



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

November 12, 2024

VIA EMAIL AND UPS-SIGNATURE REQUIRED

Roger G. Wieand
Campaign Legal Center
1101 14th St., N.W., Suite 400
Washington, DC 20005
rwieand@campaignlegalcenter.org

RE: MUR 7146R
Correct the Record and Elizabeth Cohen in
her official capacity as treasurer
Hillary for America and Elizabeth Jones
in her official capacity as treasurer

Dear Mr. Wieand:

This is in reference to the complaint Campaign Legal Center filed with the Federal Election Commission on October 6, 2016. After the U.S. District Court for the District of Columbia remanded this matter to the Commission for further action on September 12, 2024, *see Campaign Legal Center, et al. v. FEC*, 19-2336 (D.D.C.), the matter was reopened and numbered MUR 7146R. The Commission on October 10, 2024, voted to dismiss the complaint. Accordingly, the Commission voted to close the file in this matter, effective today. Documents related to the case will be placed on the public record today. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter's transmittal are enclosed.

If you have any questions, please contact, me at (202) 694-1588 or mallen@fec.gov.

Sincerely

Mark Allen

Mark Allen
Assistant General Counsel



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Correct the Record and Elizabeth Cohen in her
official capacity as treasurer, *et al.*

MUR 7146R

**STATEMENT OF REASONS OF COMMISSIONERS SHANA M. BROUSSARD,
ALLEN J. DICKERSON, DARA LINDENBAUM, AND
JAMES E. "TREY" TRAINOR, III**

I. INTRODUCTION

The original Complaint, filed with the Commission in October 2016, alleged that Correct the Record ("CTR") made undisclosed impermissible in-kind coordinated contributions to Hillary for America ("HFA"), Hillary Clinton's authorized campaign committee for President during the 2016 election cycle. Respondents contended that, because CTR's activities were limited to communications distributed on its own websites or on free online platforms, the relevant activity was protected by Commission regulations exempting certain internet communications.¹

Upon consideration of the original Complaint, there were an insufficient number of Commission votes to find reason to believe that CTR violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b) by making excessive and impermissible unreported in-kind contributions to Hillary for America or that Hillary for America violated 52 U.S.C. §§ 30116(f), 30118(a) and 30104(b) by knowingly accepting excessive and impermissible unreported in-kind contributions from Correct the Record. The Commission also failed to garner sufficient votes to authorize the Office of General Counsel ("OGC") to defend the agency in the event Complainants filed suit against the Commission pursuant to 52 U.S.C. § 30109(a)(8). Accordingly, the Commission closed its file in MUR 7146.²

¹ 11 C.F.R. § 100.26.

² A motion to find reason to believe failed by a vote of 2-2, with four affirmative votes being statutorily required. The vote to authorize defense of the agency failed by a vote of 3-1. Certification at 1-4 (Jun. 5, 2019). At the time, two of the six Commission seats were vacant.

In conformance with D.C. Circuit precedent, the “Controlling Commissioners” – *i.e.*, those commissioners who voted not to find reason to believe – issued a Statement of Reasons. The Controlling Commissioners concluded that expenses such as overhead, polling, and production costs that eventually resulted in a communication over the internet qualified for the internet exemption. Further, to the extent any expenses were not exempt, they found insufficient evidence that Respondents coordinated expenditures.

Complainant filed suit pursuant to section 30109(a)(8), but because the Commission failed to garner sufficient votes to authorize a defense, the Commission failed to appear. HFA and CTR subsequently intervened. After five years of litigation, the U.S. Court of Appeals for the D.C. Circuit determined that the Commission’s dismissal of the administrative complaint was contrary to law. The Court of Appeals remanded the matter to the District Court, which in turn remanded it to the Commission. The Commission has, accordingly, been ordered to conform to the opinion of the Court of Appeals and “sketch the bounds of the internet exemption” while “more fully analyz[ing] the facts before it.”³

As explained below, we dismiss this matter pursuant to *Heckler v. Chaney*.⁴ Given the expired statute of limitations and the Commission-approved termination of both Respondents, further efforts at enforcement would be an inefficient, and likely futile, use of our limited agency resources. Mindful, however, of the district court’s requirement that the Commission further explain the law, we voted to draft a Notice of Proposed Rulemaking to more clearly define the types of expenses covered by the internet exemption.⁵

II. FACTUAL BACKGROUND AND PROCEEDINGS BEFORE THE COMMISSION

On April 13, 2015, Hillary Clinton filed a Statement of Candidacy for the 2016 presidential election, designating HFA as her principal campaign committee.⁶ On May 13, 2015, CTR registered with the Commission as a hybrid political committee with a Carey non-contribution account.⁷

The Complaint alleged that CTR spent almost \$6 million in coordination with HFA, but that neither HFA nor CTR reported these funds as in-kind contributions from CTR to HFA in

³ *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175 (D.C. Cir. 2024) (quoting *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 69 (D.D.C. 2022)).

⁴ Certification at 2 (Oct. 10, 2024); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

⁵ Certification at 1, Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).

⁶ Hillary Clinton Statement of Candidacy (Apr. 13, 2015).

⁷ Statement of Organization, Correct the Record (June 5, 2015); *See* Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), available at <https://www.fec.gov/updates/fec-statement-on-carey-fec/> (explaining the genesis and purpose of these types of committees).

1 violation of 52 U.S.C. §§ 30116(a), (f) and 30118(a) or as coordinated expenditures in violation
2 of section 30104(b).⁸

3
4 CTR allegedly financed several types of activity to benefit HFA. CTR commissioned
5 polling;⁹ paid employees to conduct fact-checking and media outreach; financed opposition
6 research; paid ordinary overhead expenses;¹⁰ employed “trackers” to “record the public events”
7 of other campaigns;¹¹ and made expenditures for producing, distributing, and promoting videos,
8 and other content, that were published on its website and social media accounts.¹² As relevant
9 here, the Responses argued that all of CTR’s expenses resulted in or related to communications
10 that were disseminated for free over the internet and, therefore, qualified for the internet
11 exemption.¹³

12
13 OGC recommended that the Commission find reason to believe that HFA impermissibly
14 coordinated expenditures with CTR resulting in undisclosed prohibited and excessive
15 contributions.¹⁴ As discussed above, the Commission split on OGC’s recommendations,¹⁵ and
16 the Controlling Commissioners issued the Statement of Reasons reviewed by the courts.

17 **III. SUBSEQUENT DEVELOPMENTS**

18
19
20 On August 2, 2019, Complainant Campaign Legal Center (“CLC”) filed suit challenging
21 the Commission’s dismissal.¹⁶ The Commission, having failed to authorize defense, lost its
22 quorum later that month.¹⁷ HFA and CTR were permitted to intervene.¹⁸ And in November
23 2022, while the litigation was pending, HFA and CTR were permitted to terminate.¹⁹

8 Compl. ¶ 1 (Oct. 6, 2016).

9 *Id.* ¶ 31.

10 *Campaign Legal Ctr.*, 106 F.4th 1175, 1191 (D.C. Cir. 2024) (citing Statement of Reasons of Charmain Matthew S. Petersen and Commissioner Caroline C. Hunter at 13 (Aug. 21, 2019)).

