UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 17-2770 (ABJ) REPLY IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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ARGUMENT

The Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief that plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Anne L. Weismann's challenge to the Commission's resolution of their administrative complaint must be dismissed for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. Neither the Federal Election Campaign Act ("FECA") nor the Administrative Procedure Act ("APA") allows for judicial review in this situation. FECA does not authorize judicial review of plaintiffs' challenge because the Commission did not dismiss plaintiffs' administrative complaint. On the contrary, the Commission investigated the administrative complaint and resolved violations of FECA's prohibition on contributions in the name of another, 52 U.S.C. § 30122, through a conciliation agreement with four persons, including an "Unknown Respondent" entity uncovered by the Commission.

Plaintiffs' opposition fails to controvert any of these points. Plaintiffs have attempted to revise the theory set forth in their complaint that a dismissal arose from a combination of factors, including that the Commission's non-authorization of a civil action during the investigation to enforce subpoenas amounted to a dismissal of the administrative complaint. Plaintiffs now scale back their theory of jurisdiction to allege a dismissal on the basis that the Commission did not make reason-to-believe findings that one or both of the entities known as John Doe 1 and John Doe 2 (collectively, the "John Does") was the true source of the contribution scheme alleged in the administrative complaint. At the same time, they continue to criticize the extent of the Commission's investigation by alleging that the FEC did not sufficiently identify the true source of the contribution in the conciliation agreement resolving the matter.

Critically, however, plaintiffs have not refuted the main point here: once the Commission investigates an administrative complaint and enters into a conciliation agreement, the Commission resolves — it does not dismiss — that administrative complaint. In this case, the Commission conciliated with four persons found to have made, accepted, or assisted in the making of a contribution in the name of another. Plaintiffs' challenge to an absence of factual findings they contend should have been made regarding additional entities, as well as to the final scope of the investigation, are not permitted by FECA's limited judicial review provision in section 30109(a)(8). Prosecutorial discretion is presumptively unreviewable and reviewable only where Congress has explicitly provided otherwise. Because FECA does not contemplate review of non-dismissal resolutions of administrative complaints, the Court should dismiss this case for lack of subject matter jurisdiction. Additionally, because the APA is unavailable since FECA provides an alternative, detailed judicial review process, the Court should dismiss plaintiffs' APA claims for failure to state a claim.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS MATTER BECAUSE FECA DOES NOT AUTHORIZE JUDICIAL REVIEW OF PLAINTIFFS' CLAIMS

As the Commission demonstrated in its opening brief, FECA does not authorize plaintiffs' challenge to the Commission's investigative choices or resolution of their administrative complaint through settlement. Plaintiffs cannot invoke a cause of action under 52 U.S.C. § 30109(a)(8) because the Commission did not dismiss their administrative complaint. Rather, the Commission investigated the allegations of the administrative complaint and resolved plaintiffs' allegations in a conciliation agreement which contained a $350,000 penalty. (FEC's Mem. in Supp. of Mot. to Dismiss at 7 (Docket No. 22) ("FEC Mem.").) Plaintiffs have provided no facts or authority in contravention of this controlling principle that applies here.

Though plaintiffs claim that they have been "aggrieved" by the Commission's actions (Pls.' Opp'n to FEC's Mot. to Dismiss at 13, 17 (Docket No. 29) ("Opp'n")), being aggrieved is insufficient to trigger judicial review under FECA.[1] As the Commission has shown, under FECA's plain language, plaintiffs must be "aggrieved by an order of the Commission dismissing a complaint." 52 U.S.C. § 30109(a)(8)(A); FEC Mem. at 11-12. Though plaintiffs repeatedly assert that the FEC "dismissed" their administrative complaint, they cite only to the conciliation agreement and to their own court complaint for authority to support this assertion. (*E.g.*, Opp'n at 13.) The Commission did not dismiss plaintiffs' complaint, and this case must end there.

