ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5339

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellant,
v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:22-cv-01976-JEB
Before the Honorable James E. Boasberg

APPELLANT'S REPLY BRIEF

Megan P. McAllen (DC Bar No. 1020509)
Erin Chlopak (DC Bar No. 496370)
Allison Walter (DC Bar No. 90008637)
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
Email: mmcallen@campaignlegalcenter.org
Email: echlopak@campaignlegalcenter.org
Email: awalter@campaignlegalcenter.org

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Authorities upon which appellant principally relies are marked with an asterisk*

Cases : Page

Statutes:

Other Materials:

GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

SUMMARY OF ARGUMENT

Plaintiff-Appellant Campaign Legal Center's opening brief ("CLC Br.") explained why the decision below should be reversed. Plaintiff identified the fatal flaws in the district court's finding that it could not review the Federal Election Commission's ("FEC" or "Commission") dispositive legal reasons for dismissing plaintiff's administrative complaint against Donald J. Trump's 2020 presidential campaign committee, Donald J. Trump for President, Inc., and one of his authorized joint fundraising committees, Trump Make America Great Again Committee ("Trump Committees"), because the FEC, in reliance on those legal conclusions, also purported to exercise "prosecutorial discretion."

The administrative complaint documented, in meticulous detail, how the Trump Committees had violated core transparency requirements of the Federal Election Campaign Act ("FECA" or "Act") by routing payments to campaign vendors and staff through affiliated firms without reporting their ultimate payees—thereby concealing upwards of three quarters of a *billion* dollars in 2020 campaign spending. Yet the Commission, contrary to its General Counsel's recommendations, deadlocked 3-3 on whether there was "reason to believe" this scheme violated the Act's disclosure provisions, and thereafter dismissed the complaint. While the controlling Statement of Reasons issued by the three no-voting Commissioners purported to invoke prosecutorial discretion as a basis for the decision, the

Commissioners explicitly rested that supposed "discretionary" rationale on their legal analysis of the complaint's merits.

Because that legal analysis was hopelessly flawed and contrary to law, plaintiff filed suit to challenge it under FECA's "unusual" provision for judicial review of FEC nonenforcement decisions. *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995); 52 U.S.C. § 30109(a)(8). As plaintiff has shown, the district court's finding that judicial review is nonetheless unavailable was wrong for at least two distinct reasons: first, because the court based that determination on the divided panel decisions in *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission on Hope*")[1]—though neither forecloses review of FEC dismissals premised on the Commission's substantive legal determinations; and second, because even if those decisions *were* construed to apply in this case, they conflict with prior controlling precedent from the Supreme Court and this Circuit and should not be followed. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). The dismissal of plaintiff's administrative complaint against the Trump Committees is reviewable in either event.

[1] To differentiate between cases brought by CREW, this brief refers to each by the name of the administrative respondent, and to the *Commission on Hope* and *New Models* decisions collectively as the "*CREW*" cases.

In response, the FEC largely ignores and dismisses plaintiff's arguments, but it does not meaningfully refute them, or otherwise provide a viable argument for sustaining the decision below.

First, the FEC fails to refute plaintiff's showing that *Commission on Hope* and *New Models* are readily distinguishable from this case. The Commission's arguments rely on overstating the holdings in those cases and mischaracterizing the controlling Statement of Reasons in this one. While a dismissal grounded in an *independent* discretionary rationale may be unreviewable under the *CREW* cases, a dismissal based upon the Commissioners' interpretations of the Act, including one based upon legal and putative "discretionary" grounds that are inextricably entwined, is decidedly not. Indeed, both the FEC and the district court acknowledge that the dismissal at least partly relied on the Commissioners' substantive "application of FECA," FEC Br. 23-24; that their claimed discretionary rationale contained extensive "merits-related discussion of legal issues" and "the legal landscape," *id.*; and that their "invocation of prosecutorial discretion is closely intertwined with" their legal analysis on the merits, JA 47. It is this dispositive interpretation of the relevant statutory and regulatory disclosure provisions that remains subject to judicial review.

