UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 17-2770 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MOTION FOR JUDGMENT ON THE PLEADINGS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Federal Rule of Civil Procedure 12(c), defendant Federal Election Commission ("FEC" or "Commission") hereby moves for judgment on the pleadings. Even if the Commission's resolution of plaintiffs' administrative complaint constituted a dismissal within the meaning of 52 U.S.C. § 30109(a)(8), as plaintiffs have contended in opposition to the Commission's motion to dismiss, the Court of Appeals's recent and controlling decision in *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) establishes that plaintiffs' challenge to the controlling FEC Commissioners' exercise of prosecutorial discretion in connection with the underlying administrative enforcement matter would be unreviewable. In support of this motion, the Commission submits the attached memorandum and proposed order.

Respectfully submitted,

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September 7, 2018

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Plaintiffs,	)	Civ. No. 17-2770 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Citizens for Responsibility and Ethics in Washington and Anne L. Weismann seek judicial review under the Federal Election Campaign Act ("FECA") and the Administrative Procedure Act ("APA") of the Federal Election Commission's ("FEC" or "Commission") handling of an administrative complaint that plaintiffs had filed with the agency. The Commission has moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction or for failure to state a claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (FEC's Mem. in Supp. of Mot. to Dismiss ("FEC MTD") (Docket No. 22); FEC's Reply in Supp. of Its Mot. to Dismiss (Docket No. 31) ("FEC MTD Reply").) As the Commission demonstrated in that motion, FECA does not authorize judicial review of plaintiffs' challenge because the Commission did not dismiss plaintiffs' complaint. Rather, the Commission investigated the complaint and resolved the alleged violations in a global conciliation agreement with multiple persons identified by name in plaintiffs' administrative complaint and another entity that the Commission had identified. And plaintiffs' resort to the

APA is similarly unavailing because FECA's preclusive effect renders the APA unavailable as a vehicle to challenge FEC enforcement proceedings.

In June 2018, following the submission of the parties' briefing on the FEC's motion to dismiss, the D.C. Circuit issued its opinion in *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW*"), *petition for rehearing en banc filed*, No. 17-5049, Doc. # 1742905 (July 27, 2018), which independently requires that the Commission prevail here as a matter of law even under plaintiffs' own theory of the case. In *CREW*, the D.C. Circuit, relying on *Heckler v. Chaney*, 470 U.S. 821 (1985) ("*Heckler*"), held "that federal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *CREW*, 892 F.3d at 438 (internal citations omitted). Accordingly, even if the Court were to assume that the Commission's resolution of plaintiffs' administrative complaint constituted a dismissal, what plaintiffs propose to challenge in this case would be an exercise of prosecutorial discretion that is unreviewable under the D.C. Circuit's decision in *CREW*. The Court should enter judgment for the Commission.

BACKGROUND

The principal legal background and factual background on the underlying FEC administrative matter, Matter Under Review ("MUR") 6920, and the filing of plaintiffs' judicial complaint before this Court are set forth in the Commission's motion to dismiss. The FEC respectfully refers the Court to that brief. (FEC MTD at 1-6.) Additional relevant legal and factual background is set forth below.

I. PLAINTIFFS' CHALLENGE TO THE PROSECUTORIAL DECISION OF CERTAIN COMMISSIONERS

Plaintiffs' challenge in this case focuses on the decision by certain Commissioners not to vote to find reason to believe that John Does 1 and 2 "violated the FECA," as well as those Commissioners' alleged failures "to pursue an investigation into the true source of the contribution and the identity of the Unknown Respondent(s)" and "enforce outstanding subpoenas" against the Does. (Compl. ¶¶ 3-4.) Plaintiffs contend that the statement explaining that vote by Commissioner Caroline C. Hunter and former Commissioner Lee E. Goodman "fails to adequately justify their vote not to find reason to believe" and that "the three commissioners' refusal to vote to find reason to believe the John Doe Trust and John Doe Trustee violated the FECA was arbitrary and capricious, an abuse of discretion, and contrary to law." (*Id.* ¶ 38; *see also* Compl. Exh. 5 (Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman, MUR 6920 (Dec. 20, 2017)) ("statement").)

