



FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) No. 21-cv-2128 (RJL)
End Citizens United PAC v. FEC) (D.D.C. filed Aug. 9, 2021)
)

**STATEMENT OF CHAIR SHANA M. BROUSSARD AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

The underlying enforcement matter here involved a clear soft-money violation. An entity controlled by a federal candidate violated the Act by soliciting, receiving, directing, transferring, or spending non-federal funds.¹ Though our Office of General Counsel recommended that the Commission pursue the allegations contained in the complaint, three of our colleagues declined to do so. The Commission then voted to dismiss the matter.²

The Complainant sued, challenging the dismissal as contrary to law. We voted “No” on the motion to instruct our Office of General Counsel to defend against the lawsuit.³ As a result, the D.C. District Court will likely issue an order of default against the Commission.

We write today to shine a spotlight on our vote and on the D.C. Circuit precedents in this area that have forced this seemingly odd result.

In its May 20, 2021 Executive Session, the Commission voted on a motion to find reason to believe that Respondents New Republican PAC and 2018 Senate candidate Rick Scott had

¹ For details on the underlying enforcement matter, *see* Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub, MURs 7370 & 7496 (New Republican PAC, *et al.*), July 15, 2021, *found at* https://www.fec.gov/files/legal/murs/7370/7370_20.pdf and, more generally, the FEC’s public file in MURs 7370 & 7496 (New Republican PAC, *et al.*): <https://www.fec.gov/data/legal/matter-under-review/7370/>.

² Certification, MURs 7370 & 7496 (New Republican PAC, *et al.*), June 10, 2021, *found at* https://www.fec.gov/files/legal/murs/7370/7370_16.pdf.

³ Redacted Certification, *End Citizens United PAC v. FEC*, No. 21-cv-2128 (RJL) (D.D.C. filed Aug. 9, 2021) (Sept. 30, 2021), *found at* https://www.fec.gov/resources/cms-content/documents/ecu_212128_redacted_certification.pdf.

committed violations of the Act (“RTB,” in FEC shorthand).⁴ We voted for this motion, but it failed 3-3.⁵ The Commission therefore did not find RTB in this matter.

In its June 10, 2021 Executive Session, the Commission voted on two motions in this matter:

1. A motion to exercise the Commission’s legal authority to apply its prosecutorial discretion to the matter and dismiss pursuant to *Heckler v. Chaney*. We voted against this motion, and it failed 3-3.⁶ The Commission therefore did not exercise its legal authority to apply its prosecutorial discretion to the matter.
2. A motion to close the file and issue appropriate letters. Two of the three of us, and all our other colleagues, voted for this motion. It passed 5-1.⁷ The Commission, recognizing that there were not four votes to take action, therefore dismissed the matter.

Based upon the foregoing, it came as some surprise to us to find that our colleagues on the other side of the aisle characterized the result in this case very differently. It is puzzling that their Statement of Reasons makes no mention of the RTB vote taken in the matter on May 20. In that key vote, the three of us approved OGC’s recommendations to pursue the complaint. Because that vote split, however, the Commission made no finding, either to find reason to believe or to find *no* reason to believe that the law was violated. Instead, our colleagues claim that they found “no reason to believe that New Republican violated the soft money rules.” They then state that they “dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v. Chaney*.”⁸

This is simply not the case. The Commission specifically considered whether to dismiss under *Heckler v. Chaney*, and specifically voted not to do so. Under the Act, “All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”⁹ Commission policy

⁴ 52 U.S.C. § 30109(a)(2).

⁵ Certification, MURs 7370 & 7496 (New Republican PAC, *et al.*), May 20, 2021, *found at* https://www.fec.gov/files/legal/murs/7370/7370_15.pdf.

⁶ Certification, MURs 7370 & 7496 (New Republican PAC, *et al.*), June 10, 2021, *found at* https://www.fec.gov/files/legal/murs/7370/7370_16.pdf.

⁷ *Id.*

⁸ MURs 7370 and 7496 (New Republican PAC, *et al.*), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor III at 2 (July 21, 2021), *found at* https://www.fec.gov/files/legal/murs/7370/7370_21.pdf. *See also id.* at 10 (“we determined that this Matter merited the invocation of our prosecutorial discretion”; “we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*”; “we ... exercised our prosecutorial discretion”). Individual Commissioners do not have – and cannot invoke – such discretion; only the Commission itself can exercise that power.

⁹ 52 U.S.C. § 30106(c).

specifies that “[a]s with other actions taken by the Commission, [discretionary] dismissal of a matter requires the vote of at least four Commissioners.”¹⁰

But there’s a problem. Current D.C. Circuit precedent has granted exalted status to our colleagues’ Statements of Reasons in such situations. Because those three colleagues voted “No” on the motion regarding whether to find RTB, the D.C. Circuit deems them the “Controlling Commissioners” and the words of their Statement of Reasons are deferred to as the rationale for the Commission’s dismissal.

So if a few Commissioners *say* they dismissed under *Heckler*, courts will hold that the Commission *did* dismiss under *Heckler*, even though the Commission may have, in reality, declined to do so just moments before. At the moment, the D.C. Circuit makes zero distinction between an offhand mention of prosecutorial discretion in a few Commissioners’ Statement of Reasons and a Commission vote to formally exercise its legal authority to apply its prosecutorial discretion in a matter.

To complicate matters, under the Circuit’s most recent precedent,¹¹ when our colleagues use the term “prosecutorial discretion” in their statements, that invocation renders the Commission’s dismissal invulnerable to court review.¹²

Congress built a check on all of this into the Act. The Commission must vote on whether to mount a defense against these lawsuits – a motion that takes a minimum of four affirmative votes to succeed.¹³ Just like the four-vote requirement that governs our RTB determinations,¹⁴ each Commissioner has full discretion to vote on a litigation motion as he or she sees fit.

Given the facts of this matter, as well as the distortions in our colleagues’ Statement of Reasons regarding the disposition of this matter, and the deference that would be given to those

¹⁰ FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007).

¹¹ *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).

¹² *CREW v. FEC*, 993 F.3d 880, 895 (D.C. Cir. 2021) (Millett, J., dissenting) (“Under the plain statutory text and well-settled precedent, that type of decision falls squarely within the Federal Election Campaign Act’s provision for judicial review. Yet, according to the majority opinion, all of that changes because the Commission’s decision tossed a dependent clause with seven magic words into the final sentence of its statement: “For these reasons” – that is, the preceding 31 pages – “*and in exercise of our prosecutorial discretion*, we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.” The majority opinion holds that, with a wave of that verbal wand, the Commission extricated its final decision from all statutorily authorized judicial review and inoculated the entirety of the preceding legal analysis, determinations, and conclusions from judicial scrutiny”) (internal citations removed).

¹³ 52 U.S.C. § 30106(c) (“[T]he affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title”); 52 U.S.C. § 30107(a) (“Specific authorities. The Commission has the power – ... (6) to ... defend (in the case of any civil action brought under section 30109(a)(8) of this title) ... any civil action in the name of the Commission to enforce the provisions of this Act ... through its general counsel”).

¹⁴ 52 U.S.C. § 30109(a)(2).

distortions under current legal precedents, the three of us voted against instructing our Office of
General Counsel to defend incorrect statements of fact and law.

October 15, 2021
Date



Shana M. Broussard
Chair

October 15, 2021
Date



Steven T. Walther
Commissioner

October 15, 2021
Date



Ellen L. Weintraub
Commissioner