IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and ANNE L. WEISMANN Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant, JOHN DOE 1 And JOHN DOE 2 Proposed Intervenor-Defendants	)	Civil Action No.: 17-cv-02770 (ABJ)

[PROPOSED] INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), Intervenor-Defendants John Doe 1 and John Doe 2 hereby move, through undersigned counsel, for an order dismissing Plaintiffs Citizens for Responsibility and Ethics in Washington's and Anne L. Weismann's Complaint challenging under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706 the Federal Election Commission's actions in connection with Matter Under Review 6920. A supporting memorandum and a proposed order accompany this motion.

March 1, 2018

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON	)
and	)
ANNE L. WEISMANN	)
Plaintiffs,	)
v.	) Civil Action No.: 17-cv-02770 (ABJ)
FEDERAL ELECTION COMMISSION	)
Defendant,	)
JOHN DOE 1	)
And	)
JOHN DOE 2	)
Proposed Intervenor-Defendants	)

[PROPOSED] INTERVENOR-DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Pursuant to 52 U.S.C. § 30109(a)(8), the Federal Election Campaign Act ("FECA") provides a limited cause of action for parties that filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission") to challenge as contrary to law the FEC's handling of that complaint. By its plain language, FECA allows for this review only where the FEC has either failed to act or dismissed the complainant's administrative complaint. Neither is the case here, and therefore the instant complaint must be dismissed for lack of jurisdiction and for failing to state a claim upon which relief can be granted.

The deficiency of Plaintiffs' complaint is plain on its face. Far from taking no action or dismissing Plaintiffs' administrative complaint, the FEC thoroughly investigated the claims therein, added a respondent of which Plaintiffs were unaware when they filed their complaint, and resolved that complaint via a conciliation agreement entered into with the respondents. That conciliation agreement explained the FEC's view of the underlying legal violation and imposed a substantial monetary penalty against respondents. By no rational standard was the action that the FEC took with respect to Plaintiffs' complaint a dismissal.

This case arises because Plaintiffs take issue with the conduct of the FEC's investigation, in particular its decision not to add John Doe 1 and John Doe 2 (collectively, "John Does") as respondents to Plaintiffs' complaint and investigate them for alleged violations of FECA. This decision also is plainly not appealable, because it does not involve the dismissal of any claim or party from Plaintiffs' complaint. Moreover, permitting Plaintiffs to invoke this Court's jurisdiction to challenge the conduct of the FEC's investigation, merely because the FEC did not carry out an investigation with respect to non-parties to the full extent that Plaintiffs desire, would expand the scope of the review provided by Subsection (a)(8) well beyond what Congress intended.

The FEC has the exclusive jurisdiction to enforce federal campaign finance law. Congress deliberately placed safeguards on the exercise of the FEC's power. Plaintiffs now seek to slip the bonds of those limits and force the FEC to conduct an investigation to Plaintiffs' specifications. This is not the role FECA contemplates for private litigants, and therefore this Court lacks jurisdiction to entertain Plaintiffs' complaint, which fail to state a claim upon which can be granted.

I. STATUTORY AND REGULATORY BACKGROUND

As alleged in Plaintiffs' Complaint, this case arises out of an administrative enforcement proceeding before the FEC, Matter Under Review ("MUR") 6920.

FECA empowers the FEC to investigate and, as appropriate, enforce potential violations of campaign finance laws. *See* 52 U.S.C. §§ 30106(b), 30107(a). This power is not unlimited, but is instead closely bound and regulated by the provisions of FECA, which provides the framework for all FEC administrative enforcement proceedings. The FEC is deliberately structured as a bipartisan agency; no more than three of the Commission's six members "may be affiliated with the same political party." *Id.* § 30106(a)(1). Moreover, "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." *Id.* § 30106(c). Therefore, "four affirmative votes are needed for the FEC to take an enforcement action." *CREW v. FEC*, 164 F. Supp. 3d 113, 115 (D.D.C. 2015). This limitation on the Commission's power to act, ensuring an equal partisan split but requiring a majority for action, was a deliberate feature that Congress included in the statute given the FEC's broad powers to regulate political activity. As noted on the occasion of the 1976 overhaul of FECA in response to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which created the modern FEC, "[t]he four-vote requirement serves to assure that enforcement actions, as to which Congress has no

continuing voice, will be the product of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976).