11 Compl. ¶ 17.

12 Compl. ¶¶ 30, 35, 37, 43, 64-67.

13 CTR Resp. at 3-4 (Dec. 5, 2016); HFA Resp. at 3-4 (Jan. 24, 2017).

14 First Gen. Counsel’s Rpt. at 27 (Oct. 16, 2018).

15 Certification at 1-3 (Jun. 5, 2019)).

16 Compl. at 1 (Aug. 2, 2019), *Campaign Legal Center v. FEC*, Case No. 1:19-cv-02336-JEB (D.D.C.).

17 Press Release, Matthew Petersen to depart Federal Election Commission (Aug. 26, 2019),
<https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/>.

18 *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1 (D.D.C. 2019).

19 HFA Termination Approval (Oct. 27, 2022); CTR Termination Approval (Nov. 2, 2022). Committees ordinarily are not permitted to terminate if they are in active litigation or have a pending enforcement Matter Under Review. Due to administrative oversight, the Commission inadvertently approved HFA and CTR’s request to terminate.

1 Following several years of litigation over collateral issues such as standing,²⁰ on
2 December 8, 2022, the District Court granted summary judgment in favor of CLC.²¹

3
4 Shortly thereafter, and with five new commissioners having been seated since the 2019
5 vote, the Commission voted to authorize OGC to defend the agency and appeal the District
6 Court's decision.²² On July 9, 2024, the Court of Appeals affirmed, holding that the Controlling
7 Commissioners interpreted the internet exemption too broadly.²³

8
9 Specifically, the Court took issue with the Controlling Commissioners' exemption of
10 polling and overhead costs allocable to non-exempt activity.²⁴ The Court of Appeals further held
11 that the Controlling Commissioners erred in dismissing the "non-internet related
12 communications," including "research and tracking activities, surrogacy program, and contacts
13 with reporters," due to a lack of evidence to support a finding of coordination.²⁵ And it
14 concluded that CTR's public statements that it coordinated all of its activity with HFA were
15 sufficient to establish coordination, at least at the Reason to Believe stage of the Commission's
16 proceedings.²⁶

17
18 On the other hand, the Court of Appeals did not call the internet exemption itself into
19 question and noted that even CLC conceded that "some expenses antecedent to unpaid internet
20 communications—including 'input costs' like 'video production or domain services expenses'
21 for videos to be posted online—fall within the internet exemption."²⁷ Ultimately, the Court left
22 it to the Commission to "sketch the bounds of the internet exemption and . . . more fully
23 analyze the facts before it."²⁸ On September 12, 2024, the District Court remanded the matter to
24 the Commission to conform with the Court of Appeals' opinion within 30 days.²⁹

20 *See, e.g., Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) (holding that HFA and CTR had standing).

21 *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57 (D.D.C. 2022), *aff'd*, 106 F.4th 1175 (D.C. Cir. 2024).

22 In the Matter of Appearance, Defense, and Appeal Authorization in *Campaign Legal Ctr. v. Fed. Election Comm'n*, Certification at 1 (Dec. 14, 2022).

23 *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175 (D.C. Cir. 2024).

24 *Id.* at 1191-92.

25 *Id.* at 1193.

26 *Id.* at 1191-92.

27 *Id.* at 1190.

28 *Id.* at 1195 (quoting *Campaign Legal Ctr.*, 646 F.Supp. 3d at 69).

29 Minute Order (Sept. 12, 2024), *Campaign Legal Ctr. v. FEC*, Case No. 1:19-cv-02336-JEB (D.D.C.); *see also* 52 U.S.C. § 30109(a)(8)(C).

IV. THE COMMISSION DISMISSES AS AN EXERCISE OF ITS PROSECUTORIAL DISCRETION AND VOTES TO INITIATE THE RULEMAKING PROCESS


We voted to dismiss this matter in an exercise of our prosecutorial discretion.³⁰ Respondents have terminated with Commission approval, the Committees have considered themselves terminated since 2022 and therefore records needed to determine the extent of any expenditures or contributions, assuming they were properly maintained, may be difficult to obtain. And the statute of limitations has expired, rendering any further enforcement a drain on the agency's already limited resources. In addition, the significant budgetary constraints under which the Commission operates and the need to conserve resources for meritorious matters arising from more recent election cycles, including the current one, informed our decision to dismiss.

We are mindful, however, of the D.C. Circuit's instruction to "sketch the bounds of the internet exemption."³¹ Accordingly, we have instructed the Office of General Counsel to prepare the documents required for a rulemaking addressing unanswered questions concerning allocation of expenses under the internet exemption.³² We believe any such clarifications should be made with input from the public and the protections of the Administrative Procedure Act, and that they should apply broadly, not merely to one entity that finds itself the subject of a complaint. Moreover, we are acutely aware that, for the last four election cycles, even the most sophisticated actors, have acted under the mistaken assumption that the internet exemption was as broad as the Controlling Commissioners' Statement of Reasons stated. Accordingly, we do not believe it would be appropriate for the Commission to develop a binding interpretation of the internet exemption in the context of this enforcement matter under the gun of a thirty-day remand.³³

V. CONCLUSION

For the foregoing reasons, the undersigned commissioners voted to dismiss this Matter pursuant to the Commission's prosecutorial discretion and instructed the Office of General Counsel to prepare documents for a formal rulemaking addressing the concerns raised by the Court of Appeals.

11/5/2024
Date


Shana M. Broussard
Commissioner

³⁰ Certification at 2 (Oct. 10, 2024);; *Heckler v. Chaney*, 470 U.S. 821 (1985).

³¹ *Id.* at 1195 (quoting *Campaign Legal Ctr.*, 646 F.Supp. 3d at 69).

³² Certification at 1, Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).

³³ *Cf.* 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title.").


MUR 7146R (Correct the Record, *et al.*)

Statement of Reasons


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11/5/2024
Date


Allen J. Dickerson
Commissioner

11/5/2024
Date


Dara Lindenbaum
Commissioner

11/5/2024
Date


James E. "Trey" Trainor, III
Commissioner



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Correct the Record, *et al.*

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MUR 7146R

**STATEMENT OF REASONS OF
CHAIRMAN SEAN J. COOKSEY**

This matter returns before the Commission upon a remand order from the U.S. District Court for the District of Columbia,¹ following its ruling that the Commission’s 2019 dismissal of the underlying Complaint was contrary to law. That decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit, which concluded that the controlling bloc of Commissioners’ Statement of Reasons impermissibly applied the Commission’s regulatory exemption for unpaid internet communications to expenditures at issue in the Complaint.² In its opinion, the D.C. Circuit declined to articulate its own interpretation of the internet exemption, but instead held that on remand “the expert Commission should have an opportunity in the first instance to draw that line” to “decide ... which expenses can be exempt from regulation as inputs to unpaid internet communications.”³

On October 10th, 2024, the Commission voted again to dismiss this matter and close the file.⁴ As explained in greater detail below, following the D.C. Circuit’s opinion, I believe that an appropriate interpretation of the Commission’s “internet exemption” covers the unpaid internet communications themselves, as well as inputs to those communications.⁵ Therefore, while many

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

² 11 C.F.R. § 100.26; *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1195 (D.C. Cir. 2024).

