



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C.

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Correct the Record and Elizabeth Cohen in her ) MUR 7146R  
official capacity as treasurer, *et al.* )  
 )

**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.<sup>1</sup>

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.<sup>2</sup>

11 C.F.R. § 100.26

<sup>2</sup> 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.

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

7  
 8        Complainant filed suit pursuant to section 30109(a)(8), but because the Commission  
 9 failed to garner sufficient votes to authorize a defense, the Commission failed to appear. HFA  
 10 and CTR subsequently intervened. After five years of litigation, the U.S. Court of Appeals for  
 11 the D.C. Circuit determined that the Commission’s dismissal of the administrative complaint was  
 12 contrary to law. The Court of Appeals remanded the matter to the District Court, which in turn  
 13 remanded it to the Commission. The Commission has, accordingly, been ordered to conform to  
 14 the opinion of the Court of Appeals and “sketch the bounds of the internet exemption” while  
 15 “more fully analyz[ing] the facts before it.”<sup>3</sup>

16  
 17        As explained below, we dismiss this matter pursuant to *Heckler v. Chaney*.<sup>4</sup> Given the  
 18 expired statute of limitations and the Commission-approved termination of both Respondents,  
 19 further efforts at enforcement would be an inefficient, and likely futile, use of our limited agency  
 20 resources. Mindful, however, of the district court’s requirement that the Commission further  
 21 explain the law, we voted to draft a Notice of Proposed Rulemaking to more clearly define the  
 22 types of expenses covered by the internet exemption.<sup>5</sup>

23  
 24 **II. FACTUAL BACKGROUND AND PROCEEDINGS BEFORE THE  
 25 COMMISSION**

26  
 27        On April 13, 2015, Hillary Clinton filed a Statement of Candidacy for the 2016  
 28 presidential election, designating HFA as her principal campaign committee.<sup>6</sup> On May 13, 2015,  
 29 CTR registered with the Commission as a hybrid political committee with a Carey non-  
 30 contribution account.<sup>7</sup>

31  
 32        The Complaint alleged that CTR spent almost \$6 million in coordination with HFA, but  
 33 that neither HFA nor CTR reported these funds as in-kind contributions from CTR to HFA in

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<sup>3</sup> *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)).

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

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

<sup>6</sup> Hillary Clinton Statement of Candidacy (Apr. 13, 2015).

<sup>7</sup> 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-Contributed 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).

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

3  
 4 CTR allegedly financed several types of activity to benefit HFA. CTR commissioned  
 5 polling;<sup>9</sup> paid employees to conduct fact-checking and media outreach; financed opposition  
 6 research; paid ordinary overhead expenses;<sup>10</sup> employed “trackers” to “record the public events”  
 7 of other campaigns;<sup>11</sup> and made expenditures for producing, distributing, and promoting videos,  
 8 and other content, that were published on its website and social media accounts.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> As discussed above, the Commission split on OGC’s recommendations,<sup>15</sup> and  
 16 the Controlling Commissioners issued the Statement of Reasons reviewed by the courts.

17  
 18 **III. SUBSEQUENT DEVELOPMENTS**

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

24  
 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.

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1        Following several years of litigation over collateral issues such as standing,<sup>20</sup> on  
2 December 8, 2022, the District Court granted summary judgment in favor of CLC.<sup>21</sup>  
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.<sup>22</sup> On July 9, 2024, the Court of Appeals affirmed, holding that the Controlling  
7 Commissioners interpreted the internet exemption too broadly.<sup>23</sup>  
8

9        Specifically, the Court took issue with the Controlling Commissioners’ exemption of  
10 polling and overhead costs allocable to non-exempt activity.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>  
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.”<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup>  
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<sup>20</sup>        See, e.g., *Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) (holding that HFA and CTR had standing).

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

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

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

<sup>24</sup>        *Id.* at 1191-92.

<sup>25</sup>        *Id.* at 1193.

<sup>26</sup>        *Id.* at 1191-92.

<sup>27</sup>        *Id.* at 1190.

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

<sup>29</sup>        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).

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

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

13

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

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26

27     **V. CONCLUSION**

28

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

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34

35

36    11/5/2024

37    Date

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 Shana M. Broussard  
 Commissioner

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

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

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

<sup>33</sup> 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.").

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4 11/5/2024

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17 11/5/2024

18 Date

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Allen J. Dickerson

Commissioner



Dara Lindenbaum

Commissioner



James E. "Trey" Trainor, III

Commissioner