A. The Administrative Proceedings Ended in Conciliation, Not Dismissal

Despite the Commission's successful conciliation with four persons, plaintiffs' complaint asserts that a "dismissal" arose from a combination of three purported Commission "failures": (1) that the John Does, a trust and its trustee investigated by the Commission, violated FECA by making a contribution in the name of another, Compl. ¶ 37; (2) that the Commission failed to authorize "the enforcement of subpoenas against uncooperative witnesses," *id*. ¶ 45; and (3) that the Commission did not "confirm[]" that the John Does were the true source of the contribution to Now or Never PAC, *id*. ¶¶ 43, 44. The Commission's opening brief explained why these alleged failures do not satisfy section 30109's statutory confinement of judicial review to "an order of the Commission dismissing a complaint," 52 U.S.C. § 30109(a)(8)(A). (FEC Mem. at 10-20.)

[1] In support of their "aggrieved" status, plaintiffs cite to *FEC v. Akins*, 524 U.S. 11 (1998), which undisputedly concerns *standing* to seek redress of an informational injury. (*See* Opp'n at 13-14.) But the only parties to have raised questions about plaintiffs' standing are plaintiffs themselves. The FEC's opening brief did not address standing.

In response, plaintiffs acknowledge the FEC's discretion to investigate in accordance with its resources and priorities (Opp'n at 27-30), the agency's wide discretion regarding the scope and terms of its conciliation agreements (*id.* at 13-14, 27), and the impropriety of plaintiffs "seek[ing] an order requiring the FEC to start litigation to enforce the subpoenas it issued" (*id.* at 14). Plaintiffs nevertheless insist that a constructive dismissal arose when the Commission did not make reason-to-believe findings regarding the John Does and when it did not keep investigating until it had ascertained the "true source" of the contribution alleged in the administrative complaint. (*Id.* at 13-27.) But neither the cases that plaintiffs cite nor the purported procedural facts on which they rely support their theory that there was a dismissal here. The Court should reject plaintiffs' effort to expand judicial review beyond section 30109(a)(8).

1. The Cases On Which Plaintiffs Rely Do Not Establish a Dismissal

Contrary to plaintiffs' contention that this case "raises no novel issue about the scope of judicial review" (Opp'n at 1), the FEC is aware of no case approving of the type of expanded judicial review plaintiffs seek here. Neither of the two cases plaintiffs principally rely upon support finding that section 30109(a)(8)'s provision of judicial review of a dismissal reaches the Commission's actions on the underlying enforcement matter. *Common Cause v. FEC*, 729 F. Supp. 148 (D.D.C. 1990), is readily distinguishable because the issue the FEC is raising here was not explicitly addressed in that opinion. The mere "existence of unaddressed jurisdictional defects [in that earlier case] has no precedential effect," *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996), contrary to plaintiffs' claim that a reference to an earlier codification of section 30109(a)(8) constituted passing on this issue (Opp'n at 15-16). In any event, in *Common Cause* certain Commissioners' decision not to proceed on a particularized claim against a person

who had been identified as a respondent in the administrative complaint poses less danger to the investigatory and prosecutorial discretion reserved to the Commission than the unbounded judicial review plaintiffs seek here. That decision evaluated the Commission's failure to find probable cause as to one of five allegations against the same named respondent in the administrative complaint. But *Common Cause* does not support plaintiffs' contention that their inclusion of "unknown respondent" in the administrative complaint creates reviewability over the FEC's investigation of all the named respondents who conciliated, of additional parties who were identified and conciliated with, and of the John Does, additional persons who were not party to the conciliation agreement but whose role in the underlying events was uncovered and discussed in detail.[2] Section 30109(a)(8)'s limited review should not be expanded to allow boilerplate claims of additional uncovered violations or parties to bootstrap judicial review over FEC conciliation agreements and investigations, as plaintiffs seek here.

The earlier case plaintiffs rely on, *Common Cause v. FEC*, 489 F. Supp. 738 (D.D.C. 1980), was issued before *Heckler v. Chaney*, 470 U.S. 821 (1985), and is even less relevant. That case concerned section 30109(a)(8)'s separate basis for review — an alleged failure to act, not a dismissal — in which the court declined to find that the FEC had failed to act. *Id.* at 744. The court found that the "[conciliation] agreements . . . *resolve* . . . all but arguably one of the sixty-nine violations alleged by [the plaintiff] *by the statutorily preferred method, that of*

[2] Plaintiff seek to minimize the FEC's investigation as "identif[ying] one additional link in the contribution chain" (Opp'n at 19), but the FEC in fact not only identified Government Integrity, LLC, of which plaintiffs were unaware, but also identified the Does themselves. Plaintiffs have not yet learned the Does' real names because the Does have sued and temporarily prevented that disclosure. Thus, to the extent plaintiffs claim injury from not knowing the Does' identities (*see id.*), that short-term lack of information will be resolved in accordance with this Court's determination that the Does' identities may be released, assuming that decision is upheld.