Forced to concede that the Commissioners' legal analysis and "discretionary" considerations are inseparable, the FEC proposes an alternative rule: reflexive and

unconditional immunity from judicial review whenever a decision so much as "mention[s]" prosecutorial discretion, regardless of whether the reference to discretion is freestanding, expressly contingent on statutory analysis, or somewhere in between. *See* FEC Br. 23-24. But such a rule is irreconcilable with controlling precedent and would eviscerate FECA's provision for judicial review and a limited private right of action.

Second, even if *Commission on Hope* and *New Models* could be construed to foreclose review of the Statement here, the FEC fails to explain why those rulings—which directly conflict with the prior established law of the Supreme Court and this Circuit, *see FEC v. Akins*, 524 U.S. 11 (1998), *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, *FEC v. Akins*, 524 U.S. 11; *Chamber of Commerce*, 69 F.3d 600; *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) ("*DCCC*"); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)—should nevertheless be followed.

Indeed, the FEC claims that the *CREW* cases occasioned no "true conflict" or even "tension" with prior precedent, *see* FEC Br. 27-29, but it fails to cite to a single Circuit decision prior to *Commission on Hope* in support of that contention. The Commission attempts to distinguish the *CREW* decisions from prior authorities by pointing to superficial and irrelevant distinctions between the underlying administrative matters, but its hairsplitting arguments provide no basis to disregard

the clear holdings of the Supreme Court and this Circuit. And the FEC offers no explanation at all for its own dramatic reversal of course in suddenly deciding to espouse a sweeping exception to FECA's judicial review provision that it had formerly, and correctly, "eschewed." *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 362 (D.C. Cir. 2020) (Edwards, J., concurring).

In sum, the FEC has failed to provide any sound defense of the district court's erroneous decision. For the reasons detailed in plaintiff's opening brief and below, the district court's decision should be reversed, and the case remanded for consideration of whether the FEC's dismissal of the administrative complaint was contrary to law.

ARGUMENT

I. Dismissal of plaintiff's administrative complaint is judicially reviewable.

The FEC fails to refute that its dismissal of Matter Under Review 7784 is reviewable under the *CREW* decisions. In attempting to liken the agency action challenged here to the dismissals found unreviewable in *New Models* and *Commission on Hope*, the FEC dramatically overstates the holdings of those cases, ignores their materially distinguishable facts, and ultimately fails to refute plaintiff's core argument: that the *CREW* cases do not foreclose judicial review where, as here, the supposed "discretionary" rationale is expressly based upon, and entangled with, dispositive legal conclusions on the merits.

A. The FEC's unreviewability argument depends on its overstatement of the holdings in *Commission on Hope* and *New Models*.

The FEC's defense of the district court decision hinges upon an overstatement of the holdings in *Commission on Hope* and *New Models*. As the FEC acknowledges, the controlling Statement of Reasons here "contained significant legal analysis," and "substantial discussion" of the "legal landscape," together with an invocation of prosecutorial discretion. FEC Br. 1, 24. But the agency leaps from this undisputed fact to the assertion that judicial review is therefore necessarily precluded under *New Models* and *Commission on Hope*—irrespective of the relationship between the intertwined legal and "discretionary" factors cited to justify this dismissal—because, according to the FEC, the limited exception to reviewability articulated in the *CREW* cases automatically immunizes any FEC decision that so much as "mention[s]" prosecutorial discretion. *See* FEC Br. 23-24. The Commission's interpretation extends the *CREW* decisions far beyond their holdings.

Indeed, the FEC's claim that a mere "mention" of prosecutorial discretion is categorically sufficient to shield any dismissal from judicial scrutiny, *see* FEC Br. 23-24, ignores what the *New Models* and *Commission on Hope* majorities actually said: it is not the length of the controlling Commissioners' legal analysis relative to the assertion of prosecutorial discretion that matters, but the logical connection between the two. A "brief mention of prosecutorial discretion alongside a robust statutory analysis" may preclude judicial review, but only if it is actually

independent of the legal analysis. *New Models*, 993 F.3d at 883. Correspondingly, even a lengthy discussion of prosecutorial discretion cannot shield the Commissioners' legal determinations from judicial scrutiny when the asserted exercise of discretion "rests solely on legal interpretation," *id.* at 884, or "reference[s] their merits analysis as a ground for exercising prosecutorial discretion," *CREW v. FEC*, 55 F.4th 918, 920-21 (D.C. Cir. 2022) ("*New Models II*") (Rao, J., concurring in denial of rehearing en banc) (citation omitted) (emphasizing that the Commissioners "relied on an independent ground of prosecutorial discretion" and "did not reference their merits analysis as a ground for exercising" it).

