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September 23, 2024

VIA E-MAIL

Federal Election Commission
Office of Complaints Examination and Legal Administration
1050 First Street, NE
Washington, DC 20463

Re: Remand of MUR 7146

Dear Commissioners:

We submit this letter as counsel to Hillary for America ("***HFA***") and Correct the Record ("***CTR***") (collectively, "***Respondents***") in response to the remand of this matter to the Federal Election Commission ("***FEC***" or "***Commission***") pursuant to the district court's order on September 12, 2024.[1]

The Commission should exercise its prosecutorial discretion to dismiss this matter. The allegations involve events that took place during the 2016 election cycle, nearly a decade ago. Since that time, HFA and CTR have terminated with the Commission's explicit approval.[2] As part of the termination process, each committee had to wind down its operations by paying off any debts, distributing assets, and spending any remaining funds in their accounts.[3] HFA and CTR no longer exist; there is nothing left of these committees.

Under these circumstances, it would be impractical to require HFA and CTR to obtain the granular information necessary to file any additional reports disclosing further details of expenditures that were made four election cycles ago. It would also take an inordinate amount of Commission resources to (1) evaluate each expenditure under a narrower conception of what constitutes an "input cost" for unpaid internet communications, and (2) determine whether the expenditures would be excluded from the definition of "contribution" under other Commission regulations and precedent. And if amended reports were necessary, there appears to be no technical way for Respondents to file them because their ability to file reports ended when they terminated as

[1] Minute Order, *Campaign Legal Ctr. v. FEC*, No. 19-cv-02336, (D.D.C. Sep. 12, 2024).

[2] CTR, Termination Approval (Nov. 2, 2022), https://docquery.fec.gov/pdf/836/202211020300157836/202211020300157836.pdf; HFA, Termination Approval (Oct. 27, 2022), https://docquery.fec.gov/pdf/295/202210270300156295/202210270300156295.pdf.

[3] *See* 11 C.F.R. § 102.3; FEC, *Campaign Guide for Congressional Candidates* at 137-41 (Oct. 2021), https://www.fec.gov/resources/cms-content/documents/policy-guidance/candgui.pdf.

political committees.[4] Finally, to the extent the Commission seeks to impose any penalties against Respondents, all of the alleged violations are barred by the five-year statute of limitations under 28 U.S.C. § 2462.

For these reasons, and because nothing in the courts' orders precludes dismissal here, the Commission should exercise its discretion to dismiss this matter and close the file.

BACKGROUND

I. HFA and CTR's Activity in the 2016 Election Cycle

HFA was the principal campaign committee of former United States Secretary of State Hillary Clinton, who was the nominee of the Democratic Party for the office of the President of the United States in the 2016 general election.[5] CTR was a "hybrid" or *Carey* PAC that registered with the FEC in June 2015.[6]

During the 2016 campaign, CTR publicly announced that it was supporting Ms. Clinton's presidential campaign and that it was limiting activities to communications that would not qualify as contributions to HFA to avoid violating the Act's source and amount restrictions.[7] Consistent with its public announcement, CTR conducted the vast majority of its activities online, using its website and social media accounts.[8] CTR conducted a handful of other activities that were not directly related to its online presence, but those activities were relatively rare, represented a smaller portion of its program, or were activities that would not be considered contributions to HFA under other applicable FEC regulations and past precedent.[9] HFA also paid for the fair market value of the research and tracking services CTR provided; those disbursements were reported on both CTR's and HFA's FEC reports.[10]

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[4] *See* 11 C.F.R. § 104.18 (requiring electronic filing for political committees that receive contributions in excess of $50,000 or make expenditures in excess of $50,000 in any calendar year).

[5] HFA, Statement of Organization, (Apr. 13, 2015), https://docquery.fec.gov/pdf/528/15031411528/15031411528.pdf.

[6] CTR, Statement of Organization, (June 2, 2015), https://docquery.fec.gov/pdf/085/15031431085/15031431085.pdf.

[7] Matea Gold, *How a Super PAC plans to coordinate directly with Hillary Clinton's campaign*, The Washington Post (May 12, 2025), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html.

[8] *See* CTR Response, MUR 7146 (Dec. 5, 2016); Intervenors' Mem. Sum J. at 3, *Campaign Legal Ctr. v. FEC*, No. 19-cv-02336, (D.D.C. Aug. 31, 2020).

[9] Intervenors' Mem. Sum J. at 3, *Campaign Legal Ctr. v. FEC*, No. 19-cv-02336, (D.D.C. Aug. 31, 2020).

[10] *See* CTR Resp. at 5-6, MUR 7146; HFA Resp. at 1, 8-9, MUR 7146; *see also* CTR, FEC Form 3X, Schedule A, line 17 at 8 (July 31, 2015); CTR, FEC Form 3X, Schedule A, line 17 at 17 (Dec. 31, 2015).

