



FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Freedom Vote, Inc.) MUR 7465
)

**STATEMENT OF REASONS OF CHAIRMAN ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III**

I. INTRODUCTION

This Matter arose from a complaint alleging that Freedom Vote, Inc., ("Freedom Vote" or "Respondent") violated the Federal Election Campaign Act of 1971 ("FECA" or "Act") by failing to organize, register, and report as a political committee in connection with Freedom Vote's spending in 2014, 2015, and 2016.¹ The Commission issued a reason-to-believe finding, and the Commission's Office of General Counsel ("OGC") opened an investigation.² By the time this Matter was presented to the Commission for a probable-cause determination, however, the five-year statute of limitations had expired on the bulk of Freedom Vote's alleged FECA violations. In an exercise of our prosecutorial discretion, we declined to pursue the alleged violations that were not time-barred. We further declined to adopt OGC's theory that the Commission has jurisdiction, in perpetuity, to require continued reporting by any organization that has ever operated as a political committee. We issue this statement of reasons as contemplated by the courts.³

II. FACTUAL BACKGROUND

In 2010, Freedom Vote organized as a tax-exempt corporation under Internal Revenue Code § 501(c)(4), stating that its purpose was "[t]o further the common good and general

¹ See generally Complaint at 1–2, MUR 7465 (Aug. 9, 2018).

² General Counsel's Brief ("GC Br.") at 1, MUR 7465 (Sept. 20, 2021); Certification ¶ 2.a, MUR 7465 (July 29, 2019).

³ See, e.g., *Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did.") (citation omitted); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

welfare of the people of Ohio.”⁴ In 2014, Freedom Vote made several independent expenditures, at least some of which it reported to the Commission.⁵ It did not, however, register as a political committee.

On August 9, 2018, Citizens for Responsibility and Ethics in Washington (“CREW”) filed a complaint with the Commission alleging, *inter alia*, that Freedom Vote’s spending in 2014, 2015, and 2016 triggered requirements to organize, register, and report as a political committee under the Act.⁶ On July 29, 2019, the Commission found reason to believe that Freedom Vote violated 52 U.S.C. §§ 30102, 30103, and 30104(a), (b), and (g)(2).⁷ In its subsequent investigation, OGC concluded that Freedom Vote:

- spent at least \$239,877.81 on “federal campaign activity”⁸ in 2014, which was 82.67% of its total spending for that year;⁹
- spent at least \$217,539.00 on “federal campaign activity” in 2015, which was 66.28% of its total spending for that year;¹⁰ and,
- spent at least \$2,987,563.45 on “federal campaign activity” in 2016, which was 77.35% of its total spending for that year.¹¹

⁴ GC Br. at 2.

⁵ *Id.* at 6–8.

⁶ *See generally* Complaint at 1–2, MUR 7465 (Aug. 9, 2018).

⁷ Certification ¶ 2.a, MUR 7465 (July 29, 2019). The Commission also found reason to believe that Freedom Vote violated 52 U.S.C. § 30120(a) and (d) and 11 C.F.R. § 110.11 by failing to include a disclaimer on its “Third Largest” advertisement, which aired in June and July of 2016. *See id.*; GC Br. at 14 & n.63. This alleged violation was time-barred once this Matter reached the Commission for a probable-cause finding and therefore provided no basis for further action against Freedom Vote. *See infra*, Part III(a) (explaining why the statute of limitations barred enforcement action in connection with many of Freedom Vote’s alleged FECA violations); OGC Memorandum to the Commission, MUR 7465 (Sept. 13, 2021) (acknowledging that statute of limitations had expired as to alleged failure to include a disclaimer on “Third Largest” ad).

⁸ OGC’s references to “federal campaign activity” include “Freedom Vote’s contributions to political committees, its own express advocacy, expenses associated with the “Third Largest” advertisement (to the extent it is not, itself, express advocacy), and other expenses described above such as polling done to support Freedom Vote’s express advocacy.” GC Br. at 18. As OGC notes, the Commission never found that the “Third Largest” ad is express advocacy. *Id.* at 23, n.103.

