NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the District of Columbia Circuit

No. 22-5277

END CITIZENS UNITED PAC,

Plaintiff-Appellant,

– v. –

FEDERAL ELECTION COMMISSION,

Defendant-Appellee,

and

NEW REPUBLICAN PAC,

Intervenor-Appellee.

On Appeal from the Unite States District Court
foe the District of Columbia, Case No. 1:21-cv-02128-RJL

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for amicus curiae Citizens for Responsibility and Ethics in Washington, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant.

References to the rulings at issue appear in the Brief for Appellant.

Amici is unaware of any related cases pending before this court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, and D.C. Circuit Rule 26.1, Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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STATEMENT OF INTEREST[1]

Citizens for Responsibility and Ethics in Washington ("CREW") uses a combined approach of research, advocacy, public education, and litigation to seek to combat corrupting influences in government and protect citizens' right to be informed about the source of contributions used to fund campaign expenditures. Among its principal activities, CREW monitors Federal Election Commission ("FEC") filings to ensure proper and complete disclosure as required by law and utilizes those filings to craft reports for public consumption. If CREW observes a violation of campaign finance laws, CREW files complaints with the FEC under 52 U.S.C. § 30109(a). When necessary, CREW seeks judicial review of complaints unlawfully dismissed by the FEC pursuant to 52 U.S.C. § 30109(a)(8)(A). CREW, moreover, was the litigant involved in the decision applied below to preclude review, *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*").

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), CREW affirms that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than CREW or its counsel contributed money that was intended to fund the preparation or submission of this brief. All appearing parties have consented to the filing of this amicus.

ARGUMENT

The Federal Election Campaign Act ("FECA"), like many federal regimes, creates a dual enforcement mechanism. First, it sets up the Federal Election Commission ("FEC"), an evenly divided agency, that may only pursue enforcement through bipartisan majority votes. Second, it provides private individuals with private federal rights and a federal cause of action to protect those rights, for which the FEC acts as "first arbiter." *CREW v. FEC*, 923 F.3d 1141, 1149 (D.C. Cir. 2019) ("*Commission on Hope II*") (Pillard, J., dissenting). Complainants may seek judicial review of the FEC's adjudication, and if they can establish that they in fact presented a "plausible claim" and exhausted administrative remedies, *id.* at 1144, they may seek their own relief in court.

A recent pair of divided decisions from the D.C. Circuit, however, have upended this framework, confounding the separate mechanisms. They have "wrongly treat[ed] [a private party's] effort to pursue its private right to judicial review" of the agency's adjudication of its claim "as if it were an attempt to force the Commission itself to proceed in the face of an agency exercise of constitutionally unreviewable prosecutorial discretion." *CREW v. FEC*, 55 F.4th 918, 929 (D.C. Cir. 2022) ("*New Models II*") (Millett, J., dissenting). They have granted a partisan-aligned non-majority bloc of commissioners a "judicial-review kill switch" that they may unilaterally operate, over the objection of the agency

itself, with nothing more than a post-hoc "incantation." *Id.* at 922, 925. According to the court below, that partisan non-majority bloc exercised that power in this case to close the courthouse door to End Citizens United PAC ("ECU") and eliminated the group's right to seek judicial relief for its injuries.

The district court's decision, however, and the decisions of this Court on which it relies, "amoun[t] to a wholly unwarranted rule of judicial abstinence that nullifies the explicit statutory provision for judicial review of private-party challenges to the Commission's substantive decisions." *Id.* at 929. They irreconcilably conflict with this Court and the Supreme Court's precedents on § 30109 judicial review, and administrative law more generally. As such, they must be disregarded, and it was error for the district court to rely on them to deprive ECU of its day in court.

I. Background

A. The FECA's Private Right of Action and the FEC's Gatekeeping Adjudicatory Role

The FECA includes "a feature of many modern legislative programs," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990): paired civil enforcement through a government agency with private litigation. *See* 52 U.S.C. § 30107(e) (FEC's "exclusive" civil enforcement power subject to "[e]xcept[ion]" of private suits "in section 30109(a)(8)").

Congress subjected both mechanisms to significant safeguards. "To avoid agency capture, [Congress] made the Commission partisan balanced, allowing no more than three of the six Commissioners to belong to the same political party," *Commission on Hope II*, 923 F.3d at 1143 (Pillard, J., dissenting), while requiring a majority vote for any enforcement decision, *id.* at 1142 (Griffith, J., concurring) ("FECA thus requires all actions by the Commission occur on a bipartisan basis."); 52 U.S.C. § 30106(c). "That balance created a risk of partisan reluctance to apply the law," however. *Commission on Hope*, 923 F.3d at 1143–44 (Pillard, J., dissenting).

