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) REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Shaina Ward (D.C. Bar No. 1002801)
Attorney
sward@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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I. INTRODUCTION

The Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief that recent D.C. Circuit decisions require that the FEC prevail as a matter of law in this challenge to its dismissal of plaintiffs' administrative enforcement complaint alleging violations of the Federal Election Campaign Act ("FECA"). (*See* FEC Mem. in Supp. of Mot. to Dismiss (Docket No. 13-1).) Under this binding precedent, judicial review is not available where, as here, the rationales for the votes of Commissioners were based on prosecutorial discretion. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("*Commission on Hope*"); *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 884 (D.C. Cir. 2021) ("*New Models*"), *pet. for reh'g en banc filed*, Doc. No. 1903510 (D.C. Cir. June 23, 2021). In this case, after reviewing plaintiffs' administrative complaint, four Commissioners voted to dismiss plaintiff's allegations as to the Government of the Russian Federation ("Russian Federation"), and a controlling group of three Commissioners voted to dismiss the claims made against the 2016 campaign of former President Donald J. Trump ("Trump Campaign"), in both cases based on prosecutorial discretion. Because of these exercises of unreviewable discretion, plaintiffs cannot state a claim for relief that can be granted.

In response, plaintiffs have failed to demonstrate that any potential exception to this precedent applies. Indeed, they do not dispute that the rationales offered by the groups of Commissioners who voted to dismiss the Trump Campaign and the Russian Federation qualify as prosecutorial discretion rationales under *Commission on Hope* and *New Models*. And plaintiffs do not challenge the dismissal of the Russian Federation under the controlling precedent above.

Plaintiffs do challenge the dismissal of the Trump Campaign, but their opposition is premised on a mistaken view of the law. They argue, without support, that it takes the votes of a majority of Commissioners to exercise prosecutorial discretion, at least if the Commission takes a separate vote on that specific determination. (*See* Plaintiffs' Opp'n to FEC's Mot. to Dismiss, Docket No. 24 ("Opp.") at 20-30.) And plaintiffs also argue that because the motion to dismiss the Trump Campaign failed to garner a majority of four votes, the Commissioners that voted *in favor* of moving forward with enforcement are actually the controlling group, even if there were only three of them. (*Id*. at 24-27.) This is not the law. Long-standing Circuit precedent makes clear that the controlling group in a challenge to an FEC dismissal like this one is the group of Commissioners that declined to move forward with enforcement against the respondent named in the administrative complaint. That standard is properly applied to the group that voted to dismiss the Trump Campaign as an exercise of prosecutorial discretion. And under *New Models* and *Commission on Hope*, that forecloses judicial review, as recognized in recent decisions of this Court, including one that rejected the same argument plaintiffs make here that a majority of Commissioner votes is required to exercise prosecutorial discretion.

The additional arguments that plaintiffs have "[p]reserve[d] for [f]urther [r]eview" (Opp. at 30) seek to directly challenge the D.C. Circuit's holdings in *New Models* and *Commission on Hope*, which foreclose acceptance of such claims by this Court. Because plaintiffs do not dispute that the grounds cited by the groups of Commissioners who voted to dismiss here are traditional grounds for the exercise of prosecutorial discretion, and those grounds are independent of the merits, judicial review is not available. The FEC's Motion should be granted.

II. ARGUMENT

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

Plaintiffs argue that the decisions in *Commission on Hope* and *New Models*, which establish that dismissals by a controlling group of Commissioners based on prosecutorial discretion are not subject to judicial review, do not apply here because (a) only three Commissioners, rather than the "full Commission," voted to dismiss the Trump Campaign as an exercise of prosecutorial discretion, and (b) the Commission held separate votes on whether there was reason to believe that the Trump Campaign violated FECA and whether to dismiss. (*See* Opp. at 20-27.) Plaintiffs' claims reflect a misunderstanding of Circuit precedent, which sets forth both when FECA requires four affirmative votes of Commissioners and what constitutes a "controlling" group of Commissioners in a dismissal case. Because that precedent takes a functional approach by looking at the actual reasoning of the Commissioners who declined to move forward, rather than the type of formalistic approach plaintiffs propose, judicial review is unavailable in this case.

