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,	)	REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS
Defendant.	)	

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

The Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief that 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) ("*CREW*"), *petition for rehearing en banc filed*, No. 17-5049, Doc. #1742905 (July 27, 2018), requires that the Commission prevail here as a matter of law. Even if the Court were to assume that the Commission's resolution of plaintiffs Citizens for Responsibility and Ethics in Washington and Anne L. Weismann's 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, 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*.

Plaintiffs present no substantial arguments in opposition. Their contradictory objections that this motion is both redundant and premature are misconceived and unsupported by practice in this District. Likewise meritless are plaintiffs' attempts to fit this case into the two potential exceptions to the general unreviewability of FEC prosecutorial decisions described in *CREW*.

While plaintiffs do not dispute that the alleged dismissal decision they challenge was based on prosecutorial discretion and that the *CREW* decision thus applies, plaintiffs now suggest that this case involves a matter of statutory interpretation or a general policy of the Commission abdicating its statutory responsibilities. Neither claim has merit. Any dismissal here was based on prosecutorial discretion, not an erroneous interpretation of 52 U.S.C. § 30122, and the idea that the Commission has abdicated statutory responsibility for enforcement against straw donors is belied by, among other things, the FEC's successful conciliation in this very case, including the $350,000 penalty it obtained. The Court should grant judgment to the Commission.

ARGUMENT

I. THE FEC'S MOTION FOR JUDGMENT ON THE PLEADINGS IS TIMELY, DISTINCT FROM ITS MOTION TO DISMISS, AND CAN BE ADJUDICATED

The Court can decide the FEC's motion for judgment on the pleadings because the FEC's motion is consistent with practice in this District, appropriate in light of the D.C. Circuit's issuance of the decision in *CREW* following the parties' briefing on the FEC's distinct motion to dismiss, and readily satisfies the substantive standard for relief under Federal Rule of Civil Procedure 12(c). Rather than contesting the FEC's "demonstrat[ion] 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) (internal quotation marks omitted), plaintiffs argue that the FEC's motion is "both premature and redundant" (Pls.' Opp'n to FEC's Mot. for J. on the Pleadings at 2 (Docket No. 34) ("Opp'n")). These objections are meritless.

Plaintiffs' claim that the FEC's two motions are redundant because they supposedly "address the same issue" (Opp'n at 5) is incorrect. The FEC's motion to dismiss contends that this Court lacks subject matter jurisdiction over this matter because the Federal Election Campaign Act ("FECA" or "Act") does not authorize judicial review of plaintiffs' claims here,

where the Commission secured redress for plaintiffs' administrative complaint through a conciliation agreement and did not dismiss the complaint. (FEC's Mem. in Supp. of Its Mot. to Dismiss at 10-20 (Docket No. 22) ("FEC MTD").) In other words, there is no jurisdiction for plaintiffs to challenge an FEC dismissal of an administrative complaint under 52 U.S.C. § 30109(a)(8) because there was no underlying section 30109(a)(8) dismissal here.[1] This motion, by contrast, explains that even accepting plaintiffs' contention that there was a dismissal, any such dismissal was based on an exercise of prosecutorial discretion and, accordingly, plaintiffs' claims nevertheless still fail as a matter of law in light of the *CREW* decision, which found such dismissals unreviewable. (FEC's Mem. in Supp. of Its Mot. for J. on the Pleadings at 7-12 (Docket No. 32) ("FEC Mot. for Judgment").)[2] This motion, based upon the D.C. Circuit's decision in *CREW*, does not "repeat[] arguments" (Opp'n at 5 (internal quotation marks omitted) (alteration in original)) but rather presents an independent basis why the Commission should prevail in this case.

