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WASHINGTON, D. C. 20463

**Statement of Commissioner Ellen L. Weintraub
On the Opportunities Before the D.C. Circuit in the *New Models* Case
To Re-Examine *En Banc* Its Precedents Regarding ‘Deadlock Deference’**

March 2, 2022

The D.C. Circuit is currently considering a petition to rehear *en banc* *CREW v. FEC*, D.C. Cir. Case No. 1:18-cv-00076-RC (“*New Models*”) on the issue of the reviewability of Federal Election Commission (“FEC” or the “Commission”) decisions involving prosecutorial discretion.¹

The full Circuit absolutely should vacate the panel’s decision and overturn the precedent set by *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (“*CHGO*”).² *New Models* and *CHGO* were fundamental misreadings of the law that have eliminated the public’s ability to challenge the FEC when it improperly dismisses enforcement complaints.³ The petition for rehearing ably makes the argument for rehearing regarding prosecutorial discretion.⁴

But the full D.C. Circuit can and should go further than the Petition suggests. I urge the Court to include as part of its rehearing a re-examination of its precedents regarding deference to a non-

¹ The *New Models* case stems from MUR 6872 (New Models); see Statement of Reasons of Commissioner Ellen L. Weintraub, Dec. 21, 2017, found at <https://eqs.fec.gov/eqsdocsMUR/17044435602.pdf>; Chair Ellen L. Weintraub, Statement Re: D.C. District Court Decision in *CREW v. FEC* (*New Models*), April 5, 2019, found at https://www.fec.gov/resources/cms-content/documents/2019-04-05_ELW_Statement_-_DDC_decision_in_New_Models.pdf.

² The *CHGO* case stems from MURs 6391 and 6471 (Commission on Hope, Growth & Opportunity (“CHGO”)); see Statement of Reasons of Commissioner Ellen L. Weintraub, Nov. 5, 2015, found at <https://eqs.fec.gov/eqsdocsMUR/15044381181.pdf>; Vice Chair Ellen L. Weintraub, Statement on the D.C. Circuit’s Decision in *CREW v. FEC*, June 22, 2018, found at https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf.

³ Just today, a D.C. District Court provided a fresh example of how *New Models* and *CHGO* shut down meaningful judicial review of Commission dismissals and failures to act. See *Memorandum Opinion and Order, CREW v. American Action Network* (No. 1:18-cv-00945-CRC), March 2, 2022 (dismissing third-party suit stemming from Commission dismissal and noting that a quick “rhetorical wink to prosecution discretion” was “fatal to CREW’s claim.” Mem. Op. at 16).

⁴ See Petition for Rehearing En Banc, *CREW v. FEC* (“*New Models*”), D.C. Cir. No. 1:18-cv-00076-RC, found at https://www.fec.gov/resources/cms-content/documents/crew_195161_pet_rhrg.pdf.

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majority bloc of FEC commissioners when the Commission splits on enforcement votes, precedents that helped lay the groundwork for *CHGO* and *New Models* and have independently undermined Congress’s statutory plan for bipartisan Commission decision-making and for judicial oversight of Commission inaction.

The *CHGO* decision made it impossible for complainants to successfully challenge Commission inaction when a group of commissioners cite prosecutorial discretion. But the reality is that even before *CHGO*, any challenge to the Commission’s failure to enforce had the deck stacked against it. These challenges, including the *New Models* lawsuit, follow a depressing pattern. They frequently are filed in cases where the Commission’s professional legal staff recommended that the Commission act, and half the Commission agreed with them, but the votes included a deadlock – a 2-2 or 3-3 split on a motion to pursue enforcement. Under existing D.C. Circuit precedent, courts defer to the reasoning of the commissioners who voted to block enforcement of the law, even where those views plainly did not represent the consensus of the Commission and contradict the statutory mandate that Commission decisions cannot be made by less than a majority of commissioners.

The basic problem with the Court’s precedent is simple: It violates the statute by allowing less than a majority of commissioners to exercise the full authority of the Commission. It accomplishes this by muddying the distinction between a *failed* vote to proceed with enforcement in a matter and the Commission’s separate *majority* vote to dismiss the matter, leading some to suggest that the Commission’s enforcement matters are magically dismissed when an enforcement vote splits. This is just not the case, nor *can* it be under the Commission’s governing statute, which requires all decisions to be made by at least a majority vote. Though the Court has, in dicta, analytically conflated split enforcement votes and dismissal votes, they are two separate votes, taken at two separate times, with two different voting lineups.

The D.C. Circuit has an opportunity here to correct its conflation of distinct Commission votes and abandon the unfounded “deadlock deference” it has created – a doctrine the Court has never reevaluated in light of subsequent Supreme Court precedent.⁵ Indeed, abandoning deadlock deference would be an even more significant step than reversing *CHGO* toward restoring what Congress intended and the statute provides: bipartisan decision-making at the Commission and the opportunity for meaningful judicial review when the Commission fails to act.

