FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
American Action Network	)	MUR 6589R
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON

A supplemental statement of reasons, especially in response to one commissioner's personal views, is unusual. But, as in MURs 6915 and 6927 (John Ellis Bush, *et al.*),[1] Commissioner Weintraub's Statement of Reasons in this Matter makes claims requiring a response.

At the outset, it bears repeating that good-faith disagreements concerning the scope and application of campaign finance law are routine and expected. Commissioner Weintraub habitually characterizes these disagreements in partisan (and sometimes personal) terms, a regrettable rhetorical flourish that does nothing to strengthen her legal points.

As to the legal arguments in her Statement of Reasons here, Commissioner Weintraub makes at least three significant errors.

First, she simply asserts – without legal support of any kind – that the Commission's vote to close the file this year was the "dismissal" of this Matter.[2] As has been fully explained elsewhere,[3] it was not. Closing the file is a convenient, ministerial act, not a dismissal of a matter on its merits.

---

[1] *See* Statement of Reasons of Comm'r Weintraub, MURs 6915/6927 (John Ellis Bush/Right to Rise USA, *et al.*) (Sept. 30, 2022); Supp'l Statement of Reasons of Chairman Dickerson, MURs 6915/6927 (John Ellis Bush, *et al.*) (Oct. 4, 2022).

[2] Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) (Sept. 30, 2022) at 2.

[3] *See, e.g.,* Statement of Chairman Dickerson & Comm'rs Cooksey & Trainor Regarding Concluded Enforcement Matters (May 13, 2022).

Commissioner Weintraub's Statement acknowledges this, repeatedly explaining that the Commission's vote *in 2018* fully resolved the merits of this Matter.[4] She states that it was her "May 10, 2018 vote that prevented the Commission from pursuing RTB[5] in this matter,"[6] not any vote to close the file. She even argues that a reviewing court must defer to her Statement of Reasons because she is the only remaining commissioner who was present for the 2018 vote.[7] This misunderstands the controlling-commissioner doctrine, at least insofar as it conflates the 2022 vote to close the file with the Commission's 2018 determination on the merits. But it is correct insofar as this Matter was resolved in 2018 when the Commission, with a lawful quorum, declined to find RTB because there were not four affirmative votes for that result.[8]

Commissioner Weintraub's argument buttresses this conclusion. As her Statement notes, D.C. Circuit precedent requires a Statement of Reasons explaining the basis for the Commission's merits determination — here, its 2018 declination to find RTB — rather than a justification of its decision to close a file (a practice which is, incidentally, mentioned nowhere in FECA).[9] But this is unsurprising: it is precisely because the closing-the-file vote is not a merits dismissal, and indeed has no independent legal significance. Meaningful judicial review is necessarily directed toward the Commission's substantive acts and the explanations thereof.[10]

---

[4] *See, e.g.*, Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 2, n.8 ("None of the five commissioners who voted to [close the file in 2022] ever voted on the merits of the complaint."); 8 (stating that, in 2021, "the underlying complaint was not being pursued because of the May 10, 2018 RTB votes.").

[5] RTB is the Commission's usual acronym for "Reason to Believe."

[6] Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 3.

[7] *Id.*

[8] *See, e.g.*, 52 U.S.C. § 30109(a)(2) (requiring four affirmative votes to proceed with enforcement action, including in response to an administrative complaint), (a)(8) (providing for aggrieved persons to challenge Commission's dismissal of an administrative complaint, or failure to act upon an administrative complaint, within 120 days of its filing).

[9] *See* Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 7 ("[T]his September 2022 statement today retroactively becomes the rationale for the Commission's May 10, 2018, RTB votes.").

[10] *See, e.g.*, *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 355 (D.C. Cir. 2020) ("The three 'controlling' commissioners who voted against opening an investigation issued a statement of reasons regarding their votes, which, under our case law, 'necessarily states the agency's reasons for acting as it did.'") (quoting *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)).