⁹ *Id.* at 11, 18.

¹⁰ *Id.* at 12, 18.

¹¹ *Id.* at 16–17, 18.

Freedom Vote did not spend any funds on “federal campaign activity” after 2016.¹² After settling an audit with the IRS and going bankrupt, Freedom Vote dissolved in 2019.¹³

Freedom Vote responded that it did not meet the threshold for political-committee status, and that—in recommending a reason-to-believe finding—OGC had misunderstood information that Freedom Vote provided about its spending during the investigation.¹⁴ It also contended that, rather than focus upon spending in an isolated year or years, the Commission ought to consider Freedom Vote’s spending over time (which, according to Freedom Vote, demonstrated that the organization did not satisfy the major-purpose test for political-committee status).¹⁵

On October 27, 2021, OGC recommended that the Commission find probable cause to believe that Freedom Vote violated 52 U.S.C. §§ 30102, 30103, and 30104(a), (b), and (g)(2) by failing to organize, register, and report as a political committee.¹⁶ The Commission considered OGC’s recommendation on November 9, 2021, and we voted against finding probable cause.¹⁷ Commissioner Broussard joined us in voting to close the file on this Matter.¹⁸

III. AUTHORITY AND ANALYSIS

a. The statute of limitations deprived the Commission of enforcement authority in connection with conduct more than five-years old.

Congress gave the Commission “exclusive” jurisdiction over civil enforcement of the Act.¹⁹ But exclusive jurisdiction is not perpetual jurisdiction. Because “FECA itself contains no

¹² *Id.* at 17–18.

¹³ *Id.* at 2, 19.

¹⁴ Freedom Vote Supp’l Resp.at 1-2, MUR 7465 (July 6, 2021).

¹⁵ *Id.* at 4. While we need not reach the issue in this Matter, previous Commissioners have “rejected OGC’s myopic focus on one year of spending,” noting that “[t]he fundamental flaw of OGC’s one-year approach—which is a recent creation by OGC—is that it ignores an organization’s history and other activities.” Statement of Reasons of Vice Chair Hunter and Comm’r Goodman at 21, n.96, MUR 6872 (Dec. 20, 2017).

¹⁶ OGC Notice to Commission, MUR 7465 (Oct. 27, 2021).

¹⁷ Certification, MUR 7465 (Nov. 14, 2021). The three other Commissioners voted to find probable cause, *see id.*, and issued a Statement of Reasons. Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 9, MUR 7465 (Dec. 16, 2021).

¹⁸ *Id.*

¹⁹ 52 U.S.C. § 30107(e) (“Except as provided in section 30109(a)(8) of this title [providing for persons aggrieved by Commission dismissal of or failure to act on a complaint to pursue litigation under certain circumstances], the power of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act”); (a)(6) (“The Commission has the power . . . to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under

explicit limitations period. . . courts have applied the catch-all five-year limitations period set forth in 28 U.S.C § 2462 to FECA enforcement actions brought by the Commission.”²⁰ Under 28 U.S.C. § 2462, “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained *unless commenced within five years from the date when the claim first accrued . . .*”²¹

Thus, when the Commission voted on OGC’s probable-cause recommendation on November 9, 2021,²² the five-year limitations period prevented us from pursuing enforcement based on activity before November 9, 2016. Accordingly, we voted against finding probable cause in connection with alleged violations before that date. This is consistent with the statutes and the caselaw (as well as our votes in previous matters),²³ and disposed of the bulk of Freedom Vote’s alleged violations.

Our colleagues who voted to find probable cause minimize the statute of limitations in two ways,²⁴ neither of which changes our analysis. First, they state that the Commission’s lack of a quorum during parts of 2019 and 2020 and Freedom Vote’s recalcitrance delayed progress in this Matter. But courts have repeatedly rejected the notion that uncooperative

section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of Title 26, through its general counsel”).