COMMISSION PROCEDURE

Congress set out a clear course for the FEC to take in resolving enforcement matters under the Federal Election Campaign Act, as amended (“FECA” or the “Act”).⁶ The trigger for action in an enforcement matter is a finding, based on information received in a complaint or in the course of its supervisory responsibilities, that the Commission has “reason to believe that a person has committed, or is about to commit, a violation” of the Act (“reason to believe” or “RTB,” in FEC

⁵ See *U.S. v. Mead*, 533 U.S. 218 (2001); Daniel P. Tokaji, “Beyond Repair: FEC Reform and Deadlock Deference,” in *DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA* 173 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

⁶ 52 U.S.C. § 30101 *et. seq.*

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shorthand).⁷ This finding requires the affirmative vote of four or more commissioners.⁸ An RTB motion that receives fewer than four affirmative votes fails. After such failed RTB motions, or in lieu of them, a motion may be made to close the file and dismiss the matter. This motion’s success also requires the affirmative vote of four of the six commissioners.⁹ The motions and votes in *New Models* followed this pattern.¹⁰ A tie vote does not dismiss a matter; Commission decisions can only be made by agreement of at least a majority of commissioners.¹¹

A complainant aggrieved by the Commission’s dismissal of its complaint may file a petition with the U.S. District Court for the District of Columbia.¹² The District Court will then determine whether the Commission’s dismissal of the complaint was contrary to law.¹³

THE CIRCUIT’S JURISPRUDENCE ON DEFERENCE AND THE CONFUSION OVER COMMISSION VOTING

The D.C. Circuit has long grappled with how to determine whether the Commission’s dismissal of an enforcement complaint is contrary to law when the Commission is split on the question of whether to find RTB.

Three D.C. Circuit cases, *DCCC v. FEC* (1987),¹⁴ *Common Cause v. FEC* (1988),¹⁵ and *FEC v. NRSC* (1992),¹⁶ form the backbone of the jurisprudence in this area. In none of these cases (or any subsequent ones) was the fact of the dismissal at issue or in dispute. Thus the Court never needed to attend to the precise process by which complaints get dismissed at the FEC. The Court’s various descriptions of FEC dismissals glossed over that process in dicta. The first two cases conflated

⁷ 52 U.S.C. § 30109(a)(2).

⁸ *Id.*

⁹ The FECA requires that all decisions exercising Commission duties or powers be made by a vote supported by at least a majority of commissioners. By law, certain decisions require an affirmative vote of at least four commissioners, while other decisions may be made by majority vote. 52 U.S.C. § 30106(c). Long ago, the Commission bound itself to the principle of bipartisan decision-making. Commission Directive 10(E)(3) provides: “Any principal or secondary motion that exercises a duty or power of the Commission under the Act shall require four votes for approval.” (*Emphasis added.*) See also FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (“As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners”). When all six seats on the Commission are filled, as is currently the case, and all commissioners vote, whether four votes or a majority is required is a distinction without a difference.

¹⁰ Certification for MUR 6872 (New Models), Nov. 14, 2017, found at <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>.

¹¹ 52 U.S.C. § 30106(c).

¹² 52 U.S.C. § 30109(a)(8)(A).

¹³ 52 U.S.C. § 30109(a)(8)(C).

¹⁴ *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n* (“DCCC”), 831 F.2d 1131 (D.C. Cir. 1987).

¹⁵ *Common Cause v. FEC* (“Common Cause”), 842 F.2d 436 (D.C. Cir. 1988).

¹⁶ *FEC v. NRSC* (“NRSC”), 966 F.2d 1471 (D.C. Cir. 1992).

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aspects of the law and Commission practice in a way that caused minimal harm within the confines of those cases. But everything went off the rails in the third case, *FEC v. NRSC*, a decision that combined the errors of the first two in a way that led directly to the twin disasters of *CHGO* and *New Models*.¹⁷

In *DCCC v. FEC*, the Court made a key factual oversimplification in its second sentence, asking what it termed a “novel question”: “When the six member Federal Election Commission... deadlocks and for that reason dismisses a complaint, is the dismissal amenable to judicial review?”¹⁸

The Court correctly held that dismissals after deadlocked votes are indeed reviewable. And it sought to ensure that commissioners were making reasoned decisions about enforcement matters, and not capriciously blocking disfavored investigations: “Because we have no explanation why three Commissioners rejected or failed to follow the General Counsel’s recommendation, we are unable to say whether reason or caprice determined the dismissal of DCCC’s complaint.”¹⁹

This description, however, conflated two separate Commission votes. “[W]hy three Commissioners rejected or failed to follow the General Counsel’s recommendation” in an RTB vote cannot explain “whether reason or caprice determined the dismissal of DCCC’s complaint” in a subsequent dismissal vote. The two votes involved (RTB and dismissal) are discrete, independent, and discretionary; by definition, when the first vote deadlocks, the two votes involve different voting lineups. A successful vote on a motion to dismiss may *follow* a failed vote on an RTB motion, but the outcome of that dismissal vote is not *determined* by that RTB motion. When a motion is made for RTB and the vote splits 3-3, the motion simply fails and the status quo is unchanged.

In *Common Cause* the following year, the D.C. Circuit again addressed whether Commission decisions were reviewable after a deadlock vote and again conflated RTB and dismissal votes. The *Common Cause* court referred to the situation when “a deadlock vote results in an order of dismissal,”²⁰ shorthand that obscures the Commission’s two-step process. Dismissals do not inevitably or automatically “result” from “deadlock votes.” They result from one or more commissioners changing course and, for their own reasons, voting in favor of a succeeding motion to dismiss and close the file on the matter.