The Commission glosses over this clear language, which confirms that even under the *CREW* cases, an FEC dismissal cannot be relieved from congressionally mandated judicial review unless prosecutorial discretion formed a distinct and *independent* rationale for the decision. If, however, an invocation of discretion is based upon or intertwined with interpretations of law, the dismissal remains reviewable under FECA's "contrary to law" standard. *See* 52 U.S.C. § 30109(a)(8)(C). That the controlling Commissioners here dressed their legal conclusions in discretionary garb is not sufficient to negate Congress's express provision for judicial review, and neither *CREW* decision held otherwise. *C.f. New Models II*, 55 F.4th at 921 (Rao, J., concurring in denial of rehearing en banc)

("Because the controlling commissioners relied on an *independent* ground of prosecutorial discretion, this court has no basis for declaring that decision 'contrary to law.'") (emphasis added).

Moreover, the FEC elides the significant and material factual distinctions between this case and the dismissals at issue in *Commission on Hope* and *New Models*, asserting in conclusory fashion that those cases "control the outcome here" and suggesting that the underlying agency decisions were comparable. *See* FEC Br. 15, 18. They were not. In both *CREW* cases—unlike in this one—there was no question of how to separate an invocation of prosecutorial discretion from legal analysis on the merits. In *New Models*, the invocation of prosecutorial discretion, though perfunctory, was also clearly unmoored from the many pages of legal analysis preceding it, *see* 993 F.3d at 884; in *Commission on Hope*, the controlling Statement of Reasons contained no merits analysis whatsoever, *see* 892 F.3d at 439; *New Models*, 993 F.3d at 905 (Millett, J., dissenting) (noting that the statement in *Commission on Hope* "provided no legal analysis at all").

Commission on Hope involved an administrative respondent—a pop-up political association charged with having triggered federal political committee status without registering or filing required disclosure reports—that had dissolved and disappeared while CREW's complaint was pending. *See CREW v. FEC*, 236 F. Supp. 3d 378, 382 (D.D.C. 2017), *aff'd*, *Commission on Hope*, 892 F.3d 434. After

the Commission initially voted unanimously to authorize an investigation at the reason-to-believe stage, its Office of General Counsel spent significant time and effort to conduct that investigation, which "encountered procedural and evidentiary difficulties from the outset" that only multiplied over time, until it became clear "that [Commission on Hope] had become a defunct organization without any money, officers, directors, or attorney representing it." *Id.* at 388. At that point, even the General Counsel believed that further enforcement efforts would be a "pyrrhic" exercise. *Id.* at 388-89.

The Commission nevertheless deadlocked on whether to proceed, and the no-voting Commissioners later explained that they opted to exercise prosecutorial discretion to dismiss given the practical obstacles already standing in the way of enforcement. *See Commission on Hope*, 892 F.3d at 438 (noting, *inter alia*, that the "defunct" association "no longer existed," "had filed termination papers with the IRS four years earlier," and "had no money . . . [or] counsel . . . [or] agents who could legally bind it"). Accordingly, the panel majority determined that the "[t]he three naysayers on the Commission placed their judgment squarely on the ground of prosecutorial discretion," *id.* at 439—and there was no occasion for the Court to consider, much less to decide, how to treat a dismissal in which "discretionary" and substantive legal rationales are merged, as they are here.