As is relevant here, an administrative enforcement proceeding generally begins when a complainant files a written, sworn complaint. *See* 52 U.S.C. § 30109(a)(1).[1] The complaint must "clearly identify as a respondent each person or entity who is alleged to have committed a violation." 11 C.F.R. § 111.4(d)(1). Upon the filing of a complaint, the FEC's Office of General Counsel ("OGC") notifies the respondents that a complaint has been filed against them. *See* 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.5(a). FECA requires that the respondent to a complaint be afforded an opportunity to make a response before the FEC is permitted to vote to find "reason to believe" that the respondent violated the law. 52 U.S.C. § 30109(a)(1)-(2); 11 C.F.R. § 111.6.

Based on the complaint and any response received, OGC makes a recommendation to the Commission regarding whether a violation has occurred. 11 C.F.R. § 111.7. The Commission then votes whether to find "reason to believe" that a violation occurred. *See* 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9. The Commission may only find "reason to believe" that a respondent violated FECA upon an affirmative vote of four of its members. 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9. Regardless of whether the FEC finds reason to believe a

[1] An administrative enforcement proceeding may also begin when the Commission obtains information in the course of its supervisory responsibilities indicating that a violation of FECA has occurred. *See* 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.3(a). Although John Does do not believe that is the case here, the FEC has raised arguments in a related matter suggesting that the review of John Does' conduct could have been an internally-generated matter arising under these provisions. If it were, Plaintiffs would have no argument for standing, as their right to file this action is predicated on appealing the dismissal of their complaint. There is no private cause of action for citizens to challenge, and courts to second-guess, the FEC's determination on an internally-generated matter.

violation occurred or if such a vote fails, the FEC's regulations require it to notify the complainant and the respondent by letter. *See* 11 C.F.R. § 111.9.

If the FEC determines that there is reason to believe that a violation occurred, it may investigate the allegations in the complaint. *See* 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.10(a). FECA provides the FEC with broad investigatory powers, including the power to issue subpoenas, compel the testimony of witnesses, and require the production of documents. *See* 52 U.S.C. § 30107(a)(3); 11 C.F.R. §§ 111.11-111.15. Upon the conclusion of the investigation, OGC prepares a brief setting forth its view of whether there is probable cause to believe that a violation occurred and recommending a course of action to the Commission. 11 C.F.R. § 111.16(a). If OGC intends to recommend that the Commission find probable cause, OGC is required to notify respondents and provide them with the opportunity to respond. *See* 52 U.S.C. § 30109(a)(3); 11 C.F.R. § 111.16(b)-(c).

Again, a majority of four votes is required for the Commission to find probable cause that FECA has been violated. *See* 52 U.S.C. § 30109(a)(4)(A)(i); 11 C.F.R. § 111.17(a). If the Commission determines that there is probable cause, it is required to enter into negotiations with the respondents in order to attempt to reach a conciliation agreement. 52 U.S.C. § 30109(a)(4)(A)(i). In addition, the FEC has the power to enter into a conciliation agreement resolving a matter before it makes a probable cause finding. *See* 11 C.F.R. § 111.18(d). If the FEC (again, upon four votes of its members) reaches conciliation with the respondent, that is the end of the administrative enforcement proceedings. FECA provides that a conciliation agreement "is a complete bar to any further action by the Commission," so long as respondents abide by the terms of the conciliation agreement. *See* 52 U.S.C. § 30109(a)(4)(A)(i). This enforcement scheme was carefully calibrated by Congress to pursue its policy goals:

> Together, the requirement of four votes for affirmative action, the broad investigatory powers granted (which are limited only by the requirement that complaints be signed and sworn to and that the Commission shall not act solely on the basis of anonymous information), the conciliation procedure mandated, and the substantial civil remedies provided represent a delicate balance designed to effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable.

H.R. Rep. No. 94-917, at 4.

If the parties cannot reach a conciliation agreement, only then is the FEC authorized by FECA to commence a civil action in federal district court against the respondents to enforce a violation of the Act. *See* 52 U.S.C. § 30107(a)(6). With one exception, "the power of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act." *Id.* § 30107(e). That exception is the one at issue in this case.