¹⁷ *NRSC*’s flawed treatment of the Commission’s votes flowed into another Circuit precedent: *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), an extension of *NRSC* where the Court held that statements from *NRSC*’s so-called “controlling commissioners” regarding the *Act* – not just Commission regulations – should be deferred to in subsequent criminal proceedings. According to the Court, the Department of Justice was seeking to rely on “an interpretation of the relevant statutes that has been rejected by the Commission in a 3-3 decision that, under the statutory voting mechanism ... controls Commission enforcement.” *Id.* at 779. That analysis only works once RTB motions and motions to dismiss are improperly conflated. A 3-3 vote is a disagreement, not a decision.

¹⁸ *DCCC*, 831 F.2d at 1132 (footnote omitted).

¹⁹ *Id.* at 1135.

²⁰ *Common Cause*, 842 F.2d at 449.

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The *Common Cause* court’s conflation of the Commission’s votes led to its requiring what it termed “the declining-to-go-ahead Commissioners” to provide their reasons for not proceeding with a matter. But the Court looked to the wrong vote in identifying those commissioners. It is not the failed vote on an RTB motion that determines whether the Commission moves ahead with a matter. There can be – and there frequently are – multiple RTB motions. A failed motion has no effect. The actual act of “declining to go ahead” is the Commission’s one *successful* vote to dismiss a matter. Up until that moment, the case remains open, and any outcome is possible. The lineup of commissioners who “decline to go ahead,” then, is the group of four or more commissioners who vote for the *successful* motion to dismiss the matter, not the three who vote against any one of possibly several failed RTB motions.

The *DCCC* court found before it an unexplained dismissal and a district court that had stepped into the breach and decided the matter on the merits. The circuit court sent the matter back to the Commission because “the Commission should have *a further opportunity to set its precedent* in order so that it, and not a court of review, will serve as primary decisionmaker in the area Congress has committed, initially, to the FEC’s charge.”²¹

Three things stand out: (1) The *DCCC* court did not *require* a statement; its remand was an attempt to protect the Commission’s jurisdiction by giving the Commission the *opportunity* to explain itself before a court reviewed the outcome. (2) The statement the Court sought was one that would set Commission precedent, necessarily one signed by four or more commissioners. (3) The Court noted that it owed deference to such Commission dispositions, the result of bipartisan majority decisions.²²

The statement of reasons described by the *Common Cause* court the next year was something entirely different. The Court *required* a statement in split RTB vote matters from the commissioners who voted against the RTB motion. Such statements, according to the Court, would bear several benefits. They are “necessary to allow meaningful judicial review of the Commission’s decision not to proceed.” They “contribute[] to reasoned decisionmaking by the agency” by ensuring reflection and creating “an opportunity for self-correction.” They also “enhance the predictability of Commission decisions for future litigants.”²³

What the three-commissioner statement would *not* be, the Court was careful to point out, is *precedential*, nor could it be taken to represent Commission action: “Of course, such a statement of reasons would not be binding legal precedent or authority for future cases. The statute clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote. To

²¹ *DCCC*, 831 F.2d at 1133 (*emphasis added*).

²² *Id.* at 1134. “[T]he Supreme Court has clarified that judges in court owe large deference to a Commission disposition so long as the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition,” *citing* *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 n. 19 (1981), a case involving review of a unanimous Commission decision. The *DCCC* court noted that the FEC had begun to supply these statements of reasons when “it overturns by *four or more votes* the recommendations of its General Counsel regarding an enforcement action.” 831 F.2d at n. 3 (*emphasis added*).

²³ *Common Cause*, 842 F.2d at 449.

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ignore this requirement would be to undermine the carefully balanced bipartisan structure which Congress has erected.”²⁴ Nor did the Court anywhere suggest that it would defer to the non-precedential three-commissioner statements it was mandating.

Four years later, in a single paragraph in the *FEC v. NRSC* decision, the Court created the doctrine of the “controlling group” of commissioners (“controlling commissioners”) that has dominated FEC jurisprudence, and contorted FEC practice, ever since.²⁵ This single paragraph contains a troubling number of material factual, procedural, and legal errors and mischaracterizations.

The *NRSC* panel stated, “In *Democratic Congressional Campaign Committee v. Federal Election Commission*, we held that when the Commission deadlocks 3–3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § [30109](a)(8).”²⁶

This goes well beyond the earlier confections and entirely ignores the existence of the Commission’s separate RTB votes and dismissal votes. The small word “so” carries a lot of weight. To be sure, the Commission has frequently deadlocked on an RTB motion and *then*, in a separate vote, voted to dismiss a complaint. The Commission may deadlock and *so* some commissioners who voted for RTB may decide, for reasons unrelated to those put forth by the commissioners who voted against RTB, to vote now to dismiss the matter.

But if the Court intended “so” to mean “in so doing,” this description is contrary to the reality of both the statutory text and the Commission’s practice. The Act requires that “[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”²⁷

The *NRSC* panel continued, “We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting.”²⁸

This bears no resemblance to *DCCC*’s holding. It appears to be a mashup of different (and incompatible) parts of the *DCCC* and *Common Cause* decisions.

