UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

HILLARY FOR AMERICA and CORRECT THE RECORD,

Defendant-Intervenors.

Civil Action No. 19-2336 (JEB)

MEMORANDUM OPINION

Back in 2019, Plaintiff Campaign Legal Center brought this suit to challenge the Federal Election Commission's dismissal of its administrative complaint against Correct the Record and Hillary for America for failing to report millions of dollars' worth of alleged in-kind contributions in connection with the 2016 presidential campaign. After myriad twists and turns, on December 8, 2022, this Court held that the FEC's dismissal was contrary to law and remanded the matter to the Commission. Unhappy with that result, the FEC, which had refused to participate and had ceded its defense to Defendant-Intervenors CTR and HFA, now finally comes off the sidelines to seek a stay of that remand pending its noticed appeal to the D.C. Circuit. Although cognizant of the Commission's concerns about its ability to present its legal

arguments on appeal, the Court nonetheless finds that the relevant factors weigh against a stay. It will, accordingly, deny the Motion.

I. Background

The legal, factual, and procedural background of this case has by now been covered numerous times by this Court and once by the D.C. Circuit. Campaign Legal Ctr. v. FEC, 334 F.R.D. 1, 3–4 (D.D.C. 2019) (CLC I); Campaign Legal Ctr. v. FEC, 466 F. Supp. 3d 141, 146–50 (D.D.C. 2020) (CLC II); Campaign Legal Ctr. v. FEC, 507 F. Supp. 3d 79, 81–83 (D.D.C. 2020) (CLC III); Campaign Legal Ctr. v. FEC, 31 F.4th 781, 784–88 (D.C. Cir. 2022) (CLC IV); Campaign Legal Ctr. v. FEC, No. 19-2336, 2022 WL 17496220 (D.D.C. Dec. 8, 2022) (CLC V). The briefest of summaries will therefore suffice here.

Plaintiff Campaign Legal Center — a non-profit campaign-finance watchdog group — filed an administrative complaint with the FEC in October 2016. CLC V, 2022 WL 17496220, at *2. It alleged that a Super PAC named Correct the Record had improperly coordinated expenditures with the Hillary Clinton campaign (Hillary for America) without disclosing them as in-kind contributions and in gross violation of the Federal Election Campaign Act's contribution limits. Id. CTR rejoined that this spending was appropriate because it fell under the so-called "internet exemption," which excluded certain expenses related to unpaid internet communications from the definition of in-kind contributions. Id.

Although the FEC's Office of General Counsel investigated the allegations and issued a report recommending that the Commission find reason to believe that several violations had occurred, the FEC itself rejected the OGC's recommendation and dismissed the administrative complaint without further action by a 2-2 deadlocked vote. Id. at *3. The controlling Commissioners, in a written Statement of Reasons, agreed with CTR that its expenditures fell

under FECA's internet exemption and therefore did not need to be reported as in-kind contributions. Id. They further concluded that insufficient record evidence existed to indicate that CTR had coordinated with HFA as to non-communications activities. Id.

In August 2019, CLC and one of its directors, Catherine Hinckley Kelley, filed this action challenging the FEC's dismissal order under 52 U.S.C. § 30109(a)(8). See ECF No. 1 (Complaint) at 22–23; see also ECF No. 15 (Amended Compl.). The FEC, however, failed to garner the four affirmative votes required by 52 U.S.C. §§ 30106(c) and 30107(a)(6) to defend this civil suit and thus defaulted. CLC I, 334 F.R.D. at 3–4. Notwithstanding the Commission's default, this Court permitted HFA and CTR to intervene as Defendants in November 2019 over Plaintiffs' objection. Id. at 5–7. After an initial dismissal for lack of standing and subsequent reversal by the D.C. Circuit, see CLC II, 466 F. Supp. 3d at 146–50, rev'd, CLC IV, 31 F.4th 781, this Court in its latest Opinion on cross-motions for summary judgment rejected the controlling Commissioners' justifications for dismissing the administrative complaint. First, it held that their Statement of Reasons rested on a flawed and overly broad interpretation of the internet exemption. CLC V, 2022 WL 17496220, at *4. Second, it held that the controlling Commissioners' "analysis of CTR's offline activities flagrantly disregarded key pieces of evidence" and was therefore arbitrary and capricious. Id. The Court did not, however, delineate the full scope of the internet exemption and, instead, left it "to the expert Commission on remand to sketch the bounds of the . . . exemption and to more fully analyze the facts before it." Id. at *9.

