IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. **FEDERAL ELECTION COMMISSION**, Defendant.	Civil Action No. 22-35-CRC

PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") hereby respectfully responds to the Court's order to show cause "why the case must not be dismissed in light of the D.C. Circuit's ruling in *CREW v. FEC* (*New Models*), 993 F.3d 880 (D.C. Cir. 2021), and its recent denial of en banc review in that case" due to "the likelihood that the Court lacks jurisdiction." Minute Order (D.D.C. Feb. 8, 2022). Neither *New Models*, nor the en banc court's denial of rehearing, provide cause to dismiss this action.

When CREW filed this suit, there was no statement by the three commissioners who chose to block further proceedings against Freedom Vote—an organization that was the subject of an incredibly rare FEC investigation which produced overwhelming evidence of its status as an unregistered political committee. Only months after this suit began, and after learning the FEC would not defend their meritless analysis, did they issue a belated statement that, by its own terms, purports to invoke prosecutorial discretion for some of the issues involved, but not the "bulk" of them. Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR 7465 (Freedom Vote) (Mar. 7, 2022),

https://bit.ly/3RMsuwM ("Dickerson Statement").

That belated statement, however, does not undermine the basis of this suit, particularly for a lack of jurisdiction, as "reviewability [under the FECA] is not a jurisdictional issue." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020). First, *New Models* only purports to prohibit review of claims over which the commissioners invoke prosecutorial discretion, and by its own terms, the Dickerson Statement does not purport to exercise discretion over claims arising before November 9, 2016, Dickerson Statement 7—which wholly encapsulates CREW's claims against Freedom Vote. Second, the Dickerson Statement is also inadmissible in any event as it is the belated statement of a group other than the decisionmakers here: the four commissioners who voted to close the file and who include among them a decisive commissioner who has explicitly declined to invoke prosecutorial discretion. Third, even if the statement were admissible and covered CREW's claims, *New Models* cannot compel dismissal because its conflict with prior precedent of this Circuit and the Supreme Court render it "not binding." *CREW v. FEC (CHGO II)*, 923 F.3d 1141, 1145 (D.C. Cir. 2019) (Pillard, J., dissenting).

BACKGROUND

On August 8, 2018, CREW filed an administrative complaint with the FEC alleging, among other things, that Freedom Vote qualified as a political committee no later than 2016 but failed to register and file required disclosures. Compl. ¶¶ 1, 26. CREW's complaint detailed extensive political spending by Freedom Vote, *id*. ¶¶ 27, 28, and an FEC investigation initiated by the Commission's unanimous reason-to-believe vote "obtained overwhelming evidence" that Freedom Vote was an unregistered political committee by 2014, Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub 2, MUR 7465 (Freedom Vote) (Dec. 16, 2021) https://bit.ly/3Ie0XRy ("Broussard Statement"). Nonetheless, the Commission failed to pursue conciliation as, on November 9, 2021, the Commission

deadlocked 3-3 on a vote to find probable cause Freedom Vote violated the FECA. Compl. ¶ 39. In addition, the Commission rejected a motion to exercise prosecutorial discretion in this case. *Id.* Nonetheless, the Commission closed the case when one Democratic commissioner who wished to proceed joined her Republican colleagues to "close the file." *Id.*¶ 40; Certification, MUR 7465 (Freedom Vote) (Nov. 9, 2021), https://bit.ly/3jNIBxr.

Shortly after the vote to close, and before the expiration of CREW's sixty days to challenge the dismissal, 52 U.S.C. § 30109(a)(8)(B), the Democratic commissioners who voted to find probable cause released a statement explaining the dismissal. They explained that they "strongly" supported proceeding, but closed the case because "three of [their] colleagues voted against" doing so. Broussard Statement 1. They explained further that the "primary basis of [their] colleagues' refusal to support the [FEC General Counsel's] recommendation" was "the statute of limitations." *Id.*at 6.

CREW brought this suit on January 6, 2022, within sixty days of the dismissal. At that time, the Republican commissioners had issued no independent explanation of their judgment that there was no probable cause to believe Freedom Vote violated the law. On February 18, 2022, the FEC declined to defend this suit. Certification, No. 22-cv-35 (CRC) (Feb. 15, 2022), https://bit.ly/3IfPxNg. On March 20, 2022, the FEC defaulted on CREW's suit, and CREW sought and obtained an entry of default.