In *DCCC*, the Court granted *the Commission* the *opportunity* to cast (and explain) a four-or-more-commissioner *precedential* vote on the matter, to which a district court should defer, but it did not *require* the Commission to provide such an explanation.²⁹

²⁴ *Id.* at 449, n. 32. *See also id.* at 444, n. 20 (“Under the statute, a 4–2 vote is sufficient for a valid Commission decision”).

²⁵ *NRSC*, 966 F.2d at 1476.

²⁶ *Id.* (internal citation omitted).

²⁷ 52 U.S.C. § 30106(c).

²⁸ *NRSC*, 966 F.2d at 1476.

²⁹ *See DCCC*, 831 F.2d at 1133-34.

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Common Cause was the case that *required* a statement. That statement, from those commissioners whose votes blocked an RTB finding, would illuminate the Court’s understanding of the dismissal before it. But this three-commissioner statement would not serve as precedent, nor would the Court defer to it.³⁰

The *NRSC* panel extended the mashup of its earlier precedents to reach this catastrophic conclusion: “Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency’s reasons for acting as it did.”³¹

The *NRSC* panel took the statement described in *DCCC* (an *optional* statement from *four or more* commissioners to which courts *must defer*, because it is *precedent*) and *Common Cause* (a *required* statement from *three or fewer* commissioners to which *no deference* would be paid, because such a statement *cannot be precedent*), and *required* a statement from *three or fewer* commissioners, and labeled it “necessarily” the agency’s reasoning to which courts now defer. And once a court *does* defer to that statement, you’ve got yourself a precedent. This misreading of precedent, statute, and Commission practice birthed the “controlling commissioner” doctrine.³²

The *NRSC* court took the deference the Supreme Court granted a *unanimous* Commission decision and grafted it onto the opinion of just three commissioners (when the other three commissioners voted the opposite way). In doing so, the Court ignored *Common Cause*’s clear statement that the deference owed to the Commission derives in large part from *the bipartisanship of its actions* – bipartisanship not found in three-commissioner statements: “Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer.”³³

³⁰ *Common Cause*, 842 F.2d at 449, 453.

³¹ *NRSC*, 966 F.2d at 1476.

³² The damage was done with the “controlling group” sentence, but the Court’s errors continued to the end of the paragraph. The last section again misstates *DCCC*’s holdings: “A footnote to the opinion also strongly suggests that, if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission’s rationale. This was consistent with the Supreme Court’s observation, in upholding (against a complainant’s § [30109](a)(8) challenge) the Commission’s unanimous dismissal of a complaint, ‘that the Commission is precisely the type of agency to which deference should presumptively be afforded’ [citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)]. Though our *DCCC* opinion limited itself to its facts, we have since expanded it to control generally situations in which the Commission deadlocks and dismisses [citing *Common Cause*].” *NRSC*, 966 F.2d at 1476 (*internal citations omitted*).

When the Supreme Court said “the Commission is precisely the type of agency to which deference should presumptively be afforded,” the Court specifically referenced the Commission’s bipartisan structure. But when the Commission splits 3-3, it is acting solely along partisan lines. Moreover, in the *DCCC* footnote to which the *NRSC* court referred, there is no mention of “the meaning of the statute.” The footnote states that “[i]n the absence of *prior Commission precedent* . . . , judicial deference to the agency’s initial decision or indecision would be at its zenith.” *DCCC*, 831 F.2d at 1135, n. 5 (*emphasis added*). The *DCCC* court was grappling with the opposite case, a situation in which “the FEC may have slighted its own precedent and accorded similar cases dissimilar treatment, thereby proceeding on a course ‘contrary to law.’” *Id.* at 1135.

³³ *Common Cause*, 842 F.2d at 448, *citing* *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). If the FEC were less unfortunately blocked along ideological lines, we might regularly see a series of failed RTB votes

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Moreover, in imputing the minority bloc’s reasoning to the Commission, the Court also ignored the plain text of the statute, that “[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”³⁴

U.S. v. MEAD

As has been persuasively argued by Daniel P. Tokaji, now Dean of the University of Wisconsin Law School, the Supreme Court’s 2001 decision in *U.S. v. Mead*,³⁵ which added “Step Zero” to the Court’s *Chevron*³⁶ jurisprudence, renders the analysis in *DCCC*, *Common Cause*, and *NRSC* “not defensible under current law.”³⁷ The D.C. Circuit has never reviewed these precedents in light of *Mead*’s teachings.

Mead held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁸ Congress was very clear: “All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission” except for those (including in the enforcement context) that require four votes.³⁹ Nothing in the FECA suggests that Congress intended that a partisan bloc of less than a majority of commissioners could under any circumstances promulgate binding interpretations of law. Indeed, the clear statutory language says quite the opposite.

As Dean Tokaji wrote: “Whatever uncertainty exists about whether *Mead* is satisfied in cases where a majority of the FEC votes to dismiss an enforcement matter, it cannot be understood to cover interpretations adopted by less than a majority of the FEC. A dismissal in these circumstances does not meet *Mead*’s second prong: the agency has not exercised congressionally delegated authority to

with different lineups, as commissioners considered different proposals and negotiated with each other through motions. But as it is, the voting lineups on the Commission’s split votes on RTB motions are extraordinarily predictable. Since at least 2008, whenever the Commission’s General Counsel has recommended moving forward on a matter, the three Republican commissioners have *never* been on the “Yes” side of a 3-3 vote on an RTB motion. *Never*.