Accepting *arguendo* plaintiffs' theory of the case, their proposed focus on the votes and statement of the declining-to-proceed Commissioners are consistent with well-established Circuit law. In an FEC dismissal case brought under 52 U.S.C. § 30109(a)(8) that is premised on a divided Commission vote, such as the 2-3 vote regarding John Does 1 and 2 that plaintiffs allege constitutes a dismissal here (Compl. Exh. 4 (Certification)), the Commissioners who effectuated a dismissal must provide a statement of their reasons in order "to make judicial review a meaningful exercise." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.*; *CREW*, 892 F.3d at 437-38 (explaining that under Circuit precedent, "for purposes of judicial review, the statement or statements of those naysayers — the so-called 'controlling

Commissioners' — will be treated as if they were expressing the Commission's rationale for dismissal" (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988))). Here, because Commissioners Hunter and Goodman, along with Commissioner Matthew S. Petersen, were the Commissioners voting against making the reason-to-believe finding, they are the "controlling group" of Commissioners with respect to the Commission enforcement decision that plaintiffs attempt to challenge here. *NRSC*, 966 F.2d at 1476.

The statement issued by Commissioners Hunter and Goodman articulated their reasons for voting to pursue enforcement and conciliation with certain parties and not voting to find reason to believe or pursue further investigatory actions as to the Does. (Compl. Exh. 5, Statement at 1-5.) Initially, these Commissioners explained that they found the legal theory of liability to be "unprecedented and unclear." (*Id.* at 2 & n.4 (citing *Heckler*, 470 U.S. at 824-25).) Citing a set of MURs involving straw donor allegations concerning corporate LLCs that these Commissioners had also voted to dismiss on the basis of prosecutorial discretion and which is the subject of a separate dismissal suit (Compl. Exh. 5, Statement at 2 n.5), these Commissioners concluded that "the facts establishing [redacted] potential legal liability were unclear" in light of the "wholly new terrain under 52 U.S.C. § 30122" they viewed as arising from the use of corporate entities such as LLCs in alleged straw donor schemes following changes in caselaw (*id.* 2-3).[1]

[1] The district court in that case has since agreed, finding that "because corporations could now legally be donors, the Commission [in those other matters] had to consider for the first time how and when a corporation might still break the law as a straw donor." *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 162 (D.D.C. 2018) ("*CLC*"), *appeal docketed*, No. 18-5239 (D.C. Cir. Aug. 8, 2018). The court thus upheld the controlling Commissioners' exercise of prosecutorial discretion, finding that they had "furnished" the requisite "rational basis for [the] decision." *Id.* at 166. *CLC* was issued shortly before the *CREW* opinion came down from the Court of Appeals.

Commissioners Hunter and Goodman also articulated their concerns about the "imminent" expiration of the statute of limitations. (Compl. Exh. 5, Statement at 3-4.) As they explained, "[a] majority of Commissioners expressed concerns about concluding the [administrative] case before the statute of limitations ran, and [Commissioners Hunter and Goodman] believed the most efficient prosecutorial path forward was to finalize the case against the three Respondents as efficiently and expeditiously as possible." (*Id.* at 4.) Citing *Heckler*, the Commissioners then explained that "[i]n sum, we concluded the prudent and preferred course was to conciliate with the named Respondents" and that "[t]he Commission was well within its discretion to take the safer course." (*Id.*) They explained that "the unclear state of the law, imminent expiration of the statute of limitations and other legal difficulties weighed in favor of proceeding to conciliation with the named Respondents promptly and without jeopardizing the resolution in hand by adding [redacted] on more uncertain legal and factual grounds." (*Id.* at 5.) Finally, the Commissioners stated that the public interest was best served by "establish[ing] clear precedent, impos[ing] a large $350,000 civil penalty, and . . . deter[ring] future misconduct." (*Id.*) They believed that "[t]his matter could have gone in a different direction, one that would have delayed any resolution for years," and that their handling of the matter "avoided that." (*Id.*)