conciliation." *Id*. (emphasis added). Although the court looked to "whether the Commission's *conduct of the investigation and the agreements entered into* are contrary to law," *id*. at 744 (emphasis added), in the decades since that decision courts have repeatedly affirmed that investigations and conciliations fall within the discretion of the agency. (FEC Mem. at 17-18 (collecting cases); *accord* Opp'n at 13 (disclaiming effort "to challenge the terms of the conciliation agreement" and the FEC's investigation).) Concerned about delays, the earlier *Common Cause* court ordered that the Commission enter into conciliation agreements with the remaining respondents named in the administrative complaints, *Common Cause*, 489 F. Supp. at 744-45, but no analogous delay has taken place here, and that issue is far removed from plaintiffs' claim that a dismissal occurred. In addition, the court did not order that the Commission address the remaining violation that plaintiffs had alleged as to several named respondents. *Common Cause*, 489 F. Supp. at 744-45. More importantly, however, even in the context of delay cases, the order entered in *Common Cause* is not consistent with later clarity provided by the Court of Appeals about the limited remedy appropriate in such cases. "When the FEC's failure to act is contrary to law," 52 U.S.C. § 30109(a)(8)(C) allows "nothing more" than a generic "order requiring FEC action." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). Courts may not, for example, "compel the FEC to enforce [one of] its regulation[s]" or "act immediately." *Id.* at 558-59. The outdated holding in *Common Cause* from nearly 40 years ago does not help plaintiffs here.[3]

[3] In addition to these two cases relied upon by plaintiffs, there are at least two other cases arising under section 30109(a)(8) in which a conciliation agreement was present. Both of those cases were dismissed for lack of standing. *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 145 (D.D.C. 2005) (dismissing for lack of jurisdiction, finding that the plaintiff had failed to establish an informational injury sufficient for standing); *Antosh v. FEC*, 631 F. Supp. 596, 598 (D.D.C. 1986) (holding that the plaintiff lacked standing, and accordingly declining to reach jurisdictional and merits issues in the case).

The non-conciliation cases plaintiffs cite are even further afield. Although plaintiffs frequently sue the FEC over its handling of administrative complaints they have filed, this is the only case among multiple pending cases plaintiffs have filed against the FEC that is seeking collateral review of a conciliated matter and the only one in which the FEC is asserting this argument. The challenge in *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016), was not "essentially . . . identical" (Opp'n at 13; *id.* at 20 n.8) to that here. That case challenged FEC dismissal decisions regarding plaintiffs' administrative complaints in two matters, neither of which had ended in conciliation. 209 F. Supp. 3d at 83. When the Commission failed to find reason to believe on those matters, it notified plaintiffs and advised them, unsubtly, that FECA "allows a complainant to seek judicial review *of the Commission's dismissal of this action.*" Letter from William Powers, Assistant General Counsel, FEC, to Melanie Sloan, Executive Director, CREW (June 30, 2014), http://eqs.fec.gov/eqsdocs MUR/14044361927.pdf (emphasis added). In contrast, the Commission's notification of the conciliation of this matter contained no language regarding a Commission dismissal or right to judicial review. *See* Letter from Antoinette Fuoto, Attorney, FEC, to Anne L. Weismann, CREW (Nov. 3, 2017), http://eqs.fec.gov/eqsdocsMUR/17044434744.pdf ("On October 24, 2017, the Commission accepted a conciliation agreement signed by the respondents, thereby concluding the matter.").

Plaintiffs also attempt to analogize this case to another FEC dismissal they have litigated against the Commission. (Opp'n at 20.) In that matter, involving allegations regarding the Commission on Hope, Growth, and Opportunity ("CHGO"), after taking no action on certain allegations, the Commission had insufficient votes to find reason to believe that CHGO had violated certain provisions FECA, and it closed the file without an investigation or conciliation.