FECA provides a limited provision permitting narrow review of the FEC's enforcement decisions. Pursuant to 52 U.S.C. § 30109(a)(8)(A), "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . , or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed" may file suit in the District Court, which is empowered to "declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days." *Id.* at § 30109(a)(8)(C). In the event the Commission fails to do so, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* Apart from this provision, "there is no private right of action to enforce the FECA against an alleged violator." *Perot v. FEC*, 97 F.3d 553, 558 n.2 (D.C. Cir. 1996) (per curiam).

II. PROCEDURAL HISTORY

According to Plaintiffs' complaint in this matter, they filed an administrative complaint with the FEC on February 27, 2015. Compl. ¶ 24. The administrative complaint alleged that American Conservative Union, Now or Never PAC, and James C. Thomas III violated FECA in connection with a $1.7 million contribution to Now or Never PAC. *Id.* The administrative complaint also named an "Unknown Respondent." *Id.* The FEC later substituted an additional party, Government Integrity, LLC, in place of Unknown Respondent. Compl. Ex. 6. Accordingly, American Conservative Union, Now or Never PAC, James C. Thomas III, and Government Integrity, LLC, (collectively, "Respondents") were the respondents to MUR 6920. The FEC conducted an investigation and entered into a conciliation agreement with Respondents, which was accepted following a vote by the Commission on October 24, 2017. Compl. Ex. 8. The FEC then sent a letter to Plaintiffs, notifying them that the FEC had investigated the allegations in their complaint and entered into conciliation with the respondents to the complaint, "thereby concluding the matter." *In the Matter of Amer. Conservative Union, et al.*, Notification to Citizens for Responsibility and Ethics in Washington, MUR 6920 (Nov. 3, 2017).

As part of the investigation into Respondents' conduct, the FEC served subpoenas on John Doe 2 through John Doe 1, its trustee. Compl. Ex. 2 at 7. OGC recommended that the Commission authorize it to file a suit to enforce the subpoenas and find reason to believe that John Does 1 and 2 violated FECA. *Id.* at 17. The Commission failed, by a vote of 2-3, to authorize OGC to enforce the subpoenas or to find reason to believe that John Does violated FECA. Compl. Ex. 4. Plaintiffs do not allege that any other action was taken with respect to John Does.

On December 22, 2017, fifty-nine days after the FEC approved the conciliation agreement with Respondents, Plaintiffs filed the instant complaint.

III. STANDARD OF REVIEW

Dismissal of Plaintiffs' complaint is appropriate under Federal Rule of Civil Procedure 12(b)(1), which permits the Court to dismiss a complaint for lack of subject matter jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Moreover, "[i]t is 'presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.'" *Gammill v. U.S. Dep't of Educ.*, 989 F. Supp. 2d 118, 120 (D.D.C. 2013) (quoting *Kokkonen*, 511 U.S. at 377). While the Court must accept the factual allegations in a complaint as true, "'because subject matter jurisdiction focuses on the court's power to hear the claim,' a court 'must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim.'" *Id.* (quoting *Bailey v. WMATA*, 696 F. Supp. 2d 68, 71 (D.D.C. 2010)) (alteration omitted). Where "a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The court must 'accept all the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in the plaintiff's favor.'" *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017) (quoting *Banneker Ventures, LLC v. Graham*, 798

F.3d 1119, 1129 (D.C. Cir. 2015)). "In determining whether a complaint fails to state a claim, [the court] may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaints and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

IV. ARGUMENT

Plaintiffs allege claims arising from two statutory sources: the Administrative Procedure Act ("APA") and 52 U.S.C. § 30109(a)(8)(A), the provision of FECA that allows administrative complainants to appeal from an order dismissing their complaint or to challenge the FEC's failure to act on their complaint. Compl. ¶¶ 5, 14-16. Plaintiffs' claims under Subsection (a)(8) must be dismissed, because neither of the conditions that would trigger Subsection (a)(8) review, the FEC's failure to act on or its decision to dismiss Plaintiffs' administrative complaint, have occurred. Additionally, Plaintiffs' APA claims are precluded by FECA's comprehensive enforcement and review scheme. Accordingly, this Court lacks subject matter jurisdiction over Plaintiffs' claims and Plaintiffs have failed to state a claim for which relief can be granted.