²⁰ *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 23 (D.D.C. 2019) (citing *CREW v. Fed. Election Comm’n*, 236 F. Supp. 3d 378, 392 (D.D.C. 2017), *aff’d*, 892 F.3d 434 (D.C. Cir. 2018)), *on reconsideration*, No. 18-CV-945 (CRC), 2022 WL 612655 (D.D.C. Mar. 2, 2022). *See also, e.g., Fed. Election Comm’n v. Christian Coal.*, 965 F. Supp. 66, 69 (D.D.C. 1997) (“FECA does not contain an internal statute of limitations. The applicable statute of limitations is provided under 28 U.S.C. § 2462—a point the parties do not, nor could they, reasonably dispute.”) (citations omitted); *Beam v. Mukasey*, No. 07 C 1227, 2008 WL 4614324, at *4 (N.D. Ill. Oct. 15, 2008) (collecting cases; noting that, “[a]lthough FECA does not contain a statute of limitations for civil liability, courts that have considered the question have found that the five-year default statute of limitations provided by 28 U.S.C. § 2462 applies.”) (citations omitted).

²¹ 28 U.S.C. § 2462 (emphasis added). The statute of limitations applicable to the Commission’s civil enforcement of FECA parallels the statute governing the Department of Justice’s authority over criminal enforcement of the Act. *See* 52 U.S.C. § 30145(a) (“No person shall be prosecuted, tried, or punished for any violation of” the Act “unless the indictment is found or the information is instituted within 5 years after the date of the violation.”); *see also Fed. Election Comm’n v. Lance*, 617 F.2d 365, 371–72 (5th Cir. 1980), *supplemented*, 635 F.2d 1132 (5th Cir. 1981) (Stating, in context of predecessor to 52 U.S.C. § 30145(a), that “[t]he statute refers to the institution of an ‘information’ or an ‘indictment,’ but not to the pursuit of a civil remedy. Thus, the statutory language indicates that the period of limitations applies only to the criminal prosecutions for violations of the FECA . . .”).

²² Certification, MUR 7465 (Nov. 14, 2021).

²³ Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 1–2, MURs 7859, 7860 (Dec. 17, 2021) (rejecting OGC’s argument that, “the passage of more than five years [since the alleged violations] notwithstanding, [the Commission] retain[s] authority over the[] Respondents”) (citing, *inter alia*, 52 U.S.C. § 30145(a); 28 U.S.C. § 2462); Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 2, MUR 7181 (Mar. 18, 2021) (rejecting OGC’s suggestion that the Commission possessed jurisdiction over alleged FECA violations that occurred in “the 2010, 2012, and 2014 federal elections.”).

²⁴ *See* Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 6, MUR 7465 (Dec. 16, 2021).

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respondents or lengthy delays in the administrative process have any impact on our statute of limitations.²⁵ To the contrary—“nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.”²⁶

Second, our colleagues argue that the statute of limitations does not preclude the Commission from pursuing “equitable remedies [] including requiring Freedom Vote’s disclosure of its receipts and disbursements as a political committee.”²⁷ As we have noted in the past, courts reject the theory that the statute of limitations prevents the Commission from imposing fines but does not bar equitable relief.²⁸ For instance, in *Federal Election Commission v. Williams*, this agency “argue[d] that § 2462 does not apply to actions for injunctive relief.”²⁹ The U.S. Court of Appeals for the Ninth Circuit flatly rejected that argument as “directly contrary to the Supreme Court’s holding in *Cope v. Anderson*, [which] holds that ‘equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.’ In other words, because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both.”³⁰ So too here.