³ *Campaign Legal Ctr. v. FEC*, 106 F.4th at 1192.

⁴ Certification ¶ 3 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *See also Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) (“The FEC has broad discretionary power in determining whether to investigate a claim, and how, and whether to pursue civil enforcement under the Act.”).

⁵ The “internet exemption” broadly refers to the exemption for unpaid “communications over the internet” within the definition of “public communication” at 11 C.F.R. § 100.26, as well as the exemptions for “uncompensated Internet activity” in the regulatory definitions of “contribution” and “expenditure.” *See* 11 C.F.R. §§ 100.94, 100.155 (exempting individuals’ uncompensated services or use of equipment for “Internet activities” including “[s]ending or forwarding electronic messages; providing a hyperlink or other direct access to another person’s website; blogging; creating, maintaining, or hosting a website; paying a nominal fee for the use of another person’s website; and any other form of communication distributed over the Internet.”). The Commission has

of the expenditures at issue do fall under the internet exemption, others fall outside of its scope and therefore likely constituted prohibited in-kind contributions.

Nonetheless, with respect to those in-kind contributions, dismissal is appropriate given that the five-year statute of limitations has expired for all the alleged violations, which relate to activities that took place during the 2016 election cycle. Moreover, if the Commission did proceed with enforcement now, it would necessitate disproportionate use of the agency's time and resources due to the age of the allegations and the likely difficulty of obtaining any relevant evidence at this point. Lastly, Respondents Correct the Record ("CTR") and Hillary for America ("HFA") have both ceased operations and formally terminated as political committees. For these reasons, I voted to dismiss the matter rather than moving forward with enforcement, as recommended by the Office of the General Counsel ("OGC").⁶

I. BACKGROUND & PROCEDURAL HISTORY

The events that gave rise to this matter occurred more than eight years ago, during the 2016 election cycle. As alleged in the MUR 7146 Complaint, Correct the Record—a federal “hybrid” committee created to support Hillary Clinton’s 2016 presidential candidacy—made unlawful in-kind contributions of nearly \$6 million to Clinton’s principal campaign committee, Hillary for America. It did so by coordinating numerous expenditures directly with the Clinton campaign, including payments to produce internet communications and other online materials.⁷ CTR’s alleged spending for the benefit of HFA also included “salaries and compensation for its staff and contractors to conduct research, develop messaging materials, ‘track’ opposition candidates, ‘engage in online messaging ... for Secretary Clinton,’” as well as “disbursements for computer equipment and office space, software and web hosting for its multiple websites, video equipment and production for its campaign ads, commissioning private firms to conduct polls and media trainings, [and] travel for opposition ‘trackers’ and for staffers to conduct interviews,” among other activities.⁸

Although CTR asserted that much of its coordinated activity with HFA was broadly excluded from regulation as an in-kind contribution under the “internet exemption,”⁹ many of

explained that the internet exemption is a “broad exemption” intended “to remove any potential restrictions on the ability of individuals to use the Internet as a generally free or low-cost means of civic engagement and political advocacy.” Internet Communications, 71 Fed. Reg. 18589, 18603 (Apr. 12, 2006). *See also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49072 (July 29, 2002) (“[T]he internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost.”).

⁶ Supplemental Circulation to Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al.*).

⁷ *See* Complaint ¶¶ 1–2 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*).

⁸ *Id.* ¶¶ 94–95.

⁹ *See* Correct the Record Response at 3–4 (Dec. 5, 2016), MUR 7146 (Correct the Record, *et al.*) (“In its regulations and several Matters Under Review, the Commission has consistently held that online content—including costs associated with researching and producing that content—is not a ‘public communication’ unless a fee is paid to post it on another’s website.”). *See also* 11 C.F.R. § 100.26 (“The term general public political advertising shall not include communications over the internet, except for communications placed or promoted for a fee on another person’s website, digital device, application, or advertising platform.”).

CTR's disbursements were not "communication-specific," but rather were made for "mixed purposes."¹⁰ Therefore, the Complaint argued, "even if the finished product—such as a research memo, messaging guide, or video—falls under 'communications over the Internet exception,'" CTR's "underlying expenditures for staff compensation and equipment 'are still 'expenditures'" that, if coordinated with Clinton's campaign, would constitute in-kind contributions under the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), and Commission regulations.¹¹ On the basis of those allegations, OGC proceeded to recommend the Commission find reason to believe that CTR made, and that HFA accepted, excessive and prohibited in-kind contributions in the form of coordinated expenditures.¹²

The Commission, however, did not adopt OGC's reason-to-believe recommendation and ultimately voted to dismiss the Complaint and close the file.¹³ In a Statement of Reasons, the controlling group of Commissioners agreed with the Respondents that, since CTR had not paid to place its online communications on any third-party website, those communications could be neither "public communications" nor "coordinated communications" under the Commission's regulations.¹⁴ Consequently, CTR's internet communications, and any "payments for 'services necessary to make an Internet communication,'" did not constitute in-kind contributions to HFA.¹⁵

The statement further concluded that any input cost that, in some manner, helped to produce an online communication, such as staff compensation, equipment usage, and "additional overhead," would qualify as an in-kind contribution "only when the internet communication itself is an in-kind contribution."¹⁶ In the opinion of the controlling Commissioners, this "bright-line

¹⁰ See First General Counsel's Report at 9–10 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) ("[T]he bulk of CTR's reported disbursements are for purposes that are not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping in addition to payments for explicitly mixed purposes such as 'video consulting and travel' and 'communication consulting and travel.'").

¹¹ Complaint ¶ 94 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*). Notably, the Complaint described how CTR had commissioned a polling firm to conduct a poll during the November 2015 Democratic debate between Hillary Clinton and Bernie Sanders; the results of the poll "declared that Clinton had won the debate," and were posted online and given to reporters. *Id.* ¶ 31.

¹² First General Counsel's Report at 25 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

¹³ Certification ¶ 5 (June 4, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

¹⁴ See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) ("According to the plain text of 11 C.F.R. § 109.21, which governs the meaning of coordination 'in the context of communications,' an extensive underlying rulemaking record, and subsequent Commission advisory opinions and enforcement determinations, an internet communication is not regulated as 'coordinated' unless it is placed for a fee on a third party's website."); see also First General Counsel's Report at 19 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) ("CTR argues that, because none of its expenditures for communications were for electioneering communications or public communications, it cannot have made 'coordinated communications.'").