Moreover, even apart from partisan deadlock, Congress worried that enforcement "cannot be left to a commission that is under the thumb of those who are to be regulated," FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 72 (1977), https://perma.cc/G23G-SQ7T (Statement of Sen. Clark). Industry capture of the FEC was all but guaranteed, as the commissioners were to be appointed and overseen by the very people the agency regulated. Indeed, while the FEC's structure protected against partisan witch-hunts—a risk already guarded by the need to appeal to an independent judiciary, *see* 52 U.S.C. § 30109(a)(6)—it compounded the risk that it would become a "toothless lapdog" rather than the "active watchdog" required to "restor[e] [] public confidence in the election process. Legislative History at 75 (Statement of

Sen. Scott).[2] The structure meant that, unlike other agencies whose underenforcement would be subject to democratic correction through appointment of new leadership, an FEC that failed to faithfully enforce the law would be subject to no correction, as even the election of a pro-enforcement President cannot result in the appointment of a majority of similar-minded commissioners. *See* 52 U.S.C. § 30106.

Accordingly, rather than rely solely on the agency, Congress provided private litigants with an avenue to protect the private rights to which the FECA entitles them, *FEC v. Akins*, 524 U.S. 11, 22 (1998), subject to the safeguard obliging any plaintiff to obtain preliminary adjudication by the FEC, *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (dismissing lawsuit filed without first presenting claim to the FEC and obtaining judgment); *see also Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("[T]he procedures [the FECA] sets forth … must be followed before a court may intervene."). The agency then acts as "first arbiter," screening out meritless complaints, while the FECA assures "plausible claims" are pursued either by the agency or by the private litigant. *Commission on Hope II*, 923 F.3d at 1143–44, 1149 (Pillar, J., dissenting); *accord* Caroline Hunter, How my FEC Colleague is Damaging the Agency and Misleading the Public, Politico

[2] *See also id.* at 92 (Statement of Sen. Mondale) (expressing concerns of "history of weak enforcement of campaign financing laws").

(Oct. 22, 2019) https://perma.cc/AW3K-KF6M ("In enforcement actions, commissioners are like judges.").

The FECA does so by requiring the Commission adjudicate what is essentially an automatic motion-to-dismiss: judging whether a complaint raises a "reason-to-believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). If a majority concludes it does, then "the Commission *shall* make an investigation." *Id.* (emphasis added); *New Models II*, 55 F.4th at 923 (Millett, J., dissenting) ("If at least four of the six commissioners determine there is reason to believe a violation occurred, the Commission must go forward with an investigation."); *accord Commission on Hope II*, 923 F.3d at 1144 (Pillard, J., dissenting). In that case, the FEC supplants the complainant in pursuing the case. If, on the other hand, the FEC, in its discretion, chooses not to pursue its own investigation contrary to that provision, that decision would trigger the complainant's right to seek relief themself in court for a meritorious complaint. 52 U.S.C. § 30109(a)(8)(C) (requiring judicial determination FEC's nonenforcement was "contrary to law").

If a majority does not conclude the complaint raises a reason-to-believe, the FEC may then choose to close the case by a majority vote. The commissioners who judged the complaint as lacking merit must then "state their reasons why" they voted that way to permit a court to "intelligently determine whether the Commission is acting 'contrary to law.'" *DCCC v. FEC*, 831 F.2d 1131, 1132

(D.C. Cir. 1987). "When the agency votes on whether there is a 'reason to believe' that a violation of FECA has occurred, it must give reasons for that action that are subject to judicial review." *CREW v. FEC*, 892 F.3d 434, 445 (D.C. Cir. 2018) ("*Commission on Hope I*") (Pillard, J., dissenting).

If judicial review demonstrates the analysis was correct, the FEC has lawfully performed its gatekeeping adjudicatory function and the case is at an end. If a court concludes the commissioners' analysis was erroneous, however, then the court declares the error and remands to the agency. "[T]he Commission is [then] given the right of first refusal on enforcement," and "[i]f the agency is still opposed or unable to bring an enforcement action, no court will force it to do so; all that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J, dissenting).

Thus, while the FEC has "discretion," *see Akins*, 524 U.S. at 26, "prosecutorial discretion" only "settle[s] [the FEC's] own claims," and has no bearing in the FEC's adjudication of a private plaintiff's claims, *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008). "The statute, in other words, never requires the agency to bring an enforcement action that it does not want to bring." *New Models II*, 55 F.4th at 923 (Millett, J., dissenting). "It just opens the door to private enforcement by an aggrieved party." *Id.* That door may only be shut by a judicially-sustainable conclusion that it fails on the merits.