On March 7, 2022—118 days after closing this case, 81 days after their colleagues' issued their statement, 60 days after CREW filed its suit, and 17 days after losing their vote to defend this suit, the three Republican commissioners who judged this action to not establish

probable cause issued a belated statement.[1] In it they said, "[b]y the time this Matter was presented to the Commission for a probable-cause determination, … the five-year statute of limitations had expired on the bulk of Freedom Vote's alleged FECA violations." Dickerson Statement 1. Accordingly, they voted to find no probable cause these violations occurred. *Id.* Further, with respect to "alleged violations that were not time-barred," they stated they elected to "exercise … prosecutorial discretion." *Id.* The statement goes on to explain that the commissioners believed allegations that Freedom Vote became a political committee prior to November 9, 2016, as well as a disclaimer claim related to a 2016 ad, were time-barred. *Id.* at 2 n.7, 4. They said claims that Freedom Vote failed to file disclosures after November 2016 carried "litigation risk" because the statute of limitations was "imminent," and said they supported prosecutorial discretion to dispose of those claims. *Id.* at 8–10.

ARGUMENT

Neither the *New Models* decision, nor the denial en banc,[2] compel dismissal here. As an initial matter, reviewability under *New Models* is "not a jurisdictional issue." *CLC*, 952 F.3d at 356. Turning to the substance, first, even treating the Dickerson Statement as controlling here, it does not, by its own terms, justify dismissing CREW's complaint against Freedom Vote based on prosecutorial discretion, but only invokes prosecutorial discretion with regard to a subset of potential claims arising from failures to disclose in late 2016. Second, the Dickerson Statement is not controlling because it was not issued "at the time" of the closure, *Common Cause v. FEC*,

[1] Commissioner Cooksey subsequently issued a supplemental statement on his own. Supplemental Statement of Reasons of Commissioner Sean J. Cooksey, MUR 7465 (Freedom Vote) (Mar, 9, 2022), https://bit.ly/3Ihkil7.

[2] The en banc court did not endorse *New Models*, but rather only declined to consider it, *see CREW v. FEC (New Models II)*, 55 F.4th 918, 918–19 (D.C. Cir. 2022), and, by an "evenly-split decision," its precursor, *CHGO*, *id.* at 926 (Millett, J., dissenting); *see CHGO II*, 923 F.3d 1141, and "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).

842 F.2d 436, 449 (D.C. Cir. 1988), and does not reflect the view of the "decisionmakers," *Local 814, Int'l Broth. of Teamster v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). Finally, *New Models* cannot compel dismissal because it is "not binding" due to its conflict with prior decisions of the D.C. Circuit and Supreme Court. *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting).

A. FECA Reviewability is Not Jurisdictional

As a preliminary matter, the Court asked CREW to address whether the case must be dismissed because of 'the likelihood that the Court lacks jurisdiction" because the case is not reviewable under *New Models*. Minute Order. "[R]eviewability [under the FECA] is not a jurisdictional issue," however. *CLC*, 952 F.3d at 356; *see also Califano v. Sanders*, 430 U.S. 99, 107 (1977) (APA reviewability is not jurisdictional). "[A] complaint seeking review of agency action 'committed to agency discretion by law' has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6), not under the jurisdictional provisions of Rule 12(b)(1)." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). Accordingly, even if *New Models* precluded review here, the defect would not impact this Court's subject-matter jurisdiction. Moreover, *sua sponte* dismissal for failure to state a claim is permissible only where a plaintiff "cannot possibly win relief," *Best v. Kelly*, 39 F.3d 328, 331 (D.C. Cir. 1994), which, for the reasons stated herein, does not apply to this case.

B. No Commissioner Purports to Invoke Discretion to Dismiss CREW's Claims

New Models precludes judicial review where the dismissal "rests on prosecutorial discretion." *New Models*, 993 F.3d at 882. Where commissioners do "not cite [] prosecutorial discretion in dismissing [a] complaint regarding [a] claim," however, a court may review it, even where they cite discretion to dismiss other parts of the case. *End Citizens United PAC v. FEC*, No. 21-21289(RJL), 2022 WL 4289654, at *6 (D.D.C. Sept. 16, 2022); *see CREW v. FEC (CHGO)*, 892 F.3d 434, 438 n.6 (D.C. Cir. 2018) (discussing *FEC v. Akins*, 524 U.S. 11, 25

(1998) and noting Commission there "invoked prosecutorial discretion to dismiss [one] charge," but that plaintiffs could challenge "the remaining charge"). Here, no commissioner cited prosecutorial discretion to dispose of CREW's claims, even if they did so with respect to other claims, so the Court may review the Commission's disposition of CREW's claims.