¹⁵ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12–13 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

¹⁶ *Id.* at 13.

rule” comported with “[t]he Commission’s traditional approach to input costs,” while also relieving committees and other groups of having to “allocate overhead expenses across internet communications (other activities),” which were burdensome administrative responsibilities that could “eviscerate the internet exemption” and “potentially chill political speech online.”¹⁷ As an example of how such an approach would apply in practice, the controlling Commissioners highlighted CTR’s commissioning of a November 2015 poll in coordination with the Clinton campaign, the results of which were then posted online at no cost.¹⁸ They concluded that the costs of the poll were exempt from the Act’s contribution limits by virtue of being an input to the subsequent communication posted online by CTR.¹⁹

After the Commission dismissed the Complaint in 2019, the complainant in MUR 7146 filed suit pursuant to 52 U.S.C. § 30109(a)(8), alleging that the Commission had acted “contrary to law” by dismissing the Complaint against CTR and HFA.²⁰ After several years of litigation,²¹ the U.S. District Court for the District of Columbia held that the Commission acted contrary to law in dismissing the Complaint.²² On appeal, a three-judge panel of the D.C. Circuit unanimously affirmed the district court, finding that the Commission had acted contrary to law, because (1) the controlling Commissioners’ broad reading of the internet exemption to include any expenditures “tangentially related” to an internet communication “rested in part on an impermissible interpretation of FECA,” and (2) their disregard of the allegations related to CTR’s non-internet expenditures was “arbitrary and capricious.”²³

In relevant part, the D.C. Circuit held that, “in defining exempt ‘input costs’ as broadly as it did,” the controlling Commissioners’ interpretation of the internet exemption “stretches it beyond lawful limits” and was “contrary to FECA’s expansive definition of expenditures, 52 U.S.C. § 30101(9)(A)(i), and its regulation of all expenditures made ‘in cooperation, consultation, or concert with, or at the request or suggestion of’ a candidate or party, *id.* § 30116(a)(7)(B).”²⁴ Moreover, “[b]y reading FEC regulations to exempt any expenditure even remotely or tangentially related to an eventual posting on the internet,” the court observed, “the controlling commissioners pave a path for the very circumvention of campaign finance laws that FECA’s reporting requirement is designed to prevent.”²⁵

¹⁷ *Id.*

¹⁸ *See supra* note 11.

¹⁹ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12–13 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

²⁰ *See Campaign Legal Ctr. v. FEC*, 466 F. Supp. 3d 141 (D.D.C. 2020).

²¹ Initially, the district court held that the plaintiff lacked standing to challenge the Commission’s decision not to proceed with enforcement of the Complaint. *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 85 (D.D.C. 2020). However, the D.C. Circuit reversed the standing decision, 31 F.4th 781, 793 (D.C. Cir. 2022), and on remand the district court found the Commission’s dismissal was contrary to law. 646 F. Supp. 3d 57, 59 (D.D.C. 2022). The Commission then appealed to the D.C. Circuit.

²² *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 59 (D.D.C. 2022).

²³ *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1190 (D.C. Cir. 2024).

²⁴ *Id.* at 1179, 1190–91.

²⁵ *Id.* at 1191.

The D.C. Circuit also cited the poll commissioned by CTR as “an illustrative example” of how, under the controlling Commissioners’ approach to input costs, “all the payments that went into conducting the poll, analyzing the data, and writing up the results” would be exempt from treatment as an in-kind contribution “so long as the Committee posts the results for free on a blog and, in so doing, delivers the commissioned poll results to the candidate.”²⁶ The court thought that such an expansive interpretation “cannot square with FECA’s plain text or purpose,” which limit the Commission’s discretion to exclude otherwise qualifying communications from federal law’s coordination regime.²⁷ On remand, the Commission would have “an opportunity in the first instance” to recalibrate its understanding of the internet exemption in a manner consistent with the D.C. Circuit’s decision.²⁸

Following remand in September of this year, OGC again recommended that the Commission find reason to believe CTR and HFA violated the Act by making and accepting prohibited and excessive in-kind contributions, and that the Commission attempt to conciliate the violations with the Respondents.²⁹ On October 10th, 2024, the Commission declined to follow that recommendation and instead voted to dismiss the Complaint.³⁰

II. LAW

Under the Act, any expenditure made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate” is a contribution to that candidate subject to the statutory limits and source prohibitions.³¹ Section 109.20 of the Commission’s regulations defines “coordinated” in largely the same terms as the Act, and provides that any expenditure that is coordinated with a candidate, “but that is *not* made for a coordinated communication under 11 C.F.R. 109.21,” is an in-kind contribution to the candidate with whom it was coordinated.³²

With respect to spending for communications, 11 C.F.R. § 109.21(b)(1) states that if a communication is “coordinated” with a candidate or authorized committee, then payment for that

²⁶ *Id.*

²⁷ *Id.* at 1192.

²⁸ *Id.*

²⁹ Supplemental Circulation to the Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al.*).

³⁰ Certification ¶ 3 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*).

³¹ 52 U.S.C. § 30116(a)(7)(B). A “contribution,” as defined in the Act, includes “anything of value” made or given by a person “for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i). The term “anything of value,” in turn, covers “all in-kind contributions,” including “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.” 11 C.F.R. § 100.52(d)(1). *See also id.* § 100.52(d)(2) (“[U]sual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.”).

³² *See* 11 C.F.R. § 109.20(b) (emphasis added).

communication is an in-kind contribution to the candidate with whom it is coordinated.³³ The regulations incorporate a three-prong test—consisting of a payment prong, a content prong, and a conduct prong—to assess whether a particular communication is a “coordinated communication.”³⁴ A communication must satisfy all three prongs to be considered a “coordinated communication” under the regulations.³⁵

The content prong of the coordinated communication test provides, in relevant part, that only “electioneering communications” and certain “public communications” may qualify as coordinated communications.³⁶ In the Act, an “electioneering communication” is defined as a “broadcast, cable, or satellite communication” that refers to a clearly identified federal candidate, is publicly distributed within certain time periods, and is targeted to the relevant electorate.³⁷ The Act defines a “public communication” as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”³⁸ Neither of these statutory definitions explicitly include internet communications.

However, the Commission’s regulations make clear that a “public communication” *excludes* “communications over the internet, except for communications placed or promoted for a fee on another person’s website, digital device, application, or advertising platform.”³⁹ The Commission originally adopted the broad regulatory exemption for unpaid internet communications as part of its 2006 rulemaking on internet activity; as the Commission made clear at that time, the intention behind the exception in the “public communication” definition for unpaid internet communications, and the internet exemption more generally, was to “make plain that the vast majority of Internet communications are, and will remain, free from campaign finance regulation,” in recognition of the internet’s status as “a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.”⁴⁰

III. LEGAL ANALYSIS

The allegation before the Commission on remand is whether or to what extent CTR made, and HFA knowingly accepted, prohibited and excessive in-kind contributions through CTR’s coordinated expenditures. OGC maintains that many of CTR’s expenditures do qualify as in-kind

³³ 11 C.F.R. § 109.21(b)(1).

³⁴ 11 C.F.R. § 109.21(a)(1)–(3).

³⁵ See 11 C.F.R. § 109.21(a); Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

³⁶ 11 C.F.R. § 109.21(c).

³⁷ 52 U.S.C. § 30104(f)(3).

³⁸ 52 U.S.C. § 30101(22).

³⁹ 11 C.F.R. § 100.26.