II. Campaign Legal Center's FEC Complaint

On October 6, 2016, Campaign Legal Center ("CLC") filed a complaint with the Commission in which it alleged that HFA and CTR were unlawfully coordinating their activities.[11] CLC asserted that CTR's expenditures were therefore impermissible in-kind contributions to HFA.[12] Both HFA and CTR filed responses defending their activities and arguing that no unlawful coordinated activity had occurred.[13] The Office of General Counsel ("OGC") recommended dismissing or taking no action on most of the allegations contained in CLC's complaint, but recommended finding reason to believe that Respondents violated the Act by making and accepting excessive and prohibited in-kind contributions in the form of coordinated expenditures.[14]

The FEC, however, did not adopt OGC's conclusions on coordinated spending. On June 4, 2019, by a vote of 2-2, the Commissioners were unable to find reason to believe and subsequently dismissed the matter.[15] The controlling Commissioners concluded that, because none of CTR's communications were placed for a fee on a third party's website, they were not "public communications" and could not be "coordinated communications."[16] Therefore, any amounts of money CTR spent on placing the communications, and all the "production" or "input" costs related to creating the communications, were not in-kind contributions to HFA.[17] The Commissioners then analyzed CTR's remaining expenditures for its non-communicative activities under 11 C.F.R. §109.20, the regulation which applies to coordinated expenditures that are not communications. With respect to those non-communicative activities, the Commissioners found that they had already been paid for, or the evidence in the record was insufficient to establish that HFA and CTR engaged in prohibited coordination with respect to the specific activities at issue.[18]

III. Litigation Challenging the FEC's Dismissal

On August 2, 2019, CLC filed a lawsuit against the Commission under 52 U.S.C. § 30109(a)(8), challenging the Commission's dismissal of the administrative complaint as contrary to the Federal Election Campaign Act, as amended in 1971.[19] The Commission lacked a quorum and therefore declined to defend itself against the suit. Respondents were granted intervention and vigorously defended the Commission's decision to dismiss the administrative complaint. The district court

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[11] Complaint, MUR 7146 (Oct. 6, 2016).

[12] *Id.* at 38-41.

[13] *See* CTR Resp. at 5-6, MUR 7146; HFA Resp. at 1, 8-9, MUR 7146.

[14] First General Counsel's Report at 5-6, 18-20, MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record), (Oct. 16, 2018).

[15] Commission Certification, MURs 6940, 7097, 7146, 7160, 7193, (June 4, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record).

[16] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12-18, MURs 6940, 7097, 7146, 7160, 7193, (June 4, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record).

[17] *Id.*

[18] *Id.* at 14-18.

[19] *Campaign Legal Ctr. v. FEC*, Compl., No. 19-cv-02336, (D.D.C. Aug. 2, 2019).

granted summary judgment in favor of Respondents because it determined that CLC lacked standing to bring the case.[20] Following CLC's successful appeal of the district court's decision, the district court held that the Commission's dismissal was contrary to law and remanded the matter to the Commission to "sketch the bounds of the internet exemption and to more fully analyze the facts before it," and directed the Commission to conform with its decision within 30 days.[21] After an appeal by the FEC, the D.C. Circuit affirmed the district court's decision on July 9, 2024, and instructed the Commission as follows:

> We have not been asked to decide in the first instance precisely which expenses can be exempt from regulation as inputs to unpaid internet communications. As did the district court, we conclude that the expert Commission should have an opportunity in the first instance to draw that line. It suffices for present purposes to hold that the line drawn by the blocking commissioners in this case unmistakably conflicts with the statutory text and purpose.[22]

On September 12, 2024, the district court remanded the matter to the FEC pursuant to 52 U.S.C. § 30109(a)(8)(C), in accordance with the opinion of the D.C. Circuit.[23] The Commission has until October 12, 2024 to conform to the district court's order.

DISCUSSION

I. The Commission should exercise its prosecutorial discretion to dismiss this matter.

The Commission has "*broad discretionary power* in determining whether to investigate a claim, and whether to pursue civil enforcement under the [FECA]."[24] As the Supreme Court has explained, when agencies are determining whether to pursue enforcement, they should not "assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action best fits the agency's overall policies," among other issues.[25] The Commission appropriately

[20] *Campaign Legal Ctr. v. FEC*, 507 F.Supp.3d 79 (D.D.C. 2020).

[21] *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 62 (D.D.C. 2022).

[22] *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1195 (D.C. Cir. 2024).

[23] Minute Order, *Campaign Legal Ctr. v. FEC*, No. 19-cv-02336, (D.D.C. Sep. 12, 2024).

