FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

STATEMENT OF
COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. "TREY" TRAINOR, III
ON THE PETITIONS FOR REHEARING *EN BANC* IN
CAMPAIGN LEGAL CENTER V. FEDERAL ELECTION COMMISSION* AND *END CITIZENS UNITED PAC V. FEDERAL ELECTION COMMISSION

The Federal Election Campaign Act "fails safe." In this sensitive area, the "exercise [of] coercive power over an individual's liberty or property rights"[1] must be premised upon bipartisan agreement.[2] Consequently, the courts have uniformly acknowledged that when the FEC declines to enforce "by an affirmative vote of 4 of its members,"[3] commissioners declining to move forward with enforcement "constitute a controlling group" whose "rationale necessarily states the agency's reasons for acting as it did."[4] There is no dispute on this point.

The difficulty arises when the Commission chooses not to move forward based upon an exercise of discretion. Two of our colleagues, quoting a distinguished member of the Court of Appeals, suggest that any decision not to enforce, "'no matter the reason,'" is "'reviewable in court.'"[5] The Petitioners themselves are more modest, seeking only review of the controlling commissioners' "merits analysis."[6]

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[1] *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (emphasis omitted).

[2] 52 U.S.C. § 30109(a)(2).

[3] *Id.*

[4] *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

[5] Statement of Vice Chair Weintraub and Comm'r Broussard on the Petitions for Rehearing *En Banc* in *Campaign Legal Center v. FEC* and *End Citizens United PAC v. FEC* at 1, Mar. 14, 2024 (quoting *End Citizens United PAC v. Fed. Election Comm'n*, 90 F.4th 1172, 1184 (D.C. Cir. 2024) (Pillard, J., dissenting)) (Weintraub-Broussard Statement).

[6] Pet. for Reh'g *En Banc*, *End Citizens United PAC v. Fed. Election Commission,* Case No. 22-5227 at 13 (D.C. Cir. Feb. 20, 2024); *Campaign Legal Ctr. v. Fed. Election Comm'n*, Case No. 22-5339 at 13 (D.C. Cir. Feb. 20, 2024) (both noting that "merits analysis" is "the only aspect of the decision [Petitioner] seeks to challenge").

Whatever the legal merits of these proposals, they fail to meaningfully grapple with the resource constraints placed upon the Commission by Congress. The Commission's budget is roughly $80,000,000 and tradeoffs are necessary. The Commission must process reports containing hundreds of millions of individual transactions, provide educational programs for candidates and political committees, and interpret the Act by writing regulations and responding to requests for advisory opinions. The overwhelming majority of the Commission's resources are dedicated to this unsung and uncontroversial work.[7]

With the funds available, the Commission has made hiring – including in the Enforcement Division – a priority.[8] But, last year, the Commission employed only 36 attorneys dedicated to processing and reviewing the deluge of complaints received by the Commission.[9] In each Matter Under Review, a team of attorneys must draft a First General Counsel Report advising the Commission – a task that, given the length and complexity of those reports, consumes the bulk of the Division's resources. And where the Commission chooses to enforce, it must dedicate further attorney time toward investigating allegations and negotiating conciliation agreements.

Multiply those efforts by literally hundreds of complaints, divide by the number of attorneys available, and an obvious fact becomes apparent: the Commission cannot possibly engage in credible enforcement efforts in all meritorious cases. Commissioners must necessarily assess "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."[10]

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[7] By contrast, according to its tax filings, the Campaign Legal Center, counsel in both pending petitions, raised over $25,000,000 in 2022 and may use the entirety of that amount for advocacy and litigation efforts. IRS Form 990 (Public Disclosure Copy), The Campaign Legal Center, Inc., 2022.

[8] Fed. Election Comm'n, "Fiscal Year 2025 Congressional Budget Justification" at 4, Mar. 11, 2024 ("The FEC prioritized filling vacant positions and rebuilding staffing levels during FY 2023; however, the agency has again paused hiring efforts during FY 2024 in order to absorb increased FY 2024 costs at the FY 2023 funding level").

[9] Joint Testimony of All Comm'rs Before the Comm. on House Admin., U.S. House of Representatives at 5, "Hearing: *Oversight of the Fed. Election Comm'n*," Sept. 20, 2023.

[10] *Heckler*, 470 U.S. at 831.

What some see as "abuse"[11] is instead a careful consideration of whether a particular enforcement matter will overwhelm the Commission's docket.[12] Expansive and contested legal theories create precisely the cases most likely to consume an outsized share of the Commission's resources, making it harder to successfully prosecute clear-cut and egregious violations of law. Statements of Reasons that take a position on what the law is or should be, as part of an evaluation of "whether the agency is likely to succeed if it acts," reflect this reality.[13]

Unreviewed statements by three commissioners are not themselves "comprehensive determinations of law"[14] and do not bind the Commission or litigants, except as an explanation of the reasoning in a particular matter. The Court of Appeals is well suited to determine whether review of such statements is required by the Act or a mere advisory opinion, just as it is well suited to determine what the expected remedy in such a case would be.

