

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	Civil Action No. 22-35-CRC
Plaintiff,)	
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
_____)	

**PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON’S
MOTION TO RECONSIDER THE DENIAL OF THE MOTION TO COMPEL
PRODUCTION**

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) hereby respectfully requests the Court reconsider its denial of CREW’s Motion to Compel Defendant Federal Election Commission to Produce the Administrative Record and Respond to Requests for Production. *See* Minute Entry, *CREW v. FEC*, No. 22-35 (D.D.C. Feb. 8, 2023). The Court may modify or reconsider an “interlocutory order disposing of ‘fewer than all the claims or the rights and liabilities of fewer than all the parties’ ‘at any time’ before the [C]ourt’s entry of final judgment.” *Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015) (quoting Fed. R. Civ. P. 54(b)); *see also Attias v. CareFirst, Inc.*, 518 F. Supp. 3d 43, 52 (D.D.C. 2021) (Cooper, J.) (granting reconsideration under Rule 54(b) where court’s reliance on authority was “misplaced”).¹

The Court denied CREW’s motion without prejudice “given the likelihood that the Court lacks jurisdiction.” Minute Entry (D.D.C. Feb. 8, 2023). As CREW explained in its response to

¹ In accordance with Local Rule 7(m), CREW attempted to confer with counsel for the FEC prior to filing this motion, but the FEC refused to participate.

the Court's order to show cause, the Court has jurisdiction in this action to review the FEC's dismissal of CREW's administrative complaint, and that jurisdiction is not impacted by any reference to prosecutorial discretion in the blocking commissioners' analysis. *See* CREW's Response to Court's Order to Show Cause, ECF No. 8 (D.D.C. Feb. 15, 2023). The D.C. Circuit held in *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020), that "reviewability [under the FECA] is not a jurisdictional issue" in deciding to bypass the question of reviewability under *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"), and instead proceeding to the merits of the analysis provided by the controlling commissioners. In so holding, the *CLC* Court relied on *PETA v. U.S. Dep't of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015), which recognized that the APA's bar on review of agency action "committed to agency discretion by law" was not a "jurisdictional bar." *Id.* at 1097 (quoting 5 U.S.C. § 701(a)(2)); *see also Califano v. Sanders*, 430 U.S. 99, 107 (1977) (the APA is not a jurisdictional statute). It is the APA's non-jurisdictional bar on reviewability of discretionary agency actions that *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), applied to FEC dismissals where commissioners refer to prosecutorial discretion. Accordingly, regardless of the extent to which *New Models* applies—and as CREW explained in its Response to the Court's Order to Show Cause, it does not apply—it cannot deprive the Court of jurisdiction to address CREW's Motion to Compel Production.

Further, as explained in CREW's Motion to Compel Production, CREW is entitled to the administrative record in this action and to documents responsive to its requests for production. The FEC has defaulted in this action and defaulted in its obligation to respond to CREW's requests. Nevertheless, CREW requires these materials to "establish[h] [its] claim or right to relief by evidence that satisfies the court," Fed. R. Civ. P. 55(d), that the FEC's dismissal of CREW's complaint alleging Freedom Vote was a political committee was "contrary to law," 52

U.S.C. § 30109(a)(8)(C). The political committee test is “fact intensive,” FEC, *Political Committee Status*, 72 Fed. Reg. 5595, 5601–02 (Feb. 7, 2007), and the FEC dismissed despite an investigation providing “overwhelming evidence” that Freedom Vote was an unregistered political committee by 2014, *Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub* at p. 2, MUR 7465 (Freedom Vote) (Dec. 16, 2021) <https://bit.ly/3Ie0XRy> (“Broussard Statement”).

In addition to establishing the merits to CREW’s claim, the materials here are necessary to contradict the claimed bases for dismissal in the statement of reasons of the commissioners who deadlocked proceedings. *Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III*, MUR 7465 (Freedom Vote) (Mar. 7, 2022), <https://bit.ly/3RMsuwM> (“Dickerson Statement”). They claimed a five-year statute of limitations ran on the “bulk” of the claims by November 9, 2021. *Id.* at 4. Evidence of Freedom Vote’s activities, its solicitations, and contributions after the November 9, 2016 cut-off employed by the deadlocking commissioners to consider evidence could provide a basis to disprove that a statute of limitations had begun to run, however, as it would indicate Freedom Vote had not and could not have terminated its political committee status as of November 9, 2016 and thus that a statute of limitations would not have begun to run on a political committee claim.

Furthermore, the deadlocking commissioners claimed prosecutorial discretion served as the basis for the majority vote to close the file with respect to claims about Freedom Vote’s failed reporting in late 2016 and early 2017. Dickerson Statement at 7. Commissioner Broussard, however, stated that she provided the fourth vote to close the file because “three of [her] colleagues voted against” finding probable cause here, not because of any interest to exercise

prosecutorial discretion. Broussard Statement 1. Understanding the discussion that preceded the vote to close the file will illuminate whether the claim of prosecutorial discretion “differ[s] from the [reasoning] provided originally” at the time of the vote to close. *End Citizens United v. FEC*, 21-cv-1665(TKJ), 2022 WL 136062, *2 (D.D.C. Apr. 18, 2022).

CREW respectfully requests this Court reconsider its denial of CREW’s Motion to Compel and require the FEC produce documents responsive to CREW’s request and essential to resolving this matter.

Dated: April 19, 2023

Respectfully submitted,

/s/ Stuart McPhail

Stuart C. McPhail

(D.C. Bar No. 1032529)

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Certificate of Service

I certify that on April 19, 2023, I caused service of the attached motion and supporting documents to be made on defendant Federal Election Commission by U.S.P.S. First Class Mail as follows:

Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

/s/ Stuart C. McPhail
Stuart C. McPhail

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[PROPOSED] ORDER GRANTING MOTION TO COMPEL

Upon reconsideration of Plaintiff Citizens for Responsibility and Ethics in Washington’s Motion to Compel Defendant Federal Election Commission to Produce the Administrative Record and Respond to Requests for Production, ECF No. 6, (the “Motion”), it is hereby

ORDERED that the motion for reconsideration is **GRANTED**, and it is further

ORDERED that the Motion is **GRANTED**; and it is further **ORDERED** that:

1. The Federal Election Commission shall provide to CREW within five (5) days of this order the entire administrative record of MUR 7465,
2. The Federal Election Commission shall produce to CREW within ten (10) days all other documents responsive to CREW’s First Request for Production not otherwise part of the administrative record of MUR 7465.

SO ORDERED.

Date: _____

HON. CHRISTOPHER R. COOPER
United States District Judge