UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE,
1320 Centre St. #405
Newton, MA 02459,

CAMPAIGN FOR ACCOUNTABILITY
611 Pennsylvania Ave. SE #337
Washington, D.C. 20003,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463,

Defendant.

Civil Action No. 22-cv-666-CKK

RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Neither decision identified by Defendant Federal Election Commission ("FEC" or "Commission") in its Notice of Supplemental Authority (Doc. No. 27) should persuade this Court to grant Defendant's motion to dismiss this case. First, the facts underlying *CREW v. FEC*, which the D.C. Circuit declined to rehear en banc, are inapposite. *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models* I"); *CREW v. FEC*, 55 F.4th 918 (D.C. Cir. 2022) (denying petition for rehearing en banc) ("*New Models* II"). Second, *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) is not binding on this Court and was wrongly decided.

Denying the FEC's motion to dismiss does not require this Court to judicially review an agency's exercise of prosecutorial discretion. Here, as the plaintiffs argued in their opposition to the FEC's motion to dismiss (*See* Memorandum in Opposition to Defendant Federal Election Commission's Motion to Dismiss, Doc. 24), the FEC unambiguously *declined* to exercise prosecutorial discretion. Such discretion therefore cannot now be the basis asserted by the FEC to evade judicial review of its decision to close the file.

1. *New Models* is inapposite.

The per curiam majority opinion in the denial of rehearing en banc in *CREW v. FEC*, 55 F.4th 918 (D.C. Cir 2022) ("*New Models* II") provides no legal analysis, and the opinion concurring is inapposite. There is a critical distinction between this case and *New Models*: in *New Models*, the FEC did not take a separate vote on prosecutorial discretion. Here, the FEC *did* take a separate vote on prosecutorial discretion, which failed. For the reasons discussed in plaintiffs' opposition at pp. 27-30 and summarized herein, the Commission's deliberate use of this procedure distinguishes this case from *New Models*.

Furthermore, the concurral strongly emphasizes Congress's intentional attempt to require bipartisan support for agency action. *New Models II*, 55 F.4th at 920. The same congressional purpose extends to other agency actions, including the exercise of discretionary power pursuant to a motion under *Heckler v. Chaney*, 470 U.S. 821 (1985), which requires a majority vote of the members of the bipartisan Commission. *See* 52 U.S.C. § 30106(c).

Plaintiffs do not ask this Court to conclude that prosecutorial discretion is subject to review, nor to change the practice of looking to the opposing commissioners' statement of reasons in a failed reason-to-believe vote for the basis upon which to review the FEC's decision to close a file. However, here the decision to close a file emerged only after *two distinct votes:* a failed reason-to-believe vote, and a failed *Heckler* vote. The separate votes make clear that the agency has declined to take two actions: (a) enforcement and (b) dismissal on the basis of prosecutorial discretion. And prosecutorial discretion cannot "shield the Commission's decision from judicial review [where] the Commission has not relied on it." *New Models I*, 993 F.3d 893.

The rationale of the commissioners who voted in favor of the *Heckler* motion merits the same status as the rationale of the commissioners who voted in favor of enforcement: these failed movants' rationales do not represent the *Commission's* rationale and cannot explain why the Commission failed to take either action.

2. *CLC v. FEC* is non-binding and was wrongly decided.

This Court is not bound by the decision in *CLC v. FEC*, see *In re Exec. Off. of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000), and should not be persuaded by it. The *CLC* decision concludes that naysayers to a defeated reason-to-believe vote—the "controlling Commissioners," *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("*Commission on Hope*")—can evade judicial review by exercising the Commission's discretionary power despite the Commission's express refusal to authorize use of

that very power. This ruling cannot be squared with either FECA's plain language or Supreme Court precedent.