B. Proceedings below

Consistent with the provisions above, this case began when ECU perceived a deprivation of its rights under the FECA: specifically, the failure of the U.S. Senate candidate Rick Scott to disclose information to which the Act entitled the group. *See CLC v. FEC*, 31 F.4th 781, 790 (D.C. Cir. 2022). Accordingly, as required by the FECA, ECU presented its claim to the FEC. *See* JA118–151.

Thereafter, three commissioners of the six-member Commission judged the complaint to fail on the merits. JA270–71. The Commission then subsequently voted on whether it would exercise its discretion to decline to pursue the complaint, but that also failed to gain majority support. JA272–73. Nonetheless, five commissioners, a majority, chose to close the case. *Id.*

Thereafter, as required to permit judicial review of their adjudication on the merits, the commissioners who judged the complaint to be unmeritorious issued a statement to explain that vote. JA281–91. ECU then sought judicial review, consistent with the statutory procedures for exhausting their claim.

At this point, inconsistent with the statutory provisions, U.S. District Court Judge Richard Leon declined, in relevant part, to determine whether the commissioners had issued an explanation that demonstrated their adjudication of the merits was not contrary to law. *End Citizens United v. FEC*, No. 21-2128

(RJL), 2022 WL 4289654, at *5–6 (D.D.C. Sept. 16, 2022).[3] Rather, Judge Leon erroneously concluded that he was precluded from reviewing the matter because the three commissioners cited "prosecutorial discretion" in their statement, notwithstanding such discretion did not explain their vote on the merits. Judge Leon did so based on the erroneous panel decision in *New Models*, *End Citizens United*, 2022 WL 4289654, at *5, which itself stated review was "foreclose[d]" by *Commission on Hope I*, 892 F.3d 434. Judge Leon concluded that these decisions meant the partisan-aligned non-majority of the Commission need not defend their vote on the merits and could instead, unilaterally, invoke a "superpower … to kill any enforcement matter, wholly immune from judicial review," *Commission on Hope II*, 923 F.3d at 1150 (Pillard, J., dissenting), through no more than a "mere incantation of 'prosecutorial discretion,'" *New Models II*, 55 F.4th at 925 (Millett, J., dissenting), that terminated not only the FEC's proceedings, but extinguished ECU's private rights as well.

[3] The district court found it could review the dismissal of one claim because the commissioners did not invoke prosecutorial discretion to justify their reason-to-believe vote with respect to that claim. *Id.* at *6. As explained in appellants' brief, however, the district court also erred in conducting the required review for that claim. Appellant Br. 35–52.

II. In Applying a Decision In Conflict with Circuit and Supreme Court Precedent, the District Court Erred

The lower court refused to review the three commissioners' adjudication of ECU's complaint as failing to even raise a reason to believe a violation occurred because it concluded it was bound by the "inexorable logic" in *New Models. End Citizens United*, 2022 WL 4289654, at *5. The court rejected two of the four distinctions ECU drew between that case and this one and, as ECU covers in its brief in chief, the court erred in doing so. Appellant Br. 26–33. But it also committed a more fundamental error by following *New Models* at all: *New Models* is "not binding" because it, and its precursor, *Commission on Hope*, "conflicts with … the Supreme Court's decision in [*Akins*], 524 U.S. 11[]; and with [this Court's] decisions in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); [*DCCC*], 831 F.2d 1131 [ ], and *Orloski* [*v. FEC*], 795 F.2d 156 [(D.C. Cir. 1986)]." *Commission on Hope II*, 923 F.3d at 1145 (Pillard, J., dissenting) (citing *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail."); *accord New Models*, 993 F.3d at 900–01 (Millett, J., dissenting); *CLC v. FEC*, 952 F.3d 352, 358–59 (D.C. Cir. 2020) (Edwards, J., concurring); *see also* Pl.'s Mot for Default J. 45 n.9, *End Citizens United v. FEC*, No 1:21-cv-2128-RJL (D.D.C. Dec. 27, 2021) (raising infirmity of *New Models*). Further, the line of cases conflicts with

settled administrative law precedent and places the FECA in serious tension with separation of powers principles and the First Amendment.[4]

A. *New Models* Conflicts with FECA Precedent

Prior to *Commission on Hope*, all precedent on point recognized that every adjudication by the FEC of a private party's complaint was reviewable. Where a complainant could demonstrate the agency's dismissal did not stem from the complaint's lack of merit, a court would permit the complainant to bring a suit in their own name by finding the FEC's dismissal was contrary to law. *Commission on Hope*, however, *sua sponte* departed from that precedent without even mentioning it, and *New Models* expanded on that departure. Neither case can be reconciled with precedent recognizing the purpose of judicial review under the FECA: to permit complainants to pursue their own plausible claims if the FEC will not.[5]

