FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Governor Scott Walker	)	
Scott Walker, Inc. and Kate Teasdale in her official	)	
capacity as treasurer	)	MURs 6917 and 6929
Our American Revival and C. Ryan Burchfield	)	
in his official capacity as treasurer	)	
	)	
and	)	
	)	
In the Matter of	)	
	)	
John R. Kasich	)	
Kasich for America, Inc. and	)	
J. Matthew Yuskewich in his capacity as treasurer	)	MURs 6955 and 6983
New Day For America and	)	
J. Matthew Yuskewich in his capacity as treasurer	)	

SUPPLEMENTAL STATEMENT OF REASONS OF
COMMISSIONER SEAN J. COOKSEY

These matters deserved discretionary dismissal under *Heckler v. Chaney* because they were old, there was no penalty to be assessed, and the Commission has higher-priority investigations to pursue. That is why I voted to dismiss these matters and joined the accompanying Statement of Reasons to that effect with Vice Chair Dickerson and Commissioner Trainor.[1]

I write separately to emphasize that, in addition to these prudential considerations, I believe the Commission lacked the legal authority to press these matters further. The five-year statute of limitations barred enforcement in these cases entirely, and it is worth dwelling upon why the Office of General Counsel's ("OGC") theory of unending equitable remedies in these matters is wrong—indeed dangerous.

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1 *See* Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (April 29, 2021), MURs 6917 and 6929 (Scott Walker *et al.*) and MURs 6955 and 6983 (John R. Kasich *et al.*).

The Complaints allege that two candidates for the 2016 Republican nomination for President violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by accepting excessive and impermissible contributions from associated organizations through testing-the-waters expenditures, and that they likewise failed to timely file their statements of candidacy.[2] The conduct at issue is old—much of it, if not all, took place in the early days of the presidential primary season in 2015.[3] When the Commission considered these matters in March 2021, the applicable five-year statute of limitations had run.[4] The sensible solution, therefore, was to dismiss them as time-barred.

But OGC advised to the contrary. In its probable cause briefs and associated memoranda to the Commission, OGC argued that "regardless of whether the five-year statute of limitations invoked by [Our American Revival] impedes the Commission's ability to seek a civil penalty, it does not prevent the Commission from pursuing equitable remedies."[5] As a result, OGC recommended that the Commission continue to pursue enforcement against these Respondents in order to mandate retrospective disclosure of the contributions and expenditures at issue through amended FEC reports.[6] I reject OGC's argument for several reasons.

First, I believe OGC misstates the law. OGC maintains that equitable remedies fall outside of the five-year limitations period on "enforcement of any civil fine, penalty, or forfeiture,"[7] but the Supreme Court has held otherwise. In *Kokesh v. SEC*, the Court ruled that § 2462's limitations period applied to the Securities and Exchange Commission's claim for disgorgement—an equitable remedy.[8] The Court reasoned that whether a remedy constitutes a "penalty" does not turn on it being legal or equitable, but rather on the remedy's purpose and the body of law being enforced. A remedy is a penalty, the Court said, if it is imposed to enforce public laws—as opposed to private rights—and if its purpose is to punish and deter future violations rather than to

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2 General Counsel's Brief at 1–3 (May 11, 2020), MURs 6917 and 6929 (Scott Walker *et al.*); General Counsel's Brief at 1–4 (Dec. 4, 2020), MURs 6955 and 6983 (John R. Kasich *et al.*).

3 General Counsel's Brief at 2–17 (May 11, 2020), MURs 6917 and 6929 (Scott Walker *et al.*); General Counsel's Brief at 4–20 (Dec. 4, 2020), MURs 6955 and 6983 (John R. Kasich *et al.*).

4 18 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.").

5 Office of General Counsel's Notice to the Commission following the Submission of Probable Cause Brief at 2 (July 7, 2020), MURs 6917 and 6929 (Scott Walker *et al.*). *See also* General Counsel's Brief at 44 (Dec. 4, 2020), MURs 6955 and 6983 (John R. Kasich *et al.*) ("Thus, regardless of whether the five-year statute of limitations invoked by the statute impedes the Commission's ability to seek a civil penalty, it does not prevent the Commission from pursuing equitable remedies, including requiring disclosure of excessive and prohibited contributions, as well as the disclosure of Kasich's testing-the-waters activity.").