In the Dickerson Statement, the commissioners expressly cabined their claim to prosecutorial discretion to only "violations that were not time-barred." Dickerson Statement 1. They recognized that this excluded the "bulk" of the claims in the case. *Id.* Among those claims was the claim that Freedom Vote qualified as a political committee due to its activities prior to November 9, 2016. *Id.* at 4. That, however, covers the entirety of the claims asserted by CREW.

In its complaint to the FEC, CREW alleged that "between October 1, 2015 and September 30, 2016 … about 80% of [Freedom Vote's] spending was political." Compl. Ex. 1, ¶ 2. CREW further alleged that electioneering constituted 61.3% of Freedom Vote's expenses from October 1, 2013 to September 30, 2014, *id.* ¶ 59, and that even considering Freedom Vote's spending from October 1, 2011 to September 30, 2016, electioneering amounted to 71.3% of its spending, *id.* ¶ 61. CREW also alleged Freedom Vote made more than $1,000 in expenditures in 2014 and 2016, and accepted over $1,000 in contributions those same years. *Id.* ¶ 53. Accordingly, CREW alleged that Freedom Vote "was a political committee starting in 2014 and certainly no later than 2016." *Id.* ¶ 51.

Accordingly, by their own terms, the commissioners expressly did not invoke prosecutorial discretion to dismiss CREW's claims as those claims all concerned activity the commissioners (erroneously) believed were time-barred.[3] Rather, they invoked discretion to

[3] Though the merits of the analysis are not yet at issue, the statute of limitations "does not preclude equitable relief" here. *CLC v. FEC*, 19-2336(JEB), 2022 WL 17496220, at *8 (D.D.C.

refuse to pursue claims raised by the FEC's General Counsel: That Freedom Vote had failed "to file a 2016 Post-General Report … and a 2016 Year-End Report." Dickerson Statement 8. Thus, the only claims that could be unreviewable under *New Models* are claims related to those two specific reports. CREW's claim, however, that Freedom Vote's actions qualified it as a political committee before November 9, 2016 are, by even the express terms of the commissioners, still reviewable.

C. Post-Hoc Statements, Particularly by Non-Decisionmakers, Cannot Preclude Review

More fundamentally, the belated Dickerson Statement cannot preclude review because it was not issued "at the time" of the dismissal, *Common Cause*, 842 F.2d at 449, but rather represents a "post hoc rationalization," *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020), and by a group other than the "decisionmakers" no less, *Local 814*, 546 F.2d at 992. Agencies may not "offer post-hoc rationalizations where no [contemporaneous] rationalization exists," and courts will not consider them. *AT&T Info. Sys., Inc. v. GSA*, 810 F.2d 1233, 1236 (D.C. Cir. 1987). Here, there was no statement by the Republican commissioners to explain their judgment at the time of the dismissal—indeed there was none offered in the sixty days CREW was required to sue or forfeit its claim. Rather, it appeared only after the commissioners learned the FEC declined to expend resources to defend the indefensible: their abdication of enforcement against Freedom Vote. As such, it is no more than a "convenient litigating position," offered only to "defend past agency action against attack.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (court will not rely on "pretextual basis"

Dec. 8, 2022) (citing *Saad v. SEC*, 980 F.3d 103, 107 (D.C. Cir. 2020)); *accord New Models*, 993 F.3d at 902 n.4 (Pillard, J., dissenting) (noting FEC "walked back any reliance on statute of limitations" (citing *Saad v. SEC*, 980 F.3d 103, 107 (D.C. Cir. 2020)).

offered to benefit litigation).