Nevertheless, our colleagues contend that this principle does not apply to an enforcement action by the United States, citing two opinions from the U.S. District Court for the District of Columbia.³¹ But both of those were “cases where there [wa]s a significant risk of future harm,” and in such instances, “the law may allow the FEC to grant equitable relief

²⁵ See, e.g., *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 916 F. Supp. 10, 14 (D.D.C. 1996) (Where “[t]he Commission did not get around to voting to find probable cause until May of 1989, a mere four months before the fifth anniversary of [the respondent’s] last known transgression,” the court could “discern no reason why the administrative process cannot easily be accomplished by the FEC within the five year limitation in § 2462, *even with discovery and subpoena enforcement delays of many months or even years*,” as encountered there) (quoting *Fed. Election Comm’n v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. 15, 18–19 (D.D.C. 1995)) (emphasis added) (cleaned up).

²⁶ *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994); *Fed. Election Comm’n v. Christian Coal.*, 965 F. Supp. at 70 (quoting and applying *3M Co.* in context of Commission enforcement action).

²⁷ Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 7, MUR 7465 (Dec. 16, 2021).

²⁸ See Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 3–4, MURs 7859, 7860 (Dec. 17, 2021).

²⁹ 104 F.3d 237, 240 (9th Cir. 1996).

³⁰ *Id.* (quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)). See also, e.g., *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 916 F. Supp. at 14, 15 (“The FEC’s claim for civil penalties is barred by 28 U.S.C. § 2462. The FEC argues that even if § 2462 bars its civil penalty claims, it is nevertheless entitled to its declaratory judgment and an injunction. The Court disagrees. . . . Notions of welcome repose for ancient grievances aside, the practical concerns alone for problems of missing documents, faded memories, and absent witnesses that inevitably occur with the passage of time are no less problematic in adjudicating actions for declaratory and injunctive relief than in determining liability for monetary civil penalties.”).

³¹ Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 6, n.26, MUR 7465 (Dec. 16, 2021) (citing *Fed. Election Comm’n v. Christian Coal.*, 965 F. Supp. at 71 and *Fed. Election Comm’n v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. at 20–21 for the proposition that “injunctive relief is not a penalty.”).

notwithstanding the expiration of the statute of limitations.”³² Plainly, this “future harm” exception does *not* apply on these facts: the Respondent is a defunct, bankrupt entity accused of prior reporting violations, and there is no basis to believe that the allegedly impermissible conduct will recur.³³ Indeed, as the U.S. District Court for the District of Columbia recognized (and the Court of Appeals affirmed), the Commission’s “injunctive remedies would be moot, given [a respondent’s] defunct status,” and the “controlling commissioners almost certainly could not have found a significant risk of future harm by [the respondent] as required [to invoke the ‘future harm’ exception], because [the respondent] was defunct at the time of the decision.”³⁴ This reasoning squarely applies here.

Finally, our colleagues suggest that the statute of limitations “does not prevent us from making a probable cause to believe finding.”³⁵ Even if true, this would be irrelevant at best. Upon finding probable cause, the Commission is empowered to “attempt . . . to correct or prevent” an alleged FECA violation “by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved.”³⁶ The Commission must spend no less than 30 (but no more than 90) days attempting conciliation.³⁷ Nothing, however, requires a respondent to reach agreement (or even engage) with the Commission in the conciliation process. Instead, the Commission’s sole coercive power is derived from the courts of the United States—³⁸ and, as such, ultimately depends upon this

³² *CREW v. Fed. Election Comm’n*, 236 F. Supp. 3d at 392–93 (discussing *Fed. Election Comm’n v. Christian Coal.*, 965 F. Supp. at 71 and *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 916 F. Supp. at 15).

³³ *See id.*

³⁴ *Id.* at 393.

³⁵ Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 6, MUR 7465 (Dec. 16, 2021). *But see Fed. Election Comm’n v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989) (stating, with respect to injunctive relief under FECA, “Because the Act implicates First Amendment concerns about political expression, it is important that courts avoid granting injunctive relief which is unnecessary to further the purposes of the Act.”).

