

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN LEGAL CENTER and
CATHERINE HINCKLEY KELLEY,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

HILLARY FOR AMERICA and
CORRECT THE RECORD,

Defendant-Intervenors.

Civil Action No. 1:19-cv-02336-JEB

**PLAINTIFFS' MOTION FOR AN ORDER DECLARING THAT DEFENDANT HAS
FAILED TO CONFORM TO THE REMAND ORDER**

Plaintiffs Campaign Legal Center (“CLC”) and Catherine Hinckley Kelley respectfully move this Court to issue an order declaring defendant Federal Election Commission (“FEC”) to be in violation of the Court’s September 12, 2024 order remanding this case and directing the FEC to conform with the opinion of the D.C. Circuit, *see Op., CLC v. FEC*, No. 22-5336 (July 9, 2024).

Counsel for plaintiffs have conferred with counsel for defendant FEC and intervenors Correct the Record (“CTR”) & Hillary for America (“HFA”); defendant and intervenors oppose this motion.

This Court directed the 30-day remand period to commence on September 20, 2024, and the period for conformance under 52 U.S.C. § 30109(a)(8)(C) thus expired on October 20, 2024. The FEC has neither taken action in conformance with the Court’s order or the D.C. Circuit’s decision, nor provided any explanation for its refusal to conform. Instead, it voted 5-1 to “close the file” and dismiss the remanded proceedings.

BACKGROUND

I. Past Proceedings

On December 8, 2022, this Court held that the FEC’s dismissal of CLC’s administrative complaint against Hillary for America (“HFA”) and Correct the Record (“CTR”) was contrary to law and remanded the matter for “the Commission to conform with this decision within 30 days.” Mem. Op. 20, ECF No. 66. Thirteen days later, on December 21, 2022, the FEC appeared for the first time in the district court to notice an appeal of this decision, and moved to stay the remand order pending appeal. FEC Mot. for Stay of Remand Order, ECF No. 73. The stay was denied. Order, ECF No. 79. The Commission otherwise took no action to conform within the 30-day remand period.

Accordingly, CLC initiated a private action pursuant to 52 U.S.C. § 30109(a)(8)(C) against HFA and CTR three days after the 30-day conformance period elapsed, on January 10, 2023. *See* Compl., *CLC v. CTR-HFA*, No. 23-00075 (Jan. 10, 2023). On April 7, 2023, the court in the private action stayed that case pending the resolution of the appeal filed by the FEC in this case.

On July 9, 2024, the D.C. Circuit affirmed the “contrary to law” ruling of this Court. *See* Op. 30, 36, No. 22-5336. The D.C. Circuit further directed this Court to again remand the case back to the Commission to address “the bounds of the internet exemption” and “the facts before it” in a manner consistent with its opinion. *Id.* at 36 (internal quotations omitted).

The D.C. Circuit mandate issued on September 3, 2024. Accordingly, on September 12, 2024, this Court again remanded the matter to the FEC “consistent with 52 U.S.C. 30109(a)(8)(C), [and] in accordance with the opinion of the D.C. Circuit,” dating the remand for September 20. Minute Order (Sept. 12, 2024).

II. Commission Non-Conformance

On October 11, under a protective order, the FEC filed a sealed document noticing this court of the Commission's actions with respect to the remanded matter. *See* Notice, ECF No. 86. To date, the FEC has filed no further notices with this Court.

In its October 11 Notice, the FEC explained that the Commissioners decided by a vote of 5-1 to dismiss CLC's administrative complaint against CTR and HFA and to close the file. The notice also described a series of failed 2-4 votes to find "reason to believe" that CTR or HFA or the other respondents violated the Federal Election Campaign Act ("FECA") as alleged in CLC's administrative complaint. The Notice did not describe or append any legal rationale or other explanation for the votes cast by the various blocs of Commissioners.

ARGUMENT

Despite this Court's clear instruction to the FEC to take action with respect to CLC's administrative complaint against CTR and HFA in "in accordance with the opinion of the D.C. Circuit," the FEC failed to do so. Indeed, no Commissioner has provided any explanation or justification for the agency's actions on remand that attempts to remedy the legal defects identified by this Court and the D.C. Circuit. This is per se non-conformance with this Court's remand order.

