

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

CAMPAIGN LEGAL CENTER, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civ. No. 19-2336 (JEB)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant,)	
)	
and)	
)	
Hillary for America, <i>et al.</i> ,)	OPPOSITION
)	
Defendant-Intervenors.)	

**FEDERAL ELECTION COMMISSION’S OPPOSITION
TO PLAINTIFFS’ MOTION FOR AN ORDER DECLARING
THAT DEFENDANT HAS FAILED TO CONFORM
TO THE REMAND ORDER**

The Defendant Federal Election Commission (“FEC” or “Commission”) hereby opposes Plaintiffs’ Motion for an Order Declaring that Defendant Has Failed to Conform to the Remand Order (Oct. 30, 2024) (“Motion”). Campaign Legal Center and Catherine Hinkley Kelley (collectively here “CLC” or “plaintiffs”) filed the instant Motion before this matter was formally closed, and thus it is based solely on a partial view of the record. However, as the complete administrative record plainly shows, on remand the FEC did consider the administrative complaint filed by CLC, and the Commissioners issued detailed statements of reasons to explain their votes.¹ Five Commissioners supported the dismissal of the matter based on a prosecutorial

¹ The record in MUR 7146R was publicly released consistent with agency policy on November 12, 2024. *See* MUR 7146R (Correct the Record) <https://www.fec.gov/data/legal>

discretion rationale that is unreviewable here as a matter of law. Additionally, five Commissioners acted to provide further guidance as to the bounds of the internet exemption, directing the FEC's Office of the General Counsel to prepare a Notice of Proposed Rulemaking, the initial step in a rulemaking to address unanswered questions concerning the allocation of expenses under the internet exemption. The FEC acted in accordance with the September 12, 2024, remand order, and plaintiffs' Motion should be denied.

BACKGROUND

A. The FEC's Initial Consideration of the Administrative Complaint

CLC filed an administrative complaint with the Commission on October 6, 2016, alleging that Hillary for America and Correct the Record, the intervenors in this case, violated the Federal Election Campaign Act ("FECA") by making or receiving impermissible in-kind contributions.² The matter hinged on the interpretation of a Commission regulation defining public communications that excludes certain internet communications not placed for a fee from the definition of coordinated communication, thereby excluding such communications from certain FECA limitations and prohibitions. *See* 11 C.F.R. § 100.26.

When the Commission initially considered the administrative complaint, it voted 2-2 at the first step of the enforcement process to determine whether there was "reason to believe" a FECA violation occurred and to open an investigation.³ *See* 52 U.S.C. § 30109(a)(2). The FEC

/matter-under-review/7146R. The original administrative complaint is designated MUR 7146, and on remand it is designated MUR 7146R. The released file contains materials from both MUR 7146 and MUR 7146R.

² The procedural background in this case is recounted in *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1179-88 (D.C. Cir. 2024).

³ Certification (June 4, 2019), https://www.fec.gov/files/legal/murs/7146R/7146R_09.pdf.

thus fell short of the required four votes to proceed. *Id.* In conformance with D.C. Circuit precedent, the “Controlling Commissioners” — *i.e.*, those commissioners who voted not to find reason to believe — issued statements 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. Those Commissioners also found, to the extent any expenses were not exempt, there was insufficient evidence to conclude that the spending qualified as coordinated expenditures.

B. Judicial Review

In the initial proceedings in this Court, plaintiffs sought judicial review of the dismissal under 52 U.S.C. § 30109(a)(8). After failing to garner the necessary four votes, the FEC did not appear to defend the agency at this stage of the proceedings. 52 U.S.C. §§ 30106(c), 30107(a)(6). The district court granted the Correct the Record and Hillary for America (“Intervenors”) motion to appear in the lawsuit and defend the dismissal. (Order (ECF No. 19).) The case then proceeded without the Commission’s involvement through final judgment in this Court.⁴

This Court granted summary judgment to CLC on December 8, 2022, concluding that the controlling Commissioners’ rationale was contrary to law in two respects. (Memorandum Opinion (ECF No. 68).) The Court concluded that the Controlling Commissioners contravened the plain language of the statute in that the Controlling Commissioners’ analysis of the record

⁴ This Court initially found that CLC lacked standing to challenge the dismissal. *See Campaign Legal Ctr. v. FEC*, 466 F. Supp. 3d 141, 152 (D.D.C.), *on reconsideration in part*, 507 F. Supp. 3d 79 (D.D.C. 2020). On appeal the D.C. Circuit concluded CLC had informational standing finding that the Intervenors had not broken down their expenditures to show which were coordinated contributions, and it then remanded to this Court for consideration of the merits. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 783–84 (D.C. Cir. 2022).

was arbitrary and capricious because it did not properly weigh certain evidence of coordination between the Intervenors. (*Id.* at 19-20.)

