



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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)
)
 John Ellis Bush, *et al.*) MURs 6915 & 6927
)

SUPPLEMENTAL STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON

A supplemental Statement of Reasons, especially in response to a single commissioner's personal views, is unusual. But Commissioner Weintraub's Statement of Reasons in these Matters makes points requiring a response.

At the outset, good-faith disagreements concerning the scope and application of campaign finance law are routine and expected. Commissioner Weintraub is fond of characterizing 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.¹ As has been fully explained elsewhere,² it was not. Closing the file is a convenient, ministerial act, not a dismissal on the merits of a matter.

Commissioner Weintraub's Statement acknowledges this, repeatedly explaining that the Commission's vote *in 2018* fully resolved the merits of this Matter.³ Commissioner Weintraub even argues that courts must defer to her Statement – even though she writes alone and disagrees with the actions taken by

¹ Statement of Reasons of Comm'r Weintraub at 4-5 & n.18, MURs 6915/6927 (John Ellis Bush, Right to Rise USA, *et al.*), Sept. 30, 2022.

² *See, e.g.*, Statement of Chairman Dickerson and Comm'rs Cooksey and Trainor Regarding Concluded Enforcement Matters, May 13, 2022.

³ *See, e.g.*, Statement of Reasons of Comm'r Weintraub at 4, 5, n.20 MURs 6915/6927 (John Ellis Bush, Right to Rise USA, *et al.*), Sept. 30, 2022.

the Commission – precisely because she is the only remaining commissioner who was present for the 2018 vote.⁴ This is plainly not how the controlling-commissioners doctrine works, but she is otherwise correct: this Matter was fully resolved in 2018 when the Commission, with a lawful quorum, declined to adopt the Office of General Counsel’s theory of the case and voted not to find Reason to Believe (“RTB”).

This point is buttressed by Commissioner Weintraub’s own argument. As her Statement notes, the D.C. Circuit requires a Statement of Reasons for the Commission’s merits determination – that is, its 2018 decision not to find RTB – rather than a discussion of its decision to close the file.⁵ 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.

Second, Commissioner Weintraub argues that the Commission enjoys perpetual jurisdiction to impose equitable remedies regardless of the statute of limitations.⁶ I, and others, have explained why this is wrong several times.⁷ Notably,

⁴ See *id.* at 5 (Commissioner Weintraub describing herself “as the only commissioner with any authority to explain the Commission’s actions here”).

⁵ Statement of Reasons of Comm’r Weintraub at 4, MURs 6915/6927 (John Ellis Bush, Right to Rise USA, *et al.*), Sept. 30, 2022. See also, e.g., *Fed. Election Comm’n v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (“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. 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”) (citation omitted); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm’n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

⁶ Statement of Reasons of Comm’r Weintraub at 6, MURs 6915/6927 (John Ellis Bush, Right to Rise USA, *et al.*) (Claiming that “[t]he Commission has considerable equitable remedies available to it that are not subject to 28 U.S.C. § 2462”).

⁷ See, e.g., Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 3-7, MUR 7465 (Freedom Vote, Inc.) (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 five 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”) (citations omitted); *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

she makes no effort to engage with those arguments, or even with the judicial opinions relied upon.⁸ Ignoring these on-point decisions does not make them go away.

Third, in a lengthy footnote, Commissioner Weintraub suggests that Statements of Reasons may not be part of the administrative record and therefore are not properly before courts reviewing the Commission's disposition of enforcement matters.⁹ 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 Counsel's recommendations, and (2) the courts have repeatedly evaluated and deferred to Statements of Reasons written after a vote is taken.¹⁰ 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.

The Statement repeatedly takes issue with binding judicial rulings. But those decisions remain the law and 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 the opinions expressed in her Statement, but they are not the law.

actions for declaratory and injunctive relief than in determining liability for monetary civil penalties”).

⁸ Among others. *See, e.g. Kokesh v. Securities and Ex'chg Comm.*, 581 U.S. ___; 137 S. Ct. 1635, 1643 (2017) (holding that the 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 statutory limits on enforcement “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 and quotation marks omitted); *Gabelli v. Securities and Exch'g Comm.*, 568 U.S. 442, 448 (2013) (holding that 28 U.S.C. § 2462's “five-year clock” on the 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); *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)).

⁹ *E.g.*, Statement of Reasons of Comm'r Weintraub at 5, n.18, MURs 6915/6927 (John Ellis Bush, Right to Rise USA, *et al.*), Sept. 30, 2022.

¹⁰ *See, e.g., supra* n.5.



Allen J. Dickerson
Chairman

10/4/2022

Date