⁴⁰ Internet Communications, 71 Fed. Reg. 18589, 18589, 18590 (Apr. 12, 2006).

contributions, and it has recommended that the Commission find reason to believe a violation occurred and proceed with enforcement. But as explained below, I disagree.⁴¹

First, following the directions in the D.C. Circuit’s opinion and reapplying the internet exemption correctly, I am convinced that many of CTR’s expenditures are properly covered by the internet exemption because they are input costs to unpaid internet communications. Further, for those expenses that do not fall under the internet exemption but that would otherwise constitute coordinated expenditures under the Act and regulations, it is appropriate for the Commission to exercise its prosecutorial discretion to decline further enforcement at this time.

A. Correct the Record’s Internet-Exempted Expenditures

In accordance with the D.C. Circuit’s directive, the Commission should now reconsider the extent to which CTR’s various expenditures for coordinated activities with HFA constituted exempt inputs for unpaid internet communications, or instead were prohibited in-kind contributions. In doing so, it must heed the D.C. Circuit’s conclusion that the controlling group of Commissioners in MUR 7146 misconstrued the regulatory exemption and take “an opportunity in the first instance to draw that line” appropriately.⁴² The Commission must also consider the full body of law and agency precedent surrounding the internet exemption, including its own decisions and interpretive guidance that post-date the Commission’s original dismissal in this matter.

Properly interpreted, the internet exemption provides that unpaid internet communications, as well as the input costs of producing and disseminating those communications, are not public communications or coordinated expenditures. On the other hand, costs that are “only tangentially related” to an internet communication fall beyond the internet exemption’s boundaries. This reading of the exemption’s application to input costs, I believe, closely adheres to both the text and purpose of the Act, while continuing the Commission’s longstanding recognition that the internet is “a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.”⁴³

This framework may be readily applied to the types of cost inputs at issue in MUR 7146. For example, in the case of payments made for polling that is then placed online at no charge, like the CTR poll concerning Hillary Clinton’s debate performance,⁴⁴ the costs associated with “conducting the poll, analyzing the data, and writing up the results” are too attenuated to the subsequent online communication to be considered necessary to the creation of that communication;⁴⁵ therefore those costs are not within the internet exemption’s scope, even though the free online posting of the poll results is.

⁴¹ See Supplemental Circulation to the Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al.*).

⁴² See *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1192 (D.C. Cir. 2024).

⁴³ Internet Communications, 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006).

⁴⁴ See First General Counsel’s Report at 20 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

⁴⁵ *Campaign Legal Ctr. v. FEC*, 106 F.4th at 1191.

With respect to compensation to staff and vendors for their work relating to internet communications, the Commission clarified, in its recent revisions to the rules for internet communications, that internet communications, including “staffing, technology, or design costs” incurred to create such communications, generally are not in-kind contributions, even if coordinated with a candidate, unless there is a payment made to place or promote the communications on a third party’s site.⁴⁶ That rationale is consistent with our interpretation of input costs here.

Similarly, in Advisory Opinion 2024-01 (Texas Majority PAC), the Commission determined that the payment of vendors to produce literature specifically for a paid canvass that would be coordinated with federal candidates was not an in-kind contribution where the canvass itself did not meet the definition of “coordinated communication,” and the production costs for the literature were “limited to payments to the vendor to design and produce these specific communications, which will not be used outside of the Paid Canvass.”⁴⁷ In other words, the direct inputs for the exempt communication—payments to vendors for the purpose of creating literature specifically for that canvass—were also exempted. The production costs for Texas Majority PAC’s canvassing literature stands in contrast with CTR’s allocation of staff costs to travel to opposing candidates’ events, engage in private communications with reporters, and “develop relationships with Republicans,” among other activities, as “communication” costs, since these expenses are too far removed from any internet communications to qualify as sufficiently direct inputs to them, even if they do inform subsequent internet communications in some way.⁴⁸

When it comes to the internet exemption, I believe the Commission should employ the same general framework: costs that are direct inputs of exempted internet communications are also exempt from treatment as coordinated expenditures. What is relevant is not the kind of expense, but its proximity as an input to the ultimate communication. Input costs may be simple, low-level expenses—such as the cost of an internet service in order to disseminate the communications—or may be more substantial—such as consultants, graphic designers, videographers, actors, and other specialists necessary to produce the communications. But all costs should be exempt insofar as they are used as inputs to exempt communications—otherwise, the exemption itself becomes meaningless.

For equipment or services used for mixed purposes, costs should be reasonably allocated proportionally based on use.⁴⁹ While this may sometimes pose administrative challenges for organizations, like CTR, that engage in many varieties of political activities, it is consistent with the Commission’s general approach to the issue of mixed-purpose activities subject to multiple regulations or exemptions, which allows committees sufficient flexibility to determine allocation

⁴⁶ See Technological Modernization, 89 Fed. Reg. 196, 211 (Jan. 2, 2024).

⁴⁷ Advisory Op. 2024-01 (Texas Majority PAC) at 7.

⁴⁸ First General Counsel’s Report at 21, 23 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

⁴⁹ Factual and Legal Analysis at 3, 7–8 (July 17, 2012), MUR 6477 (Turn Right USA, *et al.*) (finding no coordinated communication because the video uploaded to internet for free was not a “public communication,” despite costing almost \$5,800 to produce).

appropriately.⁵⁰ Often, the value of the proportional use of equipment or services for internet communications compared to other activities will be minimal or virtually impossible to quantify with any precision,⁵¹ and I expect the Commission will continue to exercise discretion in deciding whether a committee or other organization has appropriately allocated its costs between unpaid internet communications and other activities in those circumstances.⁵²

Under this framework, most of the CTR expenses that the controlling group of Commissioners previously found to be exempt in this matter remain so because they were for made unpaid internet communications or direct inputs thereof. For instance, CTR's sending emails to supporters or journalists, creating its own websites and social media accounts, and posting content to its various platforms all fall within the internet exemption's scope.⁵³ The same is true of input costs for those activities, including but not limited to the purchase of necessary software and equipment, fees to third-party vendors such as internet and website-hosting service providers, and the staff work necessary to produce and disseminate the communications. I therefore declined to find reason to believe that any of those expenses constituted prohibited or excessive in-kind contributions from CTR to HFA.⁵⁴

B. Correct the Record's Other Expenditures

At the same time, applying the foregoing framework, it follows that a number of CTR's expenditures do *not* qualify under the internet exemption as unpaid internet communications or input costs thereof—either because they were unconnected with any unpaid internet communications or because they were for mixed purposes and were not appropriately allocated.

In the former category, the earlier bloc of controlling Commissioners correctly identified many expenditures as falling outside the internet exemption, such as CTR's training of media surrogates, its opposition research and tracking, and its costs in making contacts with reporters.⁵⁵ Furthermore, as D.C. Circuit concluded, the polling at issue in the Complaint was also too

⁵⁰ See, e.g., Advisory Op. 2024-14 (DSCC and Rosen for Nevada) (allowing an allocation of costs in hybrid television advertisements); Advisory Op. 2022-21 (DSCC, *et al.*) (allowing reasonable cost allocation as part of television advertisements soliciting funds for a party committee's legal proceedings fund). See also 11 C.F.R. § 106.3 (requiring allocation of expenses between campaign and non-campaign related travel); *id.* § 106.4 (requiring allocation of polling expenses).