New Models is no more analogous to this case, notwithstanding the FEC's claims to the contrary. *See* FEC Br. 18. While the FEC decision considered in *New Models* included extensive merits analysis, the relevant invocation of prosecutorial discretion—which appeared in a single seven-word clause and footnote on the final page of the decision—was wholly unconnected to the thirty-one pages of substantive FECA interpretation that preceded it. 993 F.3d at 896 (Millett, J., dissenting). And in holding the dismissal unreviewable, the panel majority expressly relied on that fact, emphasizing that the decision "rested on two *distinct* grounds: the Commission's interpretation of FECA and its exercise of . . . prosecutorial discretion," *New Models*, 993 F.3d at 884 (emphasis added) (internal quotation marks omitted). As the Court further stressed, the Commission had invoked discretion "*in addition to* its legal analysis," *see id.* at 886 (emphasis added), and based upon practical considerations that stood entirely apart from the merits, *see id.* at 885 (noting that New Models was "defunct and likely judgment proof").

The same cannot be said here. Although the FEC points to the district court's statement that "it was 'clearer in this case than it was in *New Models* that the Commissioners invoked their discretion as an independent reason for dismissal,'" FEC Br. 25 (quoting JA 48), even a cursory comparison belies that assessment. Unlike in *New Models*, each purportedly "discretionary" rationale cited in the controlling Statement here was a direct consequence of the Commissioners' legal

conclusions on the merits. *See* CLC Br. 29-33. At a minimum, the Statement here merges "discretionary" and merits discussion in a way that clearly bears no resemblance to the isolated invocation of prosecutorial discretion in *New Models*.

In both *CREW* cases, therefore, the Commissioners' discretionary concerns were not only wholly independent of any merits conclusions, but also revolved around purely practical obstacles to the pursuit of enforcement against absentee administrative respondents that had become defunct and appeared likely to resist legal process. *See Commission on Hope*, 892 F.3d at 438 (noting that "the 'defunct' association no longer had any agents who could legally bind it"); *see also New Models*, 993 F.3d at 885 ("New Models is now defunct and likely judgment proof"). No comparable concerns were cited here. Nor could they have been—both respondent Trump Committees are very much still in existence, and the candidate they promoted in 2020 is actively campaigning to be elected president of the United States in 2024.[2]

The FEC ignores all these salient distinctions. Indeed, in its haste to extend its newfound powers under the *CREW* cases to thwart judicial scrutiny of an even

[2] *See* Trump Make America Great Again Committee, *Financial Summary*, FEC, https://www.fec.gov/data/committee/C00618371 (last visited May 19, 2023); Donald J. Trump for President, Inc., *Financial Summary*, FEC, https://www.fec.gov/data/committee/C00580100/?cycle=2020 (last visited May 19, 2023); Donald J. Trump for President, Inc., *Financial Summary*, FEC, https://www.fec.gov/data/committee/C00828541/?cycle=2024 (last visited May 19, 2023).

broader range of agency actions, the FEC all but ignores plaintiff's central argument: that neither *New Models* nor *Commission on Hope* forecloses review of *this* FEC dismissal because its legal and discretionary rationales were inextricably intertwined. Instead, as both *CREW* majorities affirmed, FEC dismissals justified based on interpretations of law remain subject to judicial review, *Commission on Hope*, 892 F.3d at 441 n.11—and so do decisions, such as the one here, where the Commissioners invoke prosecutorial discretion in reliance on their merits analysis, *New Models II*, 55 F.4th at 920 (Rao, J., concurring in denial of rehearing en banc).

Accepting the FEC's drastically exaggerated view of the scope of the *CREW* holdings would effectively render any Commission decision that utters the phrase "prosecutorial discretion"—however contingent or pretextual the reference, and regardless of what else the decision says—per se unreviewable. The *CREW* majorities did not purport to do that, and neither should this Court.

B. The FEC does not seriously dispute that the Commissioners' invocation of discretion is inextricable from their legal conclusions.

As plaintiff explained in its opening brief, each and every "discretionary" factor cited in the Commissioners' Statement hinged on faulty legal analysis. *See* CLC Br. 29-33. The FEC does not meaningfully contend with this argument and in fact, essentially concedes it. For example, the FEC states, in conclusory fashion, that the Commissioners "invoked prosecutorial discretion as a distinct basis for the dismissal," FEC Br. 22, because they cited "traditional considerations in exercising

prosecutorial discretion" that "do not depend *entirely* on interpretations of the statute," *id.* at 24-25 (emphasis added). But simply saying that the Commissioners' purported discretionary concerns were "distinct" from merits judgments does not make it so. And the FEC offers no explanation of how it thinks these "discretionary" considerations are extricable from the legal conclusions upon which they rest. On the contrary, the FEC suggests that "those two categories" always and "inherently" overlap, FEC Br. 23—revealing the breadth of the rule the FEC is advocating.

