

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	Civ. No. 22-3281 (CRC)
)	
v.)	
)	REPLY IN SUPPORT OF
FEDERAL ELECTION COMMISSION,)	MOTION TO DISMISS
)	
Defendant,)	
)	
and)	
)	
AMERICAN ACTION NETWORK,)	
)	
Intervenor-Defendant.)	

**FEDERAL ELECTION COMMISSION’S REPLY IN
SUPPORT OF ITS MOTION TO DISMISS**

The Federal Election Commission (“Commission” or “FEC”) demonstrated in its Motion to Dismiss (Docket No. 12) that a remand to the agency, under 52 U.S.C § 30109(a)(8)(C), would serve no discernible interest and that the futility doctrine supports avoiding a third round of administrative proceedings. In its Opposition (Docket No. 16), plaintiff argues the merits of the administrative matter and argues that a remand would provide further opportunity for Commission review. (Opp. at 15-19.) But plaintiff fails to grapple with statements by three Commissioners who have indicated they will not vote to revisit the merits of votes that took place more than four years ago. (*Id.*) In this long-pending matter, where there is an ample record of the views of a sufficient number of decision makers to control the outcome, the FEC has properly invoked the futility doctrine. The FEC’s motion to dismiss should be granted.

ARGUMENT

The Commission's opening brief explained that a remand in this case would serve no purpose because a sufficient number of Commissioners to prevent further agency enforcement steps has indicated they do not plan to revisit the merits of this case. In response, CREW primarily argues that, were this Court to remand to the Commission and the Commission again decline to find reason to believe, "that would merely demonstrate a failure to conform." (Opp. at 16.) That argument ignores the long line of cases establishing that administrative agencies in general, and the Commission in particular, are entitled to "reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998); see also *Nat'l Treasury Emp. Union v. Fed. Labor Relations Auth.*, 30 F.3d 1510, 1514 (D.C. Cir. 1994) ("[W]e frequently remand matters to agencies while leaving open the possibility that the agencies can reach exactly the same result as long as they rely on the correct view of a law that they previously misinterpreted, or as long as they explain themselves better or develop better evidence for their position.").

That is precisely what happened after this Court's original remand order in *CREW I*. The Commission dismissed again in a decision that was "free of the legal errors identified in this Court's" remand order. Mem. Op. & Order at 5, *CREW v. FEC*, No. 19-cv-1419 (CRC) (Docket No. 74) (Apr. 6, 2017). This Court correctly rejected CREW's argument that the Commission had failed to conform to the remand order, and as a result no private right to suit attached at that point. *Id.* CREW points to this Court's second remand to the FEC to assert that a failure to find reason to believe demonstrates a failure to conform (Opp. at 16), but there the Commission took no public action on the remand at all (*See* Compl. ¶ 52). Here, however, a sufficient number of Commissioners have explained in writing precisely their approach to this matter. CREW is

therefore incorrect to assert that any failure to find reason to believe on any remand would automatically result in it gaining a private right to sue. (*See Opp.* at 16-18.)

CREW's other arguments against futility similarly misinterpret relevant case law. CREW argues that the Supreme Court's conclusion in *Akins* contradicts the FEC's position here (*Opp.* at 15), but that decision involved an administrative complainant's Article III standing to seek judicial review, which the Commission has not here challenged. There, the Court concluded that an administrative complainant's injury was traceable to the Commission's dismissal decision even though it was "possible" for the Commission to reach the same result for a different reason because the Court could not "know that the FEC would have exercised its prosecutorial discretion in this way." *Akins*, 524 U.S. at 25. While the *Akins* Court could only guess at what the Commission might do on a remand based on argument from counsel, there is no need for similar speculation here. This Court already knows the views of a sufficient number of Commissioners to control the agency's consideration of this matter because those Commissioners have themselves explained their thinking on the record.

CREW claims a lack of on-point authority for the FEC's position in this case, but concedes that futility may properly be invoked where the agency decision makers "provided an adequate alternative lawful basis for its actions." (*Opp.* at 17.) That is precisely what has occurred here. The other authority cited by the FEC illustrates the well-established doctrine in a range of factual contexts. (*See Mot.* at 17 (citing *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35-36 n.10 (D.D.C. 2016) (matter pending more than six years); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (action agency would take on remand already clear); *Keats v. Sebelius*, No. 13-1524, 2019 WL 1778047, at *7 (D.D.C. Apr. 23, 2019) (action on remand preordained).)

CREW also argues that the decision in *FEC v. Legi-Tech*, 75 F.3d 704, 706 (D.C. Cir. 1996) does not support the FEC's motion to dismiss because the ratified administrative decision in that case that authorized the enforcement action there "could not be reexamined." (Opp. at 18.) Plaintiff's claim is at odds with the court's analysis in *Legi-Tech*, where the court reasoned that "forcing the Commission to start at the beginning of the administrative process, given human nature, promises no more detached and 'pure' consideration of the merits of the case than the Commission's ratification decision" to bring suit. *Id.* at 709. The court's rationale was not rooted in a conclusion that suit was legally required, rather it was rooted in its conclusion that a Commission that authorized suit, then ratified that decision a second time, was unlikely to reach a different conclusion in its consideration of the merits if that matter was once again back before it on remand. That is also the case here. This Court should reach the same conclusion as the court in *Legi-Tech*: credit the explanations of Commissioners in the record and not require a third round of agency review with no practical chance of agency enforcement.

Nor does CREW's assertion that the FEC has "abdicated any attempt to apply the law to AAN" (Opp. at 19) suggest that a remand is appropriate here. It is true that agency exercises of prosecutorial discretion may be reviewed if the "agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 883 n.4 (1985) (internal quotation marks omitted). But CREW fails to establish how an agency could abdicate its general statutory responsibilities in the context of a single enforcement matter. And in any event, the D.C. Circuit has observed that "the Commission routinely enforces the election law violations alleged in CREW's administrative complaint," including FECA's political committee provisions. *CREW v. FEC*, 892 F.3d 434, 440 n.9 (D.C. Cir. 2018).

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiff's complaint because it fails to state a claim on which relief can be granted.

Respectfully submitted,

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