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[4] Although en banc courts have declined to reconsider *New Models*, *see New Models II*, 55 F.4th at 918–19, and, by an "evenly-split decision," its precursor, *Commission on Hope*, *id.* at 926 (Millett, J., dissenting); *see Commission on Hope II*, 923 F.3d 1141, "deny[ing] rehearing en banc does not necessarily connote agreement with the decision as rendered," *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 129 (D.C. Cir. 1977).

[5] *See also generally* Br. of Election Law Scholars as *Amici Curiae* in Supp. of Appellants' Pet. for Rehearing En Banc, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 30, 2021) (explaining "significant conflict in the rulings of this Court" with *New Models*, that decision permits "one party [to] dominate the FEC's decision-making" and "threatens Congress's carefully crafted framework for the enforcement of campaign finance law").

First, *New Models* conflicts with binding Supreme Court authority in *Akins*. The majority in *New Models* held that the "FECA cannot alter the APA's limitation on judicial review," *New Models*, 993 F.3d at 889, and that, notwithstanding the plain language of 52 U.S.C. § 30109(a)(8)(A), "the [FEC's] decision not to bring an administrative enforcement action is 'committed to agency discretion by law' and therefore unreviewable," *New Models*, 993 F.3d. at 888. In contrast, *Akins* recognized the APA's "traditiona[l]" limit on review, but found that the FECA "explicitly indicates [] the contrary." *Id.* at 900 (Millett, J., dissenting) (quoting *Akins*, 524 U.S. at 26 (holding *Heckler v. Chaney*, 470 U.S. 821 (1985), does not apply to review of FEC dismissals)); *accord Commission on Hope II*, 923 F.3d at 1146 (Pillard, J., dissenting); *CLC*, 952 F.3d at 361 (Edwards, J., concurring). Rather, "as the Supreme Court has specifically held, 'reason-to-believe' assessments under the [FECA] are expressly excepted from the general presumption that decisions not to enforce the law are unreviewable." *New Models II*, 55 F.4th at 926 (Millett, J., dissenting).

New Models tried to revise *Akins*'s history to limit the case to dismissals premised on "only legal reasons." 993 F.3d at 889, n.8. Yet the FEC in *Akins* claimed the dismissal under review *was* discretionary, *compare id. with* Reply Br. for Pet'r, *FEC v. Akins*, 524 U.S. 11 (1997) (No. 96-1590), 1997 WL 675443, at *9 n.8 (invoking prosecutorial discretion), and the Supreme Court expressly stated

that the FECA extends review to even "discretionary agency decision[s]" to correct any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25. Rather, courts "cannot know that the FEC would have exercised its prosecutorial discretion" with a correct view of the law. *Id.*

New Models sidestepped *Akins* because it found nonenforcement "is explicitly vested in the Commission's discretion," 993 F.3d at 890, due to the FEC's discretion over the remedy at the end of an enforcement action it pursues, *id.* (quoting 52 U.S.C. § 30109(a)(6)(A)). But that discretion over remedy exists for every action, including the action in *Akins*, and yet the Supreme Court recognized the "decision not to undertake an enforcement action" was still reviewable. 524 U.S. at 26.

In short, *Akins* recognizes the FECA provides "an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings," *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1996) (en banc), without exception. Indeed, the provision is not so unusual when the statutory scheme is understood as a whole. The FECA does not "attempt to force the Commission itself to proceed in the face of an agency exercise of constitutionally unreviewable prosecutorial discretion." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). Rather, it authorizes judicial review of the agency's

adjudication of a private party's claim to permit it to show exhaustion and "pursue its private right[s]." *Id.*

Second, *New Models* conflicts with this Court's decision in *DCCC*, which recognized the FEC's discretionary dismissals, even those with unanimous backing, are reviewable. 831 F.2d at 1133–34 (recognizing both "6-0 decision" and "3-2-1 decision" to "exercise[s] of prosecutorial discretion" are reviewable). Rather than limit review to dismissals based "exclusively on an interpretation of the relevant statutory and regulatory standards," *New Models*, 993 F.3d at 894, *DCCC* held the FECA did not "confin[e] the judicial check to cases in which … the Commission acts on the merits," 831 F.2d at 1134; *see also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (applying *DCCC* to discretionary rationales). Instead, review extends to commissioners' "unwilling[ness]" to enforce to ensure they do not "shirk [their] responsibility to decide" a matter on the merits. *DCCC*, 831 F.2d at 1134, 1135 n.5.