On appeal, the D.C. Circuit considered and upheld this Court’s decision on the merits, setting aside the Commission’s dismissal as contrary to law. *Campaign Legal Ctr.*, 106 F.4th at 1195. It analyzed the internet exemption, and it found that in the absence of a limiting principle, that exemption conflicted with the disclosure required by the statute. *Id.* at 1191. The Court concluded that it had “not been asked to decide in the first instance precisely which expenses can be exempt from regulation as inputs to unpaid internet communications.” *Id.* at 1192. Thus, it concluded that the Commission “should have an opportunity in the first instance to draw that line,” remanding the matter. *Id.* This Court, in turn, remanded the matter to the FEC for further proceedings in accordance with the opinion of the D.C. Circuit. *See Minute Order* (Sept. 12, 2024).

C. The FEC’s Consideration of the Administrative Complaint on Remand

On remand, the Commission deliberated regarding Matter Under Review (“MUR”) 7146R in a closed executive session. In a series of votes on October 10, 2024, it considered reason to believe findings against Correct the Record and Hillary for America for making or receiving undisclosed impermissible in-kind coordinated contributions. (*See Notice of Subsequent Factual Developments*, ECF No. 86.) The Commission, by votes of 2-4, did not find reason to believe, the threshold determination as to whether to open an investigation. (*Id.*) It then voted to dismiss the complaint and close the file, which, consistent with agency policy, was publicly released and became effective 30 days after the date of the vote. (*Id.*)⁵

⁵ As the FEC explained in its recent Notice of Subsequent Factual Developments, (ECF No. 86), the FEC has published a statement explaining its implementation of its case closure procedures. Federal Election Commission, *FEC Implements New Enforcement Case Closure*

On November 12, 2024, the Commission publicly released the MUR 7146R file, and the administrative materials, including statements of reasons, are now on the public record. *See* Closed Matters Under Review, MUR 7146R (Correct the Record), <https://www.fec.gov/data/legal/matter-under-review/7146R>.

The Commissioners issued three statements of reasons: In the first statement, four Commissioners explained that they dismissed the matter as a matter of prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). (*See* Statement of Reasons of Commissioners Shana M. Broussard, Allen J. Dickerson, Dara Lindenbaum, and James E. “Trey” Trainor, III (Nov. 5, 2024) (Exh. 1).) The statement cited the expired statute of limitations, which in their view render it impossible to fully vindicate the statute; concluded that further enforcement would be a drain on the agency’s already limited resources; and noted their preference to allocate agency resources to matters where the limitations period had not expired. (*Id.* at 2.) The statement noted that both the administrative respondents had been administratively terminated by the Commission, which would complicate or prevent an efficient investigation. (*Id.*) As a practical matter, the statement explained, there may be difficulty, even if the records were maintained, in obtaining that material as part of an investigation. (*Id.* at 5.)

Procedures (“Closure Procedures”), (Apr. 3, 2024) (<https://www.fec.gov/updates/fec-implements-new-enforcement-case-closure-procedures/> (closure vote effective and the file is released 30 days after vote). Following the decision in *End Citizens United PAC v. FEC*, 69 F.4th 916 (D.C. Cir. 2023) (“*End Citizens United*”), the agency has adopted a detailed policy that ensures that the formal closing of the file, notification to respondents, and the issuance of any necessary statements of reasons occur essentially simultaneously. (Closure Procedures at 1.) Disposition letters are sent to the complainants and respondents after the 30 days have elapsed and the file closes. This occurs nearly simultaneously with the public release of certain documents related to the matter on the FEC’s website. *Id.* This policy is designed to ensure “[a]dministrative complainants will have a full 60 days from the day they are notified of the case’s outcome to determine whether to seek judicial review of the Commission’s actions under 52 U.S.C. § 30109(a)(8), as they will be notified on the day the file officially closes.” *Id.*