First, plaintiffs wrongly assert that the FEC can only exercise prosecutorial discretion "with a majority vote, which, with regard to the Trump campaign, it failed to obtain." (Opp. at 27.) Therefore, plaintiffs argue, the Commission "did not exercise its authority to utilize its prosecutorial discretion in choosing not to pursue enforcement against the Trump Campaign." (*Id.*) Essentially, plaintiffs argue that in a situation like this one, with six Commissioners voting, four Commissioners must concur not only in going forward with FECA enforcement, but also in declining to go forward, at least when there is a distinct vote that is explicitly on prosecutorial

discretion. (*Id.*)[1] This contention is incorrect. The D.C. Circuit has explained that four members are necessary under the statute only "to initiate," "defend," "or appeal any civil action." 52 U.S.C. § 30107(a)(6); *see also New Models*, 993 F.3d at 891 (noting that "the statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list"). Thus, as described in *New Models*, "[a] decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners." *Id.* Moreover, "[t]hat FECA does not allow courts to also review dismissals based on enforcement discretion is simply a function of the "'contrary to law'" standard." *Id.*

1. Under D.C. Circuit Precedent, the Commissioners Who Decline to Go Forward Are the Controlling Group for Review of FEC Administrative Complaint Dismissals

It is well-established that four votes are required for the Commission to move forward with an enforcement action. In particular, the Court of Appeals has explained that four votes are required if the Commission chooses to find that there is "reason to believe" an administrative respondent committed a violation of FECA or find that there is "probable cause to believe" a violation occurred. 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i); *compare id.* § 30106(c) (majority vote). These two stages are framed as conditional. That is, "[i]f" the Commission makes the relevant determination, it "shall" take a specified act. *Id.* § 30109(a)(2) ("If the Commission [determines] that it has reason to believe . . . the Commission shall . . . notify the person [and] shall make an investigation."); *id.* § 30109(a)(4)(A)(i) (requiring that "the Commission shall attempt" to conciliate "if the Commission determines . . . that there is probable cause to believe."). After satisfying all other procedural requirements, the Commission "may . . . institute

[1] Plaintiffs note that "[a]s 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." (Opp. at 20 n.8 (citing 52 U.S.C. § 30106(a)).)

a civil action for relief," a decision which also requires four affirmative votes. *Id.* § 30109(a)(6)(A). *See also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm. v. FEC* ("*DCCC*"), 831 F.2d 1131, 1133 (D.C. Cir. 1987) (noting the possibility of judicial review of "a dismissal due to a deadlock").

However, if the Commissioners deadlock on a "reason to believe" vote, they may take a customary vote to close the file and terminate the matter associated with the applicable administrative complaint.[2] Commissioners who voted not to proceed with the matter (the "controlling Commissioners") must issue a statement explaining their reasons. *New Models*, 993 F.3d at 883 ("When the Commission lacks four votes to proceed, the commissioners who voted against enforcement must 'state their reasons why'"). The rationale of the Commissioners who voted against proceeding with enforcement "necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

In the matter under review here, a motion to find reason to believe that the Trump Campaign had violated FECA failed by a vote of 3-3. The Commission then voted 3-3 to

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[2] Although plaintiffs rely on provisions of FECA to suggest that a vote as to prosecutorial discretion is one that "shall" be made by a majority vote (*see* Opp. at 20-22 (citing 52 U.S.C. § 30106(c)); *see also id.* at 32 (citing 52 U.S.C. § 30109(a)(2))), that is not the way the D.C. Circuit has read the statute. The *New Models* Court explained its view of the difference between the use of the words "shall" and "may" in the statute. The Court noted that "[o]nly after four commissioners make [the] discretionary decision" to determine whether there is reason to believe a violation has occurred "'shall' the Commission 'make an investigation.'" *New Models*, 993 F.3d at 892. And "FECA's mandatory duties do not 'constrain the Commission's discretion whether to make those legal determinations in the first instance.'" *Id.* (citing *Commission on Hope*, 892 F.3d at 439). The "obligations that follow a discretionary decision to proceed with enforcement cannot somehow transform the enforcement decision into a mandatory one." *Id.* Thus, the court did not read the statute to require a majority vote to *decline to* proceed with enforcement. *See id. Cf.* FEC, *Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (2007) ("Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter . . . when the Commission lacks majority support for proceeding with a matter.").