Third, *New Models* conflicts with *Chamber*, which similarly held the Commission's "unwillingness" to proceed was reviewable, and that it presented an "easy" case for reversal. 69 F.3d at 603. In *Chamber*, the court's jurisdiction depended on the fact "even without a Commission enforcement action" due to prosecutorial discretion, "[plaintiffs] [were] subject to litigation challenging ... their actions" because "the Commission's refusal to enforce would be based not on

a dispute over the meaning of the applicability of the rule's clear terms" and thus any discretionary dismissal would be contrary to law. *Id.*; *see also Commission on Hope II*, 923 F.3d at 1150 (Pillard, J., dissenting) (Commission "oblig[ed] to pass on the merits of a complaint," and "[i]f three Commissioners could vote 'no' at the reason-to-believe stage on grounds of prosecutorial discretion, there would be little to check 'the Commission's unwillingness to enforce its own rule'" (quoting *Chamber*, 69 F.3d at 603)).

Fourth, *New Models* conflicts with *Orloski*, which held that all FEC dismissals are subject to review. 795 F.2d at 161. Indeed, it recognized that, as the first step in any review, the commissioners must demonstrate their analysis is based only on "permissible interpretation[s]" of law. *Id.* Moreover, "a decision dismissing a complaint 'is contrary to law' even 'under a permissible interpretation of the statute' if it involves 'an abuse of discretion.'" *Commission on Hope II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Orloski*, 795 F.2d at 161).

Each of these decisions accords with the FECA's basic structure for review of private complaints: the FEC acts as a "first arbiter" to weed out unmeritorious complaints, subject to judicial review. *Commission on Hope II*, 923 F.3d at 1149. But where nonenforcement is the result of the FEC's "unwilling[ness]," *DCCC*, 831 F.2d at 1135 n.5; *accord Chamber*, 69 F.3d at 603, review is not thwarted. Rather, that is an "easy" case because it demonstrates there is no dispute over the

complaint's merit. *Chamber*, 69 F.3d at 603. The Court does not thereby compel the FEC to act; rather, it merely finds a plaintiff has exhausted their attempts to seek administrative relief and permits the plaintiff to bring a suit in its own name, subject to an additional 30-day window in which the FEC is permitted to change its mind.

New Models, however, corrupts this system. It confuses the FEC's prosecutorial discretion over the pursuit of its *own* claims, with a power to veto claims private litigants wish to bring. Indeed, "[t]he harm worked by this decision is serious and recurring." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting) (citing evidence that, since the *Commission on Hope* decision, two-thirds of dismissals contrary to the agency's general counsel's recommendation have cited prosecutorial discretion). Indeed, at a time that lax enforcement has bred a culture of impunity with respect to campaign finance laws, *see* Chad Day & Paul Kiernan, Sam Bankman-Fried's Alleged Campaign Finance Violations Explained, *Wall Street Journal*, Dec. 14, 2022, https://perma.cc/X4JF-PH2T; *see also* Alexandra Berzon & Grace Ashford, The Mysterious, Unregistered Fund That Raised Big Money for Santos, *NY Times*, Jan. 12, 2023, https://perma.cc/Y5NE-YYSK, *New Models* has proven fatal to every private litigant trying to protect their rights under

the FECA where they seek to challenge a FEC dismissal that occurred after the decision came down.[6]

Courts in this Circuit are bound to follow the earlier line of cases that faithfully applied the FECA and to disregard *Commission on Hope* and *New Models*. The court below erred in following them and warrants reversal.

