ASHBY

February 11, 2021

VIA EMAIL

Federal Election Commission
1050 First Street, NE
Washington, District of Columbia 20436

MURs 6917 & 6929: Supplemental Response to Probable Cause Notice

Dear Commissioners:

On behalf of Our American Revival and its Treasurer, C. Ryan Burchfield, thank you for the additional opportunity to respond to the Office of General Counsel's Notice to the Commission dated July 7, 2020, in which OGC recommends the Commission should find probable cause against OAR.

Three presidents have occupied the Oval Office since these matters first landed on the Commission's docket, where they now are nearing the end of their sixth year. Still, OGC endeavors to keep them alive for the sole purpose of obtaining empty injunctions against OAR—an organization that, at this point, is only awaiting the end of these proceedings so it can terminate. For the following reasons, the Commission should reject OGC's recommendation, and close the files in these matters.

To begin, as it has done throughout this matter, OGC continues to mischaracterize OAR's positions on the facts of this matter and its arguments on the law. It writes that "OAR does not contest the facts cited in the General Counsel's Brief." Probable Cause Notice at 3. This is untrue, unfair and uncalled for. On this point, please see the Response of OAR to General Counsel's Brief (May 26, 2020) at pp. 6-14, and especially at pp. 10-14, as well as the Response of OAR to F&LA (June 5, 2019) at pp. 5-15. OGC also blows off OAR's legal arguments, ignoring our arguments about OGC's flawed "nexus" analysis and the departure from precedent that OGC's position in this matter represents, Response of OAR to F&LA at pp. 2-9, Response of OAR to General Counsel's Brief at p. 15, and alleging that our only positions are "that the statute of limitations has run and that the full extent of the violations has not been precisely accounted," Probable Cause Notice at p. 3, as if those are trifling side issues instead of the bars to a probable cause finding or the continuance of this proceeding that they actually are.

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More importantly for present purposes, however, **OGC overstates the Commission's authority to act following the expiration of the five-year statute of limitations and fails to apprise the Commissioners of directly relevant legal authority that weighs against the action it urges the Commission to take.** Specifically, OGC appears to have conceded that the statute of limitations has expired in these matters,[1] but contends that it nevertheless can bind OAR up in the Commission's administrative process—apparently indefinitely—for the purpose of making academic probable cause findings and seeking pyrrhic equitable remedies. Probable Cause Notice at p. 2 ("Thus, regardless of whether the five-year statute of limitations invoked by OAR impedes the Commission's ability to seek a civil penalty, it does not prevent the Commission from pursuing equitable remedies . . . .").

In support of this position, OGC cites *CREW v. FEC*, 209 F. Supp. 3d 77, n.3 (D.D.C. 2016), *FEC v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997), and *FEC v. National Republican Senatorial Committee*, 877 F. Supp. 15, 20-21 (D.D.C. 1995). **But it fails to cite *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), and *FEC v. National Right to Work Committee*, 916 F. Supp. 10, 15 (D.D.C. 1996), two cases that do not support its position.** In *Williams*, the Ninth Circuit ruled that post-statute of limitations injunctive relief was not permissible because the Commission's claim for equitable relief was connected to its time-barred claim for legal relief. 104 F.3d at 240 (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947) ("[E]quity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."). In *National Right to Work Committee*, the D.C. District Court denied the Commission's request for post-statute of limitations injunctive relief against an organization that already had ceased engaging in the conduct at issue. 916 F. Supp. at 15.

We are certain that OGC is aware of these cases because it acknowledged them by name—and the split in authority on this issue—to the district court in the *CREW* case. "Indeed," OGC wrote, "the split of authority on the availability of equitable relief after the expiration of the statute of limitations at 28 U.S.C. § 2462 is significant . . . ." FEC's Reply Memorandum in Support of Motion for Summary Judgment, *CREW v. FEC*, Civ. No. 15-2038 (D.D.C. Nov. 10, 2016) at 16. Advising a court of the split in authority on this issue, while failing to so advise its own agency even as it pushes to continue an enforcement action in the sixth year of a five-year statute of limitations, is particularly duplicitous.

Fairly and fully stated, the availability of injunctive relief after the running of the statute of limitations at 28 U.S.C. § 2462 generally depends on whether the injunction sought would be penal or remedial in nature. *SEC v. Bartek*, 484 Fed. Appx. 949, 956-57 (5th Cir. 2012); *U.S. v. Telluride Co.*, 146 F.3d 1241, 1245-46 (10th Cir. 1998); *see also United States v. Harper*, 490 U.S. 435, 447 n.7 (1989) ("Even remedial sanctions carry the sting of punishment."); *SEC v. Colyard*, 861 F.3d 760, 763 (8th Cir. 2016) ("Just as disgorgement's 'equitable' label does not exempt it from being a § 2462 'penalty,' injunction's 'equitable' label does not exempt it from being a § 2462 'penalty.'"). An injunction is penal in nature if it is imposed "for the purpose of punishment," "to redress a public wrong," or "to deter others from offending in like manner." *Collyard*, 861 F.3d at 764. A remedial injunction, on the other hand, "looks forward in time,"

[1] In its July 7 notice and the May 11 brief that underlies it, OGC does not identify a single expenditure OAR made that remains within the five-year statute of limitations.

