

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND)		
ETHICS IN WASHINGTON, <i>et al.</i> ,)		
)		
Plaintiffs,)	Civ. No. 19-1650 (TJK)	
)		
v.)		
)		
FEDERAL ELECTION COMMISSION,)	PARTIAL MOTION TO DISMISS	
)		
Defendant.)		
<hr/>)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
PARTIAL MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Federal Election Commission (“Commission”) hereby moves to partially dismiss plaintiffs’ complaint, which invokes the Federal Election Campaign Act (“FECA”), 52 U.S.C. § 30109(a)(8)(A), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Plaintiffs challenge the Commission’s handling of an administrative complaint, but to the extent that challenge is judicially reviewable, FECA provides the exclusive mechanism. APA review is therefore precluded and plaintiffs have failed to state a claim upon which relief can be granted pursuant to that statute. A supporting memorandum of points and authorities and a proposed order accompany this motion.

Respectfully submitted,

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August 12, 2019

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**DEFENDANT FEDERAL ELECTION COMMISSION'S
MEMORANDUM IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS**

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	1
I. STATUTORY AND REGULATORY BACKGROUND	1
A. The Federal Election Commission.....	1
B. FECA Regulates Federal Campaign Finance Activities Through Disclosure Requirements and Certain Restrictions on the Making of Contributions.....	2
C. FECA’s Administrative Enforcement and Judicial-Review Provisions	2
II. PLAINTIFFS’ CLAIMS	4
ARGUMENT	4
I. STANDARD OF REVIEW	5
II. PLAINTIFFS’ ATTEMPTED RELIANCE ON THE APA IS PRECLUDED BECAUSE FECA PROVIDES THE EXCLUSIVE VEHICLE FOR JUDICIAL REVIEW OF THE FEC’S HANDLING OF ADMINISTRATIVE ENFORCEMENT MATTERS	5
CONCLUSION.....	9

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Abdelfattah v. U.S. Dep’t of Homeland Sec.</i> , 787 F.3d 524 (D.C. Cir. 2015)	5
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	5
<i>Block v. Cmty. Nutrition Inst.</i> , 467 U.S. 340 (1984).....	6, 7
<i>Bowen v. Massachusetts</i> , 487 U.S. 879 (1988).....	6
<i>Chatman v. U.S. Dep’t of Def.</i> , 270 F. Supp. 3d 184 (D.D.C. 2017).....	5
<i>Citizens for Responsibility & Ethics in Wash. v. Dep’t of Justice</i> , 846 F.3d 1235 (D.C. Cir. 2017).....	6
<i>Citizens for Responsibility & Ethics in Wash. v. FEC</i> , 363 F. Supp. 3d 33 (D.D.C. 2018)	8
<i>Citizens for Responsibility & Ethics in Wash. v. FEC</i> , 243 F. Supp. 3d 91 (D.D.C. 2017)	8
<i>Citizens for Responsibility & Ethics in Wash. v. FEC</i> , 164 F. Supp. 3d 113 (D.D.C. 2015)	7-8, 8
<i>Coal River Energy, LLC v. Jewell</i> , 751 F.3d 659 (D.C. Cir. 2014).....	7
<i>FEC v. Nat’l Conservative Political Action Comm.</i> , 470 U.S. 480 (1985)	4
<i>FEC v. Rose</i> , 806 F.2d 1081 (D.C. Cir. 1986).....	3
<i>Garcia v. Vilsack</i> , 563 F.3d 519 (D.C. Cir. 2009)	7
<i>In re Nat’l Cong. Club</i> , Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984)	3
<i>Klayman v. Obama</i> , 957 F. Supp. 2d 1 (D.D.C. 2013).....	6
<i>Perot v. FEC</i> , 97 F.3d 553 (D.C. Cir. 1996).....	7
<i>Sierra Club v. Jackson</i> , 648 F.3d 848 (D.C. Cir. 2011).....	6
<i>Stockman v. FEC</i> , 138 F.3d 144 (5th Cir. 1998).....	8
<i>Strumsky v. Wash. Post Co.</i> , 842 F. Supp. 2d 215 (D.D.C. 2012).....	5