See Certification, MURs 6391 and 6471 (Oct. 2, 2015), http://eqs.fec.gov/eqsdocsMUR/15044380400.pdf. Again, the Commission notified plaintiffs that FECA "allows a complainant to seek judicial review of the Commission's dismissal of this action." Letter from William A. Powers, Assistant General Counsel, FEC, to Noah Bookbinder, Executive Director, CREW (Oct. 7, 2015), http://eqs.fec.gov/eqsdocsMUR/15044380403.pdf.

Plaintiffs' use of *Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119 (D.D.C. 2017), is likewise unavailing. (Opp'n at 22.) Once again, that case concerns administrative matters that were dismissed, not conciliated by the FEC. In the opinion that plaintiffs cite, the court determined that the plaintiff had *standing* to bring a challenge under section 30109(a)(8). *Campaign Legal Ctr.*, 245 F. Supp. 3d at 126-29; *see supra* p. 3 n.1. The case did not concern whether FECA permits review because the matters concededly were dismissals. Letter from William A. Powers, Assistant General Counsel, FEC, to J. Gerald Hebert, Campaign Legal Center (Mar. 2, 2016), http://eqs.fec.gov/eqsdocsMUR/16044390067.pdf. Plaintiffs' reliance on what they refer to as "common" FEC dismissals (Opp'n at 20) neither transforms this case into a reviewable dismissal decision nor supports their claim that the review of the conciliated matter at issue is permitted.

2. The Procedural Steps On Which Plaintiffs Rely Do Not Establish a Dismissal

Plaintiffs also err in identifying certain procedural steps that they claim indicate a dismissal. Plaintiffs contend that the FEC dismissed their administrative complaint when it "[c]losed the [f]ile" after reaching a conciliation agreement with the respondents. (Opp'n at 19-21 & nn.9-10; *see id.* at 9 (arguing as background that closing the file "dismiss[ed] all remaining respondents and claims"); *id.* at 27 ("[T]he FEC dismissed Plaintiffs' claim against the true sources when they closed the case file without proceeding with enforcement against Unknown

Respondent(s).").) But the Commission closes the file in every enforcement matter. This allows for notification of complainants regarding the status of their administrative complaints and for the records to be made public. Closing the file is administrative housekeeping and does not necessarily constitute a dismissal. Indeed, the Commission closes the file after approving conciliation agreements. *E.g.*, Certification, MURs 6563 and 6733 (Oct. 6, 2016), https://www.fec.gov/files/legal/murs/6563/16044401326.pdf (Commission certification reflecting that the Commission closed the file after approving a conciliation agreement); Certification, MUR 6816 (July 1, 2016), http://eqs.fec.gov/eqsdocsMUR/16044397380.pdf (same). Closing the file did not turn this matter into a dismissal.

In discussing the administrative proceedings, plaintiffs claim that the FEC "misleadingly slides between two sets of respondents," referring to the parties who conciliated, on the one hand, and the "Unknown Respondent(s) or the Does," on the other. (Opp'n at 20.) It is plaintiffs, however, who seek to craft a dismissal by blurring the administrative proceedings with respect to an alleged FEC "failure to take enforcement action against the true source of the contribution, and in particular [the] vote to take no action . . . to find reason to believe the Does violated the law due to being the true source of the contribution." (*Id.* at 21.) Under the expansive theory of section 30109(a)(8) review set forth in plaintiffs' opposition, if the Does were not the true source, and just another "link in the money chain" like Government Integrity, LLC (*id.* at 24), then they were not the ultimate respondent supposedly named in plaintiffs' administrative complaint, with respect to whom the dismissal decision supposedly occurred. What plaintiffs are really complaining about is the FEC's investigation itself — *i.e.*, the supposed failure to confirm the Does as the true source. (Opp'n at 25 (complaining that "the true

source was not a party to the conciliation" agreement).)[4] But section 30109(a)(8) provides no basis to review an FEC investigation or the terms of conciliation. (FEC Mem. at 15.)

To require otherwise would be inconsistent with the concept of resolving matters through conciliation and would risk requiring the FEC to pursue enforcement to the satisfaction of all administrative complainants. That result would not only be antithetical to well-established principles of agency enforcement deference (*see* FEC Mem. at 23-25), but would also likely threaten to impede future conciliation attempts by the agency. While FECA's judicial provision allows for review of dismissals of administrative complaints, it does not permit review into the depth of the Commission's investigations or the terms of the settlements when it resolves complaints through conciliation rather than dismissal.

