

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

FREE SPEECH FOR PEOPLE and  
CAMPAIGN FOR ACCOUNTABILITY,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 22-cv-666 (CKK)

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR ORAL ARGUMENT**

In 2022, Defendant Federal Election Commission (“FEC” or “Commission”) moved to dismiss this case. (ECF No. 13, June 3, 2022). If its motion is granted, the FEC will be able to wholly evade judicial review of its decision to close the underlying administrative file without investigating serious and credible assertions that the Trump Campaign and the Russian Federation violated federal campaign finance laws. The FEC now is discouraging this Court from holding an oral hearing on its motion to dismiss. But its opposition to Plaintiffs’ motion for oral argument is rooted in a woefully inadequate summary of the issues now before this Court. The facts and the legal arguments presented in this case make it clear that the issues are complex and consequential, and warrant oral argument. *See Rivera v. Equifax Information Servs., LLC*, Order, Case No. 18-cv-04639, 2021 WL 5024381, at \*1 (N.D. Ga. Sept. 28, 2021) (noting that oral argument would benefit the court where the plaintiffs had raised “complex issues of law” in a “consequential case”).

**1. This case raises complex issues of law.**

The FEC asserts in its opposition to this motion and in its motion to dismiss that “dismissal of plaintiffs’ administrative complaint is not subject to judicial review because it was based on an exercise of prosecutorial discretion.” (FEC Opp. to Mot. for Oral Argument, ECF No. 34, May 1, 2024, at \*2 (citing FEC Mem. in Supp. of Mot. to Dismiss, ECF No. 13-1)) (“Opp.”). But it makes no mention of the central question before the Court: whether the FEC can evade judicial review by claiming that it exercised prosecutorial discretion, even after the full Commission took a vote on whether to exercise prosecutorial discretion and that vote *failed*.

This fact distinguishes this case from the primary cases cited by the FEC in both its motion to dismiss and its opposition to this motion. In the FEC administrative proceedings at issue in both *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) (“Commission on Hope”) and *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 denied*, 55 F.4th 918 (D.C. Cir. 2022), the Commission took two relevant votes: (1) a vote on whether there was reason to believe the campaign finance violations asserted in the administrative complaint had occurred (the reason-to-believe motion), which deadlocked, thereby failing to obtain the four votes required for the reason-to-believe motion to pass; and (2) a vote to close the file. More than one month after these votes, the Commissioners who voted against the reason-to-believe motions claimed that they exercised prosecutorial discretion in doing so.<sup>1</sup> In neither matter did the Commission specifically vote on whether to exercise prosecutorial discretion.

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<sup>1</sup> In Commission on Hope, the Commission’s relevant votes took place on October 1, 2015; the naysayer Commissioners submitted a statement of reasons on November 6, 2015. *See In the Matter of Commission on Hope, Growth and Opportunity*, Certification, MURs 6391 and 6471 (Oct. 2, 2015), <https://www.fec.gov/files/legal/murs/6391/15044380175.pdf>; *In the Matter of*

But that vote did take place in the administrative matter at issue here. As we explained in our opposition to Defendant’s Motion to Dismiss: “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.” (Mem. in Opp. to Defendant FEC’s Mot. to Dismiss, ECF No. 24, Aug. 25, 2022, at \*3.)

The FEC insists in its motion to dismiss that the Court should simply ignore this vote and ignore federal law, which requires that the exercise of Commission duties and powers be made by majority vote. 52 U.S.C. § 30106(c).<sup>2</sup> Its attempt to hand-wave away the nuances of this case in fact indicates that the Court would benefit from oral hearing on the complex legal arguments and the facts that underpin them.

## **2. The case and the motion to dismiss it are both consequential.**

The FEC suggests that granting their motion “would fully resolve this case” and that this

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*Commission on Hope, Growth and Opportunity*, Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MURs 6391 and 6471 (Nov. 6, 2015), <https://www.fec.gov/files/legal/murs/6391/15044381253.pdf>. In *New Models*, the Commission voted on November 14, 2017, and the naysayer Commissioners submitted a statement of reasons on December 20, 2017. *In the Matter of New Models*, Certification, MUR 6872 (Nov. 16, 2017), <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>; *In the Matter of New Models*, Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, MUR 6872 (Dec. 20, 2017), <https://www.fec.gov/files/legal/murs/6872/17044435569.pdf>.

<sup>2</sup> As explained in Plaintiffs’ Opposition, exercising prosecutorial discretion is one such duty requiring a majority vote. *See 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* (2012), [https://www.fec.gov/resources/cms-content/documents/policy-guidance/respondent\\_guide.pdf](https://www.fec.gov/resources/cms-content/documents/policy-guidance/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)).

is reason not to grant plaintiffs’ motion for oral argument. (Opp. at 1.) But it is precisely this fact that supports plaintiffs’ request. If the Court grants the FEC’s motion, the plaintiffs and voters in this country will be deprived of the opportunity to have a full, impartial judicial review by this Court of the FEC’s decision to close the file without investigating serious transgressions by the Trump Campaign and the Russian Federation. And if the FEC’s motion is granted, it will be because a non-majority of the Commission indicated that they would have exercised prosecutorial discretion to reject the reason-to-believe motion even though the Commission *already rejected* a prosecutorial discretion motion.

The issues themselves are complex, and can only be simplified by wholly omitting discussion of the central issues of this case. And the consequences are serious—not just for the plaintiffs but for American voters. For these reasons, Plaintiffs respectfully reiterate its submission that oral argument would assist the Court in resolving Defendant’s dispositive motion, given the importance and complexity of the procedural questions at issue in this case.

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Respectfully submitted,

/s/ Courtney Hostetler

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