dismiss the Trump Campaign on the basis of prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). Lacking the necessary four votes to continue enforcement proceedings, the Commission voted 6-0 to close its file. 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 (AR 268-272). The three Commissioners that voted to dismiss the Trump Campaign are the controlling group for purposes of review of the agency's reason not to proceed, not the three Commissioners that desired to move forward with enforcement and *against* dismissal. *See Common Cause*, 842 F.2d at 449 (referring to the requirement of a statement of reasons by the "declining-to-go-ahead Commissioners at the time when a deadlock vote results in an order of dismissal"); *see also Commission on Hope*, 892. F.3d at 437 ("[I]f the Commission fails to muster four votes in favor of initiating an enforcement proceeding, the Commissioners who voted against taking that action should issue a statement explaining their votes"). *Commission on Hope* specifically refers to the "three naysayers on the Commission" that "placed their judgment squarely on the ground of prosecutorial discretion," whose analysis the Court looks to "as if they were expressing the Commission's rationale for dismissal." *Commission on Hope*, 892 F.3d at 437, 439. In sum, the Court of Appeals held that these three Commissioners "exercised the agency's prerogative not to proceed with enforcement," and "[t]here is no doubt the Commission possesses such prosecutorial discretion." *Id.* at 438. And "[n]othing in the substantive statute overcomes the presumption against judicial review." *Id.* at 439.

2. Plaintiffs' Proposed Approach to Review of FEC Dismissals Is Inconsistent with Controlling Precedent

In review of FEC dismissals, it makes no difference that there were several different votes prior to the Commission closing the file. Nevertheless, plaintiffs erroneously focus on the Commission's separate votes in MUR 7207 on whether there was reason to believe the Trump

Campaign had violated FECA and whether to dismiss that respondent as a matter of prosecutorial discretion, asserting that a majority vote was needed to exercise such discretion when it was considered in a distinct vote. (Opp. at 1, 15.) They claim that because the vote sequences in *New Models* and *Commission on Hope* did not include these separate votes, "this multi-step procedure is critical to understanding the posture of this case and the basis for judicial review in this Court[,]" and those cases do not control here. (Opp. at 15; *see also id.* at 27-28.) However, a variation in the Commission's formal voting structure or sequence does not materially distinguish this case from *Commission on Hope* and *New Models* when the bottom line does not vary. Whether a dismissal is supported by a statement of reasons citing prosecutorial discretion that follows a 3-3 vote on finding reason to believe, on the one hand, or one that follows separate votes on reason to believe and a prosecutorial discretion dismissal, on the other hand, the controlling reasoning remains the same under prevailing law.

In fact, the Court of Appeals has never parsed vote sequences at the Commission in the manner that the plaintiffs request that this Court do here. At the reason to believe stage, the agency has at least three options: find reason to believe, find no reason to believe, or dismiss the matter pursuant to an exercise of prosecutorial discretion. *See, e.g.*, *Hagelin v. FEC*, 411 F.3d 237, 239-40 (D.C. Cir. 2005) (reviewing "no reason to believe" finding); *La Botz v. FEC*, 61 F. Supp. 3d 21, 27 (D.D.C. 2014) (affirming Commission exercise of discretion). In cases where controlling Commissioners provide a statement of their reasons for declining to go forward, courts look to those statements, not to a formalistic parsing of the sequencing of the votes that were held, to determine the reasons for the agency's action. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 (holding that "the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting"). Given varied potential grounds for the agency's

decision, the Court has required the controlling group of Commissioners to provide a statement of reasons when it does not accept staff recommendations to proceed with enforcement. *See Common Cause*, 842 F.2d at 449-50. Circuit law makes clear that judicial review depends on this explanation, not the sometimes-complex course of particular Commission votes. *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