⁵¹ Internet Communications, 71 Fed. Reg. 18589, 18596 (Apr. 12, 2006) (observing that “there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients”).

⁵² See Factual and Legal Analysis at 12, 13 (July 20, 2022), MUR 7930 (Minocqua Brewing Company SuperPAC, *et al.*) (dismissing allegations that respondent failed to report independent expenditures in connection with emails and other digital content when “incidental” costs of sending the exempt internet communications, such as “cost of [] time spent to draft and send the email and the value of the use of the email list,” had “relatively low dollar value”); Factual and Legal Analysis at 10 (May 31, 2022), MURs 7838, 7849, 7852, 7856 (Expensify, Inc., *et al.*) (dismissing allegation that corporation failed to report independent expenditures in connection with costs of sending emails in part because any “direct costs associated with preparing or sending the email” were “minimal”).

⁵³ See, e.g., Complaint ¶¶ 20, 30, 67 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*).

⁵⁴ Certification ¶¶ 1, 2 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*).

⁵⁵ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 14 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

attenuated from any exempt internet communication to itself quality as an input cost, and it was therefore likely a coordinated expenditure, despite the earlier controlling Commissioners' determination to the contrary.⁵⁶

Along with these expenses, CTR made other expenditures for overhead that evidently facilitated both internet and non-internet activities and that could not be covered entirely as exempt input costs to unpaid internet communications. These include costs like office rentals, utilities, and various staff salaries and expenses, among other things. As a result, assuming the requisite conduct occurred,⁵⁷ because these are non-communication expenditures that CTR likely coordinated with HFA, they are not protected by the internet exemption and may have constituted prohibited and excessive in-kind contributions under 11 C.F.R. § 109.20(b).

C. Dismissal as an Exercise of Prosecutorial Discretion

Notwithstanding the foregoing analysis, however, prudential considerations counsel against proceeding with enforcement against any part of the Complaint at this stage, and instead they call for the Commission to exercise its prosecutorial discretion to dismiss the alleged violations.⁵⁸ The legal and practical barriers in front of the Commission, including expiration of the statute of limitations, the age of the allegations and the termination of CTR and HFA as political committees, and related difficulties in investigating the claims and gathering evidence at this time, make further enforcement an imprudent use of Commission resources. I therefore voted to dismiss those allegations as an exercise of prosecutorial discretion.

First, the statute of limitations on all the relevant activity, which dates to 2015 or 2016, has long since lapsed.⁵⁹ Thus, if we did move forward with enforcement against CTR and HFA as recommended by OGC, the Commission would be unable to assess any civil penalty and would be limited to pursuing equitable remedies against organizations that have formally ceased to

⁵⁶ See *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1191 (D.C. Cir. 2024). The expenses for polling may have otherwise been exempted from regulation under a different rule specific to polling. 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 in-kind [or] expenditure under . . . this section.” At the very least, the existence of the separate regulation for polling expenses indicates that the correct analysis of CTR’s polling may be under another section of the Commission’s regulations.

⁵⁷ For the reasons that follow, I do not delve into the legal and factual issues of whether or to what extent sufficient coordinating conduct took place between CTR and HFA. Suffice it to say that I share the previous group of controlling Commissioners’ doubts whether other necessary elements of a coordinated communication or coordinated expenditure are met. Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 16 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (*Correct the Record, et al.*) (“Finding coordination requires more than considering the general relationship between entities—it requires a transaction-by-transaction assessment to determine whether specific conduct occurred with respect to particular expenditures. The information in the record indicates that *Correct the Record* limited its interactions with Hillary for America to the very communications that the Commission has previously decided not to regulate.”).

⁵⁸ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵⁹ See First General Counsel’s Report at 2 (Oct. 16, 2018), MURs 6940, 7097, 7146, 7160, 7193 (*Correct the Record, et al.*) (statute of limitations for alleged violations in MUR 7146 expiring between May 12, 2020, and November 8, 2021).

operate.⁶⁰ Indeed, the Commission has repeatedly chosen to exercise its prosecutorial discretion and dismiss enforcement matters where the statute of limitations on the alleged violations had previously expired.⁶¹

In addition, the significant passage of time since the relevant events in this case now makes any factual investigation practically difficult, if not impossible. Obtaining the relevant documents and witness testimony more than eight years after the activities at issue took place would likely prove a substantial challenge for the Commission and strain the agency's resources. The public also has limited interest in enforcement in a mature matter that dates back five election cycles. And, as former FEC-registered political committees, CTR's and HFA's public reports can still be reviewed by any interested person on the Commission's website, and therefore the public record is substantially complete already.⁶²

Third, both Respondent committees have since ceased operations and are no longer active organizations. CTR and HFA terminated as political committees, with the Commission's approval, in 2022.⁶³ As terminated committees, they are no longer able to file amendments to their prior reports disclosing new or revised information. The extinction of these organizations not only imposes hurdles to any factual investigation, but it negates the reasonable possibility that the Commission could successfully conciliate any violation, collect any penalty, or require any other form of compliance from these Respondents.⁶⁴

Finally, I must consider how to allocate the agency's limited enforcement resources and whether this matter warrants its attention relative to other, more pressing priorities. I am certain that it does not. In deciding how to direct the Commission's limited enforcement staff, I believe

⁶⁰ See Supplemental Circulation to the Commission at 3–4 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al.*).

⁶¹ See, e.g., Certification ¶ 2 (July 13, 2021), MUR 7125 (Debbie Wasserman Schultz for Congress, *et al.*) (dismissing allegations as to all respondents pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985)); Statement of Reasons of Vice Chair Allen J. Dickerson and Commissioner James E. “Trey,” Trainor, III, at 3 n.11 (Aug. 31, 2021), MUR 6992 (Donald J. 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 Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. “Trey,” Trainor, III at 4 (Mar. 18, 2021), MUR 7181 (Independent Women’s Voice))).

⁶² See 2015-2016 Committee filings, Correct the Record, <https://www.fec.gov/data/committee/C00578997/?cycle=2016&tab=filings> (last visited Nov. 5, 2024); 2015-2016 Committee filings, Hillary for America, <https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016> (last visited Nov. 5, 2024).

⁶³ Correct the Record, Approval of Termination, Letter from Scott Bennett, Senior Campaign Finance Analyst, Reports Analysis Division, to Elizabeth Cohen, Treasurer, Correct the Record (Nov. 2, 2022); Hillary for America, Approval of Termination, Letter from Ryan Furman, Senior Campaign Finance & Reviewing Analyst, Reports Analysis Division, to Elizabeth Jones, Treasurer, Hillary for America (Oct. 27, 2022).

⁶⁴ See Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey,” Trainor, III at 10 (Mar. 7, 2022), MUR 7465 (Freedom Vote, Inc.) (“[Respondent] 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.”).

there is a greater public interest in focusing efforts on more current complaints and investigations, including those that allege more serious violations and in which there is a greater probability of reaching meaningful enforcement outcomes and collecting penalties.⁶⁵

* * *

The Commission's internet exemption remains in force as a robust safeguard for free political expression online. Having considered the matter again following remand, I remain convinced that the internet exemption still broadly applies to much of the activity at issue in this matter. For any violations that did occur, the particular facts and circumstances of the case at this stage warrant the exercise of prosecutorial discretion. Therefore, I voted to dismiss the Complaint and close out the file.