³⁶ 52 U.S.C. § 30109(a)(4)(A)(i) (“Except as provided in clause[] (ii) [establishing 15-day conciliation period where probable-cause determination occurs during the 45 days preceding an election] and subparagraph (C) [setting out process Commission may follow to impose scheduled penalties for violations of qualified disclosure requirements], if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act . . . the Commission *shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved.* Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).”) (emphasis added).

³⁷ *Id.*

³⁸ 52 U.S.C. § 30109(a)(6)(A) (“If the Commission is unable to correct or prevent any violation of this Act . . . by the methods specified in paragraph (4) [providing for conciliation; imposition of scheduled penalties for violations of qualified disclosure requirements], the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order . . . in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.”).

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agency's ability to demonstrate an actionable violation in court. Thus, even if the Commission could find probable cause to believe a time-barred violation occurred, doing so would be an exercise in futility as the Commission lacks direct enforcement authority over the Act.

The Commission lacked authority to pursue enforcement action against Freedom Vote in connection with activity before November 9, 2016. We voted accordingly, thus disposing of all but two of Freedom Vote's alleged FECA violations.

b. We exercised our prosecutorial discretion and declined to pursue enforcement in connection with Freedom Vote's other alleged FECA violations.

OGC argued that two of Freedom Vote's alleged FECA violations were not yet time-barred: the failure to file "the Post-General Report, due December 8, 2016, and the Year End Report, due January 31, 2017."³⁹ OGC further suggested that the Commission find probable cause on the theory that, "as a political committee, Freedom Vote had a continuing obligation to file disclosure reports until it terminated."⁴⁰

In determining whether to pursue enforcement, the Commission has prosecutorial discretion as described in *Heckler v. Cheney*.⁴¹ When exercising that discretion, it is incumbent upon us to "not only 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 requested best fits the agency's overall policies[,]"⁴² and other factors.

i. The Commission does not have jurisdiction to require continuous reporting by Respondent.

OGC's suggestion that the Commission may find probable cause because "as a political committee, Freedom Vote had a continuing obligation to file disclosure reports until it terminated"⁴³ defies both logic and black-letter law. Indeed, this theory was rejected in prior litigation, as the Commission can "cite to no precedent suggesting that the reporting

³⁹ GC Br. at 24, n.105; *see also* Statement of Reasons of Chair Broussard and Comm'rs Walther and Weintraub at 7, MUR 7465 (Dec. 16, 2021) (conceding that there is "doubt" about the timeliness of enforcement action based on anything other than "disclosure reports that were due less than five years before November 9, 2021.").

⁴⁰ GC Br. at 24, n.105.

⁴¹ 470 U.S. 821, 831–32 (1985). *See also id.* at 831 ("[A]n agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion ... [and] often involves a complicated balancing of a number of factors which are peculiarly within its expertise."); *CREW v. Fed. Election Comm'n*, 892 F.3d at 438 ("The Supreme Court has recognized that federal administrative agencies in general, and the Federal Election Commission in particular, have unreviewable prosecutorial discretion to determine whether to bring an enforcement action.") (citing *Heckler v. Chaney*, 470 U.S. at 831; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *CREW v. Fed. Election Comm'n*, 475 F.3d 337, 340 (D.C. Cir. 2007)).

⁴² *Heckler*, 470 U.S. at 831.

⁴³ GC Br. at 24, n.105.

requirements are continuous and the text of FECA does not clearly establish that entities have a continuous obligation to report information.”⁴⁴ After all, if FECA did require continuous reporting, “the statute of limitations would be largely irrelevant in cases of alleged non-disclosure or failure-to-register.”⁴⁵ This cannot be right. Adopting this line of thinking would be tantamount to vesting ourselves with perpetual jurisdiction over such violations, which would gut the purpose of 28 U.S.C. § 2462—to “set[] a fixed date when exposure to the specified Government enforcement efforts ends, advancing ‘the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.’”⁴⁶

As the Supreme Court has noted, statutes of limitations including 28 U.S.C. § 2462 “are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten[.]”⁴⁷ The notion that the Commission may swoop in at any moment and pursue enforcement action against any entity that has ever operated as a political committee, regardless of how long ago the activity occurred, is at odds with the very nature of a statute of limitations, and cannot support enforcement action against Respondent.

ii. Pursuing enforcement on the theory that a reporting violation accrues on the report-filing deadline carries litigation risk, presents practical challenges, and offers little chance of furthering the Commission’s mission.