The statement explained that “further efforts at enforcement would be an inefficient, and likely futile use of our limited agency resources,” describing the need to conserve resources for use addressing more recent election cycles, including the current cycle. (*Id.* at 2, 5.) Furthermore, the four Commissioners continued, mindful of the D.C. Circuit requirement that the Commission further explain the law, and then “voted to draft a Notice of Proposed Rulemaking to more clearly define the types of expenses covered by the internet exemption.” (*Id.* at 5 (citation omitted).) The statement took into consideration the D.C. Circuit’s instruction to “sketch the bounds” of the internet exemption, seeking to obtain input from the public through the process in the Administrative Procedure Act. (*Id.* at 5.) The Commissioners took into consideration how a rule, with broad application, could serve the public, particularly since for the last four election cycles committees had relied on the broad interpretation of the internet exemption expressed in prior statements. (*Id.*) The four Commissioners further explained that “[w]e 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.” (*Id.*)

In the second statement, Chairman Sean J. Cooksey explained that a reasonable interpretation of the Commission’s “internet exemption” covers the unpaid internet communications themselves, as well as inputs to those communications. (*See* Statement of Chairman Sean J. Cooksey at 1 (Nov. 6, 2024) (Exh. 2).) He noted, “many of the expenditures at issue do fall under the internet exemption, while others fall outside of its scope and therefore likely constituted prohibited in-kind contributions.” (*Id.* at 1-2.) For example, the statement found that payments made for polling, analyzing the polling data, and writing up results that are then placed online at no charge were too attenuated to qualify for the internet exemption. (*Id.* at

7.) On the other hand, it found that for internet communications, staffing, technology, and design costs are generally not in-kind contributions, even if coordinated with a candidate. (*Id.* at 7-8.) He also found, nonetheless, with respect to those in-kind contributions, dismissal in this case is appropriate because the statute of limitations has expired for all the alleged violations, which relate to activities that took place during the 2016 election cycle. (*Id.* at 10-11.) The expiration of the statute of limitations would preclude a civil penalty, and Chairman Cooksey expressed his view that equitable remedies against Correct the Record and Hillary for America, both of which have ceased operations, are of limited value. (*Id.*) The Chairman reasoned that proceeding now would consume a disproportionate number of resources because of the allegation's age and that obtaining evidence could be difficult because the entities ceased operations and formally terminated as political committees. (*Id.*) Taking this into account, the statement considered whether this matter warranted the allocation of resources relative to other matters and concluded that it did not. (*Id.* at 11-12.)

In the third statement, Vice-Chair Weintraub explained that she would have found the alleged coordinated activity to be in violation of the FECA and concluded that the Commission should not have dismissed this matter either time the matter was before the agency. (*See* Statement of Reasons of Vice Chair Ellen L. Weintraub (Nov. 11, 2024) (Exh. 3).) She emphasized the D.C. Circuit's conclusion that the FEC's 2019 dismissal created a loophole that could not be squared with the statute or its purpose, and ran counter to the information before the agency. (*Id.* at 1.) She concluded that "in the beginning [the Commission] was too credulous and in the end decided too much time had passed." (*Id.* at 4.)

Bearing in mind the D.C. Circuit's instructions, the Commission also considered a Memorandum from Commissioner Shana M. Broussard that was on the agenda for the FEC's

Open Meeting on October 10, 2024. FEC, Open Meeting Agenda, October 10, 2024, *available* at <https://www.fec.gov/updates/october-10-2024-open-meeting/>. That memorandum recommended, “direct[ing] the Office of General Counsel to draft a Notice of Proposed Rulemaking to consider whether to revise the Commission’s regulation at 11 C.F.R. § 100.26 to delineate the scope of that regulation with respect to input costs.” (Memorandum from Shana M. Broussard, Commissioner, to the Commission (Oct. 8, 2024), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-45-A.pdf>. The Commission later approved that recommendation by a vote of 5-1, with Commissioners Broussard, Dickerson, Lindenbaum, Trainor, and Vice-Chair Weintraub voting to approve the recommendation. (*See* Certification (Oct. 23, 2024), <https://sers.fec.gov/fosers/> (search “Reg 2024-09” and select “Vote Document”).)

ARGUMENT

I. THE FEC HAS CONFORMED WITH THE REMAND ORDER

A. The Dismissal Decision Was Reasonable as a Matter of Prosecutorial Discretion and is Not Reviewable Here

The Commission reasonably conformed with the remand order in this case by dismissing this matter as a matter of prosecutorial discretion. (*See* Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh.1); Cooksey Statement at 10-11 (Exh. 2).) The D.C. Circuit has held 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.” *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) (“*Commission on Hope*”) (citing *Heckler*, 470 U.S. at 831, and *FEC v. Akins*, 524 U.S. 11, 25 (1998)); *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 884 (“*New Models*”) (D.C. Cir. 2021).