II. THE D.C. CIRCUIT'S DECISION IN *CREW*

On June 15, 2018, the D.C. Circuit issued its decision in *CREW*. In that case, the same organizational plaintiff as here, Citizens for Responsibility and Ethics in Washington, and a different individual had challenged the decision by a controlling group of Commissioners not to vote to pursue enforcement action under both FECA and the APA, as here. *CREW*, 892 F.3d at 437. The Commissioners who had voted not to proceed had determined that the matter did not

warrant the further use of Commission resources for a number of reasons, including the "concern[] that the statute of limitations had expired or was about to." *Id.* at 438.

On appeal of the district court's decision upholding the dismissal, the majority of the D.C. Circuit panel found that the Supreme Court's decision in *Heckler* "controls this case." *Id.* at 439. As the panel majority determined, the declining-to-proceed Commissioners "placed their judgment squarely on the ground of prosecutorial discretion. Nothing in the substantive statute overcomes the presumption against judicial review." *Id.*[2] The majority further reasoned that other provisions of FECA that direct that the "Commission 'shall' take specific actions after making certain threshold legal determinations," such as finding reason to believe that a violation occurred, failed to "constrain the Commission's discretion whether to make those legal determinations in the first instance." *Id*. at 439.

In addition, the majority determined that FECA does not provide meaningful standards for reviewing the Commission's exercise of prosecutorial discretion and that the agency's

[2] The Court of Appeals noted in its recent decision that *Heckler* "left open the possibility that an agency nonenforcement decision may be reviewed if 'the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities.'" *CREW*, 892 F.3d at 440 n.9 (quoting *Heckler*, 470 U.S. at 833 n.4); *see also CREW v. FEC*, 316 F. Supp. 3d 349, No. 16-259, 2018 WL 3719268, at *49 (D.D.C. Aug. 3, 2018), *appeal docketed*, No. 18-5261 (D.C. Cir. Aug. 30, 2018). This is not the case here. The Commission's processing and resolution of plaintiffs' administrative complaint strongly refutes any suggestion that the Commission "consciously and expressly adopted a general policy" that amounts to an abdication of its statutory responsibilities. The Commission investigated plaintiffs' administrative complaint and resolved the alleged violations of the same statutory provision plaintiffs contend is at issue here in a global conciliation agreement that contained a $350,000 penalty. (FEC MTD at 4-6.) The Commission negotiated this conciliation agreement with multiple persons identified in the administrative complaint and an entity who the Commission had found reason to believe was the "Unknown Respondent" that had been described in the administrative complaint. (*Id*.)

dismissals for reasons of prosecutorial discretion are therefore not subject to judicial review. *Id.*[3] For similar reasons, it found that review is also foreclosed under the APA, reasoning that the D.C. Circuit "has held that if an action is committed to the agency's discretion under APA § 701(a)(2) — as agency enforcement decisions are — there can be no judicial review for abuse of discretion, or otherwise." *Id*. at 441 (citing cases). Accordingly, the opinion explained, "[i]t follows that [plaintiffs are] not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at 441.

ARGUMENT

The Commission has moved to dismiss this case on the basis that the FEC's resolution of MUR 6920 did not constitute a reviewable dismissal decision under 52 U.S.C. § 30109(a)(8) or the APA. (FEC MTD at 6-25; FEC MTD Reply at 1-19.) But even assuming for the purposes of this motion that the agency's actions did constitute a dismissal of plaintiffs' administrative complaint,[4] any such dismissal was based upon prosecutorial discretion. The Court of Appeals held in *CREW* that such a dismissal is unreviewable by this Court. This Court accordingly should grant judgment to the Commission.

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[3] The majority recognized that the presumption against the reviewability of enforcement decisions applied only to agency enforcement decisions that are "committed to agency discretion." 892 F.3d at 441. For instance, "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion." *Id*. at 441 n. 11 (citing *Heckler*, 470 U.S. at 833 n.4; *FEC v. Akins*, 524 U.S. 11, 26 (1998)). Therefore, the opinion acknowledged, "if the Commission declines to bring an enforcement action on the basis of its interpretation of FECA," that decision would be subject to judicial review. *Id*.; *see also CREW v. FEC*, 2018 WL 3719268, at *49 (noting potential reviewability where action based on interpretation of FECA).