U.S. v. W.T Grant Co., 345 U.S. 629, 633 (1953), "regulate[s] future conduct only," *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014), and is "imposed to protect the public prospectively." *Collyard*, 861 F.3d at 764. Penal injunctions are barred by § 2462's statute of limitations, but remedial ones may not be. *Kokesh v. SEC*, 581 U.S. ___, 137 S. Ct. 1635, 1639 (2017) ("Because [disgorgement orders] 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, disgorgement orders represent a penalty and fall within §2462s 5-year limitations period."); *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996) ("[A] sanction which only remedies the damage caused by the defendant does not trigger the protections of § 2462.").

The injunctive relief OGC seeks against OAR—requiring OAR to disclose allegedly excessive and source prohibited contributions—is clearly retrospective and penal in nature. But the Commission does not need to determine this because, assuming for the sake of argument only that an injunction against OAR would be remedial, **there is zero support in law for the imposition of an injunction against OAR at this stage of these particular matters.** As even the very case OGC relies upon states:

> First, in cases where there is *a significant risk of future harm*, the law may allow the FEC to grant equitable relief notwithstanding the expiration of the statute of limitations. * * * "Injunctive relief will not be granted against *something merely feared as liable to occur* at some indefinite time."

CREW, 236 F. Supp. 3d at 392 (emphasis added) (citing *Christian Coal.*, 965 F. Supp. at 71; *Nat'l Right to Work Comm.*, 916 F. Supp. at 15 (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 244 U.S. App. D.C. 349 (D.C. Cir. 1985))).

Indeed, "[i]njunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." Rather, "the injury complained of [must be] *of such imminence that there is a 'clear and present' need for equitable relief* to prevent irreparable harm." *National Right to Work Committee*, 916 F. Supp. at 15; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1930) (same); *Ashland Oil v. FTC*, 409 F. Supp. 297, 307 (D.D.C. 1976) (same).

In these matters, OAR repeatedly has stated that it intends to terminate following the conclusion of these matters. Response of OAR to General Counsel's Brief at pp. 5-6, 14; Supplemental response of OAR to General Counsel's Brief (June 22, 2020) at p. 3. And **OGC has admitted that the conduct complained of is over.** It wrote: "These violations also *took place in the context of the 2016 presidential race* in connection with Walker's significant candidacy." Probable Cause Notice at 3 (emphasis added). Thus, in OGC's own recitation, the conduct at issue occurred in the past and is over. OGC has not made any allegation that the conduct it seeks to enjoin is continuing, let alone is likely to continue in the future—because it cannot, because it is not. This is important, as federal courts have distinguished the availability of equitable relief in cases involving past conduct versus those involving continuing conduct, and have rebuffed the Commission's attempts to gain injunctive relief against past conduct in time-barred matters. Specifically, in *National Right to Work Committee*, the district court denied injunctive relief because the Commission failed to present any evidence that NRTWC had acted in the manner complained of since the complaint or that it intended to do so again in the

future. 916 F. Supp. at 15. In the *Christian Coalition* case, on the other hand, the Commission was awarded injunctive relief following the expiration of the five-year statute of limitations. In that case, the Coalition remained engaged in the activities at issue after the filing of the complaint and throughout the litigation (and in fact remains active to this day). This is not the case with OAR. While OAR remained active in the years immediately following 2015, its activities in the context at issue—the 2016 presidential election—very obviously are over and, indeed, now all of its work is finished, and it is ready to terminate.

In support of "the Commission's ability to address violations that occurred more than five years ago," OGC cites the Conciliation Agreement in MUR 6538R (Americans for Job Security). The Conciliation Agreement in that case was reached after the matter had been on the Commission's docket for two years and in litigation for five, and there is no indication in the record that the respondent in that matter invoked its rights under Section 2462 or otherwise challenged the Commission's ability to continue enforcement proceedings. In contrast, OAR has been invoking its Section 2462 rights for the past nine months. We raised this issue to the Commission in our Response to the General Counsel's Brief dated May 26, 2020, when we wrote, "every single expenditure OGC has specifically identified in these MURs is more than five years old, and the statute of limitations has expired on them all," but the Commission did not act. We raised it again in our Supplemental Response to the General Counsel's Brief dated June 22, 2020, when we wrote, "the statute of limitations has effectively expired" on these matters, but still the Commission did not act. Now that the statute of limitations has finally and fully run out, OGC seeks the Commission's action in this matter. It is too late.

Lastly, OGC pleads that the Commission could find probable cause after the expiration of the statute of limitations because "[t]he Commission has already expended the resources to establish the violations." Probable Cause Notice at 3. An agency's sunk costs, however, do not entitle it to continue enforcement proceedings beyond the five-year statute of limitations. Rather, by operation of Section 2462, OAR's right to be free of these stale claims now has prevailed over right of the agency to prosecute them. *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

For all these reasons, OAR urges the Commission to reject OGC's request to find probable cause, and to close its files in these matters. The statute of limitations expired nearly a year ago. The injunctive relief OGC now seeks is penal not remedial. And even if the relief is remedial, it is not available in the absence of a "clear and present," "imminent" and "significant risk of future harm," factors that are not present in this case and for which there is no factual support in the record OGC has developed.

Sincerely,

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