³⁴ 52 U.S.C. § 30106(c).

³⁵ 533 U.S. 218 (2001).

³⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁷ Tokaji, *supra* note 5.

³⁸ *Mead*, 533 U.S. at 226–27 (*emphasis added*).

³⁹ 52 U.S.C. § 30106(c).

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make rules carrying the force of law.”⁴⁰ Dean Tokaji concluded, “Without a majority, FEC decisions are not ‘binding legal precedent or authority for future cases.’”⁴¹

THE MECHANICS OF RTB VOTES AND DISMISSAL VOTES

It is worth laying out in detail why a failed vote on an RTB motion does not ‘dismiss a complaint.’ If that complaint is ever going to be dismissed, a split RTB vote is never the last vote. It can be (and frequently is) followed by one or more RTB votes that may well rely upon different theories of the case, different or more limited findings, or different proposed penalties, as commissioners strive for common ground. If RTB motions fail, they may be followed by a period of time to allow commissioners to consider whether there could be a path forward that would garner four votes. Commissioners may, as the *Common Cause* court hoped, reflect and reconsider their positions – or attempt to incentivize their colleagues to return to the bargaining table. It has been the Commission’s practice for decades to consider multiple motions, often over multiple meetings. If a failed RTB motion automatically dismissed the matter, this longstanding practice of persistent attempts to achieve the bipartisan consensus Congress and the courts have sought to encourage would have been impossible. The reality is that a matter remains open, and further Commission action remains possible, until there is a successful motion to dismiss (or, frequently, to “close the file,” in FEC parlance).

When the Commission *does* successfully vote to dismiss a matter following a split RTB vote, that vote is successful only because the Commission makes a separate decision to dismiss the complaint after the RTB vote deadlocks. This dismissal is always the subject of a separate vote. In order for the matter to be dismissed, one or more commissioners who voted in favor of the motion to find RTB must essentially throw in the towel and vote to dismiss the matter. They may do this for any number of reasons, for example, in the interests of transparency of agency operations, closure for respondents, public accountability for the nay-saying commissioners, or in hopes the complainant will sue the agency and obtain a judicial reversal. But it is unlikely that these commissioners have changed their minds on the fundamental question as to whether the law had been violated. Without at least one commissioner who voted to pursue the matter deciding to turn around and vote to dismiss, the matter cannot be dismissed.

What *never* happens after a split RTB vote is a dismissal based on the reasons given by those who voted no on the RTB motion. If an RTB vote fails 3-3, and a motion is made to dismiss, if everyone votes on dismissal according to the reasoning behind their RTB vote, that dismissal motion will also fail 3-3.

At that moment, there exists the ingredients not of a dismissal suit under 52 U.S.C. § 30109(a)(8), but of the other remedy Congress included in that provision: a failure-to-act suit. Because at that moment, there has been no dismissal, no Commission decision whatsoever. And in the failure-to-act

⁴⁰ Tokaji, *supra* note 5, at 196.

⁴¹ *Id.* at 197, quoting *Common Cause*, 842 F.2d at 449 n. 32.

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context, the reasoning of the commissioners who voted against RTB is irrelevant. The basis of the lawsuit is that the Commission has failed to act on the complaint within a window of time acceptable within the law. And if all the Commission has done is deadlock 3-3 on all its motions, it has failed to act.

The only thing that transforms that inaction into action is one or more commissioners who wanted to pursue the matter making an independent judgment to shift their stance and vote in favor of a dismissal motion instead. Then, and only then, will the matter be dismissed. Then, and only then, will the FEC have taken any action on the matter. And it is *this* action – and not any previous votes – upon which the Commission is being sued in a § 30109(a)(8) dismissal suit.

If further evidence were needed that a failed vote on an RTB motion does not act to dismiss the complaint, consider this: 52 U.S.C. § 30109(a)(8)(B) establishes that aggrieved parties can sue the Commission over a dismissal, but only if they sue within 60 days of that dismissal. A failed vote on an RTB motion does not trigger the start of that 60-day clock. Only a certified successful vote on a motion to dismiss the matter by closing the file starts that 60-day jurisdictional litigation clock.

A COMMISSIONER’S VOTE ON A MOTION TO DISMISS A MATTER CARRIES INTENTION, CONTENT, AND EFFECT

Some have argued that a commissioner’s vote on a motion to dismiss a matter is ministerial. It is not. A ministerial act “involves obedience to instructions or laws instead of discretion, judgment, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance.”⁴² Each commissioner exercises their judgment and discretion in every vote they cast, including those on motions to dismiss matters. Nothing in the law instructs commissioners to obediently vote one way or the other on *any* motion.

And it is not unusual to see substantial daylight between failed RTB votes and dismissal votes. Votes on dismissal motions sometimes happen well after the votes on RTB motions.⁴³ The lineup of commissioners serving on the Commission may even be different from one set of votes to the next.⁴⁴

⁴² *Ministerial*, Black’s Law Dictionary (11th ed. 2019).