It makes no difference that the statement "was written by the [c]ommissioners who voted" against probable cause. *Cf. End Citizens United PAC v. FEC (ECU)*, No. 21-cv-1665 (TJK), 2022 WL 1136062 (Apr. 18, 2022). The bar "prohibit[s] … post hoc rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker." *Regents*, 140 S. Ct. at 1909; *see also IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 76 (2022) (criticizing and refusing to follow *ECU* for relying on speaker's identity). "The functional reasons for requiring contemporaneous explanations apply with equal force regardless of whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves." *Regents*, 140 S. Ct. at 1909; *see also CHGO*, 892 F.3d at 438 n.5 (FEC commissioners may not "*sua sponte* update the administrative record when an action is pending in court").[4]

Indeed, here, the statement was not written by the agency "decisionmakers," i.e., those who voted to dismiss CREW's complaint. *Local 814*, 546 F.2d at 992; 52 U.S.C. § 30109(a)(8)(A) (party may challenge "order of the Commission dismissing a complaint"). CREW's complaint was dismissed only because four commissioners, a majority, voted to dismiss the complaint. Compl. ¶ 40. Commissioner Broussard was part of that four. *Id.*; Certification (Nov. 2021). Accordingly, she is a necessary component of any statement from the

[4] *ECU* disregarded this admonishment because it believed *CHGO* only refused to consider "one [c]ommissioner's rationale for voting to proceed" who was not among those voting to block enforcement. *ECU*, 2022 WL 1136062, at *3 n.4. Not so—the Court also disregarded a statement by one of the controlling commissioners published after CREW's suit. *See* Supplemental Statement of Commissioner Lee E. Goodman, MUR 6391/6471 (CHGO) (Mar. 3, 2016), https://bit.ly/3xb0b1u; Certification, MUR 6391/6471 (CHGO) (Oct. 1, 2015), https://bit.ly/3xfqiEo (Goodman part of blocking commissioners). *CHGO*, moreover, did not point to the identity of the speaker, but the untimeliness of the submission, to disregard them.

decisionmakers. FEC, Statement of Policy, 72 Fed. Reg. 12546 (Mar. 16, 2007) ("[D]ismissal of a matter requires the vote of at least four Commissioners."); *Oil, Chem., 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]"). Commissioner Broussard explained that she "strongly" supported enforcement, but voted to close the file because "three of [her] colleagues voted against" finding probable cause here. Broussard Statement 1. She understood her colleagues were concerned about the running of the statute of limitations. *Id.* at 1, 6. Moreover, she expressly voted against exercising any prosecutorial discretion to dismiss this case. Certification (Nov. 9, 2021).

Commissioner Broussard's citation of her three colleague's intransigence as the motive for her vote to close thus accords with courts' expectations: where there is a deadlock and a commissioner who otherwise would pursue the investigation nonetheless votes to dismiss, the "dismissal [is] due to [that] deadlock." *DCCC v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). Courts therefore look to review that "deadlock[ing]" action, *id.*, and so require "an explanation for [that] deadlock," *Common Cause*, 842 F.2d at 449, so they may "intelligently determine whether the Commission is acting 'contrary to law.'" *DCCC*, 831 F.2d at 1132. Accordingly, the statement of blocking commissioners is not a substitute for the statement required of the majority of commissioners to explain the dismissal; rather, the blocking commissioners' statement's usefulness to judicial review of a dismissal rests on the assumption that the majority dismissed because of the deadlock on the merits, and that that dismissal would thus only be lawful if the blocking commissioners were correct on those merits.

That assumption, however, does not transfer, and cannot transfer consistent with the law, the power that may only be exercised by the majority. 52 U.S.C. § 30106(c). Accordingly, the blocking commissioners are not given free rein to explain a "dismissal," particularly to invoke

powers the agency has rejected. Rather, the blocking commissioners must explain their judgment on the merits—here a vote that there was no probable cause to believe Freedom Vote violated the law which, if sustained, precludes not only FEC enforcement but also CREW's right to seek its own relief in court—and that explanation must have a "rational connection between the facts found and the choice made." *Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983).

Prosecutorial discretion cannot explain, however, a decision adjudicating a private complaint on the merits. *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) ("prosecutorial discretion" may only "settle[e] [agency's] own claims"); *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'"); *see also 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."). Accordingly, whatever explanation prosecutorial discretion could play if invoked by the "decisionmak[ing]" majority of commissioners, *Local 814*, 546 F.2d at 992, it cannot be invoked to explain what the Dickerson Statement must explain here: their judgment the investigation failed to establish probable cause.