The Commission filed its Notice of Appeal approximately two weeks after this Court's decision, on December 21, 2022. See ECF No. 72 (Notice of Appeal). Although opinions remanding a matter to an agency are not ordinarily appealable as final orders, the FEC here does

have this opportunity. It is permitted to appeal this Court's remand Order under an exception to the finality requirement where an "agency cannot later challenge its own actions complying with a remand order." Sierra Club v. U.S. Dep't of Agric., 716 F.3d 653, 656–57 (D.C. Cir. 2013); see also, e.g., Common Cause v. FEC, 842 F.2d 436, 449 (D.C. Cir. 1988) (FEC appeal from remand order from district court). With the appeal pending, the FEC has now finally entered an appearance in this case. It here asks the Court to stay its remand Order pending appellate review. See ECF No. 73 (Motion for Stay).

II. Legal Standard

The party seeking a stay pending appeal bears the burden of justifying it based upon the following factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. U.S. Nuclear Regul. Comm'n, 772 F.2d 972, 974, 978 (D.C. Cir. 1985). This familiar test is "'essentially the same' as the test for a preliminary injunction, 'although courts often recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal where the balance of harms favors a stay.'" Citizens for Responsibility & Ethics in Wash. v. Off. of Admin., 565 F. Supp. 2d 23, 25 n.1 (D.D.C. 2008) (quoting Al-Anazi v. Bush, 370 F. Supp. 2d 188, 193 & n.5 (D.D.C. 2005)). In assessing the propriety of a stay, the Court bears in mind that it is an "extraordinary remedy," Cuomo, 772 F.2d at 978, that is "not a matter of right, even if irreparable injury might otherwise result" to the movant. Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). Instead, a stay is "an exercise of judicial discretion" that turns upon the particular circumstances of each case. Id. at 433 (citation omitted).

III. Analysis

A. Success on Merits

In considering the four factors, the Court begins with the likelihood of the FEC's success on its noticed appeal. As the Commission acknowledges, the Court has, by now, "written five opinions addressing aspects of this matter." Motion for Stay at 6. The Court remains convinced that its latest Opinion correctly resolved the issues presented therein. It recognizes, however, that so long as the other three factors "strongly favor a stay, such remedy is appropriate if 'a serious legal question is presented.'" Loving v. IRS, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (quoting Citizens for Responsibility & Ethics in Wash. v. Off. of Admin., 593 F. Supp. 2d 156, 160 (D.D.C. 2009)); see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843–44 (D.C. Cir. 1977). The Court does not dispute that the present case involves serious legal questions about the metes and bounds of the FEC's internet exemption. As a result, "[i]f the other factors tip in favor of a stay[,] . . . this factor will not preclude one." Loving, 920 F. Supp. 2d at 110; see also Holiday Tours, 559 F.2d at 843 (noting that court "may grant a stay even though its own approach may be contrary to movant's view of the merits").

B. Irreparable Harm

To establish the existence of the second factor, the movant must demonstrate that the injury is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury must also be "both certain and great; it must be actual and not theoretical." Id. (quoting Wisconsin Gas, 758 F.2d at 674). Finally, the injury must be "beyond remediation." Id.

The FEC devotes the bulk of its Motion to arguing that, absent a stay, it would be faced with irreparable harm no matter what it does. On one approach, it could decline to conform to this Court's remand Order — so as to preserve its appeal intact — but then lose exclusive civil-enforcement jurisdiction because § 30109(a)(8)(C) permits plaintiffs to bring a private lawsuit against the administrative respondents should the Commission not conform in 30 days. On the other approach, the FEC could immediately conform to the Court's Order, but thereby moot its noticed appeal and leave it with "no practical ability to challenge this Court's interpretation and application of FECA and the internet exemption to the administrative dismissal plaintiff challenges." Motion for Stay at 3.

While the Court is sympathetic to this purported dilemma, the facts on the ground have changed. The FEC's loss of exclusive civil-enforcement jurisdiction has already come to pass now that CLC has initiated a private action against HFA and CTR. See ECF No. 77 (Notice of Related Case); see also Campaign Legal Ctr. v. Correct the Record, No. 23-75 (D.D.C.). Regardless of whether the accrual of a private right of action for Plaintiffs constitutes irreparable harm for the FEC, that ship has sailed, and the Commission is no longer faced with the "untenable choice [of] conform[ing] . . . or giv[ing] up its [exclusive] jurisdiction over this case." Motion for Stay at 3. This harm is therefore insufficient "because it relates to past injury rather than imminent future injury that is sought to be" avoided through imposition of a stay. Summers v. Earth Island Inst., 555 U.S. 488, 495 (2009). After CLC initiated its private suit, the FEC filed a Notice urging the Court to stay that action as an alternative solution. See ECF No. 78 (FEC Notice) at 1. As the Commission is not even a party there, it would be unusual for the Court to take such a step, and it is not inclined to do so without the input of the parties to that case.