[24] *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) (emphasis added); *see also Nader v. FEC*, 823 F.Supp.2d 53, 65 (D.D.C. 2011) (the FEC has "considerable" prosecutorial discretion").

[25] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

exercises its prosecutorial discretion to dismiss matters when they "do not merit additional expenditure of Commission resources," or where an investigation would be a futile exercise.[26]

Application of these principles to this matter is straightforward: dismissal is warranted. CTR and HFA are defunct, have already been terminated with the FEC's approval, and have not been in operation for several years. CTR has no plans to operate in the future; there is no indication that Ms. Clinton intends to run for public office in the future. Key witnesses have moved on and it is inevitable that their memories have faded, which would make it extraordinarily difficult to obtain the necessary information to file amended reports. As terminated committees, Respondents have no technical way to file reports electronically, as is required under 11 C.F.R. § 104.18.

The Commission would incur considerable staff time and other resources pursuing this stale matter. An investigation would first require the submission of an investigative plan that contains, among other things, the information sought by OGC, each witness and category of witnesses and documents subject to the investigation, and the proposed discovery methods for the investigation.[27] Next, an enormous amount of Commission staff time and other resources would be needed to parse through the thousands of expenditures at issue, to evaluate which of the expenditures would need to be reported as in-kind contributions. Not only would the Commission be required to review the expenditures to determine whether they fit within the unpaid internet exemption, it would also have to analyze whether each expenditure fits into another exemption or should not be deemed in-kind contributions for some other reason. For example, with respect to the opinion poll CTR commissioned, the Commission would have to analyze it under the relevant polling regulations. Under 11 C.F.R. § 106.4(c), "[t]he acceptance of any part of a poll's results which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordinated by the candidate-recipient . . . shall not be treated as a contribution."[28] Moreover, the FEC has separately held that a candidate does not accept poll results such that they are a "contribution" unless the candidate receives "cross-tabs, questions asked, and methodology."[29] "Top line" results, without more, do not constitute a contribution.[30]

Conducting such an extensive investigation would require considerable resources under any circumstance, but doing so nearly a decade after the activity occurred would inevitably lead to

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[26] *See* Statement of Policy Regarding Commission at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19,729, 19,730 (Mar. 20, 2024); Statement of Reasons of Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 9-11, MUR 7465 (Freedom Vote, Inc.) ("Freedom Vote is apparently defunct and bankrupt, and it is unclear to us that there would be anyone to engage in either conciliation or litigation had the Commission pursued it. For the same reasons, we have no basis to believe that enforcement action would deter future violations of the Act.").

[27] FEC, *Directive 74, Investigations Conducted by the Office of General Counsel* (Nov. 1, 2023), https://www.fec.gov/resources/cms-content/documents/directive_74.pdf.

[28] 11 C.F.R. § 106.4(c).

[29] Statement of Reasons of Comm'rs Hunter, Goodman & Petersen at 6, MUR 6958 (McCaskill) (Feb. 28, 2017).

[30] *See* Statement of Reasons of Comm'rs Hunter & Petersen at 6, MUR 6908 (NRCC) (May 2, 2019).

significant roadblocks. This is particularly true here where OGC staff members who were most familiar with this matter may no longer be with the Commission.

Dismissal is further warranted because all of the alleged violations are barred by the five-year statute of limitations under 28 U.S.C. § 2462. Under that statute, "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."[31] The five-year statute of limitations expired on or around February 1, 2022, five years after the 2016 year-end report was due.[32]

Although some commissioners have expressed that the Commission may lack jurisdiction to exercise prosecutorial discretion when the statute of limitations has expired,[33] the Commission has dismissed on *Heckler* grounds in several matters where the activity at issue occurred after the statute of limitations has already run.[34] For example, in MUR 7181 (Independent Women's Voice), Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III stated: "Facing these state facts, a lapsed statute of limitations, and limited resources, we concluded that the fairest and most prudent course was to dismiss this case as an exercise of prosecutorial discretion under *Heckler v. Chaney* and to close the file."[35] Similarly, in MUR 7486 (45Committee), Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, voted to dismiss a complaint that was not only barred by the statute of limitations, but where "a majority of the Commissioners currently serving were not in active service at the first occasion that the Commission voted on this matter in 2020."[36] They concluded that "even if four Commissioners

[31] There can be no dispute that the statute of limitations has run on the Commission's ability to impose civil penalties. Respondents also contend that the statute of limitations bars injunctive relief. *See FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (rejecting the theory that equitable relief remains available when the statute of limitations has expired as contrary to Supreme Court's holding in *Cope v. Anderson v. Anderson*, 331 U.S. 461(1947)). The Commission should therefore dismiss this case in its entirety using its prosecutorial discretion for all of the reasons previously herein, including the expiration of the statute of limitation.