Rather than explain how the Commissioners' asserted exercise of discretion was independent from their merits conclusions—it was not—the FEC highlights that the Commissioners' discussion of discretion was "explicit," "detailed," and cited "traditional grounds for exercising prosecutorial discretion under *Heckler* [*v. Chaney*, 470 U.S. 821 (1985)]," FEC Br. 20-22. But as *New Models* stressed, it is not the degree of detail or length of the discussion that matters, nor whether the rationale is couched in "traditional[ly]" discretionary or "prudential" terms, *id.* at 21; it is whether the invocation of prosecutorial discretion clearly stands apart from merits analysis as an "independent basis" for the decision, *New Models*, 993 F.3d at 884. The FEC never provides a serious answer to that key question.

The FEC repeatedly points to the Commissioners' citations of "traditional bases" for prosecutorial discretion, FEC Br. 20-22, 29, but the relevant issue is that the Commissioners' references to agency resources, the likelihood of success, and

the strength of the evidentiary record were made explicitly in conjunction with, and based upon, their dispositive legal conclusions on the merits. And those purportedly "discretionary" considerations—assuming *arguendo* that whether a complaint presents adequate "factual or legal support" for an alleged FECA violation (JA 235) is anything but a merits determination, which plaintiff disputes—cannot be divorced from the Commissioners' underlying reliance on an impermissible legal standard and refusal to consider much of the undisputed factual record. It is this dispositive interpretation of the relevant statutory and regulatory disclosure provisions that remains subject to judicial review.

In particular, the Commissioners' assertions about the likelihood of success and the prospective "size and scope of the proposed investigation" cannot be cleaved off from their decision to fabricate an unduly stringent "attempt to disguise" standard and graft it onto FECA's statutory and regulatory disclosure provisions. *See* CLC Br. 35; JA 229-32. Similarly, the Commissioners' claimed concern about regulatory "uncertain[ty]" was a figment of their own invention, given that it relied on ignoring pertinent agency precedent and mischaracterizing a rulemaking petition with no bearing on the issues here. *See* CLC Br. 16; JA 27. Whatever "practical or prudential" considerations the Commissioners ultimately cited to justify the dismissal, FEC Br. 21, they were nothing more than an endpoint of the Commissioners' merits analysis.

Finally, the FEC admonishes that "the relative time the controlling statement spent on discussion of FECA application as opposed to prosecutorial discretion . . . is not determinative." FEC Br. 23. But that merely begs the question. Plaintiff has never argued that review is available based on the relative *length* of the discretionary and merits discussion in the Commissioners' statement; the point is that the Commissioners' substantive legal determinations are reviewable notwithstanding their discussion of prosecutorial discretion because there is no way to logically separate the two. Even under the broadest possible reading of *New Models*, the relative amount of space devoted to legal and "discretionary" rationales may not be significant, but the *relationship* between them clearly is. In attempting to reduce plaintiff's argument to "how many pages" the Commissioners spent on legal versus discretionary analysis, FEC Br. 24, the FEC tilts at a straw man—leaving the actual argument to stand undisputed.

C. There is no basis to presume how the FEC would decide the matter on remand if the Commissioners' legal determinations are held contrary to law.

Given the intertwined nature of the Commissioners' justifications for dismissal, it is impossible to know—and it was improper for the district court to presume, *see* JA 32-49—that the agency would make the same "discretionary" calculations if its FECA interpretations were held contrary to law. The FEC fails to provide any explanation, persuasive or otherwise, to justify the district court's

unfounded and improper assumption. Instead, the agency retreats to its extreme position that judicial review is categorically unavailable whenever the FEC's explanation for a decision cites prosecutorial discretion or, apparently, references *any* topic other than direct statutory interpretation. *See, e.g.*, FEC Br. 2, 23 (opining that "only dismissals based *solely* on statutory interpretation are subject to review" and that complainants must also "show that the controlling statement . . . was limited to an interpretation of FECA").