A. This Court Lacks Subject Matter Jurisdiction and Plaintiffs Have Failed To State a Claim Because None of the Conditions Triggering Review Under Section 30109(a)(8) Have Occurred

The review provision in Subsection (a)(8) is the sole basis for this Court's jurisdiction over a claim arising from the FEC's administrative enforcement proceedings. That provision provides that:

> Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . , or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

52 U.S.C. § 30109(a)(8). In all other circumstances, the Commission's power to initiate a civil suit is "the exclusive civil remedy for the enforcement of the provisions of this Act." *Id.*

§ 30107(e). Accordingly, this Court's jurisdiction to evaluate the FEC's enforcement decisions is triggered in only one of two circumstances: (1) when the FEC fails to act on a complaint; or (2) when the FEC dismisses an administrative complaint. Neither condition is met here. The FEC not only acted on Plaintiffs' administrative complaint, it conducted an investigation that revealed more information than was known to Plaintiffs at the time they filed their complaint, successfully reached a conciliation agreement with all respondents identified in the administrative complaint that clarified the law, and obtained a significant monetary penalty. This successful resolution of Plaintiffs' complaint through a conciliation agreement is far from a "dismissal" within the meaning of Subsection (a)(8). In essence, Plaintiffs seek the power to enforce FECA on their own terms, and invite the Court to intervene in and manage the FEC's conduct of its investigations, precisely the result that the narrowly-drafted review provision in Subsection (a)(8) was intended to prevent.

1. The FEC took action on Plaintiffs' administrative complaint

It is plain from Plaintiffs' complaint and the attached exhibits that the FEC took action on their administrative complaint within the meaning of Subsection (a)(8). Not only is it undisputed that the FEC conducted an investigation into the allegations of the administrative complaint, it is also undisputed that the FEC resolved these allegations through conciliation. As one court has held, when the Commission enters into conciliation with the respondents identified in a complaint, "the FEC has completed the action sought in [the administrative] complaint," and "there is no relief that the Court could provide" under Subsection (a)(8). *All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004). Thus, "[t]he conciliation agreement and closing of the administrative file mark the end of the enforcement process under [FECA] and foreclose any possible relief under [Section 30109(a)(8)] based on the FEC's failure to act." *Id.* at 43.

Accordingly, to the extent that Plaintiffs' complaint alleges any failure to act on the part of the FEC, those claims must be dismissed.[2]

2. The FEC did not dismiss Plaintiffs' administrative complaint

Subsection (a)(8) is clear: an appeal to this Court is only appropriate when the FEC has entered an order "dismissing a complaint." Plaintiffs' judicial complaint must be dismissed for the simple fact that its administrative complaint was not dismissed – it was concluded via conciliation, as the FEC stated when it notified Plaintiffs of the successful resolution of their administrative complaint. Indeed, it was not merely resolved: as a result of Plaintiffs' complaint, the FEC set out clear precedent in an uncertain area of the law and through conciliation imposed a sizable $350,000 civil monetary penalty on Respondents, one of the largest civil penalties the Commission has ever obtained. While Plaintiffs may take issue with some of the decisions the FEC made in the course of investigating the allegations in their complaint, FECA does not give Plaintiffs or reviewing courts a mechanism by which to oversee and second-guess the conduct of the FEC's investigation. As noted by Congress when FECA was revised, and as uniformly confirmed through court opinions, Subsection (a)(8) was "not intended to work a transfer of prosecutorial discretion from the Commission to the courts," 125 Cong. Rec. 36,754 (1979), which do not "sit as a board of superintendance [sic] directing where limited agency resources will be devoted," *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

[2] The complaint itself does not mention failure to act. However, in the litigation over the FEC's decision to release John Does' names, Plaintiffs suggested in their motion to intervene that their complaint was based on a failure to act theory. *See* Mot. to Intervene by Citizens for Responsibility and Ethics in Washington and Anne Weismann at 7-9, *John Doe 1, et al. v. FEC*, No. 17-02694 (ABG) (D.D.C. Filed Dec. 15, 2017), ECF No. 22. As noted above, this contention is not availing.

a. The conciliation agreement with Respondents resolved Plaintiffs' administrative complaint without a dismissal

Plaintiffs identify the Commission's vote of October 24, 2017, to accept the conciliation agreement and close the file, as the "order of the Commission dismissing a complaint." Compl. ¶ 32. It cannot be the case, however, that Congress intended Subsection (a)(8) to permit an administrative complainant to challenge as "contrary to law" the FEC's conduct of an investigation that culminated in a conciliation agreement with every respondent named in the administrative complaint and where the FEC obtained a substantial monetary penalty against those respondents. Such a result is illogical under the structure of FECA and would compromise Congress's carefully balanced enforcement scheme for investigating violations of FECA.