[4] Although the Commission's arguments in this motion are premised on plaintiffs' theory that a dismissal occurred here, by making this motion the Commission does not concede that the resolution of MUR 6920 constituted a dismissal.

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c).[5] The court may grant judgment on the pleadings "'if the moving party demonstrates that no material fact is in dispute and that it is entitled to judgment as a matter of law.'" *Lopez v. Nat'l Archives & Records Admin.*, 301 F. Supp. 3d 78, 83-86 (D.D.C. 2018) (quoting *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365, 1370 (D.C. Cir. 2008)) (collecting cases). A Rule 12(c) motion for judgment on the pleadings "may be granted 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Doe v. De Amigos, LLC*, 987 F. Supp. 2d 12, 14-15 (D.D.C. 2013) (quoting *Longwood Vill. Rest., Ltd. v. Ashcroft*, 157 F. Supp. 2d 61, 66 (D.D.C. 2001), and citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Courts in this District have in the past applied the standard of review for a Rule 12(b)(6) motion to a motion for judgment on the pleadings under Rule 12(c). *See D.C. Nurses Ass'n v. Brown*, 160 F. Supp. 3d 13, 14-15 (D.D.C. 2016); *Yancey v. D.C.*, 991 F. Supp. 2d 171, 175 (D.D.C. 2013) ("The standard of review for a motion for judgment on the pleadings on the ground that the plaintiff has failed to state a claim 'is functionally equivalent to a Rule 12(b)(6) motion' for failure to state a claim." (quoting *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122,

[5] For purposes of a motion for judgment on the pleadings under Rule 12(c), pleadings are closed upon filing of a complaint and answer or responsive pleading with no claims or counterclaims remaining open. *See Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 60 (D.D.C. 2007) ("Pleadings are closed within the meaning of Rule 12(c) if no counter or cross claims are at issue when a complaint and an answer have been filed."); *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 36 (D.D.C. 2004), *aff'd*, 184 F. App'x 9 (D.C. Cir. 2006) (considering motion for judgment on the pleadings after moving party had filed answers and motions to dismiss for lack of personal jurisdiction).

130 (D.C. Cir. 2012))). However, this Court has recently applied a standard of review for a Rule 12(c) motion in a manner that came "closer to a summary judgment type of determination." *Lopez*, 301 F. Supp. 3d at 84 (citing *Schuler*, 514 F.3d at 1370, *Jones v. Dufek*, 830 F.3d 523, 528 (D.C. Cir. 2016) ("The district court properly resolved these questions as a matter of law on a motion under Rule 12(c)."), and *Fed. Prac. & Proc.* § 1369 (3d ed. 2017)). Here, the Commission prevails under any of these formulations of the Rule 12(c) standard.

II. RECENT D.C. CIRCUIT PRECEDENT FORECLOSES PLAINTIFFS' CLAIMS AS A MATTER OF LAW

A. The Commissioners Who Voted Not to Find Reason to Believe Regarding the Does Based Their Decision Upon the Agency's Prosecutorial Discretion

It is common ground among the parties that any dismissal here was based upon the FEC's prosecutorial discretion. Not only does plaintiffs' complaint focus on challenging the statement of reasons issued by Commissioners Hunter and Goodman in which they invoked such discretion (Compl. ¶¶ 3-4, 34-35, 37-38, 43-45), but plaintiffs' opposition to the FEC's motion to dismiss further acknowledges that these Commissioners applied prosecutorial discretion by devoting a section of that brief to arguing against the idea that such discretion immunizes the agency from judicial review (Pls.' Opp'n to Def. FEC's Mot. to Dismiss at 27-30 (Docket No. 29) ("Pls.' MTD Opp'n"); *see also* Pls.' Opp'n to Def. FEC's Mot. to Defer Filing Certified List of the Contents of the Administrative R. at 8-9 (Docket No. 28) (arguing that "even an exercise of prosecutorial discretion is subject to review to determine whether it is arbitrary and capricious"); *accord* FEC MTD at 10-18 (explaining that plaintiffs are seeking to challenge FEC investigative decisions and conciliation); FEC MTD Reply at 16 (explaining that "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")). Indeed, plaintiffs' opposition