Where "an agency has set out multiple *independent* grounds for a decision," the decision can ordinarily be sustained "so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable." *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (emphasis added) (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003)). However, if the grounds are not clearly independent or "the agency has not afforded individual weight to the alternative grounds, . . . the court may uphold the decision only 'as long as one [ground] is valid and the agency would *clearly* have acted on that ground even if the other were unavailable.'" *Id.* (emphasis added) (quoting *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011)); *accord Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989). The FEC does not even attempt to make such a showing. Nor could it. As plaintiff has explained, the asserted legal

and "discretionary" grounds offered to justify this decision were anything but independent from one another. *See supra* at 12-15; CLC Br. 29-33.

In a counterfactual world in which the Commissioners' merits determinations had *not* relied on improper legal and evidentiary tests, *see* CLC Br. 15, 35, it is impossible to know whether the Commissioners would have harbored the same "discretionary" concerns about the "legal support for enforcement," JA 224, the General Counsel's "flaw[ed]" or "tenuous legal theory," JA 224, 234, or the prospects of success, JA 235. And it is equally impossible to predict how a differently composed Commission would approach those questions in the event of a remand. *See* Cong. Rsch. Serv. R45160 at 2-3, *Federal Election Commission: Membership and Policymaking Quorum, In Brief*, https://crsreports.congress.gov/product/pdf/R/R45160 (updated Jan. 13, 2023). It was improper for the district court to rely on its own speculation in these circumstances. Instead, "[w]hether [the Commissioners] would have chosen to rest" on their asserted discretionary grounds "if their legal basis for dismissal had been deemed invalid is an open question for the Commission to answer on remand." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting from denial of rehearing en banc). *Cf. Akins*, 524 U.S. at 25 (rejecting argument that plaintiffs lacked a redressable injury even though the Commission "might later, in the exercise of its lawful discretion, reach the same result for a different reason") (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

D. The FEC's proposed radical expansion of the *CREW* decisions is irreconcilable with the Act's express provision for judicial review.

The FEC fails to explain how the rule of automatic and absolute unreviewability it proposes is remotely consistent with FECA's text. The Act expressly subjects Commission nonenforcement decisions to judicial scrutiny under a "contrary to law" standard. *See* 52 U.S.C. § 30109(a)(8)(A), (C); *Orloski*, 795 F.2d at 161. Neither *Commission on Hope* nor *New Models* empowered the FEC, much less minority blocs of FEC Commissioners, to shield their legal errors from any judicial check with the mere utterance of the phrase "prosecutorial discretion." But that is precisely what the FEC urges here. Accepting the FEC's invitation to extend the *CREW* decisions to cover dismissals where, as here, the putative "discretionary" factors are dependent upon Commissioners' substantive merits analysis would render congressionally mandated review an effective nullity.

Indeed, under the FEC's unbounded interpretation of the "preclusive effect of the *Commission on Hope* and *New Models* decisions," FEC Br. 2, the availability of judicial review is a matter of agency forbearance that can be switched off at any time. Review would seemingly be precluded even with respect to, for example, a theoretical dismissal where the complaint established inarguable and serious FECA violations but the controlling Commissioners later opined: "We voted against finding reason to believe and instead exercised our prosecutorial discretion to dismiss this matter because FECA does not apply to violations committed during a

leap year, and enforcement here would create undue litigation risk and consume scarce agency resources." According to the FEC, the clearly preposterous FECA interpretation at the core of this explanation would be beyond all scrutiny because it also contains an "explicit" invocation of prosecutorial discretion and "cit[es] several well-established grounds for the exercise of that discretion." FEC Br. 1. Shorn of those elements, however, the same decision would be reviewable.

The FEC's argument that it can "turn statutorily directed judicial review off" in this fashion, "like a light switch," *New Models*, 993 F.3d at 901 (Millett, J., dissenting), is impossible to square with the Act, and neither *CREW* decision compels accepting it here.