Nor are plaintiffs correct that this motion is "[f]acially [p]remature" because the FEC has not yet filed an answer. (Opp'n at 3-5.) The Court can award judgment to the FEC on the pleadings now based on the D.C. Circuit's decision in *CREW*. Contrary to the out-of-jurisdiction

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[1] Plaintiffs' insistence that the FEC's dismissal motion, based on both Rules 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure is actually "brought under Rule 12(b)(6)" (Opp'n at 5 n.2), is also incorrect. The FEC moved to dismiss this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction because FECA does not authorize judicial review of plaintiffs' challenge. (FEC MTD at 1.) The FEC moved pursuant to Rule 12(b)(6) only with respect to plaintiffs' Administrative Procedure Act claim (*id.* at 20-25), while noting that this claim could alternatively be dismissed for a lack of subject matter jurisdiction pursuant to Rule 12(b)(1) rather than Rule 12(b)(6), as courts have "'not always been consistent in maintaining the[] distinctions' between the two rules" (*id.* at 21 n.3 (quoting *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) (internal quotation marks omitted)).

[2] The FEC continues to preserve its position that, notwithstanding the assumptions for the sake of argument in this motion, the Commission did not dismiss the underlying administrative matter. (FEC Mot. for Judgment at 7 n.4.)

authorities plaintiffs rely on (*id.* at 3-4 & n.1), courts in this District have rejected oppositions to Rule 12(c) motions based on prematurity, explaining, for example, that "if a party files a Rule 12(c) motion before its answer, the Court may treat it as a motion to dismiss under Rule 12(b)(6) for failure to state a claim." *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 35 (D.D.C. 2004), *aff'd*, 184 F. App'x 9 (D.C. Cir. 2006) (collecting cases) (cited in FEC Mot. for Judgment at 8 n.5); *Holt v. Davidson*, 441 F. Supp. 2d 92, 94-95 (D.D.C. 2006) ("If a party files a Rule 12(c) motion before the answer, the court may treat it as a motion to dismiss under Rule 12(b)(6)."); *Dale v. Exec. Office of the President*, 164 F. Supp. 2d 22, 24 (D.D.C. 2001) (same).

Neither of the two cases from this District on which plaintiffs rely hold otherwise. In *Lopez*, this Court granted a renewed motion for judgment on the pleadings, which was filed in response to an amended complaint without the defendants first filing an amended answer, by taking a practical approach and deeming the defendants' initial answer to have been treated as if it remained in effect and noting the defendants' position that filing an amended answer would not change their arguments. 301 F. Supp. 3d at 83 & n.6, 91. In *Murphy v. Dep't of Air Force*, the court rejected a defendant's effort to answer and subsequently move to dismiss for failure to state a claim under Rule 12(b)(6). 326 F.R.D. 47, 48 (D.D.C. 2018). The Rule 12(b)(6) motion could not be adjudicated as a Rule 12(c) motion in that case, the court explained, because the Rule 12(b)(6) motion "d[id] not address the existence or absence of disputed material facts, nor d[id] it attempt to evaluate the merits of the complaint's claims in light of existing law" and thus failed to satisfy the distinct Rule 12(c) standard. *Id.* at 50. Here, however, the FEC has shown the absence of any material facts (Mot. for Judgment at 9-11 (explaining that it is "common ground" among the parties and Court that "any dismissal here was based upon the FEC's

prosecutorial discretion")) and why the FEC prevails under the law established in *CREW* (*id.* at 11-12). The motion thus best fits a Rule 12(c) analysis.

In any case, whether the Court analyzes the FEC's motion in accordance with the opinions in this District that have applied the Rule 12(c) standard in similar fashion to the Rule 12(b)(6) standard, as the Commission explained in its opening brief (FEC Mot. for Judgment at 9), or formally converts the motion to a Rule 12(b)(6) motion, the Commission prevails.[3] Alternatively, if the Court uses a standard closer to the summary judgment standard as in *Lopez*, 301 F. Supp. 3d at 84, the Court should likewise grant judgment to the Commission. The Commission prevails either way because there is no material fact in dispute and the Commission is entitled to judgment as a matter of law. (FEC Mot. for Judgment at 9.) Plaintiffs present no serious reason to defer adjudication of the FEC's motion for judgment or to sequence the Court's resolution of the pending motions in their preferred way. Given the timing of the D.C. Circuit's decision, adjudication of this motion is consistent with Rule 12, the practice in this District, and the spirit of the Federal Rules, which "should be construed . . . to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1.