⁴³ See, e.g., Certifications for MUR 6656 (Anchin, Block & Anchin LLP, et al.) (unsuccessful RTB vote on Sept. 24, 2013, followed by a successful vote to close the file on March 20, 2014), *found at* <https://www.fec.gov/files/legal/murs/6656/14044353561.pdf> and <https://www.fec.gov/files/legal/murs/6656/14044353565.pdf>; Certifications for MUR 6612 (Crossroads Grassroots Policy Strategies) (unsuccessful RTB votes on Oct. 29 & Nov. 17, 2015, followed by a successful vote to close the file on Dec. 17, 2015), *found at* <https://www.fec.gov/files/legal/murs/6612/15044385336.pdf>, <https://www.fec.gov/files/legal/murs/6612/15044385338.pdf>, and <https://www.fec.gov/files/legal/murs/6612/15044385358.pdf>.

⁴⁴ See, e.g., Certifications for MUR 6596 (Crossroads GPS), Nov. 2, 2015, *found at* <https://www.fec.gov/files/legal/murs/6596/19044463266.pdf>, and Mar. 27, 2019, *found at* <https://www.fec.gov/files/legal/murs/6596/19044463311.pdf>.

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In June 2021, *The New York Times* provided a vivid illustration of the lack of causation between votes on RTB motions and votes on dismissal motions. It accurately reported that there are cases where commissioners, myself included, have voted against dismissal based on our view that these matters should have been pursued by the Commission, a step that “drastically accelerates and smooths the way for outside groups to pursue campaign finance challenges in the federal courts.”⁴⁵

This is a completely rational voting strategy, deeply grounded in the Act. Congress requires the Commission to vote on whether to find RTB in matters,⁴⁶ to dismiss matters,⁴⁷ and to defend against dismissal and delay lawsuits.⁴⁸ Nothing in the law compels a commissioner to vote to dismiss cases she believes should be pursued, or to vote to defend lawsuits she believes to be indefensible. Congress anticipated that a 3-3 Commission might fail in its enforcement mission and created an escape hatch in the provisions allowing for delay suits, dismissal suits, and private rights of action where the Commission fails to act. These statutory provisions cannot provide meaningful possibilities for relief when courts simply defer to the reasoning of commissioners who vote as a bloc to obstruct enforcement of the law.

And in so deferring, the D.C. Circuit has badly distorted Congress’ intentions. Its precedents (including *NRSC*, *CHGO*, and *New Models*) create perverse incentives for commissioners to vote against dismissing matters. Under current law, a commissioner who wants to enforce the law in a matter knows that her vote in favor of a motion to dismiss would empower the commissioners on the other side of the issue to determine the agency’s position in a way she thought was contrary to law (but could well be upheld under misplaced principles of deference). Her vote in favor of dismissal would halt enforcement of this particular complaint and could well do larger damage to the law. Under these circumstances, it should not be surprising that commissioners who are in favor of enforcing the law occasionally vote not to dismiss cases that they believe ought to be pursued. It is more surprising that after 3-3 RTB votes, such matters so frequently manage to obtain four votes for dismissal.

⁴⁵ Shane Goldmacher, *Democrats’ Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), found at <https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html>.

⁴⁶ 52 U.S.C. §§ 30106(c) (“All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”); 30109(a)(2) (“If the Commission, upon receiving a complaint ... determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act ...”).

⁴⁷ The Act clearly contemplates the dismissal of a complaint as an affirmative decision of the Commission that is voted upon, and not something that can happen by default. See 52 U.S.C. §§ 30109(a)(1) (“a vote to dismiss”); 30109(a)(8)(A) (“an order of the Commission dismissing a complaint”).

⁴⁸ *Id.* at § 30106(c); § 30107(a)(6).

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THE COMMISSION’S VOTES IN *NEW MODELS* ILLUSTRATE WELL THE DIFFERENCE BETWEEN VOTES ON MOTIONS TO FIND RTB AND MOTIONS TO DISMISS

In the *New Models* matter, an RTB motion was made. Two commissioners, Steven T. Walther and I, voted for the motion. Two commissioners, Lee E. Goodman and Caroline C. Hunter, voted against it. The motion failed.⁴⁹

At this moment, anything could have happened. Commissioners could have made a series of similar motions in an attempt to find four affirmative votes. They could have held the matter over to another meeting.

But there was not yet a dismissal. That 2-2 vote did not cause the matter to be dismissed. If no further motions were ever made in this matter, it *never* would have been dismissed.

But there *was* another motion, to close the file. The vote on this motion *did* dismiss the matter, because all four commissioners voted for it.

As it turned out, every commissioner who voted to proceed with enforcement in *New Models* also voted to dismiss the matter. But because of the *NRSC* precedent, the district court and the D.C. Circuit panel were forced to discard the rationales of these commissioners simply because they voted a certain way on a previous motion that failed, even though the dismissal that was the subject of the litigation would not have happened without the votes of these commissioners in favor of the dismissal motion.

THE D.C. CIRCUIT SHOULD REVIEW DISMISSALS *DE NOVO*

What should the D.C. Circuit do instead? Under these circumstances, the Court should review *New Models* and all similar cases *de novo* rather than relying on the opinions that less than majority of commissioners held regarding an entirely different and failed motion.

The 4-0 dismissal vote in *New Models* was the only vote that carried any consequence in the context of the current litigation. Only the Commission’s successful vote on the motion to dismiss the matter triggered the right to sue.