[6] The concurring judges in *New Models II* attempted to minimize the decision's openness to abuse, but could not identify an example post-dating the decision where the commissioners did not use prosecutorial discretion to cut off likely judicial review of their non-majority legal analysis. *See New Models II*, 55 F.4th at 921 n.3 (Rao, J., concurring). Rather, the judges cite an analysis enjoying majority support, Certification, MUR 7700 (VoteVets), Mar. 22, 2022, https://perma.cc/DM6A-ZQG9, and cases where the analysis rest on a weighing of evidence, subject to deferential review, Statement of Reasons 4, MUR 7700 (VoteVets), Apr. 29, 2022, https://perma.cc/KRN3-88BB (dismissing where "insufficient additional information" to support claim); Statement of Reasons 7, MUR 7753 (Friends of Lucy McBath), Oct. 8, 2021, https://perma.cc/9UYQ-LJDA (citing "no evidence" to support dismissal); Statement of Reasons 1, MUR 7413 (Jenkins), July 14, 2021, https://perma.cc/7GYT-EZAC ("lack of available evidence"); and those where the complainant was unlikely to seek judicial review, Complaint, MUR 7753 (Friends of Lucy McBath), June 11, 2018, https://perma.cc/C55V-YERJ (complainant Americans for Public Trust, with no record of FECA litigation); Complaint, MUR 7413 (Jenkins), June 11, 2018, https://perma.cc/3P5R-STVC (complainant Harris County Republican Party, with no record of FECA litigation). Indeed, they erroneously cite a case that *was* based on prosecutorial discretion. *See* First General Counsel's Report 2, MUR 7766 (Fl. Country), June 17, 2021, https://perma.cc/C4GG-8895 (recommending "Commission exercise its prosecutorial discretion to dismiss"); Certification, MUR 7766 (Fl. Country), Nov. 9, 2021, https://perma.cc/DVJ9-3R9V (commissioners voting to adopt recommendation to "dismiss" allegations).

B. *New Models* Conflicts with Settled Administrative Law

In addition to the FECA precedents discussed above, *New Models* further conflicts with earlier settled authority on administrative law that leaves the FEC as an agency unlike any other: a "law unto itself." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting).[7]

First, *New Models* conflicts with the rule that it is "formal action, rather than its discussion, that is dispositive" on reviewability. *ICC v. Bhd. Of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987). The question of "judicial review of a final agency action" is a matter "of Congress," *Abbott Labs v. Garder*, 387 U.S. 136, 140 (1967), rather than something commissioners can voluntarily decline, *cf. Heckler*, 470 U.S. at 837 (nonenforcement decisions categorically unreviewable under APA). "[T]he availability of judicial review [does not] turn[] on an agency's prose composition," *New Models*, 993 F.3d at 887, and thus cannot depend on whether a "statement of reasons explain[ing] the dismissal turned in whole or in part on enforcement discretion," *id.* at 894; *cf. id.* at 883 (courts cannot "teas[e] out" reviewable reasons from unreviewable action).

[7] *See also generally* Br. of Profs. of Administrative Law as *Amici Curiae* in Supp. of Pls.-Appellants, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 30, 2021) (*New Models* contravenes "clear statutory test (and an on-point Supreme Court case interpreting that text)" and "lacks support in the law").

Here, the *action* the agency took was to deadlock on a vote to find reason to believe a violation occurred, and then the agency expressly declined to exercise any prosecutorial discretion, and finally the agency closed the case by a 5-1 vote. JA270–73. There is no dispute that the reason the commissioners closed the case is because of the earlier deadlock on the reason to believe vote—had the blocking commissioners voted otherwise, the investigation would have opened irrespective of their vote to exercise prosecutorial discretion. Accordingly, where there is a "dismissal due to a deadlock" on a reason to believe vote, courts reasonably look to review that "deadlock[ing]" action, *DCCC*, 831 F.2d at 1133, and Congress "explicitly" provided for review of such votes, *Akins*, 524 U.S. at 26. Consequently, the judgment here against reason-to-believe is reviewable, and the commissioners' attempt to "justify [that] reviewable action with a discretionary reason, … does not thereby [render that action] unreviewable," *Commission on Hope II*, 923 F.3d at 1148 (Pillard, J., dissenting).

Second, *New Models* conflicts with the obligation to provide an explanation "rational[ly] connect[ed] [to] the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983). Here, the choice made was to close the file due to three commissioners negatively adjudicating ECU's complaint. Accordingly, the commissioners must "state their reasons why" they voted that there was no reason to believe a violation

occurred. *DCCC*, 831 F.2d at 1132. In other words, because the commissioners adjudicated the complaint on the merits, any justification must be "rational[ly] connect[ed]" to the merits. *State Farm*, 463 U.S. at 43.

Prosecutorial discretion cannot explain, however, a decision adjudicating a private complaint on the merits. *Burlington*, 513 F.3d at 247 ("prosecutorial discretion" may only "settle[e] [agency's] own claims"); *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) ("If [the] failure to [enforce] results from the desire of the [commissioners] to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense."); *cf. New Models II*, 55 F.4th at 919 (Rao, J., concurring) (only "an agency's refusal to institute" *its own* "proceedings falls within 'the special province of the Executive Branch'"). In other words, an invocation of prosecutorial discretion is a *non-sequitur* when commissioners are obliged to explain their adjudication of a complaint on the merits. Courts reviewing such adjudications are not called upon to review the "unreviewable," *cf. New Models II*, 55 F.4th at 919 (Rao, J., concurring); rather, they disregard it as beside the point. The commissioners' obligation is to explain why the complaint lacks merit and why *the complainant* should not be permitted to bring the claim *on their own*; a question which does not turn on matters "peculiarly within [the agency's] expertise" and for which there is always "law to apply." *Heckler*, 470 U.S. at 831, 836.