United States ex rel. Scott v. Pac. Architects & Eng’rs, Inc.,
 270 F. Supp. 3d 146 (D.D.C. 2017)..... 5

Statutes and Regulations

5 U.S.C. § 704..... 6

5 U.S.C. § 706..... 5

52 U.S.C. § 30101(4)(A)..... 2

52 U.S.C. § 30101(8)(A)(i)..... 2

52 U.S.C. § 30101(9)(A)(i)..... 2

52 U.S.C. § 30101(17) 2

52 U.S.C. § 30102..... 2

52 U.S.C. § 30103..... 2

52 U.S.C. § 30104..... 2

52 U.S.C. § 30104(a) 2

52 U.S.C. § 30104(b) 2

52 U.S.C. § 30106(b)(1) 1, 7

52 U.S.C. § 30106(c) 1, 2, 3

52 U.S.C. § 30107(a)(8)..... 1

52 U.S.C. § 30109(a)(1)..... 1, 2

52 U.S.C. § 30109(a)(2)..... 1, 2, 3

52 U.S.C. § 30109(a)(4)(A)(i) 3

52 U.S.C. § 30109(a)(6)..... 1

52 U.S.C. § 30109(a)(8)(A) 3, 8

52 U.S.C. § 30109(a)(8)(C) 3, 4, 7

52 U.S.C. § 30109(a)(12)..... 3

52 U.S.C. § 30111(a)(8)..... 1

52 U.S.C. § 30116(a) 2

52 U.S.C. § 30118.....	2
52 U.S.C. § 30119.....	2
52 U.S.C. § 30120(a)	2
52 U.S.C. § 30122.....	2
11 C.F.R. § 110.11(a).....	2
11 C.F.R. § 111.4.....	2
<i>Rules</i>	
Fed. R. Civ. P. 12(b)(6).....	5
<i>Miscellaneous</i>	
120 Cong. Rec. 35,314 (1974).....	8

INTRODUCTION

Plaintiffs Citizens for Responsibility and Ethics in Washington (“CREW”) and Noah Bookbinder seek relief for the alleged failure of defendant Federal Election Commission (“Commission” or “FEC”) to timely act on an administrative complaint under the Federal Election Campaign Act (“FECA”). Plaintiffs claim that they filed a complaint with the FEC in August 2018 alleging violations of FECA and that the FEC has failed to act in a timely manner on it. (Pls.’ Compl. for Injunctive and Declaratory Relief (“Compl.”) ¶¶ 1, 27, 48 (Docket No. 1).) Plaintiffs bring suit under FECA and the Administrative Procedure Act (“APA”) (Compl. ¶ 2), but plaintiffs’ reliance on the APA is unavailing. FECA’s preclusive effect renders the APA unavailable as a vehicle to challenge the Commission’s handling of administrative enforcement proceedings, as confirmed by every court to rule on the issue. Accordingly, to the extent this suit relies on the APA, it should be dismissed for failure to state a claim upon which relief can be granted.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The FEC is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to “administer, seek to obtain compliance with, and formulate policy with respect to” FECA, 52 U.S.C. § 30106(b)(1); “to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA],” *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has “exclusive jurisdiction” to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6). The agency is required under FECA to make decisions through

majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

B. FECA Regulates Federal Campaign Finance Activities Through Disclosure Requirements and Certain Restrictions on the Making of Contributions

FECA regulates the financing of federal election campaigns by imposing, *inter alia*, disclosure requirements and restrictions on the making of contributions. 52 U.S.C. §§ 30104, 30116(a), 30118-19, 30122. Certain groups that qualify as “political committees” are required to comply with organizational and continuous reporting requirements. *See id.* §§ 30101(4)(A), (8)(A)(i), (9)(A)(i), 30102, 30103, 30104(a)-(b). All persons must report information regarding “independent expenditures,” *i.e.*, expenditures that “expressly advocate[] the election or defeat of a clearly identified candidate” and are “not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” *See id.* §§ 30101(17), 30104.