Indeed, in a recent decision this Court specifically rejected the same argument plaintiffs make here that a majority vote is needed for the Commission to exercise prosecutorial discretion. In *End Citizens United PAC v. Federal Election Commission*, Civ. No. 21-2128, 2022 WL 4289654 (D.D.C. Sept. 16, 2022), the Court held that "[t]he FEC's exercise of its prosecutorial discretion to decline to investigate" FECA allegations "is an absolute bar to the Court's exercise of jurisdiction over a challenge to the FEC's decision." *Id.* at *5 (citing *New Models*, 993 F.3d at 889). There, as in this case, the Commission had deadlocked 3-3 on whether to investigate the allegations in the administrative complaint, and the three Commissioners "who voted against an enforcement action issued a Statement of Reasons explaining the Commission's decision not to act." *Id.* at *3. Importantly, the Court determined that the plaintiff's argument "that only a four-Commissioner majority may exercise the FEC's power of prosecutorial discretion cannot be reconciled with our Circuit Court's requirement that the Statement of Reasons filed by the deciding Commissioners reflect the basis for the FEC's action." *Id.* at *5 (citing *Common Cause*, 842 F.2d at 449). It was "beyond dispute that the FEC chose not to act in this case, and that the Statement of Reasons expressly referenced the FEC's prosecutorial discretion in deciding on that course of action." *Id.* As the Court noted, "[t]hat is sufficient!" *Id.*

In another recent case, this Court held that *New Models* and *Commission on Hope* precluded judicial review in a similar multi-vote situation with some of the same respondents as the instant case. *See End Citizens United PAC v. FEC*, Civ. No. 21-1665, 2022 WL 1136062, at *3 (D.D.C. Apr. 18, 2022). In the underlying administrative complaint at issue in that case, the Commission had failed by a 3-2 vote to find reason to believe that Donald J. Trump and Donald J. Trump for President, Inc., and Bradley T. Crate in an official capacity as treasurer, violated FECA provisions related to the raising and spending of soft money. *See* Certification for MURs 7340 and 7609 (Apr. 20, 2021), https://www.fec.gov/files/legal/murs/7340/7340_44.pdf. Three Commissioners voted affirmatively for the motion to find reason to believe, while two Commissioners dissented, and one was recused and did not vote. *See id.* Two days later, the Commission also failed by a vote of 2-3 to dismiss those same respondents under *Heckler v. Chaney*, that is, as a matter of prosecutorial discretion. *See* Certification for MURs 7340 and 7609 (Apr. 22, 2021), https://www.fec.gov/files/legal/murs/7340/7340_45.pdf. Two Commissioners voted affirmatively for the motion to dismiss, whereas three Commissioners dissented. One Commissioner was recused and did not vote. As was the case here, the Commissioners that voted *against* finding reason to believe and *in favor* of dismissal as an exercise of prosecutorial discretion provided a Statement of Reasons explaining their votes. *See* Statement of Reasons of Vice Chair Allen Dickerson and Commissioner Sean J. Cooksey, June 25, 2021, https://www.fec.gov/files/legal/murs/7340/7340_56.pdf. Denying the plaintiff's request for summary judgment, the Court held that "the Court can consider the Statement of Reasons issued by the Commissioners who voted against enforcement, and their explanation 'explicitly relies on prosecutorial discretion' to dismiss End Citizen United's [judicial] complaint." *End Citizens United*, 2022 WL 1136062, at *3 (quoting *New Models*, 993 F.3d at

885). As a result, the Court held that it lacked authority to review the MUR dismissal. *Id.* That there were multiple votes had no bearing on the Court's decision that *New Models* precluded judicial review, and the same is true of the action currently under review.

Plaintiffs also misconstrue the Supreme Court's decision in *Akins v. FEC*, 524 U.S. 11 (1998), as it applies to the instant case. They argue that 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[,]" and that "[h]ere, the FEC's vote confirms that the agency definitely did *not* exercise its prosecutorial discretion." (Opp. at 29 (emphasis in original).) However, *Akins* does not stand for the proposition that a controlling group of less than four Commissioners cannot exercise prosecutorial discretion. The only question addressed by the Supreme Court there involved the administrative complainants' standing to sue. *Akins*, 524 U.S. at 18. The Commission had declined to proceed on the sole administrative claim at issue in *Akins* based on its conclusion that the group at issue "was not subject to the disclosure requirements" because it did not meet the legal definition of a "political committee" under FECA. *Id.* at 18. That is, the Commission "based its decision entirely on legal grounds" that a reviewing court could evaluate under FECA's contrary to law standard. *New Models*, 993 F.3d at 893 (citing *Akins*, 524 U.S. at 25); *see also Comm'n on Hope*, 892 F.3d at 441 n.11. The dismissal of that claim did not invoke prosecutorial discretion, and thus the Supreme Court had no occasion to consider the availability of judicial review of such a dismissal. The Court did reject an argument that the complainants' injury was not fairly traceable to the Commission's alleged legal error because it was "possible" that the FEC *could have* declined to pursue enforcement in exercise of its prosecutorial discretion, reasoning that the mere possibility of a prosecutorial-discretion dismissal did not