Moreover, even if prosecutorial discretion could be a lawful justification for the FEC to prevent a private complainant from pursuing their own claims, it was not a justification the agency—as distinct from a few individual commissioners—invoked here. *Cf. End Citizens United*, 2022 WL 4289654, *5 (erroneously stating "the *FEC*[] reli[ed] on prosecutorial discretion to dismiss" (emphasis added)). Here, there is only a "fleeting reference to prosecutorial discretion by a Commission minority—not by the Commission itself." *New Models II*, 55 F.4th at 926–27 (Millett, J., dissenting). Rather, the case was dismissed only because five commissioners voted to close the file.[8] Two of those five commissioners—each necessary to provide the decisive vote to close the file, *see* 52 U.S.C. § 30106(c)—expressly declined to invoke any powers of prosecutorial discretion. Settled precedent provides that an explanation for that action must come from all five of

[8] The previous deadlock in May did not close the file because a deadlock does not automatically dismiss a case. *Cf. New Models*, 993 F.3d at 891 (referring to "deadlock dismissals"). For example, in the matter *New Models* cites for "deadlock dismissals," *Common Cause*, 842 F.2d 436, the case closed in 1983, not at the time of the deadlock in 1980, which is why plaintiffs suit brought in 1983 was timely, *id.* at 438–39; *see also* Br. of *Amicus Curiae* CREW in Supp. of FEC Mot. to Dismiss 13–14, *45Committee v. FEC*, 1:22-cv-01749 (D.D.C. Aug. 29, 2022), ECF No. 18-1. Similarly, in *Commission on Hope*, the D.C. Circuit recognized dismissal occurred "in 2015" with the vote "to close the file," *Commission on Hope I*, 892 F.3d at 441 n.13, not at the time of the 2014 deadlock. It is the majority vote to "clos[e] the file" that "terminat[es] [the FEC's] proceedings." *Doe, 1 v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019). The rule permits the FEC to reconsider matters after a deadlock, which it often does. *See, e.g.*, Certification, MUR 6920 (ACU) (Jan. 24, 2017), https://perma.cc/SST6-2TR2 (approving conciliation after prior deadlock on merits).

the deciding commissioners, not from some different, smaller, subset who have demonstrably different justifications for dismissal. *Local 814, Int'l Broth. of Teamster v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976) (explanation must come from "the proper decisionmakers," all others are impermissible post-hoc rationalizations); *see also Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 92–93 (D.C. Cir.1995) (agency statements must enjoy "majority-suppor[t]"). Rather, as is clear from the statement of reasons of one of those commissioners, *see* JA274–80, and from the voting record, each of the decisive commissioners voted to close the case because the three other commissioners adjudicated ECU's complaint on the merits. Accordingly, the dismissal would only be lawful if that adjudication on the merits withstood judicial review, so courts require the blocking commissioners to provide "an explanation for [that] deadlock." *Common Cause*, 842 F.2d at 449, which necessarily must have a "rational connection" to their conclusion on the merits, *State Farm*, 463 U.S. at 43.

Prosecutorial discretion is no more of a "sufficient" explanation for the commissioners' act than would be for a district court in explaining its decision to dismiss of a lawsuit. *Cf. End Citizens United*, 2022 WL 4289654, at *5. Prosecutorial discretion is thus, by necessity, a "pretextual basis" offered only to cut off review because it has no rational connection to the act under review. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). That can be

demonstrated by considering what would result if the three commissioners had joined with their colleagues to form a majority to adjudicate the complaint as raising a reason to believe but also still voted to exercise prosecutorial discretion. There is no dispute that in such a case the FEC would investigate, or the declination would trigger ECU's right to pursue its own relief in court.

Third, *New Models* ignores the rule that courts "are [not] free to guess … what the agency would have done had it realized that it could not justify its decision" through the analyses provided. 993 F.3d at 902, n.5 (Millett, J., dissenting) (quoting *Int'l Union, United Mine Workers v. Dep't of Labor*, 358 F.3d 40, 44–45 (D.C. Cir. 2004)); *accord Commission on Hope II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Akins*, 524 U.S. at 25). That three commissioners have expressed a wish to exercise prosecutorial discretion doesn't establish the agency—the is a majority of the Commission—will vote to do so on remand. Similarly, even if "the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason," *Akins*, 524 U.S. at 25, judicial review would not produce an "advisory opinion," *cf. New Models II*, 55 F.4th at 921 (Rao, J., concurring). That is because a decision by three commissioners to stymie further action on remand would be a failure to "conform," that would trigger the complainant's right to bring their own private action. 52 U.S.C. § 30109(a)(8)(C). "Even if the Commission were determined for reasons

within its discretion not to pursue this case, a judicial decision on whether the complaint shows reason to believe the Act was violated has concrete consequences for the ability of private complainants to file suit." *New Models II*, 55 F.4th at 928–29, (Millett, J., dissenting).