Second, Commissioner Weintraub argues that the Commission enjoys perpetual jurisdiction to impose equitable remedies regardless of our five-year statute of limitations.[11] I, and others, have explained why this is wrong.[12] Notably, she makes no effort to engage with those arguments, or even with the judicial opinions that foreclose her theory.[13] Ignoring these on-point decisions does not make them go away.

Third, Commissioner Weintraub suggests that statements of reasons might not be part of the administrative record and therefore are not properly before courts reviewing the Commission's disposition of enforcement matters.[14] This is obviously not the law because (1) it is the courts themselves that have required commissioners to issue statements of reasons when they disagree with the Office of General

[11] Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 9–10.

[12] *E.g.*, Statement of Reasons of Chairman Dickerson & Comm'rs Cooksey & Trainor, MUR 7465 (Freedom Vote, Inc.) (Mar. 7, 2022) at 3–7 (citing, *inter alia*, *Fed. Election Comm'n v. Christian Coal.*, 965 F. Supp. 66, 69 (D.D.C. 1997) ("FECA does not contain an internal statute of limitations. The applicable statute of limitations is [the 5 years] provided under 28 U.S.C. § 2462—a point the parties do not, nor could they, reasonably dispute.") (citations omitted); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (rejecting the theory that the statute of limitations prevents the Commission from imposing fines but does not bar equitable relief as "directly contrary to the Supreme Court's holding in *Cope v. Anderson* . . . [which] holds that 'equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy'" and concluding that "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both.") (quoting *Cope*, 331 U.S. 461, 464 (1947)); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 916 F. Supp. 10, 14–15 (D.D.C. 1996) ("The FEC's claim for civil penalties is barred by 28 U.S.C. § 2462. The FEC argues that even if § 2462 bars its civil penalty claims, it is nevertheless entitled to its declaratory judgment and an injunction. The Court disagrees.. . . Notions of welcome repose for ancient grievances aside, the practical concerns alone for problems of missing documents, faded memories, and absent witnesses that inevitably occur with the passage of time are no less problematic in adjudicating actions for declaratory and injunctive relief than in determining liability for monetary civil penalties.")).

[13] *Id. See also, e.g.*, *Kokesh v. Sec. & Exch. Comm'n*, 581 U.S. __; 137 S. Ct. 1635, 1643 (2017) (holding that non-compensatory disgorgement of funds "constitutes a penalty within the meaning of [28 U.S.C.] § 2462" subject to its five-year statute of limitations); *id.* at 1641 (observing that statutes of limitation "are vital to the welfare of society and rest on the principle that even wrongdoers are entitled to assume that their sins may be forgotten") (citations omitted; cleaned up); *Gabelli v. Sec. & Exch. Comm'n*, 568 U.S. 442, 448 (2013) (holding that 28 U.S.C. § 2462's "five-year clock" on imposition of a civil penalty "begins to tick[]when a defendant's" impermissible "conduct occurs" and that this "rule has governed since the 1830s when the predecessor to § 2462 was enacted") (citations omitted); *id.* ("Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'") (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349 (1944)).

[14] *E.g.*, Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 10 & n.45.

Counsel's recommendations, and (2) the courts have repeatedly evaluated statements of reasons written after a vote is taken.[15]

It is also unclear how commissioners could explain their votes in advance without making our deliberations in executive session a meaningless formality. Thankfully, they are not, which is why statements of reasons have always been written to explain already-completed votes. The courts, unsurprisingly, have not found this curious. At bottom, my colleague's proffered "question" about whether courts may consider statements of reasons "under basic administrative law principles"[16] has already been answered.

Commissioner Weintraub's Statement repeatedly takes issue with binding judicial rulings. Those decisions reflect sober consideration of this agency's enabling statute and its role within the larger project of administrative law and judicial review. Commissioner Weintraub is entitled to her opinions, but they are not the law.

October 12, 2022
Date

Allen J. Dickerson
Chairman

[15] *See, e.g., supra* n.10.

[16] Statement of Reasons of Comm'r Weintraub, MUR 6589R (Am. Action Network) at 10.