II. *CREW* PRECLUDES JUDICIAL REVIEW HERE UNDER PLAINTIFFS' THEORY OF THE CASE

Plaintiffs' substantive arguments with respect to the application of the D.C. Circuit's *CREW* decision here are similarly meritless. In *CREW*, the D.C. Circuit found that Commission dismissals for reasons of prosecutorial discretion are not subject to judicial review, with two

[3] Plaintiffs' only argument against converting the motion to a Rule 12(b)(6) motion is their redundancy argument. *See supra* pp. 2-3. But even if that argument were not groundless, its effect would be that the arguments the FEC presents in this motion are *already before the Court* as part of its earlier motion to dismiss and thus ready for adjudication in the FEC's favor under the dispositive supplemental authority of *CREW*.

potential exceptions noted. 892 F.3d at 439; FEC Mot. for Judgment at 6-7 nn.2-3 (noting exceptions). First, noting that "[t]he interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion," the court acknowledged that the "Commission declin[ing] to bring an enforcement action on the basis of its interpretation of FECA" would be subject to judicial review. *CREW*, 892 F.3d at 441 n.11 (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)). Second, the Court of Appeals noted that *Heckler* had "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.'" *Id.* at 440 n.9. While not disputing that the controlling Commissioners' statement was based on prosecutorial discretion, plaintiffs now attempt to fit this case into one of these two categories. Neither applies.

A. The Challenged Commissioner Decision Was Based on Prosecutorial Discretion and There Has Been No Abdication

As the FEC described in its initial brief, plaintiffs' complaint focuses on challenging the statement of reasons issued by Commissioner Caroline C. Hunter and former Commissioner Lee E. Goodman in which they invoked prosecutorial discretion, and plaintiffs' opposition to the FEC's motion to dismiss 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. (FEC Mot. for Judgment at 9.) The Commissioners' stated reasons for their decision included a lack of clarity regarding the law, 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 John Does 1 and 2, and the public interest. (Compl. Exh. 5 at 2-5 (Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman, MUR 6920 (Dec. 20, 2017))

("statement").) These are not interpretations of FECA but judgments regarding the agency's use of resources and priorities. (FEC Mot. for Judgment at 10-11.) This Court has itself noted that the statement by Commissioners Hunter and Goodman relied on the agency's prosecutorial discretion. *Doe 1 v. FEC*, 302 F. Supp. 3d 160, 173 n.7 (D.D.C. 2018). Plaintiffs do not contest any of these pre-*CREW* characterizations of the statement.

1. The Basis of the Challenged Commissioners' Decision Was Prosecutorial Discretion, Not an Interpretation of FECA

Plaintiffs now argue that judicial review nevertheless remains available under *CREW* because the "two commissioners misconstrued 52 U.S.C. § 30122 to not apply to" certain funders. (Opp'n at 1; *id.* at 6-8.) Plaintiffs' claim is belied by the statement itself. In that statement, Commissioners Hunter and Goodman explained that they did not decline "to bring an enforcement action on the basis of [an] interpretation of FECA," *CREW*, 892 F.3d at 441 n.11, but rather chose not to pursue enforcement against the Does on the basis of prosecutorial discretion. They noted that, because "there is scant legal precedent applying 52 U.S.C. § 30122's 'true source' rule to funders three or four layers behind the reportable contribution to a Super PAC," these "issues were likely to be contested and litigated." (Compl. Exh. 5, Statement at 2.) These Commissioners thus chose to exercise the agency's enforcement prerogative to conciliate with certain parties to avoid the complications that pursuing the Does would have entailed. (*Id*. at 5 ("This matter could have gone in a different direction, one that would have delayed any resolution for years. We avoided that."); *id*. at 4 ("A majority of Commissioners expressed concerns about concluding the case before the statute of limitations ran, and we believed the most efficient prosecutorial path forward was to finalize the case against the three

Respondents as efficiently and expeditiously as possible, whether by conciliation or civil action.").)