That dismissal was only achieved through the affirmative votes of two commissioners who did not want to pursue the matter and two commissioners who did. There just *isn’t* a single rationale for the dismissal.⁵⁰

⁴⁹ Certification for MUR 6872 (Nov. 14, 2017), found at <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>.

⁵⁰ This is made even more clear when there are significant temporal or voting-lineup differences between the RTB vote and the dismissal vote. If three commissioners voted against RTB in a matter where the Commission’s General Counsel counseled otherwise, the President replaced the entire lineup of commissioners, and the newly constituted Commission then simply voted to close the file, from whom is an explanation required? Former commissioners cannot speak for the Commission, nor did their votes cause the matter to be dismissed. Only the sitting commissioners who just dismissed the matter by voting to closing the file can provide the Commission’s rationale.

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THE D.C. CIRCUIT’S CURRENT JURISPRUDENCE COMMANDS SOME VERY ODD RESULTS

Suppose the Commission votes 6-0 to dismiss an enforcement complaint against its General Counsel’s recommendation. The matter is dismissed; the six commissioners who voted for the motion are the commissioners whose votes dismissed the matter.

It would make sense in the course of an (a)(8) lawsuit against the agency for a court to examine why those six commissioners voted as they did. But under D.C. Circuit precedent, more information is needed.

If that dismissal vote were the only vote taken, then all six commissioners would indeed be required to explain their positions. But if that successful dismissal vote were preceded by a *failed* 3-3 vote on an RTB motion, current D.C. Circuit jurisprudence commands that *only* the rationales of the three commissioners who voted “No” on that previous, *failed*, motion would be considered by the D.C. Circuit.

This makes no legal or parliamentary sense. How can the voting lineup *on a failed RTB motion* cause the legal rationale of 50% of the Commission to be discarded when a court evaluates the rationale of those who later voted for the *successful* dismissal motion? A failed motion has zero effect. The Commission has not *acted* in any way when a motion fails. There has been no agency action, and the adjudication of the complaint has in no way ended. As stated above, a failed RTB motion can be (and frequently is) followed by one or more RTB votes. (Sometimes, a reformulated or more limited RTB motion succeeds.) Simply put, under the Act, a complaint cannot passively be dismissed by implication.⁵¹ In the context of a failure-to-act (a)(8) lawsuit, if all Commission votes on motions regarding a matter have failed, the Commission has indeed failed to act on that matter.

It is the successful vote on the motion to dismiss – the *action* by the Commission – that the Commission is sued upon. In *New Models*, no single commissioner’s vote in that 4-0 result controlled the dismissal more than any other. When the D.C. Circuit seeks to identify the commissioners whose rationale control dismissal outcomes, it should look to every commissioner who voted for the motion to dismiss the matter – that is, *all* of them.

In practice, because the Court would be considering competing and conflicting rationales, this would result in *de novo* review by the Court. While the views of various commissioners might be informative to the Court, only a statement signed by a majority of commissioners deserves deference.

⁵¹ See 52 U.S.C. § 30106(c) (“All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”). As noted above, *supra* note 47, the Act clearly contemplates the dismissal of a complaint as an affirmative decision of the Commission that is voted upon, and not something that can happen by default. See 52 U.S.C. §§ 30109(a)(1) (“a vote to dismiss”); 30109(a)(8)(A) (“an order of the Commission dismissing a complaint”). What some might refer to as a “deadlock dismissal” (*see, e.g.*, the *New Models* panel decision itself, 993 F. 3d 880, 891) simply does not exist – a deadlocked dismissal vote is a *failed* dismissal vote, which produces no dismissal.

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AS A MATTER OF FACT AND LAW, THE COMMISSION DID *NOT* EXERCISE ITS PROSECUTORIAL DISCRETION IN *NEW MODELS*

If the D.C. Circuit decides to rehear *New Models*, it should consider the significant distinction between prosecutorial discretion (1) when some commissioners list it as a rationale for their vote to dismiss in statements they write as individuals, and (2) when the Commission actually exercises its legal authority to apply prosecutorial discretion in a matter.

In *New Models*, two of the four commissioners who voted to dismiss later listed prosecutorial discretion as among their rationales for dismissal; two did not. As a matter of law, under the Act and Commission policy, the Commission did *not* exercise its prosecutorial discretion in the matter.

Under the Act, “All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”⁵² Commission policy specifies that “As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners.”⁵³

There were only two votes in the *New Models* matter. The vote on the motion to find RTB failed 2-2. The vote to dismiss the matter succeeded 4-0. Neither motion mentioned prosecutorial discretion.⁵⁴ There is nothing in the record before the D.C. Circuit to suggest that the Federal Election Commission, by a majority vote, *actually exercised its prosecutorial discretion*, contrary to the repeated assertions by the panel that it did.

When four or more commissioners vote affirmatively to exercise prosecutorial discretion in a matter, the Commission formally exercises the legal authority granted to it by the Act, in the bipartisan manner intended by the Act. That decision is entitled to the deference that any formal and final agency action is due.⁵⁵

But that is not the case in *New Models*. Two of four commissioners voted against the RTB motion, which then failed.⁵⁶ Those two commissioners then explained their vote against the RTB motion, writing in a statement that they did not believe pursuing the matter was an appropriate use of Commission resources. But when they wrote that they voted so “in exercise of our prosecutorial

⁵² 52 U.S.C. § 30106(c).