CLC has argued that the Commission’s actions “are not responsive to the D.C. Circuit opinion and do nothing whatsoever to remedy the legal errors underpinning the original dismissal.” (Mot. at 4.) CLC’s argument is based only on a partial review of the record, having filed its motion before the matter was formally closed and placed on the public record.⁶ Accordingly, CLC failed to include any analysis of the Commission’s exercise of prosecutorial discretion or its decision to direct the Office of the General Counsel to draft a Notice of Proposed Rulemaking. (Mot. at 4.) Instead, it claims the FEC voted to close its file “without explanation” (*id.*), but that was a product of the timing of CLC’s motion, rather than the content of the record, which includes a detailed rationale for the dismissal here.

As the statements of reasons explain, the dismissal here by a majority of Commissioners is rooted in three prosecutorial discretion considerations: (1) the expired statute of limitations;

⁶ On October 10, 2024, the Commission considered this matter and acted. It determined to close the file 30 days after the Commission Secretary certified the vote, consistent with its new policy developed to respond to *End Citizens United*, as described *supra* n.5. CLC, citing *End Citizens United*, argues in its Motion (at 4 n.1) that any statements issued after its motion was filed would be impermissible “*post hoc* rationalizations.” Not so. In *End Citizens United*, the controlling Commissioners’ statements were not released until more than 60 days after the effective date of the Commission vote to close the file and, indeed, after the plaintiffs had already commenced their suit challenging the dismissal, as they were required to do by the 60-day deadline of 52 U.S.C. § 30109(a)(8)(B). The D.C. Circuit held that statements of reasons must be issued ““at the time when a deadlock vote *results in an order of dismissal.*”” *End Citizens United*, 69 F.4th at 921 (quoting *Common Cause v. FEC*, 842 F.2d 436, 449) (D.C. Cir. 1988) (emphasis added). The Commission’s new policy changed the time when the order of dismissal is effective. There are now 30 days for the Commission to come to consensus (or at least a majority) after an initial split, reverse course entirely, or correct errors. If, and only if, there is no change in the split, the statements of reasons are released, and become operative, at precisely the same time the “deadlock vote results in an order of dismissal.” So, far from being “post-hoc,” they are contemporaneous.

Furthermore, the statements of reasons make that clear this decision was based on prosecutorial discretion and one of the statements also explains that in order to delineate the bounds of the internet exemption prospectively, Commissioners directed the Office of General Counsel to draft a Notice of Proposed Rulemaking to consider whether to revise the regulations implementing the internet exemption.

(2) the committees' status as terminated entities, which would lead to difficulty in the enforcement process; and (3) budgetary considerations (conserving resources for other meritorious matters arising from more recent cycles). (Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh. 1); Cooksey Statement at 2, 10-12 (Exh 2).)

First, the Commissioners explained, "dismissal is appropriate given that the five-year statute of limitations has expired for all the allegations, which relate to activities that took place during the 2016 election cycle." (Cooksey Statement at 2, 10 (Exh 2); *accord* Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh. 1).) The Commissioners took into consideration the passage of time and how the expiration of the limitations period rendered the agency unable to seek a civil penalty and instead would be limited to equitable remedies against entities that have ceased operations and have been terminated. (Cooksey Statement at 10 (Exh. 2) (citing First General Counsel's Report at 2, (Oct. 16, 2018).) The courts have explained that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another." *Commission on Hope*, 892 F.3d at 439 n.7 (quoting *Heckler*, 470 U.S. at 831-32).) Here, as a matter of prosecutorial discretion, it is reasonable to allocate resources to matters where the statute can be fully vindicated with a civil penalty, particularly when matters that are within the limitations period are competing for the same allocation of resources.

Second, the Commissioners explained that the respondent committees "have terminated with Commission approval ... and therefore records needed to determine the extent of any expenditures or contributions, assuming they were properly maintained, may be difficult to obtain." (Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh. 1).) The fact that the

committees were terminated (as an administrative oversight) is a reasonable consideration. The committees' status will make any investigation more challenging and limit the available remedies. (Cooksey Statement at 11 (considering inability to file amended disclosure reports, participate in the statutory conciliation process, or collect a civil penalty) (Exh. 2).)