FECA does not define what constitutes "an order of the Commission dismissing a complaint," yet it is clear from the plain language of the statute that such an order is a prerequisite for bringing an action in federal court against the FEC complaining of the Commission's disposition of a matter. *See FEC v. Akins*, 524 U.S. 11, 19 (1998). In FECA, the term "dismiss" appears outside of Subsection (a)(8) only in Section 30109(a)(1), which provides that, if a person has not been given notice of a complaint against them and an opportunity to respond, the Commission may only "vote to dismiss" the complaint. Similarly, the term "dismiss" only appears (in relevant part) in the FEC's regulations that pertain to the procedures for Section 30109(a)(1). *See* 11 C.F.R. §§ 111.6, 111.7. Nor does it appear that a federal court has examined what constitutes an FEC order "dismissing" a complaint. While other disappointed complainants have previously attempted to appeal FEC orders accepting conciliation agreements, those cases have been resolved on different standing grounds. *See All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 144 (D.D.C. 2005) (finding plaintiffs lacked informational standing to challenge conciliation agreement); *Antosh v. FEC*, 631 F. Supp. 596,

598 (D.D.C. 1986) (holding plaintiff lacked standing and declining to reach FEC's jurisdictional argument).

Allowing a Subsection (a)(8) appeal where the FEC resolved all claims against all respondents would contradict the statute's clear mandate that, once accepted by the Commission, a conciliation agreement "is a complete bar to any further action by the Commission," unless the agreement is violated. 52 U.S.C. § 30109(a)(4)(A)(i). "Statutes are to be interpreted, if possible, to give operation to all of their parts, and to maintain them in harmonious working relationship." *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 449 (D.C. Cir. 1980) (footnote omitted). A determination that the Commission acted "contrary to law" in some part of its investigation that nonetheless led to a conciliation agreement would put the FEC in an untenable position: it would be unable to comply with the court's order because FECA would forbid it from taking *any* further action so long as the conciliation agreement was not violated. And judicial review under such circumstances might suggest that the FEC's inability to act could trigger Subsection (a)(8)(C), which would permit complainants to file a suit in their own name, and thereby deprive respondents and any other party of the benefit of the conciliation agreement. This clearly was not what Congress intended. Congress cannot have intended to create a review provision that would put the FEC in this position and negate the clear mandate of Section 30109(a)(4)(A)(i). Thus, Subsection (a)(8) cannot be available where a complainant's administrative complaint was investigated and resolved by the FEC via conciliation.

Moreover, the Intervenors' interpretation of FECA, which would preclude complainants from using a Subsection (a)(8) appeal to attack the conduct of an FEC investigation, as opposed to the legal basis for the FEC's decision to dismiss an administrative complaint, is consistent with judicial statements regarding the scope of the FEC's authority and Subsection (a)(8) review.

"Congress delegated exclusive enforcement to the FEC because it found expert, uniform enforcement essential to the administration of FECA." *FEC v. Nat'l Rifle Ass'n of Am.*, 553 F. Supp. 1331, 1345 (D.D.C. 1983). As such, the D.C. Circuit has observed that "Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA" when it enacted Subsection (a)(8). *Perot*, 97 F.3d at 557. Accordingly, even when a court concludes that the FEC has acted contrary law, the remedy is not to "compel the FEC to enforce" a provision, but to issue "an order requiring FEC action." *Id.* at 559. Similarly, the D.C. Circuit has rebuffed an attempt by a complainant to argue that "the FEC should have directed more energy to his complaint," by "declin[ing] this invitation to second-guess the Commission's exercise of its discretion." *Rose*, 806 F.2d at 1091. "It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance [sic] directing where limited agency resources will be devoted. We are not here to run the agencies." *Id.*

The deference to be afforded to the FEC's decision-making reflects a broader concern for maintaining its independence. As the D.C. Circuit observed, the party that is entrusted with enforcing the nation's campaign finance laws "holds potentially enormous power." *See Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). Enforcing those laws means deciding "issues charged with the dynamics of party politics, often under the pressure of an impending election." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Indeed, Congress recognized that "election campaigns are the central expression of this country's democratic ideal," and therefore it was "essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse." H.R. Rep. No. 94-917, at 3.