Importantly, these Commissioners did not state that section 30122 was inapplicable to the Does. Rather, in keeping with the views expressed in another enforcement matter they cited in their statement, the Commissioners pointed out that, among other things, "the legal theory underlying the [FEC's Office of General Counsel's] 'reason to believe' recommendation concerning [the Does] was unclear, and that more factual investigation on the question of intent was needed because 'the Commission had circumstantial evidence but not direct evidence.'" *Doe 1*, 302 F. Supp. 3d at 173 n.7 (summarizing and quoting statement). In the statement issued in that other matter — which plaintiffs wrongly characterize as an "LLC Enforcement Policy" (Opp'n at 9) — Commissioners Hunter, Goodman, and Matthew S. Petersen explicitly stated their view that "*closely held corporations and corporate LLCs may be considered straw donors*" under FECA, and they articulated how they intended to apply the statute in such situations going forward. Statement of Reasons of Chair Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman at 8, 12-13, MUR 6485 (W Spann LLC, *et al*.) (Apr. 1, 2016) (emphasis added), http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf ("MUR 6485 SOR"); *see also* FEC Mot. for Judgment at 4 n.1 (noting that another court in this District has upheld these Commissioners' exercise of prosecutorial discretion set forth in that statement).

Thus, contrary to plaintiffs' claim that the statement of Commissioners Hunter and Goodman interpreted FECA not to apply to the Does, the statement and its reference to another matter indicate that although these Commissioners found that section 30122 may apply to certain non-natural persons, they chose to exercise prosecutorial discretion in this case for a number of reasons, including litigation risk and statute of limitations concerns, efficiency, and the public

interest. (Compl. Exh. 5, Statement at 2-5.) *CREW* held that such decisions not to enforce based on prosecutorial discretion are not reviewable. 892 F.3d at 438. Moreover, under *CREW* and other Circuit precedent that the decision cited, the presence of legal interpretation in a statement of reasons for a dismissal based on prosecutorial discretion does not make the dismissal reviewable. *See id.* at 441-42 (noting that "even if some statutory interpretation could be teased out of the Commissioners' statement of reasons," the dismissal cannot be subject to judicial review because "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions'" (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)). And there certainly can be no argument that any dismissal was "based *entirely* on [an] interpretation of" FECA. *Id.* at 441 n.11 (emphasis added).

The cases plaintiffs cite do not refute this point. *FEC v. Akins*, 524 U.S. 11 (1998), does not affect the application of the *CREW* decision because that opinion did not, as plaintiffs state, "explicitly allow[] review of the FEC's interpretation of law underlying a dismissal, the agency's invocation of its prosecutorial discretion notwithstanding." Opp'n at 6; *compare CREW*, 892 F.3d at 438 n.6 (noting that "[t]he only issue the Court decided in *Akins* dealt with standing" and "[t]he [*Akins*] Court held only that the complainants had standing even though, on remand, the Commission might invoke its prosecutorial discretion to dismiss the remaining charge").[4] The dismissal at issue in *Akins* was predicated entirely on the FEC's interpretation of the statute; it did not involve prosecutorial discretion. What the Supreme Court found was that the mere *possibility* of a subsequent discretionary dismissal did not break the chain of causation for Article III standing purposes. *Akins*, 524 U.S. at 25. Even then, however, the Court strongly suggested

[4] Contrary to plaintiffs' straw man assertion that "the FEC interprets *CREW* to block all judicial review of its nonenforcement decisions" (Opp'n at 6), the FEC argues simply that *CREW* applies to prosecutorial discretion dismissals such as the one plaintiffs claim occurred here.

that a non-merits discretionary dismissal would be permissible. *Id.* (noting that "it is possible" that the Commission would "have decided in the exercise of its discretion not to" enforce FECA in that case). Thus, the only question *Akins* actually decided was the plaintiffs' standing, *id.* at 25-26, not whether plaintiffs may challenge a dismissal that was in fact based on prosecutorial discretion.