Plaintiffs confuse matters further by identifying a statement of reasons issued by the two Commissioners not voting to find reason to believe that plaintiffs ask this Court to review. (*See* Opp'n at 10 (contending that this statement of reasons "explained why [those Commissioners] voted to dismiss").) But that statement articulates not only why the Commissioners did not vote to find reason to believe as to the Does, but also why those Commissioners voted to conciliate.

[4] Plaintiffs' contention (Opp'n at 17) that administrative complainants can expand the scope of judicial review of FEC action by fragmenting their complaints into pieces, each one creating an independently reviewable piece, is incorrect. Jurisdiction does not depend upon the number of individuals or entities the Commission decides to pursue; it depends upon whether there has been a failure to act or a dismissal of the complaint instead of a conciliation agreement or civil litigation. Here, plaintiffs did not file separate administrative complaints, because they alleged a fact pattern concerning one contribution and the involvement of several parties. The Commission entered into a conciliation agreement with more than all the identified parties and resolved that complaint.

(Compl., Exh. 5.)[5] The statement itself makes clear that the Commissioners themselves believed the matter to be resolved through a non-dismissal resolution. (*See* Compl., Exh. 5 at 1 ("The Commission found reason to believe that Respondents American Conservative Union ("ACU"), Now and Never PAC, and Government Integrity, LLC ("GI, LLC") violated section 30122 of the Federal Election Campaign Act of 1971, as amended ("the Act"), conducted an investigation, voted unanimously to find probable cause that ACU violated the Act, and entered into a conciliation agreement that required the Respondents to pay a civil penalty in the amount of $350,000.").) At no point did the Commissioners explain a "decision to dismiss claims" or "'not to enforce'" as to a true source, as plaintiffs assert. (Opp'n at 11, 26.) And the Commissioners *never* "stated that the '[p]ublic [i]nterest was [s]erved by the Commission's [d]ecision' to dismiss . . . ." (*Id*. at 11.) Instead, the Commissioners explained their reasoning that the "public interest would be best served" by resolving the matter without added delays and complications that would have resulted from different prosecutorial decisions. (Compl., Exh. 5 at 5.) Here, though the Commissioners explained their determination regarding the parties they sought to include in the conciliation agreement concluding the matter, there is no "order of the Commission dismissing a complaint," 52 U.S.C. § 30109(a)(8)(A), and this case is squarely outside of section 30109(a)(8)'s boundaries.

[5] As the FEC noted in its initial brief, plaintiffs' contention that the statement of reasons was the dismissal decision is inconsistent with their theory that an alleged dismissal occurred when the agency closed the file. (FEC Mem. at 13 n.1.) In response, plaintiffs maintain their inconsistent position that closing the file was a dismissal but substantively argue that the actual alleged dismissal decision the Court should review was the earlier vote regarding the Doe entities. These conflicting positions highlight the absence of a dismissal. The closure of the file was not a dismissal. *See supra* pp. 8-9. Neither was the reason-to-believe vote; instead, it was an investigative choice that Congress did not make reviewable in section 30109(a)(8).

Nor does release of the statement indicate that the Commission "knew it was dismissing Plaintiffs' claim." (Opp'n at 26.) Commissioners routinely provide statements of reasons that do not explain dismissal decisions. The statement of Commissioner Weintraub articulating her views of the matter that plaintiffs cite as Exhibit 1 to their complaint is but one example. (Compl., Exh. 1.) Indeed, Commissioners have issued statements of reasons after the FEC has resolved matters through a conciliation agreement, and none of these statements of reasons indicate that the underlying matter is judicially reviewable under section 30109(a)(8). *See, e.g.*, Statement of Reasons of Vice Chairman Michael E. Toner, MUR 5453 (Dec. 20, 2005), https://www.fec.gov/files/legal/murs/5453/00004F2C.pdf (after Commission approved conciliation agreement, noting objection to size of civil penalty); Statement of Reasons of Vice Chair Ellen L. Weintraub, MUR 5344 (Jan. 21, 2004), https://www.fec.gov/files/legal/murs/5344/000006E7.pdf (after Commission approved conciliation agreement, noting belief that "additional discovery was warranted"); Statement of Reasons of Commissioner David M. Mason, MUR 4741 (Apr. 7, 1999), https://www.fec.gov/files/legal/murs/4741/00003E46.pdf (after Commission unanimously approved conciliation agreement with respondents, noting objection to imposition of civil penalty). Releasing statements does not establish that a dismissal occurred here.[6]

