that arose in that same case: the fiction extended to a partisan non-majority a power that should only be exercised by a majority of the Commission. At least for the purposes of determining whether the Commission exercised its authority under *Heckler*, 470 U.S. 821, and particularly given Congress's express decision to preserve Commission bipartisanship and to provide judicial oversight of Commission inaction, the Court should not look to a statement of reasons representative of a non-majority of the Commission.

B. The Commission's dismissal of the claims against the Russian Federation were contrary to law.

Plaintiffs recognize that the Commission voted 4-2 to dismiss the claims against the Russian government on the basis of prosecutorial discretion, AR 270-71, and that arguments in the preceding sections do not apply. Furthermore, Plaintiffs recognize that under current D.C. Circuit case law, judicial review is generally unavailable if the FEC, notwithstanding strong factual and legal reasons to believe that a violation of FECA may have occurred, votes by majority to dismiss a complaint on the basis of the Commission's purported prosecutorial discretion. *Akins*, 524 U.S. at 25; *Commission on Hope*, 892 F.3d at 439. Notwithstanding the above, Plaintiffs assert this claim to preserve it on appeal, and in case a pending petition for en banc review in the matter of *New Models*, D.C. Cir. No. 19-5161, may alter the D.C. Circuit's framework for reviewing such assertions by the Commission.

The current broad iteration of its prosecutorial discretion authority enables the FEC to evade any judicial review of its decisions not to investigate violations of FECA's foreign interference prohibition, despite Congress' clear directives regarding foreign interference in U.S. elections and the oversight role it has given both the FEC and the courts.

First, Congress provided that the FEC vote on the specific question of whether "it has reason to believe that *a person has committed*, or is about to commit, a violation of [FECA]." 52 U.S.C. § 30109(a)(2) (emphasis added). If so, then the FEC "*shall* make an investigation of such alleged violation." *Id.* (emphasis added). In other words, the question for the FEC to answer is whether there is

reason to believe that "a person has committed . . . a violation," after which an investigation is mandatory. Congress *could* have instead written FECA to require the FEC to vote on whether, in its judgment (taking into consideration the facts, the law, and various other factors), it *ought to* conduct an investigation. But Congress did not write the law this way. The question the FEC is called to answer is whether the respondent has committed a violation of FECA—no more and no less.

To be sure, the Commission has substantial enforcement discretion at *later* stages in the process: if it finds that there is "probable cause" (a higher threshold) that a violation has occurred, then the FEC "may" refer that violation to the Attorney General if it was knowing and willful, 52 U.S.C. § 30109(a)(5)(C), and "may" itself institute a civil action against the violator, *id.* § 30109(a)(6)(A). In *those* provisions, Congress's use of "may" confers discretion. But Congress chose not to use such discretionary terms in the reason to believe provisions.

Second, Congress authorized judicial review of the FEC's dismissal of administrative complaints using language that is textually incompatible with the notion of a broad grant of prosecutorial discretion. Upon a petition for review of an FEC order dismissing a complaint, this Court "may declare that the dismissal of the complaint . . . is *contrary to law*." *Id.* § 30109(a)(8)(C) (emphasis added). Congress knew how to provide judicial review for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Administrative Procedure Act ("APA")). Notwithstanding *Orloski*, 795 F.2d at 161, FECA's "contrary to law" standard is different from the APA's

standard. If Congress had wanted courts to defer to the FEC's exercise of discretion, it easily could have provided review for abuse of discretion, rather than review of whether the Commission had acted "contrary to law." 52 U.S.C. § 30109(a)(8)(C).

Even if FECA does incorporate prosecutorial discretion, the issues in this case demonstrate why allowing the FEC to exercise "prosecutorial discretion" at the reason to believe stage is particularly inappropriate. Congress has drawn a bright line rule that prohibits any foreign national from contributing "money or other thing of value . . . in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)(1). Such spending is "intimately related to the process of democratic self-government," *Bluman*, 800 F. Supp. 2d at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), and the United States "has a compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Id.* at 288.

The allegations at issue in this case go to the heart of the law's purpose. A foreign government poured millions of dollars into efforts to sway a U.S. presidential election toward its preferred candidate, Donald Trump. The Russian Federation conducted information-gathering on U.S. soil, spread misinformation, and hacked accounts associated with Trump's opponent and her campaign. They did so at times in coordination with Trump and his campaign. Compl. ¶¶ 59-72.

Despite these well-supported allegations of interference, the FEC declined to exercise any of its authority—which includes the authority to seek voluntary

compliance, conduct investigations and hearings, and compel testimony and the production of documentary evidence, 52 U.S.C. § 30107(a)—in relation to the Russian Federation. As a result, critical questions about the money involved in the Russian Federation's substantial interference in the 2016 U.S. elections remain unanswered by the very agency assigned to protect "voters' entitlement to 'information as to where political campaign money comes from and how it is spent by the candidate.'" *Commission on Hope*, 892 F.3d at 442 (Pillard, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)) (cleaned up).

Should the D.C. Circuit elect to revisit the FEC prosecutorial discretion framework, Plaintiffs preserve the argument that the FEC's decision to dismiss the Russian Federation was contrary to law and that judicial review of its dismissal of the Russian Federation is appropriate. *See Akins*, 524 U.S. at 25 (explaining that the FEC may exercise prosecutorial discretion provided it does not "base[] its decision upon an improper legal ground").

CONCLUSION

The FEC expressly chose not to exercise prosecutorial discretion with regard to claims related to the Trump Campaign. With regard to the FEC's majority vote to dismiss the Russian Federation and the IRA pursuant to prosecutorial discretion, pending potential change in appellate precedent, such an exercise was contrary to law and should be reviewed by this Court.

Plaintiffs have adequately stated a claim upon which relief can be granted and the FEC's motion to dismiss should be denied.

August 25, 2022

Respectfully submitted,

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