Plaintiffs' reliance on *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) (Opp'n at 6-7), is similarly unavailing. To begin, as a D.C. Circuit decision post-dating the decision in *NAACP*, *CREW* is controlling in the event of conflict. The case is also distinguishable because the plaintiffs in *NAACP* brought their challenge in relevant part under the Administrative Procedure Act ("APA"), which section 30109(a)(8) of FECA precludes. (*See* FEC MTD at 20-25.) Most importantly, the *NAACP* decision does not stand for what plaintiffs claim it does. The *NAACP* case was one of several challenges to the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals ("DACA") program. *NAACP*, 298 F. Supp. 3d at 215. In part, the plaintiffs challenged the rescission of DACA as arbitrary and capricious. *Id*. at 223. The government argued that the rescission was unreviewable under *Heckler* because it "involves a 'complicated balancing' of the agency's enforcement and resource-allocation priorities, and it resembles the '[c]hanges in policy as to criminal prosecutorial discretion' that 'regularly occur within and between presidential administrations.'" *Id*. at 229-30 (internal quotation omitted) (alteration in original). In analyzing this claim, the court recognized that "'agency decisions to refuse enforcement' . . . are 'general[ly] unsuit[able] for judicial review . . . .'" *Id*. at 227 (alterations in original) (quoting *Heckler*, 470 U.S. at 831). The court explained that "[s]uch decisions call for 'a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise,' including 'whether agency resources are best

spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies.'" *Id.* (alterations in original) (quoting *Heckler*, 470 U.S. at 831).

The court explained that, under D.C. Circuit precedent that the *CREW* decision relied upon, *Heckler*'s presumption of unreviewability applied to "an agency's refusal to act on a *single complaint*," but did not apply to "'an agency's statement of a *general enforcement policy*' that was either 'expressed . . . as a formal regulation after the full rulemaking process . . . or . . . otherwise articulated . . . in some form of universal policy statement.'" *NAACP*, 298 F. Supp. 3d at 229 (quoting *Crowley*, 37 F.3d at 676). In accordance with *Crowley*, the court noted that "an individual nonenforcement decision is presumptively unreviewable even if it is based solely on legal grounds," while "'an agency's statement of a general enforcement policy may be reviewable for legal sufficiency.'" *Id.* at 229 (quoting *Crowley*, 37 F.3d at 676-77). Here, the Commissioners' vote to not pursue the Does occurred in a single administrative matter, so even if the controlling Commissioners had made a nonenforcement decision based on a legal interpretation of FECA, which they did not, such a determination would be unreviewable even under *NAACP*. *Accord CREW*, 892 F.3d at 441-42.

2. The FEC Has Not Abdicated Its Statutory Responsibilities

Plaintiffs' suggestion that the FEC has abdicated its statutory responsibilities with respect to the enforcement of section 30122 (Opp'n at 8-11), is without basis and must be rejected. There has been no abdication. The Commission's resolution of plaintiffs' administrative complaint itself demonstrates that the Commission enforces section 30122 against LLCs and that there is no general policy of nonenforcement: Government Integrity, LLC, which the Commission uncovered in its investigation of plaintiffs' administrative complaint, was included

in the conciliation agreement for violation of section 30122. (FEC MTD at 5-6.) This conciliation agreement, which resolved alleged violations of the same statutory provision plaintiffs allege has been abdicated, included the respondents' agreement to pay a sizeable $350,000 penalty. (*Id*. at 6.)[5] That is enforcement, not abdication.

Indeed, plaintiffs' willingness to claim abdication for any FEC enforcement less than what they believe is warranted is itself fundamentally contrary to the concept of prosecutorial discretion. They thus err in claiming that the statement of Commissioners Hunter and Goodman, "when read in light of other statements of the two commissioners incorporated therein," reflects "a conscious and express abdication of the agency's statutory responsibility to identify the 'true source' of contributions." (Opp'n at 8.)[6] But FECA does not mandate that the Commission prosecute every administrative complaint alleging potential violations of section 30122 until it has uncovered the ultimate source of funds for a contribution. Rather, FECA leaves it to the Commission to decide how to expend its limited resources in investigations and conciliations.