II. The *CREW* decisions cannot preclude review because they are inconsistent with prior controlling precedent.

As plaintiff has explained, *see* CLC Br. 36-41, the decision below is flawed and should be reversed for the additional reason that it relied on the *CREW* decisions despite their direct conflict with the Supreme Court's holding in *Akins*, 524 U.S. at 25-26, and the earlier and well-established law of this Circuit, *see Akins*, 101 F.3d at 734 (distinguishing *Heckler* and noting that FECA Section 30109(a)(8) "is an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings"); *Chamber of Commerce*, 69 F.3d at 603 (same); *Orloski*, 795 F.2d 156 (recognizing FEC dismissals are contrary to law even where based on a permissible interpretation of the statute if they entail

an abuse of discretion); *DCCC*, 831 F.2d at 1133-35 & n.5 (declining to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits"). Thus, even if the *CREW* decisions are construed to apply here, they do not supersede the prior well-established law of the Supreme Court and this Circuit, *see Sierra Club*, 648 F.3d at 854.

The FEC offers little more than a token response on this point. Its primary contention is that *New Models* and *Commission on Hope* created no "true conflict" with Supreme Court or prior Circuit precedent. FEC Br. 27. But rather than offer any analysis to support that proposition, the FEC merely points back to the *CREW* majority opinions and suggests that no conflict exists because the panels were not "unaware of those prior decisions" and "discussed the prior decisions in their opinions." *Id.* According to the FEC, moreover, the rule of unreviewability embraced in *New Models* and *Commission on Hope* was "hardly novel" given that other federal agencies are traditionally afforded such latitude with respect to nonenforcement decisions. FEC Br. 14. But that is no answer to whether it was "novel" in the FECA context. And it clearly was, as confirmed by decades of prior precedent recognizing that the "traditional[]" presumption of unreviewability is "explicitly" rebutted by FECA, *Akins*, 524 U.S. at 26—not to mention by the *FEC's own understanding* of this precedent, at least before *Commission on Hope*

unexpectedly broke from it, *see* CLC Br. 38-39; *Democracy 21*, 952 F.3d at 361 (Edwards, J., concurring).[3]

The FEC has yet to acknowledge, much less to explain or defend, its own dramatic change of position. That silence is revealing. It also undercuts the Commission's bold claim that neither *Commission on Hope* nor *New Models* interposed any "true conflict" or even "potential tension" with prior precedent. *See* FEC Br. 27-29. Multiple members of this Court have authored opinions contradicting that sentiment. *See* CLC Br. 40-41. And the Commission's attempt to defend the ruling below by citing other recent district court decisions holding FEC dismissals unreviewable under *New Models*, *see* FEC Br. 19-20, only illustrates that there are no FECA cases predating *Commission on Hope* for the agency to cite. Regardless, these lower court decisions are nonbinding and may yet be reversed by this Court. *See, e.g.*, *Public Citizen v. FEC*, 547 F. Supp. 3d 51, 56 (D.D.C. 2021); *CREW v. Am. Action Network*, 590 F. Supp. 3d 164, 170 (D.D.C. 2022), *appeal*

---

[3] *See also, e.g.*, Br. for Appellee FEC at 30-31, *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (No. 96-5160), 1996 WL 34482865 (acknowledging that "'an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion' and is not reviewable" but that *DCCC* had "rejected this claim by the Commission" because FECA created a "statutory *exception* to the rule that agency decisions not to enforce are not reviewable") (quoting *Heckler*, 470 U.S. at 831-35, 837-38); FEC Mot. to Dismiss, *Akins v. FEC*, 736 F. Supp. 2d 9 (D.D.C. 2010) (No. 03-2431), 2004 WL 3704262 ("Plaintiffs argue that the 'doctrine of *Heckler v. Chaney*, 470 U.S. 821 (1985) . . . does not apply to the [FEC].' However, the Commission's position is not that its dismissal is beyond review, but rather that it is subject to highly deferential review.").

docketed, No. 22-7038 (D.C. Cir. Mar. 31, 2022); *End Citizens United PAC v. FEC*, No. 21-cv-1665-TJK, 2022 WL 1136062, at *3 (D.D.C. Apr. 18, 2022), *appeal docketed*, No. 22-5176 (D.C. Cir. June 23, 2022).

