

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FREE SPEECH FOR PEOPLE, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civ. No. 22-cv-666 (CKK)
)	
v.)	
)	NOTICE OF SUPPLEMENTAL
FEDERAL ELECTION COMMISSION,)	AUTHORITY
)	
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant Federal Election Commission (“Commission” or “FEC”) respectfully submits this Notice of Supplemental Authority to apprise the Court of a recent decision of the D.C. Circuit and a recent decision of a District Court in this District that are directly relevant to the FEC’s pending motion to dismiss this case.

In its motion, the Commission has argued that the dismissal of plaintiffs’ administrative complaint is not subject to judicial review because it was based on an exercise of prosecutorial discretion. (*See* FEC Mem. in Supp. of Mot. to Dismiss, Doc. No. 13-1.) On December 12, 2022, the D.C. Circuit denied a petition for rehearing en banc in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) (“*New Models*”), a decision on which the Commission’s motion relies. *See CREW v. FEC*, 55 F.4th 918 (D.C. Cir. 2022). An opinion concurring in the denial of rehearing authored by Judge Rao, and joined by Judges Henderson, Katsas, and Walker, affirmed that the FEC’s “decision to dismiss a complaint on the grounds of prosecutorial discretion is not judicially reviewable.” 55 F.4th at 919. That is so, the opinion made clear, even if the

controlling group of FEC Commissioners also relied on other grounds, as long as prosecutorial discretion was an independent ground supporting the dismissal. *Id.*

Importantly, the concurring opinion also confirmed that under FECA’s judicial review process, “[i]f four votes are lacking at any step of enforcement, no action moves forward. The statutory arithmetic means three of the six commissioners may block further investigation or enforcement of a complaint.” 55 F.4th at 920. Thus, the opinion states that “[b]y legislative design, three commissioners, or half, may prevent enforcement.” *Id.*

In this case, plaintiffs asserted in their Opposition to the FEC’s Motion to Dismiss that a vote to dismiss the Trump Campaign based on prosecutorial discretion by three Commissioners is subject to judicial review because the “full Commission” did not approve that step and because the Commission held separate votes on whether there was reason to believe that the Trump Campaign violated FECA and whether to dismiss. (*See* Plaintiffs’ Opp’n to FEC Mot. to Dismiss, Doc. No. 24 at 20-27.) The concurring opinion in *New Models* makes clear that these arguments are incorrect. Thus, “[b]ecause the controlling commissioners relied on an independent ground of prosecutorial discretion, this court has no basis for declaring that decision ‘contrary to law.’” 55 F.4th at 921.

In addition, on December 8, 2022, another District Court in this District applied similar reasoning in granting a motion to dismiss filed by the FEC. *See Campaign Legal Center v. FEC*, Civ. No. 22-1976, 2022 WL 17496211 (D.D.C. Dec. 8, 2022), *appeal filed*, No. 22-5339 (D.C. Cir. Dec. 23, 2022). As is the case here, the plaintiff in that case challenged the dismissal of an administrative complaint after the Commission divided 3-3 on the question of whether there was reason to believe that a FECA violation had occurred. In its decision, the Court explained that “it is the reasoning of the Commissioners who voted against enforcement — and theirs alone —

that is relevant before a reviewing court.” 2022 WL 17496211, at *5. Having determined that the “controlling Commissioners” statement of reasons provided the rationale for the dismissal of the administrative complaint, the Court concluded that because these Commissioners had invoked prosecutorial discretion, the case fell “squarely within the scope” of *New Models*, even though the statement also contained substantial FECA interpretation. *Id.* at *8. Accordingly, the Court was “bound to hold that the Commission’s dismissal [was] unreviewable.” *Id.* at *9.

These additional authorities confirm that the exercise of prosecutorial discretion by Commissioners in dismissing the administrative complaint in this matter is not subject to judicial review.

Respectfully submitted,

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