In any event, a remand for reconsideration of enforcement discretion raises enormous practical problems. Either such remands will simply result in narrower Statements of Reasons, or they will require the district courts to superintend granular decisions about the scope and nature of investigations, terms of settlement agreements, and litigation strategy undertaken by the Commission.

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[11] Weintraub-Broussard Statement at 2.

[12] Over the past three years, Commissioners Weintraub and Broussard have voted to pursue investigations in over 70 cases. No one seriously believes that the Office of General Counsel is equipped to pursue even a fraction of that number. Yet, under the approach our colleagues suggest, reasonable disagreements over resource allocation would be *disadvantaged* compared to disagreement on the law itself. Only three commissioners could forego enforcement based upon a legal disagreement, but it would require four to do so based upon the Commission's resource constraints – even if all commissioners agree on the law.

This raises two problems. First, it has no basis in the Act and would lead to interminable litigation. Second, why would a court have "judicially manageable standards," *Heckler* 470 U.S. at 830, for evaluating an agency's resource allocation decision where three commissioners invoke prosecutorial discretion, but not if four or more do so?

[13] *Heckler*, 470 U.S. at 831.

[14] *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, 993 F.3d 880, 906 (Millett, J., dissenting).

The alternative, of course, is a sea change in the enforcement of campaign finance law whereby complainants, acting as private attorneys general, enforce the laws for themselves.[15]

There are reasons to doubt that Congress intended that result, not least because it flips the Act on its head: a "partisan-aligned non-majority bloc"[16] of commissioners would be barred from initiating Commission enforcement, but those same commissioners would be empowered to hand enforcement off to ideologically aligned complainants. Those complainants, in turn, would be able to engage in wide-ranging discovery into respondents potentially selected for their partisan affiliations.[17] There would be enormous temptation to use such lawsuits as a campaign tool, and the courts would be called upon to decide especially sensitive questions on a challenging timeline. It takes little imagination to foresee the chaos such a system would produce and the resulting chill on protected political activity.

The Court of Appeals has wrestled with these questions since the Commission's creation. In deciding whether to revisit a legal regime that has been stable for decades, it should look past rhetoric and carefully evaluate the practical results of going down the path it is being encouraged to take.

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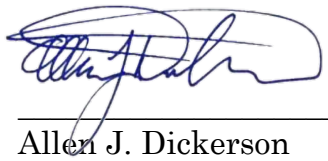
[15] Shane Goldmacher, "Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever," N.Y. Times, June 8, 2021 ("[T]he law allows advocates to sue the [C]ommission far sooner for defaulting in its basic duties. Then, because the agency isn't defending itself in those lawsuits, groups have a mostly clear path to sue candidates and campaigns directly"); Statement of Vice Chair Weintraub Regarding *CREW v. FEC* [and] *Am. Action Network* at 1, Apr. 19, 2018 ("Fire alarms are sometimes housed in boxes labeled 'Break glass in case of emergency.' The Federal Election Campaign Act has such a box; it's the provision that allows complainants to sue respondents directly when the Federal Election Commission fails to enforce the law itself. In the 44-year history of the FEC, this provision has never been fully utilized. Today, I'm breaking the glass") (internal citation omitted).

[16] Pet. for Reh'g *En Banc*, *End Citizens United PAC v. Fed. Election Commission,* Case No. 22-5227 at 15 (D.C. Cir. Feb. 20, 2024); *also Campaign Legal Ctr. v. Fed. Election Comm'n*, Case No. 22-5339 at 15 (D.C. Cir. Feb. 20, 2024) ("partisan-aligned minority faction").

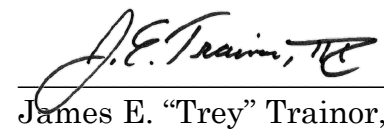
[17] After all, when a "partisan-aligned non-majority bloc" of commissioners intentionally declined to close Matters Under Review, defaulted the Commission in litigation, and quietly manufactured private causes of action against eight specific respondents, seven were prominent entities aligned with the opposing party. *Compare* MUR 7516 (Heritage Action for Am.); MUR 6589R (Am. Action Network); MURs 6915/6927, (John Ellis Bush); MUR 7422 (Greitens for Missouri).; MURs 7427/7497/7524/7553 (Nat'l Rifle Ass'n of Am. Political Victory Fund); MUR 7486, (45Committee, Inc.); MURs 7672/7674/7732 (Iowa Values); *with* MUR 7726 (David Brock).



March 18, 2024

Allen J. Dickerson
Commissioner

Date



March 18, 2024

James E. "Trey" Trainor, III
Commissioner

Date