The *CLC* decision misunderstands the import of the separate *Heckler* vote to exercise prosecutorial discretion in that case and incorrectly asserts that the "*Heckler* vote provided no new information to the Court" but rather "simply previewed the content" of the statement of reasons later provided by the naysayers to the reason-to-believe motion. *CLC*, 2022 WL 17496211, at *5. Under the *CLC* court's analysis, the outcome of that vote could not possibly change anything: if it had passed, it would mean that the FEC had dismissed the complaint for reasons of prosecutorial discretion, but if it failed (as it did), it would *also* mean that the FEC had dismissed the complaint for reasons of prosecutorial discretion. This "heads-I-win, tails-you-lose" analysis, under which the *Heckler* vote could not possibly change any legal outcome or even provide "information to the Court," treats the moving Commissioners as either naïve about the administrative processes within their own Commission, or as filing legally irrelevant motions for unknown reasons.

This Court should not presume that Federal Election Commissioners would deliberately waste the Commission's time with a motion that would have the exact same legal effect (viz., none whatsoever) if it passed or if it failed. Rather, the presumption of regularity counsels that the motion must have *some* legal effect, resulting in a change of legal relations or status depending on the outcome of the vote. But the *CLC* court's decision (and the FEC's current position in this litigation) treats that motion as legally meaningless.

The *Heckler* motion clearly was not meaningless. In fact, the failed *Heckler* vote provides critical information to the court: it establishes unequivocally that the Commission *did not* exercise prosecutorial discretion.

Congress specifically 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). The exercise of "its discretionary powers" is one such power. *FEC v. Akins*, 524 U.S. 11, 25 (1998); *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)).

The *CLC* court found that the three commissioners that declined to vote for the reason-to-believe motion "invoked prosecutorial discretion twice: first by voting 'yes' on the *Heckler* vote and second by expressly relying on it in their later-issued Statement of Reasons." *CLC*, 2022 WL 17496211, at *5. But Congress granted this power that to the Commission, not to individual commissioners. Where a vote has failed, the non-majority cannot "invoke" this power any more than the non-majority supporters of a failed reason-to-believe vote can "invoke" the Commission's enforcement authority.

The Supreme Court has held that the FEC may not block judicial review of an FEC decision by asserting that the Commission might have, or might in the future, exercise its discretionary power. *Akins*, 524 U.S. at 25. Judicial review is appropriate *unless* the Commission exercises its discretionary powers. In this case, it has expressly refused to do so. The rationale applied by the D.C. Circuit to a failed reason-to-believe motion should apply equally to a failed *Heckler* motion: where the motion fails, either because it failed to obtain either four votes (for a reason-to-believe motion to succeed) or a majority of votes (for a *Heckler* motion to succeed), the agency *does not take* the action sought by the motion. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that "consistency" is an important factor in determining the "fair measure of deference" courts may afford to an agency administering its own statute).

Plaintiffs acknowledge the prevailing rule of this circuit: that where a reason-to-believe motion before the FEC fails, the FEC subsequently votes to close the file, and that decision to close the file is later challenged by the complainant, the court will look back to the rationale of the naysayers who defeated the reason-to-believe vote "as if they were expressing the Commission's rationale for dismissal," *Commission on Hope*, 892 F.3d at 437; *CLC*, 2022 WL 17496211, at *4-5. The D.C. Circuit has described this process as "a rather apparent fiction raising problems of its own." *Commission on Hope*, 892 F.3d at 437-38.

But since the Commission went to the effort of holding a specific *Heckler* vote, the Court need not fall back on this fiction to resolve whether the agency has

exercised its power of prosecutorial discretion. It has not. Therefore, upon review the court may look to whatever reasons the controlling Commissioners might proffer with one critical exception: the controlling commissioners cannot escape judicial review by asserting prosecutorial discretion. This is an agency action that requires a majority vote that the naysayers did not obtain.

CONCLUSION

For the aforementioned reasons and those set out in their opposition to the FEC's motion to dismiss, plaintiffs ask this Court to deny the FEC's motion.

February 17, 2023

Respectfully submitted,

/s/ Courtney Hostetler
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**admitted pro hac vice*