Sean J. Cooksey
Chairman

November 6, 2024

Date

⁶⁵ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024) (Commission may exercise “its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) to dismiss Matters that do not merit the additional expenditure of Commission resources.”).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 12, 2024

VIA EMAIL

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RE: MUR 8033
Senator Raphael G. Warnock
Warnock for Georgia and
Christopher Koob in his official
capacity as treasurer

Dear Mses. Lopez, Poston, and Anspach:

On July 21, 2022, the Federal Election Commission notified your clients, Senator Raphael G. Warnock and Warnock for Georgia and Christopher Koob in his official capacity as treasurer (the "Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 8, 2024, the Commission, on the basis of the information in the Complaint and the Response, dismissed the allegation that Warnock and the Committee violated 52 U.S.C. § 30114(b)(2). Accordingly, the Commission voted to close its file in this matter effective November 12, 2024.

Documents related to the case will be placed on the public record today. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter's transmittal are enclosed.

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1507 or cjacksonjones@fec.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "A.B.R.", is written over a horizontal line.

Anne B. Robinson
Assistant General Counsel

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Warnock for Georgia and Christopher Koob **MUR 8033**
 4 in his official capacity as treasurer
 5 Raphael G. Warnock
 6

7 **I. INTRODUCTION**

8 The Complaint in this matter alleges that Raphael G. Warnock and Warnock for Georgia
 9 and Christopher Koob in his official capacity as treasurer (the “Committee”) violated 52 U.S.C.
 10 § 30114(b)(2), a provision of the Federal Election Campaign Act of 1971, as amended, (the
 11 “Act”), by converting campaign funds to personal use.¹ Specifically, the Complaint alleges that
 12 the Committee paid for litigation expenses related to allegations in an April 2021 lawsuit (the
 13 “2021 Lawsuit”), which alleges violations of federal civil rights laws based on facts that pre-
 14 dated Warnock’s candidacy and election to federal office.² The Response asserts that most of
 15 the claims made in the 2021 Lawsuit could only be brought against state and federal government
 16 actors, arguing that those claims relate to Warnock’s status as a federal officeholder and the
 17 payment of legal fees related to representation of Warnock in the 2021 Lawsuit therefore did not
 18 violate the Act’s prohibition on the personal use of campaign funds.³

19 Although many of the allegations in the 2021 Lawsuit appear to have pre-dated
 20 Warnock’s federal candidacy and election to federal office, the lawsuit alleged violations of laws
 21 that could only be brought against federal actors or agents of the federal government. Thus, the
 22 available information appears to indicate that the legal fees at issue in this matter may have been

¹ Compl. at 3 (July 18, 2022).

² Compl. at 2-3; *see* Amended Complaint, *Robertson v. Warnock, et al.*, 1:21-cv-1468-TCB (N.D. Ga. Apr.21, 2021) (“Amended District Court Complaint”).

³ Resp. at 1 (Sept. 6, 2022).

1 partially permissible and partially a conversion of funds to personal use. However, for the
2 reasons explained below, the Commission dismisses as a matter of prosecutorial discretion the
3 allegations that Warnock and the Committee violated 52 U.S.C. § 30114(b)(2) and 11 C.F.R.
4 § 113.2(e) by converting funds to personal use.⁴

5 **II. FACTUAL BACKGROUND**

6 Raphael Warnock is a U.S. Senator for the state of Georgia and was first sworn into
7 office on January 20, 2021.⁵ Warnock for Georgia is his principal campaign committee.⁶

8 The Complaint in this matter alleges that the Committee and Warnock violated the
9 personal use prohibition when the Committee paid for legal expenses related to defending
10 Warnock in the 2021 Lawsuit.⁷ The Complaint notes that the 2021 Lawsuit — filed on April
11 21, 2021, after Warnock became a federal officeholder — contains allegations relating to events
12 that occurred between 2005 and 2008, prior to Warnock’s election to the U.S. Senate.⁸

13 The 2021 Lawsuit was filed against Warnock and 22 other former and current Georgia
14 government and public officials in their individual and official capacities.⁹ The Amended
15 District Court Complaint contains varied claims of federal civil rights law violations.¹⁰

⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

⁵ Resp. at 2.

⁶ Warnock for Georgia, Statement of Organization (Oct. 15, 2023),
<https://docquery.fec.gov/pdf/974/202310159597827974/202310159597827974.pdf>; Warnock for Georgia,
Statement of Organization (July 15, 2022),
<https://docquery.fec.gov/pdf/103/202207159521895103/202207159521895103.pdf> .

⁷ Compl. at 1-2. .

⁸ Compl. at 1-2.

⁹ Amended District Court Complaint at 1.

¹⁰ *See* Amended District Court Complaint at 3, 6-10, 14, 19-29.

1 The law firms of Perkins Coie LLP and Krevolin & Horst represented Warnock in the
 2 2021 Lawsuit, and they filed a motion to dismiss the complaint for failure to state a valid
 3 claim.¹¹ On December 7, 2021, the District Court dismissed the 2021 Lawsuit.¹² The
 4 Committee disclosed disbursements to Perkins Coie LLP totaling \$27,068.99 on its 2021 Year-
 5 End Report.¹³ The Committee reported a disbursement to Krevolin & Horst of \$1,183.27 for
 6 “legal services” on its 2022 April Quarterly Report.¹⁴

7 The Response in the instant matter states that the motion to dismiss drafted by Perkins
 8 Coie LLP and Krevolin & Horst was straightforward and addressed the deficiency of the
 9 complaint as a whole without defending Warnock against any personal claims against him
 10 outside of his status as a U.S. Senator.¹⁵

11 The Response characterizes the allegations in the Amended District Court Complaint as
 12 “difficult to comprehend,” and reproduces some of the allegations against Warnock in support
 13 of that characterization.¹⁶ The Response also contends that most of the claims asserted in the
 14 2021 Lawsuit could only be brought against government actors or those acting on behalf of the

¹¹ Motion to Dismiss, *Robertson v. Warnock, et al.*, 1:21-cv-1468-TCB (N.D. Ga. Aug. 3, 2021); Resp. at 3.

¹² Order Dismissing Complaint, *Robertson v. Warnock, et al.*, 1:21-cv-1468-TCB (N.D. Ga. Dec. 7, 2021) (“Order Dismissing Complaint”).

¹³ See Warnock for Georgia, Amended 2021 Year-End Report at 34,455, 34,514 (July 8, 2022) (disclosing disbursements to Perkins Coie LLP for “legal services” in the amounts of \$25,703.99 on October 19, 2021, and \$1,365 on December 21, 2021, for a total of \$27,068.99), <https://docquery.fec.gov/pdf/057/202207089518181057/202207089518181057.pdf>; see also Warnock for Georgia, 2021 Year-End Report (Jan. 31, 2022) (disclosing the same disbursements to Perkins Coie LLP), <https://docquery.fec.gov/pdf/357/202201319486086357/202201319486086357.pdf>.