Congress chose to address this concern by entrusting "primary enforcement of the election laws" to the FEC and by sharply limiting the involvement of private citizens. *In re Fed. Campaign Act Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979). Thus, "there is no private right of action to enforce the FECA against an alleged violator," *Perot*, 97 F.3d at 558 n.2, and, as demonstrated below, FECA's review provisions displace the general APA framework for review of agency decision-making. By entrusting enforcement of FECA to the FEC, Congress ensured it could place "safeguards" on the exercise of the enormous power to investigate violations of the election laws, including through the FEC's bipartisan structure, the four-vote requirement, and the detailed enforcement scheme that the FEC must follow before it can even pursue a violation. *See Combat Veterans for Congress Political Action Comm.*, 795 F.3d at 153-54. Through these safeguards, Congress sought to ensure that "the statute could [not] be perverted by unscrupulous campaigners into a means of harassing and discrediting their opponents." *Durkin for U.S. Senate Comm. v. FEC*, No. C80-503D, 1981 Fed. Election Camp. Fin. Guide (CCH) ¶ 9147, at 51,113 (D.N.H. Oct. 30, 1980) (attached as Exhibit A).

Expanding the appeal provision in Subsection (a)(8) to embrace not only orders dismissing a complaint, but also including, as Plaintiffs assert, a failed vote to authorize enforcement of a subpoena, Compl. ¶ 45, would undermine Congress's carefully crafted regulatory scheme. Plaintiffs' complaint aims at the FEC's conduct of its investigation, not its decision to dismiss any claim or party in the administrative complaint, and thus intrudes upon an area that Congress reserved *solely* to the FEC. Plaintiffs essentially ask this Court to force the FEC to carry out the investigation that Plaintiffs themselves would have carried out.

This cannot be the outcome that Congress intended. Subsection (a)(8) is clear on its face: Plaintiffs' right to sue the FEC in this Court is predicated upon the FEC having entered an order

dismissing Plaintiffs' complaint. In the absence of that order, Plaintiffs' complaint is a request that Plaintiffs be allowed to enforce FECA on their own terms. Plaintiffs, an advocacy organization that self-describes as having a number of priorities that, even if not partisan, are certainly charged with the dynamics of partisan politics, were not chosen by Congress to administer the federal election laws. Accordingly, John Does respectfully request that this Court abide by the limits that Congress set on its jurisdiction to entertain a challenge to an FEC order. The entry of a conciliation agreement is not an order dismissing a complaint. In the absence of such an order, FECA grants Plaintiffs no right to bring this action.

b. John Does were not respondents to Plaintiffs' administrative complaint, and therefore the FEC's decision not to add them as respondents cannot be a "dismissal" within the meaning of Subsection (a)(8)

As demonstrated above, the FEC resolved Plaintiffs' administrative complaint through conciliation, which included findings of wrongdoing. To the extent that Plaintiffs' complaint can be construed to contend that the FEC's decision was a partial dismissal, this argument is no more availing.[3] Plaintiffs assert that the FEC dismissed its complaint as to Unknown Respondent, providing the supposed jurisdictional hook for this action. Compl. ¶ 44. However, the documents attached to Plaintiffs' complaint establish, as a matter of law, that the FEC did not dismiss any claim against Unknown Respondent, and that John Does were never respondents to the administrative complaint. *See Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (holding that, on a motion to dismiss, a court does "not assume the truth of legal conclusions").

[3] In at least one instance, a court has entertained a Subsection (a)(8) action where the FEC "dismissed" one of the allegations in the complaint while reaching conciliation on the others. *See Common Cause v. FEC*, 729 F. Supp. 148, 151 (D.D.C. 1990); *see also Common Cause v. FEC*, 489 F. Supp. 738, 740 (D.D.C. 1980) (entertaining "failure to act" claims where FEC had entered into conciliation with some, but not all, respondents).