6 Office of General Counsel's Notice to the Commission following the Submission of Probable Cause Brief at 2 (July 7, 2020), MURs 6917 and 6929 (Scott Walker *et al.*); General Counsel's Brief at 1–3 (May 11, 2020), MURs 6917 and 6929 (Scott Walker *et al.*); General Counsel's Brief at 43–44 (Dec. 4, 2020), MURs 6955 and 6983 (John R. Kasich *et al.*).

7 18 U.S.C. § 2462.

8 137 S. Ct. 1635, 1643 (2017).

compensate an aggrieved party.[9] The Court went so far as to say that a remedy is a penalty for purposes of § 2462 if it "cannot fairly be said *solely* to serve a remedial purpose."[10] Because the Securities and Exchange Commission was seeking to vindicate the government's interests and to sanction Charles Kokesh for the alleged securities violation, the Court ruled that disgorgement was a penalty barred by the five-year limitations period.[11]

So too here. Under *Kokesh*'s reasoning, retrospective disclosure is a penalty subject to § 2462's limitations period. Campaign-finance violations are public injuries, not personalized harms. Disclosure and reporting remedies do not compensate any individual, but vindicate the United States' general interest in upholding the law.[12] This suggests remedies to enforce campaign-finance law are more akin to penalties. Moreover, the purpose of the proposed remedy in this case is to sanction and stigmatize the Respondents and to deter future violations by requiring backward-looking disclosures through amended reports, similar to other common FEC penalties like fines or disgorgement.[13] Consequently, OGC's claim that equitable remedies had not been extinguished is wrong, and the better legal argument is that these matters were completely time-barred.

But even if the mandatory disclosure that OGC sought was not a penalty for purposes of § 2462, the reporting remedy would likely still be barred under the concurrent-remedies doctrine. As the Supreme Court held in *Cope v. Anderson*, where a party's legal remedies are time-barred, its concurrent equitable claims are generally barred as well.[14] Admittedly, some federal courts have held this doctrine inapplicable to the federal government.[15] But in at least two decisions involving the Commission, both the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Columbia have ruled that the doctrine applies, and they have blocked our pursuit of equitable remedies past the limitations period.[16] The same would be true in any civil enforcement suit seeking retrospective disclosure in these matters, which would arise from the same conduct for which the Commission could no longer assess financial penalties.

Finally, even if OGC's legal interpretation were correct, I would still reject it as a matter of policy. The upshot of OGC's theory is that there is no time limit on this agency's ability to

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[9] *Id*. at 1642.

[10] *Id*. at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)).

[11] *Id*.

[12] *See Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (describing the various public interests served by the Act's disclosure requirements).

[13] *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) ("[R]equiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals."). *See also* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005) ("By virtue of their authority to disburse funds and file disclosure reports and to amend those reports, treasurers of committees are in the best position to carry out the requirements of a conciliation agreement such as paying a civil penalty, refunding or disgorging contributions, and amending reports.")

[14] 331 U.S. 461, 464 (1947).

[15] *See*, *e.g.*, *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997); *United States v. Telluride Co*., 146 F.3d 1241, 1248 (10th Cir.1998).

[16] *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *FEC v. Nat'l Right to Work Comm.*, 916 F. Supp. 10, 14–15 (D.D.C. 1997).

investigate and bring enforcement actions against individuals for campaign-finance violations, even if the conduct is decades old. Adopting that position would erode fundamental notions of fairness and due process. As Commissioners have written elsewhere:

> Statutes of limitations exist to protect defendants against just this kind of case, where stagnant or unduly delayed claims undermine fair adjudication. When investigations or lawsuits are based on long-forgotten conduct, the passage of time hampers defendants' ability to raise an adequate defense: evidence has been lost, memories have faded, and witnesses have disappeared. Statutes of limitations are especially important for campaign-finance law. Political campaigns and committees are, by their nature, often temporary enterprises without permanent structures or personnel, and reconstituting their activities from far in the past often poses significant investigatory obstacles.[17]

For these reasons, the Commission should forswear any enforcement case past § 2462's five-year limitations period. Individuals wishing to engage in the political process should not have to rely on the FEC's beneficence to escape a government investigation for historical conduct. The public will be better served by an agency that abides by the binding statute of limitations, and that must put up or shut up when it comes to enforcing our campaign-finance laws.

Sean J. Cooksey

Sean J. Cooksey
Commissioner

April 29, 2021
Date

[17] Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III at 3 (March 18, 2021), MUR 7181 (Independent Women's Voice) (citations omitted).