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[5] Consistent with its long history of enforcing section 30122, the Commission is also currently pursuing several affirmative civil cases to enforce section 30122. *See FEC v. Johnson*, Civ. No. 2:15-0439 (D. Utah filed June 19, 2015); *FEC v. Rivera*, Civ. No. 17-22643 (S.D. Fla. filed July 14, 2017) (dismissed Sept. 27, 2018); FEC's Mot. to Reopen Case & For Leave to File Amended Compl. *FEC v. Rivera*, Civ. No. 17-22643 (Docket No. 32) (S.D. Fla. Oct. 22, 2018). And it conciliated other matters just last year as well. *See* Conciliation Agreement, MUR 7247 (Sept. 7, 2017), https://www.fec.gov/files/legal/murs/7247/17044430333.pdf ($6,700 civil penalty); Conciliation Agreement, MUR 7005, et al. (Aug. 11, 2017), https://www.fec.gov/files/legal/murs/7056/17044424631.pdf ($65,000 civil penalty).

[6] The Court should reject plaintiffs' attempt to broaden the scope of review to other administrative matters. In a previous case, CREW and another plaintiff argued that the Commission's approach to its political committee analysis during several prior administrative proceedings amounted to a "de facto regulation." *CREW v. FEC*, 164 F. Supp. 3d 113, 118 (D.D.C. 2015). The court rejected that improper attempt to mount "'an across-the-board challenge'" to the Commission's treatment of these previous matters, holding that the "exclusive remedy" for aggrieved parties is to "challenge those particular decisions under the judicial review provision of FECA." *Id*. at 120. Plaintiffs' attempt to broaden the scope of this case to include other administrative matters in the guise of an abdication claim should likewise be rejected.

(FEC MTD at 19-20.) For plaintiffs to be able to second guess such choices, they must first demonstrate that the FEC 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. Plaintiffs have shown no such conscious and express policy because none exists.

Not only did the Commissioners referenced in plaintiffs' opposition enforce section 30122 in the underlying matter, but, as explained above, *see supra* pp. 7-8, they also have found that closely held corporations and corporate LLCs may be considered straw donors under section 30122 and identified circumstances in which such findings would be warranted. At the same time, they and a colleague have articulated their views that the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), significantly altered the agency's historical approach to corporate contributions and FECA's prohibition against contributions in the name of another. MUR 6485 SOR at 1-2. They concluded that in the pre-*Citizens United* era "the Commission ha[d] never addressed the inverse of the conventional corporate straw-donor scheme," in which a corporation or corporate LLC could be considered to be making a contribution in the name of another in violation of section 30122, as alleged in the administrative complaints at issue there. *Id*. at 7. Because corporations could not make any contributions under FECA at the time the prohibition against conduit contributions was enacted, the Commissioners further found that "Congress likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions." *Id*. at 9. These Commissioners thus determined that the question presented by the administrative complaints in those matters was an issue of first impression and ultimately warranted the use of prosecutorial discretion. *Id*. Commissioners Hunter and Goodman cited that reasoning in the analysis plaintiffs seek to challenge here. (Compl. Exh. 5, Statement at 2 & nn.5-6.)

Upholding the exercise of prosecutorial discretion articulated in the MUR 6485 SOR in an opinion issued shortly before *CREW* was decided, the district court determined that the question of when a closely held corporation or corporate LLC may be a straw donor under section 30122 was "an issue of first impression for the Commission," that "even sophisticated lawyers were confused" by the regulatory environment, and credited the controlling Commissioners' concerns about notice and due process, as well as the importance of safeguarding First Amendment activity. *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 162, 165-66 (D.D.C. 2018) ("*CLC*"), *appeal docketed*, No. 18-5239 (D.C. Cir. Aug. 8, 2018). The district court thus concluded that "there was a rational basis for the Commission's exercise of its prosecutorial discretion." *Id*. at 156. Any similar exercise of prosecutorial discretion as to the Does that occurred here is not an abdication of statutory responsibility. *CREW*, 892 F.3d at 440 n.9. Thus, *CREW* bars judicial review.

B. *CREW* Also Precludes CREW's APA Claims

Finally, plaintiffs assert without support that "*CREW* has no application to [plaintiffs'] APA claim." (Opp'n at 6 n.3.) But the D.C. Circuit found in *CREW* 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." 892 F.3d at 441.

CONCLUSION

For the foregoing reasons, as well as those set forth in the FEC's initial brief, the Court should enter judgment on the pleadings in favor of the FEC and dismiss plaintiffs' complaint.

Respectfully submitted,

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