The only potential harm remaining at this juncture is the possible mooting of the Commission's appeal if it now conforms to the remand Order. But because CLC has already initiated its private suit against HFA and CTR, the Commission has not identified any trade-off from waiting and choosing to proceed with its appeal rather than immediately acting on the Court's previous Order. In other words, now that its exclusive jurisdiction is off the table, FEC has not pointed to any remaining harm "of such imminence that there is a 'clear and present' need for equitable relief," Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting Wisconsin Gas Co., 758 F.2d at 674), and the Commission's currently noticed appeal "provide[s] the very avenue for the FEC" to challenge this Court's Order. Shays v. Fed. Election Comm'n, 340 F. Supp. 2d 39, 50 (D.D.C. 2004) (denying FEC motion to stay).

The Court recognizes that the procedural posture of this appeal is unusual and complicated, and it takes seriously considerations of judicial efficiency and the risk of mootness. The FEC, nevertheless, has not demonstrated that the risk to its ability to appeal this Court's remand Order is "both certain and great." Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting Wisconsin Gas Co., 758 F.2d at 674). Finally, to the extent that the Commission now finds itself in a procedural tangle because of its late entry into this litigation, that is a knot of the agency's own tying. This factor, too, does not support a stay.

C. Public Interest and Harm to Others

Finally, the Court considers the "prospect that others will be harmed if the court grants the stay," as well as the "public interest in granting a stay." Cuomo, 772 F. 2d at 974. On the first point, the FEC maintains that staying this Court's remand would not substantially harm Plaintiffs both because the spending reports that CLC seeks concern a long-defunct presidential campaign and associated Super PAC, and because the length of this litigation means that the

"marginal extra time that an appeal will add to final resolution of this case is minimal compared with the time that has already elapsed." Motion for Stay at 5, 6. Neither argument is availing.

It has indeed been over six years since CLC first filed its administrative complaint with the FEC and over three years since the initiation of this suit. Such delay has long precluded Plaintiffs from either obtaining the disclosure of information they seek or bringing a civil action to challenge CTR and HFA's alleged violations. See 52 U.S.C. § 30109(a)(8)(C). After years of diligently pursuing their claims, further pause would push this litigation into the territory of indefinite and "undue delay." Belize Soc. Dev. Ltd. v. Belize, 668 F.3d 724, 732 (D.C. Cir. 2012); cf. Campaign Legal Ctr v. Fed Elec. Comm'n, No. 20-809 (D.D.C.), ECF No. 37 (Order on Mot. to Intervene) at 10–11 (noting that "[p]arties deserve some level of finality and cannot be expected to litigate cases indefinitely"). Although the relevant campaign activities that CLC seeks to challenge occurred long ago, Plaintiffs "ha[ve] endured the failure to act on [their] administrative complaint, filed in [2016], until now." Campaign Legal Ctr., No. 20-809, Order on Mot. to Intervene at 11.

For similar reasons, the FEC's arguments regarding the public interest in a stay fall flat. "The public interest is a uniquely important consideration in evaluating a request for [a stay]." In re Special Proceedings, 840 F. Supp. 2d 370, 376 (D.D.C. 2012) (quoting Nat'l Ass'n of Mfrs. v. Taylor, 549 F. Supp. 2d 68, 77 (D.D.C. 2008)). "It is well settled that '[d]isclosure [requirements are] justified . . . on the ground that they . . . help citizens make informed choices in the political marketplace.'" Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 369 (2010)). Here, the FEC nevertheless contends that allowing this Court's remand Order to go into effect would "result in duplicative proceedings as the private

right of action advanced in this Court while the Court of Appeals considered the Commission's case." Motion for Stay at 4. That is, however, precisely what FECA envisions by giving the Commission 30 days to conform after which a private civil cause of action becomes available under § 30109(a)(8)(C). The Commission nevertheless insists that "apply[ing] this Court's interpretation of the internet exemption while at the same time defending the controlling statement at the Court of Appeals . . . would undoubtedly cause confusion in the regulated community." Id. As noted above, however, there is no rush for the Commission to engage in such application while the appeal is pending. The Commission could thus avoid any regulatory confusion by waiting for a resolution of its appeal. This factor, too, does not support a stay.

IV. Conclusion

For the foregoing reasons, the Court will deny Defendant's Motion to Stay. A separate Order so stating will issue this day. While nothing in this decision prevents the FEC from continuing to seek its desired relief in the Court of Appeals, the Court sees no basis for any further delay.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: February 1, 2023