[32] 28 U.S.C. § 2462; 52 U.S.C. § 30104(a)(3)-(4); *FEC v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996).

[33] *See* Statement of Reasons of Vice Chair Allen Dickerson and Commissioner James E. "Trey" Trainor, III, at 1, MUR 7125.

[34] *See, e.g.*, Commission Certification, MUR 7125 (Wasserman Shultz) (July 13, 2021); Statement of Reasons of Chair Shana M. Broussard and Commissioner Steven T. Walther, at 2-3, MUR 7125 ("Further, all of the alleged conduct described in the Complaint occurred during the first half of 2016 and thus is now barred by the five-year statute of limitations."); Statement of Reasons of Commissioner Sean J. Cooksey at 1, MUR 7125 (noting that "all of the relevant conduct took place in May 2016 or earlier" and therefore the "Commission lacks the legal authority to pursue violations outside of the five-year limitations period."); *see also* Statement of Reasons of Vice Chair Dickerson and Commissioner James E. "Trey," Trainor, III, at 3 n.11, MUR 6992 (Trump, et al.) ("We have voted in the past to invoke the Heckler doctrine when faced with, inter alia, a 'lapsed statute of limitations,' and an OGC recommendation that the availability of equitable relief entitled us to enforce against a Respondent." (quoting Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 4, MUR 7181 (Independent Women's Voice)).

[35] Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 4, MUR 7181 (Independent Women's Voice)).

[36] Statement of Reasons of Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 6, MUR 7486 (45Committee).

agreed that there was reason to believe a violation occurred, the passage of time and the lapsing of the statute of limitations had eliminated the Commission's ability to successfully pursue any successful enforcement."[37]

II. The courts' orders do not preclude dismissal.

The district court's contrary to law finding does not preclude the Commission from exercising its discretion to dismiss this matter. In *FEC v. Akins*, the Supreme Court explained that, "[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—*even though the agency like a new jury after a mistrial might later, in the exercise of its lawful discretion, reach the same result for a different reason*."[38] That is precisely what has occurred here: the district court set aside the Commission's prior dismissal, and after nearly four years of motions, briefings, and hearings, the matter has been remanded to an agency. Nothing precludes the Commission from dismissing again on different grounds—particularly as here where the composition of the Commission has almost completely changed since the FEC first considered this matter.

Nor would dismissing this matter preclude the Commission from complying with the D.C. Circuit's decision to allow the Commission to "decide in the first instance precisely which expenses can be exempt from regulation as inputs to unpaid internet communications."[39] The Commission has already taken steps in this direction through recent Commission guidance not previously before the Court. Earlier this year, for example, the Commission issued revised regulations confirming that internet communications, *including associated costs to create and distribute the communications*, do not constitute an in-kind contribution if coordinated with a candidate, unless there was a payment to a third party to place the communication.[40] In the rulemaking, the Commission responded to a commenter's concern that the new regulations "could be read to capture political communications that placed or promoted for free on a third-party's platform *if the speaker incurs staffing, technology, or design costs to create the communication*."[41] In response, the Commission clarified that the commenter's concern was misplaced:

> The revised regulations, however, apply only where the speaker pays a third party's website, digital device, application or advertising platform to increase the communication's visibility on that website, device, application, or platform. They do not apply where the speaker's only costs are to create the communication or to

[37] *Id.* at 6.

[38] *FEC v. Akins*, 524 U.S. 11, 25, (1998) (emphasis added).

[39] *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 62 (D.D.C. 2022).

[40] *See* Technological Modernization, 89 Fed. Reg. 196, 211 (January 2, 2024).

[41] *Id*.

> place or promote the communication using a forum that he or she controls to establish his or her own audience."[42]

Similarly, in Advisory Opinion 2024-01 (Texas Majority PAC), the Commission analogized to the internet exemption when it confirmed that "input costs" specifically used to create and distribute communications that are not "public communications" but are coordinated with a candidate—in that case, canvassing scripts and literature—are not in-kind contributions under 11 C.F.R. § 109.20.

Here, the Commission can clarify—once and for all—the scope of its rules on unpaid internet communications and specifically when a cost for the production or distribution of a communication is also covered by the exemption. However, any new guidance the Commission issues must not be applied retroactively to Respondents; doing so would raise significant due process concerns.[43] Such due process concerns are yet another reason to dismiss this matter and take no action as to Respondents in addition to all the reasons discussed in Section I above.

CONCLUSION

Based on the foregoing, the Commission should exercise its prosecutorial discretion to dismiss this matter and close the file.

Regards,

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Graham Wilson
Jonathan A. Peterson
Counsel to Respondents

[42] *Id*. (internal quotation marks omitted).

[43] *See FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 254 (2012) (finding a due process violation where "[t]he Commission's lack of notice . . . [as to how the law would be] interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited'") (quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)).