[6] Plaintiffs' contention that "counsel for the FEC shared the same understanding that the events that transpired below constituted a dismissal" (Opp'n at 26 n.12) is directly belied by the FEC's filings in the action that plaintiffs cite. In that case, the FEC explicitly explained that "[t]here may be jurisdictional and other defenses to any claim that the administrative complainant may make here that they can challenge the Commission's handling of a[n administrative enforcement matter] which culminated with a conciliation agreement with some parties," but emphasized that a timely redacted release of the administrative case file to plaintiffs would assist the FEC in fending off "allegations by CREW that the agency had unlawfully withheld information material to its rights as a potential petitioner for review of the Commission's closure of the relevant . . . file." FEC's Resp. to Mot. for TRO and Mot. to Seal at 7 (Docket No. 16), *John Doe 1, et al. v. FEC*, No. 17-2694 (D.D.C.). Furthermore, the

Plaintiffs also err in describing the facts surrounding the FEC's treatment of the alleged "unknown respondent." As the FEC stated in its initial brief, on January 26, 2017, the Commission found reason to believe that ACU and "Unknown Respondent" violated FECA's prohibition on making or accepting contributions in the name of another and took no action at that time as to Now or Never PAC and its treasurer. (FEC Mem. at 4; Compl., Exh. 7 (Certification, MUR 6920 (Jan. 27, 2017)).) Based on information that OGC obtained during its investigation, OGC designated an entity that it had uncovered in the investigation, Government Integrity, LLC and Thomas (both in his individual capacity and as agent of Government Integrity, LLC) as respondents and notified them of plaintiffs' administrative complaint. FEC Second General Counsel's Report, MUR 6920, at 3 (July 5, 2017)), https://www.fec.gov/files/legal/murs/6920/17044434484.pdf. On July 11, 2017, the Commission substituted the entity Government Integrity, LLC in the place of "Unknown Respondent" into its previous reason-to-believe finding. (FEC Mem. at 5; Compl. Exh. 6 (Certification, MUR 6920 (July 12, 2017)).). Contrary to what plaintiffs assert, however, the Commission never "voted to transfer its previous reason to believe finding that the *intermediate* provider of the funds to ACU participated in the unlawful contribution." (Opp'n at 6 (emphasis added).) The theory for the reason-to-believe and probable-cause-to-believe findings against Government Integrity, LLC was that it had made a contribution in the name of another, not that it had been an intermediary provider of funds. FEC Factual & Legal Analysis (Government Integrity LLC), MUR 6920, at 3 (July 13, 2017), https://www.fec.gov/files/legal/murs/6920/17044434541.pdf; FEC Second General Counsel's

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Commission's arguments with respect to section 30109(a)(8) review pertained to such review generally, consistent with the breadth of the Does' challenge to the FEC's disclosure policy that applies in all enforcement cases, and was not a concession that a dismissal occurred here. *Id.*; FEC's Surreply in Response to Pls.' Reply Memorandum in Supp. of Their Mot. for a Prelim. Inj. at 3, 8 (Docket No. 37), *John Doe 1, et al. v. FEC*, No. 17-2694 (D.D.C.).

Report, MUR 6920, at 3-4 (July 5, 2017)), https://www.fec.gov/files/legal/murs/6920/17044434484.pdf. As the FEC certification of the Commission vote further shows, the Commission substituted the entity Government Integrity, LLC for "Unknown Respondent" "in the Commission's previous findings that "Unknown Respondent" violated 52 U.S.C. § 30122 by making a contribution in the name of another." (Compl., Exh. 6 (Certification, MUR 6920 (July 12, 2017)).)[7]