While courts considering FECA dismissals have not studiously required contemporary explanations consistent with the judgment of the decision-making majority of the Commission, the tardiness and consistency of the statements were never "brought to the attention of the court[s] nor ruled upon, [and thus] are not considered as having been so decided as constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Further, those decisions all predate *Regents* and assumed a later explanation by a subset of the decisionmakers was sufficient. But

permitting such after-the-fact statements undermines "'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Regents*, 140 S. Ct. at 1909. CREW filed suit before the Dickerson Statement issued—indeed it had to, or it would forfeit the opportunity to challenge the dismissal—and so could only guess whether it would mention prosecutorial discretion, and for which claims. Indeed, not only is CREW facing a moving target, but so are three FEC commissioners, who must guess whether their colleagues will invoke discretion at some later date to cut off review in deciding whether to close a file.

In addition to focusing on the speaker, and the wrong set of speakers at that, *ECU* wrongly assumed remanding the case would simply "give 'the Commission or the individual [c]ommissioners ... an opportunity to say why [End Citizens United's] complaint was dismissed,'" which the court assumed would be the same belated statement before it. *ECU*, 2022 WL 1136062. But that is not so, as this Court is well aware. 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. *New Models*, 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)). Even if "the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason," a court may "set aside [FEC] action and remand [a] case . . . even though the agency . . . might later . . . reach the same result" because the court "cannot know" how the Commission will respond on remand. *Akins*, 524 U.S. at 25. If this Court declares the dismissal here contrary to law and provides the correct guidance on the law, the effect would be to remand to "[r]equir[e] a new decision before considering new reasons." *Regents*, 140 S. Ct. at 1909; *see also* 52 U.S.C. § 30109(a)(8)(C) (Commission must decide whether to conform with this court's declaration). Even if the three commissioners wish to exercise prosecutorial discretion as they

expressed in the Dickerson Statement—or even to exercise it in response to the whole case—that is not enough to dispose of this case. *See, e.g.*, Certification, MUR 6589R (Am. Action Network) (May 10, 2018), https://bit.ly/3xea3aQ. Rather, unless they convince another commissioner to switch their vote, the Commission would fail to conform and CREW would be empowered to bring suit in its own name. 52 U.S.C. § 30109(a)(8)(C).

Accordingly, even if the Dickerson Statement claimed to exercise prosecutorial discretion to dispose of CREW's claims, it could not do so. It is a post-hoc rationalization that is not even from the decisionmakers—the four commissioners who closed the file—and does not reflect the record that the four did not agree to exercise prosecutorial discretion, but rather only closed the file due to the deadlock on the merits.

D. *New Models* Cannot Compel Dismissal Because it is "Not Binding"

Finally, *New Models* cannot compel dismissal here because it is "not binding" as it, and its precursor, *CHGO*, "conflicts with … the Supreme Court's decision in [*Akins*], 524 U.S. 11[]; and with [this Circuit'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)]." *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting) (citing *Sierra Club*, 648 F.3d at 854 ("[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*, 952 F.3d at 358–59 (Edwards, J., concurring); *see also Rockwell Cap. Partners, Inc. v. CD Int'l Enter., Inc.*, 311 F. Supp. 3d 52, 56 n.3 (D.D.C. 2018) ("To the extent that [a later Circuit decision] is contrary to [an earlier decision], the Court is bound to follow [the earlier decision] because it was decided first."). Further, the cases conflict with administrative law precedent and create serious tension with separation of powers principles and the First Amendment.

1. *New Models* Conflicts with FECA Precedent

Prior to *CHGO*, all precedent on point recognized that every adjudication by the FEC of a private party's complaint was reviewable. *CHGO*, however, *sua sponte* departed from that precedent without even mentioning it, and *New Models* expanded on that departure.[5]

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, pointing to the FEC's discretion in remedy, *id.*at 890 (citing 52 U.S.C. § 30109(a)(6)(A)). 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 CHGO II*, 923 F.3d at 1146 (Pillard, J., dissenting); *CLC*, 952 F.3d at 361 (Edwards, J., concurring), in a case over which the FEC also had discretion as to the remedy. 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's attempt to distinguish *Akins* fails. *New Models* claims *Akins* is limited to dismissals based on "only legal reasons," *New Models*, 993 F.3d at 889, n.8, but the FEC claimed

[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").

the dismissal was discretionary. 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). The Court did not dispute that characterization, but rather said review extends to even "discretionary agency decision[s]" to correct any "improper legal ground" given to support dismissal. *Akins*, 524 U.S. at 25.