⁵³ Federal Election Comm’n, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007). Commission Directive 10(E)(3) provides: “Any principal or secondary motion that exercises a duty or power of the Commission under the Act shall require four votes for approval.”

⁵⁴ Certification for MUR 6872 (Nov. 14, 2017), *found at* <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>.

⁵⁵ None of this should be construed as a critique of *Chevron* deference. Deference to the Commission is well-justified when the agency makes precedential decisions on a bipartisan majority basis as Congress intended. Deference to the views and biases of a partisan non-majority bloc has no relationship to proper agency deference.

⁵⁶ Certification for MUR 6872 (Nov. 14, 2017), *found at* <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>.

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discretion,”⁵⁷ the “our” referred to the individual discretion of the two of them, not that of the Commission; two commissioners cannot exercise the Commission’s powers on their own. (Note also that they only spoke to the motivations of their vote on the failed RTB motion, not on the successful vote on the motion to close the file that actually dismissed the matter.)

Now, the opinion of two commissioners might be useful for a court to consider when deliberating upon whether a dismissal of an FEC complaint was contrary to law. But the opinion of two commissioners cannot work to actually exercise the Commission’s legal authority.⁵⁸

CONCLUSION

The deeply flawed *NRSC* case created the D.C. Circuit’s “deadlock deference” doctrine, which led directly to the absurd and damaging precedents in *CHGO* and *New Models*. If the D.C. Circuit decides to rehear *New Models*, I encourage it to rid its jurisprudence of “deadlock deference” and abandon the flawed concept of “controlling commissioners.”⁵⁹ As explained above, those who vote against enforcement do not in fact control whether a case gets dismissed. Without the fully discretionary votes of four or more commissioners in favor of a motion to dismiss, there would never *be* a dismissal for a court to be evaluating.

It would be especially apt for the Court to repair its jurisprudence in *New Models*, a classic political committee status case. The problems wrought by deadlock deference have been seen vividly in the FEC’s dismissals of complaints regarding such dark-money groups, entities that spend heavily on federal elections without registering with the Commission as political committees. These groups set up elaborate schemes to mask the identities of millionaire and billionaire donors, while depriving members of the public the information they need to exercise their rights and duties as an informed electorate. The Supreme Court in *Citizens United* promised a world of prompt and effective disclosure that would enable “the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶⁰ This promise has not been fulfilled.

Time after time, a minority bloc of anti-enforcement commissioners has impeded the Commission from taking the smallest steps to investigate these groups. The agency’s lawyers have then headed to court to defend the anti-enforcement rationales (even when the General Counsel had

⁵⁷ Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, MUR 6872 (*New Models*), at 31 (Dec. 20, 2017), found at <https://www.fec.gov/files/legal/murs/6872/17044435569.pdf>.

⁵⁸ See, e.g., Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub, In the Matter of *End Citizens United PAC v. FEC* (Oct. 15, 2021), found at https://www.fec.gov/resources/cms-content/documents/statement_on_ECU_v_FEC_litigation_vote_broussard_walther_weintraub.pdf (“[I]f a few Commissioners say they dismissed under *Heckler*, courts will hold that the Commission *did* dismiss under *Heckler*, even though the Commission may have, in reality, declined to do so just moments before. At the moment, the D.C. Circuit makes zero distinction between an offhand mention of prosecutorial discretion in a few Commissioners’ Statement of Reasons and a Commission vote to formally exercise its legal authority to apply its prosecutorial discretion in a matter.”).

⁵⁹ The more legally useful group to focus upon could be termed the “dismissing commissioners,” as the actions of those who actually voted to dismiss are at issue in § 30109(a)(8) suits.

⁶⁰ *Citizens United*, 558 U.S. 310, 371 (2010).

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recommended that the Commission pursue the complaints in the first instance), and courts deferred to them. The result is two branches of the federal government lining up to shield the identity of influential donors from public view. According to the Center for Responsive Politics, approximately one billion dollars was spent to influence elections in the decade following *Citizens United* without the promised transparency.⁶¹ Deadlock deference has emboldened the commissioners who block these investigations and thus contributed to this opaque state of affairs.

By mandating deference to the opinions of a partisan three-commissioner bloc, the D.C. Circuit has incentivized partisan-bloc voting, undermined bipartisan decision-making, and converted non-binding commissioner statements into binding legal precedents – but *only* those that block Commission action. The Court that avowedly hoped to inspire “reasoned decisionmaking by the agency” and “ensure[] reflection and create[] an opportunity for self-correction”⁶² in *Common Cause* has instead written a recipe that has led inexorably to the opposite.

The Court sought accountability but created impunity. It encouraged reflection and self-correction but obtained intransigence. It celebrated bipartisanship but enshrined one-party decision-making.

Without deadlock deference, the law would function much more closely to how Congress intended. The D.C. Circuit has the power to wipe this doctrine from the books in its *en banc* review of *New Models*. It should do so.

⁶¹ Karl Evers-Hillstrom, Doug Weber, Anna Massoglia, Andrew Mayersohn, Grace Haley, Sarah Bryner and Alex Baumgart, “More money, less transparency: A decade under *Citizens United*,” OPENSECRETS.ORG (Jan. 14, 2020), found at <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

⁶² *Common Cause*, 842 F.2d at 449.