I. The FEC failed to conform.

In its July 9, 2024 opinion, the D.C. Circuit found that the FEC's original dismissal of CLC's administrative complaint was "contrary to law" and directed the FEC to take steps to address several substantive questions of law, declaring, for example, that:

- “[W]e conclude that the expert Commission should have an opportunity in the first instance to draw [the] line” around “precisely which expenses can be exempt from regulation as inputs to unpaid internet communications.” Op. 30, No. 22-5336.
- “We accordingly hold that the blocking commissioners’ analysis of non-internet-related expenditures was arbitrary and capricious and thus contrary to law” and “our affirmance of the district court’s contrary-to-law holding means the FEC will have an opportunity on remand to conform with our ruling.” *Id.* at 33.

The D.C. Circuit concluded by directing this Court to again “remand [the case] to the expert Commission to ‘sketch the bounds of the internet exemption and . . . more fully analyze the facts before it.’” *Id.* at 36 (citing *CLC v. FEC*, 646 F. Supp. 3d 57, 69 (D.D.C. 2022)). While highlighting several substantive legal and factual issues for the FEC to address on remand, the D.C. Circuit, notably, did not require the FEC to take any particular enforcement action. *See id.*

The FEC’s Notice describes no attempt by the FEC to undertake any analysis or action to conform with the D.C. Circuit opinion. In the remanded matter, the Commission undertook a series of failed reason-to-believe votes, and eventually voted to close the file without explanation. But these actions are not responsive to the D.C. Circuit opinion and do nothing whatsoever to remedy the legal errors underpinning the original dismissal. No Commissioner provided a contemporaneous statement of reasons or other explanation for their positions.¹

¹ Further, at this point, any attempt to belatedly issue a statement of reasons would be the type of “post hoc rationalization” disallowed by the D.C. Circuit in *End Citizens United PAC v. FEC*, 69 F.4th 916, 922 (D.C. Cir. 2023). *See id.* at 921 (noting that controlling Commissioners “were obligated to issue a contemporaneous statement ‘explaining their votes’”)

II. The related private action should proceed.

As detailed *supra*, on January 10, 2023, CLC duly filed a private action under 52 U.S.C. § 30109(a)(8)(C) against HFA and CTR after the FEC failed to conform to this Court’s initial December 2022 remand order. The private action was stayed, but the terms of the stay order made clear that the case was stayed “pending the D.C. Circuit’s resolution of *Fed. Election Comm’n v. Campaign Legal Ctr.*, No. 22-5336 (D.C. Cir.).” Stay Order, No. 23-00075 (April 7, 2023). The appeal has been resolved and the mandate issued, and accordingly, CLC today also filed a motion to lift the stay in the private action, *see* Mot. to Lift Stay, No. 23-00075 (Oct. 30, 2024).

Further, given that the Commission failed to conform on the renewed remand here, this case is no impediment to the resumption of the private action. The D.C. Circuit clarified that CLC can “maintain its private suit against Correct the Record and Hillary for America,” if: (1) “[the Court of Appeals] affirm[s] that the Commission’s dismissal was ‘contrary to law,’” and (2) “the Commission fails to conform with such declaration on remand.” Op. 30, No. 22-5336. Both conditions have been satisfied.

Because, to plaintiffs’ knowledge, the posture of this case is unique, there is no judicial authority setting forth a specific procedural route for declaring the FEC in non-conformance and resuming the existing private action. In any event, however, an order by this Court declaring that the FEC failed to conform here ensures that CLC can proceed expeditiously in its private action against HFA and CTR, and—finally—seek to remedy the blatant FECA disclosure violations described in CLC’s original administrative complaint.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court issue an order declaring that the FEC has failed to conform to this Court's remand order. A proposed order is attached.

Dated: October 30, 2024

Respectfully submitted,

/s/ Tara Malloy

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2024, I electronically filed this motion and attached documents under seal with the Clerk of Court for the United States District Court for the District of Columbia by using the CM/ECF system. Service was effected by emailing copies of these documents to all counsel of record.

/s/ Tara Malloy
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