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 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*, 842 F.2d at 449 (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 that "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 CHGO II*, 923 F.3d at 1150 (Pillard, J., dissenting) (Commission "oblig[ed] to pass on the merits of a complaint," and "[i]f three [c]ommissioners 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)). *Chamber* understood that the FEC's discretionary dismissal was not only reviewable but would inevitably expose the plaintiffs to a citizen suit.

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.'" *CHGO 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. *CHGO 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.

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 *CHGO* decision, two-thirds of dismissals contrary to the agency's general counsel's recommendation have cited prosecutorial discretion). *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.

Courts in this Circuit are bound to follow the earlier line of cases that faithfully applied the FECA and to disregard *CHGO* and *New Models*.

2. 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).[6]

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). "[J]udicial 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

[6] *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").

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).

Here, the action taken was a deadlock on a probable cause vote, and then the agency expressly declined to exercise any prosecutorial discretion, and finally the agency closed the case by a 4-1 vote. Accordingly, where there is a "dismissal due to a deadlock" on a probable cause 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; *see also CREW v. AAN*, 590 F. Supp.3d 164, 172 (D.D.C. 2022) (noting under Supreme Court authority, reviewability depends on action, not discussion, and the "underlying 'action' in cases under [§ 30109(a)(8)] is always the same," and "[t]he statute makes that action reviewable"). Consequently, the judgment here against probable cause is reviewable, and the commissioners' attempt to "justify [that] reviewable action with a discretionary reason, … does not thereby [render that action] unreviewable." *CHGO II*, 923 F.3d at 1148 (Pillard, J., dissenting).

Second, insofar as *New Models* permits the non-majority to explain their decision on the merits with a claim of prosecutorial discretion, it conflicts with the obligation to provide an explanation "rational[ly] connect[ed] [to] the facts found and the choice made." *State Farm*, 463 U.S. at 43. As discussed above, prosecutorial discretion cannot explain an adjudication on the merits that disposes of a private party's claim against a third-party. *Burlington*, 513 F.3d at 247; *New Models II*, 55 F.4th at 919 (Rao, J., concurring). And it is only that adjudication of the merits—not their failed vote to exercise prosecutorial discretion—that deadlocked the agency

and motivated Commissioner Broussard to join them to vote to close.

Third, as discussed above, *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,* 358 F.3d at 44–45); *accord CHGO II*, 923 F.3d at 1147 (Pillard, J., dissenting) (quoting *Akins*, 524 U.S. at 25). 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 failure to secure a majority to proceed or dismiss 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 [probable cause] 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 v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). Worse still, *New Models* subjects Article III courts' supervisory authority to "a judicial-review kill switch," *New Models II*, 55 F.4th at 922 (Millett, J., dissenting), operated at the whim of a partisan bloc 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* conflicts with 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 to 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"); *Akins*, 101 F.3d at 744 (FEC's discretion "raises First Amendment concerns"); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) (recognizing "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 from "the intent of Congress" and 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). *New Models* represents not only a departure from standard precedents in administrative law, but a revolution. But such revolutions may not issue from opinions of a divided panel, and thus *New Models* must be disregarded.

CONCLUSION

Neither *New Models* nor the en banc court's denial of rehearing provide cause for this case to be dismissed, whether for a lack of jurisdiction or otherwise. The statement by the blocking commissioners by its own terms does not purport to invoke prosecutorial discretion to address CREW's claims, nor is it admissible as it is a belated statement not reflecting the opinion of the decisionmakers here: the four commissioners who chose to dismiss the action. Finally, *New Models* conflicts with prior case law of this Circuit and the Supreme Court, and is therefore "not binding." *CHGO II*, 923 F.3d at 1145 (Pillard, J., dissenting). It cannot provide a justification for dismissal here.

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Respectfully submitted,

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Certificate of Service

I certify that on February 15, 2023, I caused service of the attached motion and supporting documents to be made on defendant Federal Election Commission by U.S.P.S. First Class Mail as follows:

Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

/s/ Stuart C. McPhail
Stuart C. McPhail