¹⁴ See Warnock for Georgia, 2022 Amended April Quarterly Report at 54,484 (July 8, 2022) (disclosing a \$1,183.27 disbursement to Krevolin & Horst for “legal services” on February 15, 2022), <https://docquery.fec.gov/pdf/870/202207089518215870/202207089518215870.pdf>; see also Warnock for Georgia, 2022 April Quarterly Report (Apr. 15, 2022) (disclosing the same disbursement to Krevolin & Horst), <https://docquery.fec.gov/pdf/492/202204159499688492/202204159499688492.pdf>.

¹⁵ Resp. at 3.

¹⁷ *Id.* at 5.

government.¹⁷ Finally, the Response asserts that the legal fees at issue were *de minimis* and tied to a simple motion to dismiss and one-page opposition to reconsideration prepared by counsel.¹⁸

III. LEGAL ANALYSIS

Candidates and their authorized committees are permitted to use campaign funds for a variety of specific purposes, including otherwise authorized expenditures in connection with the candidate’s campaign for federal office, ordinary and necessary expenses incurred in connection with the duties of a federal officeholder, and “any other lawful purpose,” but the Act prohibits any person from converting campaign funds to “personal use.”¹⁹ Conversion to personal use occurs when campaign funds are used to fulfill any commitment, obligation, or expense of any person “that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office.”²⁰ The Act and Commission regulations provide a non-exhaustive list of uses of campaign funds that are *per se* personal use, including rent, home mortgage, household food items, and tuition.²¹ For other uses of campaign funds, including payments for legal expenses, the Commission determines on a “case-by-case basis” whether the use is a prohibited personal use, that is, whether the expenses would exist irrespective of the candidate’s campaign or federal officeholder duties.²²

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 3, 6.

¹⁹ 52 U.S.C. § 30114(a)-(b); 11 C.F.R. §§ 113.1(g), 113.2; *see also* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) (“Personal Use E&J”) (explaining that “candidates have wide discretion over the use of campaign funds”).

²⁰ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g).

²¹ 52 U.S.C. § 30114(b)(2)(A)-(I); 11 C.F.R. § 113.1(g)(1)(i)(A)-(J).

²² 11 C.F.R. § 113.1(g)(1)(ii)(A); Advisory Opinion 2018-09 at 2-3 (Clements) (“AO 2018-09”).

1 The Commission has explained that ““campaign funds may be used to pay for legal
 2 expenses incurred in proceedings that directly relate to the candidate’s campaign activities or
 3 officeholder duties.””²³ Legal fees and expenses, however, “will not be treated as though they
 4 are campaign or officeholder related merely because the underlying proceedings have some
 5 impact on the campaign or the officeholder’s status.”²⁴ In a number of advisory opinions, the
 6 Commission has addressed legal fees incurred in criminal and congressional investigations and
 7 concluded that the use of campaign funds for such legal fees and expenses does not constitute
 8 personal use when the legal proceedings involve allegations directly relating to the candidate’s
 9 campaign activities or duties as a Federal officeholder.²⁵ The Commission has previously made
 10 clear that when a legal proceeding arises in part due to campaign activity or officeholder duties
 11 and in part for other reasons the campaign must limit its payments for legal expenses to a
 12 percentage of the cost of the proceeding associated with the campaign activity or officeholder
 13 duties.²⁶

14 The legal fees at issue here arose from the Amended District Court Complaint filed
 15 against Warnock in April 2021 — three months after Warnock was sworn into office as a U.S.
 16 Senator.²⁷ On one hand, the facts alleged in the Amended District Court Complaint occurred

²³ Factual and Legal Analysis (“F&LA”) at 6, MUR 7390 (Donald J. Trump, *et al.*) (quoting AO 2018-09 at 3) (quotation marks omitted).

²⁴ *Id.* (quoting Personal Use E&J, 60 Fed. Reg. at 7868).

²⁵ *Id.* (citing among others Advisory Opinion 2009-20 (Visclosky for Congress); Advisory Opinion 2009-12 (Coleman); Advisory Opinion 2009-10 (Visclosky I); Advisory Opinion 2008-07 (Vitter); Advisory Opinion 2003-17 (Treffinger)).

²⁶ Advisory Opinion 2003-17 at 7 (Treffinger) (determining that nine out of twenty counts in a federal candidate’s indictment “relate directly to the Federal campaign” and thus the candidate “may pay up to 45% (9/20) of the legal expenses incurred in his defense of this indictment using campaign funds”).

²⁷ *See* Resp. at 2; Amended District Court Complaint at 1.

1 between 2005 and 2008, several years before Warnock's candidacy and election to federal office,
2 suggesting that the allegations could not have related to Warnock's campaign activities or duties
3 as a Federal officeholder.²⁸ On the other hand, the Amended District Court Complaint alleges
4 causes of action that can only be brought against government officials or private citizens acting
5 on behalf of the government, suggesting that certain causes of action were related to his duties as
6 a government official.²⁹

7 As explained above, when a suit arises *in part* due to campaign activity or officeholder
8 duties and *in part* for other reasons, the campaign must limit its payments for legal expenses to a
9 percentage of the cost of the proceeding associated with the campaign activity or officeholder
10 duties.³⁰ Here, the available information indicates that the Committee paid for all of the legal
11 expenses associated with defending Warnock in the 2021 Lawsuit, indicating that a portion of
12 those payments may have violated 52 U.S.C. § 30114(b).³¹

13 However, investigating how much of the attorneys' work centered around researching
14 and analyzing claims that applied to Warnock as a federal candidate or officeholder versus those
15 claims that would exist irrespective of Warnock's candidacy or federal officeholder status would
16 not be an efficient use of the Commission's resources. Accordingly, the Commission dismisses
17 as a matter of prosecutorial discretion the allegation that Warnock and Warnock for Georgia and

²⁸ Amended District Court Complaint at 17-23.

²⁹ Resp. at 2; Amended District Court Complaint at 3, 6-10, 14, 19-29.

³⁰ F&LA at 8-9, MUR 7990 (Kim Klacik for Congress).

³¹ *Cf.* F&LA at 7-8, MUR 8034 (Friends of Matt Gaetz) (finding no reason to believe that the committee and candidate converted campaign funds to personal use where payments for legal expenses related to federal investigations would not have existed irrespective of campaign activities and where the available information indicated that the candidate hired separate counsel to represent him personally); F&LA, MUR 7990 (Kim Klacik for Congress) (finding no reason to believe that the committee and candidate converted campaign funds to personal use where the available information did not indicate that a candidate had failed to pay for a portion of litigation costs and the litigation at issue was brought as a result of the candidate's campaign).

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Factual and Legal Analysis

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- 1 Christopher Koob in his official capacity as treasurer violated 52 U.S.C. § 30114(b) and
- 2 11 C.F.R. § 113.2(e) by converting funds to personal use.³²

³² *Heckler*, 470 U.S. at 831-32.