B. The Court Should Reject Plaintiffs' Effort to Expand Section 30109's Scope of Judicial Review

Plaintiffs do not seriously dispute that, consistent with the structure and scope of FECA, section 30109(a)(8) allows only limited judicial review. (FEC Mem. at 11-16.) They nevertheless insist that the provision is there "to ensure that the FEC 'does not shirk its responsibility.'" (Opp'n at 17, 23 (quoting *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) ("*DCCC*").) But as the quote plaintiffs rely on makes plain, the failure-to-act component of section 30109(a)(8) — which concededly does not apply here — is there "'to assure that the Commission does not shirk its responsibility to decide [by] . . . also provid[ing] that a total failure to address a complaint within 120 days is a basis for a court action." *Id.* (quoting 125 Cong. Rec. 36,754 (1979) (statement of Sen. Pell)). Section 30109(a)(8) does not establish a mechanism for plenary review because a complainant believes the FEC has shirked its investigative responsibilities by not investigating to the extent the complainant prefers. Rather, as the quote plaintiffs cite explains, section 30109(a)(8)'s "'two limited bases for judicial intervention are not intended to work a transfer of prosecutorial

[7] Plaintiffs are also incorrect in asserting that the John Does were definitively designated as respondents in the matter (*see, e.g.*, Opp'n at 8 n.5, 15). Whether the Does were or should have been technically designated as respondents has been a subject of dispute, including amongst the Commissioners. (*See* FEC Mem. at 18.)

discretion from the Commission to the Courts.'" *Id.* (quoting 125 Cong. Rec. 36,754 (1979) (statement of Sen. Pell).[8]

Here, allowing administrative plaintiffs to reference unknown violations or parties to create an actionable obligation for the Commission to follow every lead it uncovers in the matter to the satisfaction of the administrative complainant would transfer such investigative decisions from the Commission to the Court, in contravention of decades of settled law concerning the purpose of section 30109(a)(8). *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("FECA's judicial review provision, [52 U.S.C. § 30109(a)(8)], is limited."); *Citizens for Responsibility & Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law." (citing 52 U.S.C. § 30109(a)(8))). Opening up judicial review as plaintiffs request could chill FEC investigations by forcing the agency to consider whether leads would create a reviewable decision outside the bounds of a dismissal and lead to increased placeholder pleading containing speculative allegations as to the initial sources of prohibited contribution schemes in order to obtain judicial review of agency investigations. Whether the allegations involve foreign national contributions, 52 U.S.C. § 30121; corporate contributions, *id*. § 30118; or contributions in the name of another, *id*. § 30122, plaintiffs' theory regarding what constitutes a dismissal does not have a limiting principle regarding how many alleged layers of violators must be pursued after the Commission has successfully enforced through a conciliation agreement with a source of funds in these prohibited contribution cases.

[8] Plaintiffs point out that the D.C. Circuit considered Senator Pell's statement in *DCCC* (Opp'n at 30), but the decision there was about the reviewability of dismissal decisions resulting from evenly divided votes of Commissioners, not whether section 30109(a)(8) allows the expansive review plaintiffs seek in this case.

Plaintiffs protest that the FEC's prosecutorial discretion only implicates the agency's defense "on the merits." (Opp'n at 28.) Although the broad deferential standard that applies pursuant to section 30109(a)(8) and the reasonableness of the action under review would readily satisfy such a merits defense, the agency's prosecutorial discretion is also implicated on this threshold jurisdictional motion. That is because plaintiffs' effort to obtain review of the agency's investigative choices through section 30109(a)(8) review would deny the Commission its enforcement discretion under FECA to pursue investigations in a manner that comports with its agency priorities and enforcement resources. (*See* FEC Mem. at 17-18 (citing cases affirming agency's discretion in pursuing investigations).)[9] Furthermore, allowing this challenge to go forward under section 30109(a)(8) could pave the way for collateral attacks on Commission investigations and settlements, undermining the Commission's ability to enter into conciliation agreements. Because FECA clearly favors conciliation as a means to resolve administrative complaints, allowing plaintiffs' challenge to continue under section 30109(a)(8) could thus frustrate the FEC's ability to carry out its mission. (*See* FEC Mem. at 12-16 (citing authority confirming preference for conciliation over other methods of resolving administrative complaints).) FECA leaves the approval of conciliation agreements entirely to the Commission in its prosecutorial discretion. (*See id*. at 14.) Dismissing this case respects Congress's choice

[9] Contrary to plaintiffs' notion that FECA's provision allowing a direct action by the complainant resolves the concern that administrative complainants will consume agency resources (Opp'n at 23-24), the direct action provision is a failsafe for a failure to conform by the Commission, 52 U.S.C. § 30109(a)(8)(C), not a way for complainants to pursue cases beyond the agency's considered decisions. Far from being "exceedingly odd" (Opp'n at 29), Congress's provision that the FEC has "exclusive jurisdiction with respect to the civil enforcement" of FECA, 52 U.S.C. § 30106(b)(1), necessarily entails the Commission being the sole arbiter in evaluating the seriousness of matters and the agency's priorities, and it denies would-be private attorneys general from pursuing matters they are interested in outside of the detailed enforcement framework established by FECA.