Next, OGC argue that the Commission should pursue enforcement based upon Freedom Vote’s failure to file a 2016 Post-General Report (due December 8, 2016) and a 2016 Year-End Report (due January 31, 2017)—violations that OGC present as within the statute of limitations. As an initial matter, we do not find any binding authority for the proposition that the statute of limitations on such violation runs from the subject report’s due date. It is equally logical that the statute should run from the date of reportable spending.⁴⁸

⁴⁴ *CREW v. Fed. Election Comm’n*, 236 F. Supp. 3d at 392–93.

⁴⁵ *Id.*

⁴⁶ *Gabelli v. Sec. & Exch. Comm’n*, 568 U.S. 442, 448 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (declining to read a discovery rule into 28 U.S.C. § 2462 in context of Securities and Exchange Commission’s effort to pursue civil penalties).

⁴⁷ *Id.* at 448–49 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349 (1944); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)) (cleaned up).

⁴⁸ Absent direction from Congress or controlling caselaw, we note that Courts have rejected the application of the discovery rule to the running of the limitations period under 28 U.S.C. § 2462. *See, e.g., 3M Co. v. Browner*, 17 F.3d at 1462.

And even under OGC’s theory of the statute of limitations, enforcement would be difficult or impossible. We consider the following timeline:⁴⁹

| | |
|-------------------|-----------------------------------------------------------|
| October 20, 2016 | First date covered by 2016 Post-General Report |
| November 8, 2016 | 2016 General Election |
| November 28, 2016 | Last date covered by 2016 Post-General Report |
| November 29, 2016 | First date covered by 2016 Year-End Report |
| December 8, 2016 | Due date for 2016 Post-General Report |
| December 31, 2016 | Last date covered by 2016 Year-End Report |
| January 31, 2017 | Due date for 2016 Year-End Report |
| July 29, 2019 | Commission’s reason-to-believe vote |
| November 9, 2021 | Commission’s probable-cause vote |
| November 10, 2021 | Start of minimum 30-day conciliation period ⁵⁰ |
| December 10, 2021 | End of minimum 30-day conciliation period |

As discussed above, when the Commission finds probable cause, it must “attempt, for a period of at least 30 days, to correct or prevent [the] violation by informal methods of conference, conciliation, and persuasion. . . .”⁵¹ Even if we voted to find probable cause on November 9, 2021, the Commission would have had to spend 30 days in conciliation before it could pursue litigation on December 10, 2021 (at the earliest). By then, the statute of limitations on the 2016 Post-General Report would have expired, barring that very lawsuit. The Commission would have had—again, at the very most, and under OGC’s expansive reading of the statute of limitations—from December 10, 2021, until January 31, 2022, to pursue litigation in connection with the Post-General Report. One-and-a-half months is not much time to marshal the relevant evidence and information, draft a complaint and a motion for injunctive relief, and file suit. This work would have to be done over the winter holidays, with much of the staff taking leave, and with a press of other matters vying for their attention. Under these circumstances, we acted consistent with Commission practice in

⁴⁹ Report due dates and coverage dates are set out in 52 U.S.C. § 30104(a) and 2016 Reporting Dates, Federal Election Commission, https://transition.fec.gov/info/report_dates_2016.shtml#quarterly (visited Feb. 22, 2022).

⁵⁰ 52 U.S.C. § 30109(a)(4)(A)(i).