Third, the Commissioners explained their preference to allocate resources to other more recent matters. Specifically, the group pointed to what it described as budgetary considerations (conserving resources for meritorious matters arising from more recent cycles, the expiration of the limitations period, and the likely difficulty in obtaining needed records from a committee terminated.) (Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh. 1); Cooksey Statement at 2 (Exh. 2).) The Supreme Court has long recognized that a federal law enforcement agency is generally "far better equipped" than the judiciary to analyze practical factors, as the Commission did here, than to attend a particular decision about whether to bring an enforcement action. *Heckler*, 470 U.S. at 831. In *Heckler*, the Court rearticulated the basis for an agency's discretion not to prosecute or enforce. *Id.* (collecting cases). The Court observed that "[t]his recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement," setting forth the "many" reasons for "this general unsuitability." *Id.* The relevant balancing includes consideration not only about "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, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

B. Further Judicial Review in this Case is Foreclosed

In *New Models*, the court confirmed that *Commission on Hope* “forecloses review” of the reasoning of FEC Commissioners that “explicitly relies on prosecutorial discretion” as a basis for dismissing a complaint. *New Models*, 993 F.3d at 885.⁷ The opinion concurring in the denial of a petition for *en banc* review of *New Models* explained:

In our structure of separated powers, “an agency’s refusal to institute proceedings” falls within “the special province of the Executive Branch” — a province the judiciary cannot invade. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); U.S. Const. art. II, § 1. The Administrative Procedure Act (“APA”) enshrines this principle by explicitly withholding judicial review of matters “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). The Federal Election Campaign Act (“FECA”) leaves such executive discretion in place, consistent with the Constitution and the APA. FECA importantly provides for judicial review of decisions “contrary to law,” 52 U.S.C. § 30109(a)(8)(C), but the Commission may decline to move forward with an enforcement action for reasons of prosecutorial discretion and such decisions cannot be reviewed by this court.

55 F.4th 918, 919 (D.C. Cir. 2022) (Rao, J. concurring, joined by Henderson, J., Katsas, J., and Walker, J.). *See also Heckler*, 470 U.S. at 831–32 (explaining that enforcement decisions require an agency 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, and, indeed, whether the agency has enough resources to undertake the action at all”). The Commissioners explained in detail their reliance on prosecutorial discretion in dismissing the administrative complaint at issue in this case, which reflected a quintessential exercise of prosecutorial discretion, not subject to further review.

⁷ The reviewability of prosecutorial discretion remains at issue in *End Citizens United PAC v. FEC*, 90 F.4th 1172, 1175 (D.C. Cir. 2024), *reh’g en banc granted, opinion vacated*, No. 22-5277, 2024 WL 4524248 (D.C. Cir. Oct. 15, 2024).

II. INITIATING A RULEMAKING IS ALSO IN CONFORMANCE WITH THE REMAND ORDER

In addition to FEC’s consideration and exercise of prosecutorial discretion, the Commission also voted to direct the Office of General Counsel to draft a Notice of Proposed Rulemaking to consider whether to revise the Commission’s regulation at 11 C.F.R. § 100.26 to delineate the scope of that regulation with respect to input costs. As plaintiffs acknowledge, “[w]hile 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.” (Mot. at 4.) A rulemaking addressing the scope of the exemption thus is reasonable.

The Act authorizes the Commission to “formulate policy with respect to” the Act, 52 U.S.C. § 30106(b)(1), and to promulgate “such rules . . . as are necessary to carry out the provisions” of the Act. 52 U.S.C. § 30107(a)(8). *See also Buckley v. Valeo*, 424 U.S. 1, 110-111 (1976). Here, the Commissioners voted 5-1 to instruct “the Office of General Counsel to draft a Notice of Proposed Rulemaking” to consider whether to revise the Commission regulation addressing unanswered questions concerning the allocation of expenses under the internet exemption. (Certification, (Oct. 23, 2024).) The statement written by four of the supportive Commissioners explained, “[w]e 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.” (*See* Broussard, Dickerson, Lindenbaum, Trainor Statement at 5 (Exh.1).) The four Commissioners went on to support prospective application of a rule: “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.” (*Id.*)

Relying on a pending rulemaking to address the scope of the application of FECA is consistent with other cases brought under 52 U.S.C. 30109(a)(8) where regulatory guidance can help assist in resolving a matter. *See, e.g., FEC v. Akins*, 524 U.S. 11, 29 (1998) (remanding administrative matter while rulemaking was pending because the Court found issuance of new rules “could significantly affect the interpretive issue presented” in the administrative matter, potentially mooted the case).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ Motion for an Order Declaring that Defendant Has Failed to Conform to the Remand Order.

Respectfully submitted,

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