Plaintiffs' contention fails because the FEC explicitly substituted Government Integrity, LLC for "Unknown Respondent" on July 11, 2017. Compl. Ex. 6. There is no analogous order for John Does. Although Plaintiffs now rewrite their administrative complaint, asserting that it was filed against "Unknown Respondent(s)," Compl. ¶ 1, the actual administrative complaint was framed singularly, against "an Unknown Respondent." *See In re Am. Conservative Union, et al.*, Complaint, MUR No. 6920 (Feb. 27, 2015). However, this case does not turn on how artfully Plaintiffs pled their administrative complaint: the FEC has represented that, and the conduct of the investigation confirms, John Does were never respondents to Plaintiffs' administrative complaint.

In their statement of reasons, two Commissioners noted the irregularity in the FEC's process, stating that OGC did not recommend substituting John Does as the Unknown Respondent. Compl. Ex. 5 at 1 n.2. Moreover, the Court may take judicial notice[4] of the fact that the FEC conceded in its litigation regarding John Does' identities that John Does were "not formally designated by the Commission as a respondent." Def. Federal Election Comm'n's Resp. to Mot. for TRO and Mot. to Seal at 5, *John Doe 1, et al. v. FEC*, No. 17-cv-2694 (ABJ) (Dec. 18, 2017). If John Does were never respondents to Plaintiffs' complaint, it cannot be the case that there was any order dismissing them from the complaint.

Indeed, the record surrounding the FEC's resolution of Plaintiffs' administrative complaint supports that conclusion. The Commission's ultimate order in this case, which resolved Plaintiffs' administrative complaint, was its decision on October 24, 2017 to accept the conciliation agreement and close the file. Compl. Ex. 8. No prior vote, such as the vote on September 20, 2017 with respect to John Does, resolved or otherwise terminated any of the

[4] *See Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 123 n.12 (D.D.C. 2017) (holding that "a publicly available court filing meets" the criteria for judicial notice).

claims or dismissed any of the respondents identified in Plaintiffs' administrative complaint. *See* Compl. Ex. 4. As explained by the Vice Chair and one Commissioner, the vote on September 20 was a vote to *add* John Does as respondents, *see* Compl. Ex. 5 at 1, 3, as is the Commission's regular process (and which occurred with respect to one of the Respondents). *Id.* at 1 n.2. There is nothing in the record provided by Plaintiffs, and no allegation in their complaint, that they or John Does received any notice from the FEC that any vote had been taken with respect to John Does. Such notice is required by FEC regulations, which provide that if the Commission "finds no reason to believe, or otherwise terminates its proceedings," both the complainant and "respondent" are to be notified. *See* 11 C.F.R. § 111.9(b). In the absence of that notice, and without any other indication in the record that any portion of Plaintiffs' administrative complaint was dismissed, the only conclusion is that John Does were not respondents and were never dismissed from Plaintiffs' administrative complaint.

Plaintiffs essentially assert that, so long as they include an "Unknown Respondent" in their complaint, they have free reign to challenge not only the FEC's decision not to investigate any person that Plaintiffs believe the FEC should have investigated, but also to direct how the FEC should conduct that investigation, including by challenging its decision not to enforce its subpoenas. As demonstrated above, this cannot be what Congress intended when it enacted Subsection (a)(8), which narrowly limits judicial review only to the Commission's failure to act on a complaint or an order dismissing a complaint. Because Plaintiffs have not, and cannot, allege that such an order was entered in the proceedings below, they cannot establish this Court's jurisdiction over this case.

B. FECA's Review Provision Precludes Suit Under the APA and Counts Based on the APA Must be Dismissed

Both counts of Plaintiffs' complaint allege that actions the FEC took during the course of the investigation in MUR 6920 were "arbitrary, capricious, an abuse discretion, and contrary to law" under the APA. Compl. ¶¶ 39, 44. However, even assuming that Plaintiffs' administrative complaint was dismissed, an administrative complainant's sole remedy to challenge the dismissal of their complaint is Subsection (a)(8), which precludes review of the same under the APA. Accordingly, to the extent that Counts 1 and 2 allege violations of the APA, they should be dismissed for lack of subject matter jurisdiction and failure to state a claim.