The FEC's other efforts to harmonize the *CREW* decisions with *Akins* and the law of this Circuit are equally unavailing.

First, the FEC's attempt to limit *Akins* to its facts, *see* FEC Br. 28, requires ignoring the Supreme Court's clear holding that *Heckler*'s presumption of unreviewability is inapplicable in the FECA context. 524 U.S. at 26 (noting that while "agency enforcement decisions 'ha[ve] traditionally been committed to agency discretion' . . . . We deal here with a statute that explicitly indicates the contrary") (quoting *Heckler*, 470 U.S. at 832). The FEC, however, posits that this aspect of *Akins* can be disregarded because "[t]he only question addressed by the Court involved the administrative complainants' standing to sue." FEC Br. 29. But in its briefing to the Supreme Court in *Akins*, the FEC specifically argued that the plaintiffs lacked standing because "the Commission's authority to exercise prosecutorial discretion" made it "particularly speculative" that a favorable ruling would ultimately redress their injury, so FECA's judicial review provision "should be given a narrow construction" in light of *Heckler*. Br. for Pet'r at 23, 29, *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 523890. The Supreme Court flatly rejected that argument. And notwithstanding the FEC's hairsplitting here about the nature of

the administrative action underlying *Akins*, in *Akins* itself, the FEC characterized its action as "a discretionary judgment." Reply Br. for Pet'r at 9 n.8, *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 675443.

Second, the FEC fails to meaningfully contend with the prior Circuit precedents confirming *Heckler*'s inapplicability to FEC nonenforcement decisions. In *DCCC*, for example, the Court definitively rejected the FEC's argument "that deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion." 831 F.2d at 1133-34 (citing Br. for the FEC at 17-20). In so doing, the Court expressly declined to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits." *See id.* at 1134-35 & n.5. Likewise, in *Chamber of Commerce*, the Court addressed the reviewability of FEC nonenforcement decisions, noting that FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce," such that "even without a Commission enforcement decision, [administrative respondents] are subject to litigation." 69 F.3d at 603. The FEC itself conceded to the Court in *Chamber of Commerce* that its "exercise of such discretion is not unreviewable, as it is for many other agencies." *See* Br. for FEC at 22, *Chamber of Commerce*, 69 F.3d 600 (No. 94-5339), 1995 WL 17204295. Finally, in *Orloski*, the Court affirmed that nonenforcement decisions are reviewable either if the FEC dismissed based on an incorrect interpretation of the law or if the decision,

"under a permissible interpretation of the statute, was arbitrary or capricious, or an *abuse of discretion*." 795 F.2d at 161 (emphasis added).

The FEC claims these decisions cannot be in conflict because "the panels in *Commission on Hope* and *New Models* were plainly aware of *Akins* and the other prior decisions." FEC Br. 29. That is not the operative inquiry. Even if the *CREW* panels were "aware of" *Akins* and this Court's relevant precedents, it does not follow that the panels were free to discount the holdings or implications of those decisions. *See Sierra Club*, 648 F.3d at 854.

Nor was the district court in this case. By applying the *CREW* decisions to bar review here, the lower court disregarded long-established Supreme Court and Circuit precedent and Congress's express mandate for judicial review. And although the court believed that result was compelled by "*New Models*'s quite capacious rule," JA 46, 49, its decision in fact improperly *extended* that rule. Either way, the ruling below was in error and should be reversed.

CONCLUSION

For the foregoing reasons and those in plaintiff's opening brief, the district court's December 8, 2022 memorandum opinion and order should be reversed, and the case remanded for further proceedings.

Dated: May 19, 2023

Respectfully submitted,

/s/ Megan P. McAllen

Megan P. McAllen (DC Bar No. 1020509)
Erin Chlopak (DC Bar No. 496370)
Allison Walter (DC Bar No. 90008637)
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
Email: mmcallen@campaignlegalcenter.org
Email: echlopak@campaignlegalcenter.org
Email: awalter@campaignlegalcenter.org

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 5,694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

s/ Megan P. McAllen
Megan P. McAllen

CERTIFICATE OF SERVICE

I certify that on May 19, 2023 I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Megan P. McAllen
Megan P. McAllen