New Models exempts the FEC from these general rules of administrative law. Indeed, by ignoring the FECA's structure and subjecting private complainants' right to seek judicial relief to an unreviewable veto by a partisan block of executive officials, *New Models* "impermissibly threatens the institutional integrity of the Judicial Branch." *CFTC v. Schor*, 478 U.S. 833, 851 (1986). By abandoning judicial review of FEC adjudication of private complaints, courts are not avoiding "order[ing] the Executive Branch to undertake an enforcement action it opposes," but rather empowering that branch to preclude private individuals from appealing to the judiciary by "bring[ing] a lawsuit in [their] own name under the Act." *New Models II*, 55 F.4th at 929 (Millett, J., dissenting). To avoid "offend[ing] the separation of powers," however, "Article I adjudicators" may only "decide claims submitted to them by consent" and only "so long as Article III courts retain supervisory authority over the process." *Wells v. Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015); *see also Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 475 (D.C. Cir. 2020) (existence of "appellate review" that provides "adequate opportunity to secure judicial protection against arbitrary action"

necessary for agency adjudication to satisfy due process); *CLC v. Iowa Values*, 573 F. Supp. 3d 243, 256 (D.D.C. 2021) (complainant's § 30109 claims do not assert "public rights," but private ones). *New Models* violates all these conditions. No party consents to present their private right claims to the FEC; rather, they do so under mandate of the FECA, *Perot*, 97 F.3d at 559. Worse still, *New Models* subjects Article III court's supervisory authority to "a judicial-review kill switch" operated at the whim of Article I bureaucrats not subject to any "degree of electoral accountability." *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); *see* 52 U.S.C. § 30106(a)(1) (President forbidden from appointing majority of like-minded commissioners). Not only do separation of power concerns "ha[ve] no purchase" here, *New Models II*, 55 F.4th at 929 (Millett, J., dissenting), *New Models* violates the separation of powers.

New Models departure from precedent also offends the First Amendment by subjecting private parties' First Amendment rights to receive information and speak to the "unbridled discretion" of an electorally-unaccountable partisan-aligned non-majority, *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), who may censor access to "facts"—"the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011)—and thus "necessarily reduce[] the quantity of expression" by plaintiff and others, *Citizens United v.*

FEC, 558 U.S. 310, 341 (2010) (FEC acts unconstitutionally when it blocks "voters [ability] to obtain information"); *see also Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) ("First Amendment rights … to know the identity of those who seek to influence their vote."). *New Models* presents "serious constitutional problems" due to its complete departure "the intent of Congress" from all precedent. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Under *New Models*, not just the FEC, but a partisan-aligned non-majority bloc of FEC commissioners are "law unto [them]sel[ves]." *New Models II*, 55 F.4th at 922 (Millett, J., dissenting). By mere incantation, they may override Congress's choice to subject dismissals to judicial review; they may provide explanations with no rational connection to the action to be explained; they may exercise powers the agency declines; they may disregard court orders; they may unilaterally issue new rules and interpretations that will guide regulated parties and deprive citizens of their rights; they may discriminate by viewpoint; and they have complete discretion to shut the courthouse door to private disputes between private parties. *New Models* represents not only a departure from standard precedents in administrative law, but a revolution. But this Circuit does not permit such

revolutions in precedent to issue from opinions of a divided panel, and thus *New Models* must be disregarded.

CONCLUSION

The court below terminated ECU's attempt to seek relief for its injuries against third parties because a non-majority of the FEC used magic words to prevent the court from evaluating their adjudication of ECU's claim on the merits. Under the decision upon which the district court relied, *New Models*, and the decision on which that case relied, *Commission on Hope*, "the statutory promise of judicial review for aggrieved persons has been turned into a game that only the commissioners can play." *New Models II*, 55 F.4th at 932 (Millett, J., dissenting). But these cases represent radical departures from settled precedent in this Circuit and from the Supreme Court involving the FECA and administrative law, and the Constitution generally, and therefore the district court erred in relying on them.

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I hereby certify that on February 1, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

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