defeat standing because the Court could not "know that the FEC would have exercised its prosecutorial discretion that way." *Akins*, 524 U.S. at 25.

Here, by contrast, the controlling FEC Commissioners "expressly" invoked prosecutorial discretion when explaining their votes against pursuing enforcement against the Trump Campaign. *New Models*, 993 F.3d at 893-94. Furthermore, *Akins* confirmed that judicial review to correct legal errors did not eliminate the Commission's authority to "decid[e] to exercise prosecutorial discretion," and it cited *Heckler v. Chaney* for that view. *Akins*, 524 U.S. at 25; *see also New Models*, 993 F.3d at 895 (noting that *Akins* "emphasized that the reviewability of the Commission's action depended on the existence of a legal ground of decision"). Plaintiffs' reliance on *Akins* for their position that the Commission "needed a majority vote to exercise its discretion" to dismiss the Trump Campaign (Opp. at 29) is thus misplaced.

B. Plaintiffs' Preserved Arguments Are Also Foreclosed by D.C. Circuit Precedent

Plaintiffs concede that the additional arguments that they seek to "preserve" in light of the petition for rehearing *en banc* in *New Models* are foreclosed by Circuit precedent. (Opp. at 30.) As they must, 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." *Id.* (citing *New Models*, 993 F.3d at 895; *Commission on Hope*, 892 F.3d at 438-39). In light of these decisions, plaintiffs assert additional arguments that directly challenge this precedent and that the Court need not reach here. Because the exercise of prosecutorial discretion was a distinct basis for dismissal, judicial review is precluded. Plaintiffs concede that an overruling of Circuit precedent would be required for this Court to take up this

issue, and plaintiffs fail to identify any conflicting authority that would otherwise support their arguments.

As part of these "preserved" arguments, plaintiffs do challenge the majority decision to dismiss the Russian Federation, but it was clearly and solely based on the Commission's prosecutorial discretion. *See* Apr. 22, 2021 Certification, at 4 (dismissing Russian Federation pursuant to *Heckler v. Chaney*) (AR 268-272). Plaintiffs do not dispute that Commissioners expressed the type of prudential concerns that are at the heart of *Chaney*'s holding and, as *Commission on Hope* and *New Models* stated, are not subject to judicial review. The Commissioners identified potential logistical and remedial problems with moving forward against the Russian Federation. They also explained additional concerns, including that other parts of government were "better situated to address," the Russian Federation and another Commissioner pointed to a "lack of resources." (*See* FEC Mem. in Supp. of Mot. to Dismiss (Docket No. 13-1) at 19-20.) The Commission determined that a dismissal decision was appropriate, and that pursuing further enforcement was not. *See CREW*, 475 F.3d at 340 ("No one contends that the Commission must bring actions in court on every administrative complaint.").

Similarly, as to the Trump Campaign, the controlling group of Commissioners clearly expressed their reasons for dismissal as an exercise of prosecutorial discretion, and plaintiffs do not dispute that the rationales provided are the type not subject to judicial review under *Commission on Hope* and *New Models*. (Opp. at 31.) Again, all of the grounds cited by the controlling group are traditional grounds for prosecutorial discretion that are referenced in *Chaney*, and the controlling analysis was not predicated on any substantive interpretation of FECA or a determination on the ultimate merits of plaintiffs' administrative complaint.

Despite plaintiffs' desire to see an enforcement action pursued against these respondents, the decision not to do so cannot be the subject of judicial review. *See New Models*, 993 F.3d at 893.

III. CONCLUSION

Because the dismissal of 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,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

/s/ Shaina Ward
Shaina Ward (D.C. Bar No. 1002801)
Attorney
sward@fec.gov

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