to the FEC's motion to dismiss explicitly analogized the matter here to the dismissal at issue in the D.C. Circuit's recent decision *CREW*. (*See* Pls.' MTD Opp'n at 20 (citing MUR 6471 and the district court's opinion in *Citizens for Responsibility and Ethics in Washington v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017)).)

Likewise, the Court has itself noted that the statement by Commissioners Hunter and Goodman relied on the agency's prosecutorial discretion. Footnote 7 of this Court's opinion granting judgment to the Commission in the related case brought by the Does against the FEC summarizes that statement. *Doe 1 v. FEC*, 302 F. Supp. 3d 160, 173 n.7 (D.D.C. 2018). As the Court noted there, the statement "makes several points," including: (1) "that the legal theory underlying the [FEC's Office of General Counsel's] 'reason to believe' recommendation concerning plaintiffs was unclear, and that more factual investigation on the question of intent was needed because 'the Commission had circumstantial evidence but not direct evidence,' and 'time was running out'"; (2) "the statute of limitations concerning the original respondents was close to expiring, and expanding the matter to include plaintiffs could delay the case further, so" Commissioners Hunter and Goodman "'believed the most efficient prosecutorial path forward was to finalize the case against the 3 Respondents' as efficiently and expeditiously as possible"; (3) "the agency's decision to conciliate with the named respondents and avoid 'the procedural, legal, and investigative complexities' of adding plaintiffs was well within the agency's prosecutorial discretion"; and (4) "the decision was in the public interest since the conciliation agreement established precedent and secured a large penalty." *Id.*; *see also supra* pp. 4-5 (summarizing statement).

All of these points — a potential lack of clarity regarding the law that was the basis for the same Commissioners' same exercise of prosecutorial discretion that was sustained in *CLC*,

see supra p. 4 n.1, the concern about the impending expiration of the statute of limitations, the balancing of proceeding against the parties who ultimately conciliated against the potential complications of trying to expand the enforcement matter to encompass the Does, and the public interest — are not questions of law but judgments regarding the agency's use of resources and priorities. *Accord CREW*, 892 F.3d at 440 (explaining that "CREW never identifies what 'law' it has in mind" and that the law cannot be either "FECA" or the "APA"). These kinds of considerations closely track the Supreme Court's observation in *Heckler* that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. Such factors include "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." *Id.* Any dismissal here was an exercise of prosecutorial discretion.

B. *CREW* Resolves This Case

Because the decision plaintiffs seek to challenge here was an exercise of prosecutorial discretion, under *CREW*, plaintiffs cannot show that "relief could be granted under any set of facts that could be proved consistent with the [plaintiffs'] allegations." *Doe*, 987 F. Supp. 2d at 14-15 (internal quotation marks omitted). Because "an agency's exercise of its prosecutorial discretion cannot be subjected to judicial scrutiny," *CREW*, 892 F.3d at 439, the votes of controlling Commissioners not to find reason to believe against John Does 1 and 2 or continue the investigation plaintiffs would have preferred are agency decisions that are not reviewable by the Court. In their statement, Commissioners Hunter and Goodman explained their reasoning that, in addition to the uncertainty regarding the use of entities such as LLCs as straw donors and

statute of limitations concerns, 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, Statement at 5.) Their prosecutorial choices "avoided that." (*Id.*) Accordingly, plaintiffs are "not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *CREW*, 892 F.3d at 441. Because plaintiffs present no claims that survive the mandate in *CREW* prohibiting review of FEC enforcement decisions, the agency should prevail as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should enter judgment on the pleadings in favor of the Commission and dismiss plaintiffs' complaint.

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