that the agency be responsible for investigative choices and settlement, with judicial review reserved for select situations where the Commission dismisses or fails to act.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE APA

To the extent that plaintiffs' challenge arises under the APA, it must be dismissed because FECA provides the exclusive vehicle for judicial review. No claim separate from plaintiffs' FECA claim exists here because FECA provides an adequate and exclusive judicial review mechanism. *See* FEC Mem. at 20-25; *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) (holding that FECA's "comprehensive judicial review provision [52 U.S.C. § 30109(a)(8)] precludes review of FEC enforcement decisions under the APA"). In fact, every court that has considered the nature of the judicial review procedures in section 30109(a)(8) has found that those FECA procedures are exclusive. (FEC Mem. at 22.)

Plaintiffs hardly contest otherwise. Revealingly basing their alternative argument upon the possibility that "the decision below was not, as the FEC contends, the dismissal of an enforcement action" (Opp'n at 31 & n.17), plaintiffs contend that review must exist under the APA if it is not available under FECA.[10] They argue that relief under the APA is available where "[a]n alternative remedy will not be adequate under [the APA] if the remedy offers only 'doubtful and limited relief.'" (*Id.* at 30 (quoting *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir.

[10] Plaintiffs' efforts to distinguish two cases brought by plaintiff CREW are unavailing. (Opp'n at 31 n.17.) In *Citizens for Responsibility & Ethics in Washington v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017), the APA claim that was allowed to proceed concerned the validity of a regulation. *Id.* at 105. And plaintiffs do not dispute that in *Citizens for Responsibility & Ethics in Washington v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015), the court held that section 30109(a)(8)'s judicial review mechanism "precludes review of FEC enforcement decisions under the APA." *Id.* at 120; *see also Perot*, 97 F.3d at 559 (precluding judicial review of FEC action other than through the procedures set forth in FECA).

2009)).) But in analyzing whether remedies are adequate, the D.C. Circuit has explained that "'the general grant of review in the APA' ought not 'duplicate existing procedures for review of agency action' or 'provide additional judicial remedies in situations where Congress has provided special and adequate review procedures.'" *Citizens for Responsibility & Ethics in Wash. v. United States Dep't of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Plaintiffs rely on *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), but that case makes clear that only an "*adequate* alternative" is needed because "'the alternative remedy need not provide relief *identical* to relief under the APA' in order to have preclusive effect." *Citizens for Responsibility & Ethics in Wash.*, 846 F.3d at 1245 (quoting *Garcia*, 565 F.3d at 522).

As relevant here, Congress has chosen not to allow FEC enforcement decisions beyond the two limited circumstances of section 30109(a)(8). Where a statute provides an exclusive vehicle for judicial review, APA claims are precluded — even when that statute does not otherwise provide an avenue for review for the specific claims at issue. *See Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1013-14 (D.C. Cir. 2009) (observing that the D.C. Circuit has found APA claims to be precluded "not because the [special review statute] identified some other kind of plaintiff or some other kind of procedure for bringing the claim, but because it *provided no way of bringing it* . . . what you get under the [statute] is what you get" (emphasis added) (internal quotation marks omitted)); *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004) ("[I]t is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies thereunder, that counsels judicial abstention." (internal citation and quotation marks omitted)); FEC Mem. at 21 (collecting cases). Plaintiffs do not dispute either the

comprehensiveness of FECA's scheme, nor the well-established law providing that APA review is unavailable for review of agency enforcement decisions. (FEC Mem. at 23-25.)

As the FEC demonstrated in its opening brief, section 30109(a)(8) provides the exclusive mechanism for challenging the Commission's dismissal of administrative complaints and limits the scope of relief available to plaintiffs in this action. (*See* FEC Mem. at 20-25.) The portions of plaintiffs' complaint that purport to rely on the APA or seek relief beyond what is permitted in section 30109(a)(8) thus fail to state a claim and should be dismissed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Commission's opening brief, the Court should dismiss plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

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