⁵¹ *Id.*

declining to pursue enforcement where the statute of limitations has not run but is “imminent.”⁵²

Moreover, 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.⁵³

Finally, even if the Commission successfully sued for an injunction compelling Freedom Vote to file the reports at issue, and even if somebody was around to comply with that injunction, the information would be unhelpful at best and misleading at worst. The Post-General Report covered receipts and disbursements from October 20 thru November 28, 2016—only two weeks of which preceded the 2016 election—and the Year-End Report covered activity after the election. The disclosure interest in such information is limited, given the likelihood that funds disbursed on election-related activity would have been received before then.⁵⁴ This is confirmed by “Freedom Vote’s own ledgers of expenses produced in the course of the investigation,” which OGC used as the basis of its recommendation.⁵⁵ Based upon Freedom Vote’s 2016 ledger, the maximum contributions that it could possibly have received during the post-general reporting period—if it were required to report as a political committee—would total \$45,000.⁵⁶ This same ledger reflects that Freedom Vote received *no* possible contributions from November 29 thru December 31, the period covered in the Year-

⁵² Statement of Reasons of Chair Broussard and Comm’r Weintraub at 2, MUR 7395 (May 7, 2021) (“Under these circumstances, and in light of the imminent statute of limitations and other priorities on the Commission’s docket, we voted to dismiss the allegations as a matter of prosecutorial discretion.”); Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 2, MUR 7265 (May 10, 2021) (concluding that “the Commission had no viable course of action but to dismiss [] matters” where “there was no reasonable chance for the Commission to bring an enforcement action to fruition in the remaining time.”). *See also* Statement of Reasons of Vice Chair Weintraub and Comm’rs McDonald, Thomas, and Toner at 2, MUR 5089 (Apr. 2, 2004) (exercising prosecutorial discretion to dismiss a matter four years and two months after respondents’ alleged violation due, in part, to “the age of the case”); Statement of Reasons of Chair Petersen and Comm’rs Hunter and Goodman at 1, MURs 6391, 6471 (Nov. 6, 2015) (dismissing matters under *Heckler* because, *inter alia*, “the statute of limitations [was] effectively expired” and the matter “did not warrant the further use of Commission resources”).

⁵³ Of course, a political committee cannot avoid Commission enforcement action by simply dissolving. *But see CREW v. Fed. Election Comm’n*, 236 F. Supp. 3d at 391 (noting that “even if there were not legal issues with prosecution, the defunct nature of the [respondent] entity—along with the apparent lack of any officer that could conciliate with the FEC—made any remedy, financial or injunctive, extremely difficult.”).

⁵⁴ Respondent did not engage in any regulable activity after 2016. *See supra* n.12.

⁵⁵ GC Br. at 18, n.78.

⁵⁶ Ledger of 2016 Freedom Vote Receipts and Expenses, FV01155-59 (reflecting a \$10,000 check dated October 11, 2016 and deposited on October 21, 2016; a \$25,000 check dated October 18, 2016 and deposited on October 21, 2016; and a \$10,000 check dated October 24, 2016 and deposited on November 4, 2016).

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End Report.⁵⁷ These records also show comparatively minimal disbursements—several of which were clearly administrative in nature—during both of these reporting periods.⁵⁸

IV. CONCLUSION

By the time this matter was before the Commission for a probable-cause finding, the 2016 election cycle was long over and Freedom Vote was defunct and bankrupt. Most of the alleged FECA violations were time-barred, and the Commission may not perpetually extend its own jurisdiction by requiring continuous reporting. Considering the litigation risk and practical obstacles associated with continued action against Freedom Vote, the (at best short) time before the statute of limitations would expire, the staleness of the facts, the narrow information subject to disclosure, and the Commission's limited resources, we voted against finding probable cause and voted to close the file on this Matter.

March 7, 2022
 Date



Allen Dickerson
 Chairman

March 7, 2022
 Date



Sean J. Cooksey
 Commissioner

March 7, 2022
 Date



James E. "Trey" Trainor, III
 Commissioner

⁵⁷ *Id.*

⁵⁸ *Id.* (reflecting modest expenses for telephone, accounting, legal, and consulting services).