FECA's comprehensive and exclusive review provision precludes APA review of the FEC's enforcement actions. "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). FECA provides that the FEC's power to bring a civil enforcement action after conclusion of the administrative enforcement process "shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 52 U.S.C. § 30107(e). The sole exception to this rule is the right of an administrative complainant to appeal to the D.C. District Court pursuant to Subsection (a)(8). *See id.* As noted, review under that provision is strictly limited to cases where the FEC either fails to act on or dismisses a complaint. As such, the comprehensive structure of FECA operates to preclude any other form of review, including under the APA.

The D.C. Circuit has emphasized the exclusive nature of the FEC's jurisdiction under FECA, which provides the only means for reviewing the FEC's enforcement actions. In the D.C. Circuit's view, FECA "provides a strong basis for scrupulously respecting the grant by Congress

of 'exclusive jurisdiction' to the FEC with respect to civil enforcement of the election laws' provisions." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 543 (D.C. Cir. 1980) (per curiam). "That a court may eventually be able to exercise a very limited review of the exercise of the FEC's discretionary decisions does not permit it to interfere with the Commission's statutory power to make the initial decisions." *Id.* at 545. In short, "Congress vested the Commission with 'exclusive jurisdiction' and this court must yield to that exclusivity." *Id.* (footnote omitted).

A court in this District has squarely held that APA review is not available. The court noted that "FECA grants the FEC 'exclusive jurisdiction' over civil enforcement of campaign finance laws, thereby channeling all complaints of campaign finance violations through the FEC." *CREW v. FEC*, 164 F. Supp. 3d at 119. Accordingly, FECA's "alternative, comprehensive judicial review provision precludes review of FEC enforcement decisions under the APA. Because FECA includes a private right of action, along with 'a detailed mechanism for judicial consideration of particular issues at the behest of particular persons,' that remedy is the exclusive means to enforce the Act.'" *Id.* at 120 (quoting *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998)). Thus, the plaintiffs in that case (including the same institutional plaintiff in this case), conceded that their APA claims challenging "the FEC's dismissal of CREW's administrative complaints" should be dismissed because FECA, not the APA, provided the relevant review mechanism. *See* Pls.' Opp'n to the Federal Election Commission's Mot. to Dismiss at 3 n.4, *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 1:14-cv-01419 (CRC)).

The decisions of other courts are in accord. The Fifth Circuit held in *Stockman v. FEC* that FECA's review provision precluded APA review: "The legislative history of [FECA]

confirms that 'the delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.'" 138 F.3d at 154 (alteration omitted) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Congressman Hayes, Chairman of the Committee reporting the bill)). Accordingly, the Fifth Circuit held that FECA precluded judicial review of the FEC's enforcement proceedings, except the "specific situation[s]" arising under Subsection (a)(8). *Id.* at 155-56. Similarly, a court in the District of New Hampshire held, shortly after FECA was enacted, that it did "not believe Congress intended that private parties could employ the general review provisions of the APA to precipitate judicial intervention in the FECA enforcement scheme." *Durkin for U.S. Senate Comm.*, 1981 Fed. Election Camp. Fin. Guide (CCH) at 51,114.

The causes of action alleged in CREW's complaint are indistinguishable from those causes of action that were held to be precluded by the above authorities. In its first Count, CREW alleges that the FEC's failure to find reason to believe that Plaintiffs violated FECA was arbitrary, capricious, and an abuse of discretion pursuant to the APA. Compl. ¶¶ 35-39. The APA cause of action in Plaintiffs' second count does no more than duplicate the Subsection (a)(8) cause of action. *Id.* ¶¶ 40-46. Plaintiffs ask the Court to find that an FEC enforcement action violated the APA and to issue an injunction directing the FEC to enforce FECA in a manner consistent with Plaintiffs' view of the law and the FEC's enforcement responsibilities. This request circumvents the Subsection (a)(8) provision, which does not permit the Court to direct the FEC to take any action, only to declare an order dismissing a complaint to be contrary to law. Accordingly, Plaintiffs' APA causes of action must be dismissed, because they are preempted by the comprehensive and exclusive review scheme enacted by Congress in FECA.

CONCLUSION

For the reasons stated above, John Does respectfully request that this Court grant their motion to dismiss Plaintiffs' complaint with prejudice.

March 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, I served the foregoing papers on all counsel of record in this case by filing them in the Court's electronic filing system, which served these same papers on counsel of record.

/s/ William W. Taylor, III
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