FECA also prohibits the making of contributions in the name of another person or acceptance of such contributions. 52 U.S.C. § 30122. In addition, certain public communications must include disclaimers with information about funding and authorizing sources. *Id.* § 30120(a); 11 C.F.R. § 110.11(a).

C. FECA’s Administrative Enforcement and Judicial-Review Provisions

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the statute. 52 U.S.C. § 30109(a)(1); *see* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent whose conduct is at issue, the Commission considers whether there is “reason to believe” that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC’s Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the

administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). Any administrative investigation under this provision is confidential until the administrative process is complete. *Id.* § 30109(a)(12).

If an investigation is conducted, the FEC must then determine whether there is “probable cause” to believe that FECA has been violated. Like a reason-to-believe finding, a probable-cause finding requires an affirmative vote of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30109(a)(4)(A)(i).

Administrative complainants may challenge the FEC’s handling of their complaints in two limited situations. *See* 52 U.S.C. § 30109(a)(8)(A). First, a party who has filed an administrative complaint may sue the Commission in the event of “a failure of the Commission to act on [the administrative] complaint during the 120-day period beginning on the date the complaint is filed.” *Id.* This 120-day period is a jurisdictional threshold before which suit may not be brought, not a timetable within which the Commission must resolve an administrative complaint. *See, e.g., FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). The second situation in which an administrative complainant may file suit is where the Commission decides to dismiss the complaint. In that event, FECA provides a cause of action for complainants to seek review of the dismissal in court. 52 U.S.C. § 30109(a)(8)(A).

If a court finds that a Commission dismissal or failure to act was “contrary to law,” it may order the Commission to conform to the court’s decision within 30 days. 52 U.S.C. § 30109(a)(8)(C); *see In re Nat’l Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (*per curiam*); *Rose*, 806 F.2d at 1084. If the Commission fails to conform within that time period, the administrative complainant may bring a civil action to remedy the violation alleged in the administrative complaint. 52 U.S.C. § 30109(a)(8)(C); *see FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

II. PLAINTIFFS' CLAIMS

The court complaint alleges that plaintiff CREW is a “non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code” (Compl. ¶ 3) and that plaintiff Noah Bookbinder is its executive director (Compl. ¶ 11). Plaintiffs allege that on August 9, 2018, they filed an administrative complaint with the FEC. (Compl. ¶ 27.) Plaintiffs filed this administrative complaint with the Court as Exhibit 1 to their complaint. (Compl. ¶ 27.)

According to the court complaint, the administrative complaint alleged that the entity Freedom Vote violated FECA by failing to include a disclaimer and file a report for a communication that constituted an independent expenditure. (Compl. ¶ 28.) The administrative complaint reportedly further alleged that Freedom Vote failed to register and report as a political committee. (Compl. ¶ 29.) Finally, plaintiffs state that their administrative complaint alleged violations of the prohibition on contributions in the name of another through Freedom Vote permitting its name to be used when unknown persons contributed to Fighting for Ohio Fund, an independent expenditure-only political committee. (Compl. ¶ 30.)

In June 2019, plaintiffs filed this suit against the FEC. (Docket No. 1.) Plaintiffs assert that the Court has jurisdiction under FECA, 52 U.S.C. § 30109(a)(8)(A), and under the APA, 5 U.S.C. § 706, and they assert a single “FEC Inaction Contrary to Law” cause of action. (Compl. ¶ 2, pp. 15-16.)

ARGUMENT

Plaintiffs' complaint should be dismissed in part for failure to state a claim. Plaintiffs purport to bring this challenge under FECA's judicial review provision, 52 U.S.C. § 30109(a)(8), and the APA, 5 U.S.C. § 706. (Compl. ¶ 2.) But because FECA provides a specific and adequate judicial review provision, the APA is unavailable as a vehicle to challenge the Commission's handling of administrative enforcement matters.

I. STANDARD OF REVIEW

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is “appropriate when a complaint fails ‘to state a claim upon which relief can be granted.’” *Strumsky v. Wash. Post Co.*, 842 F. Supp. 2d 215, 217 (D.D.C. 2012) (quoting Fed. R. Civ. P. 12(b)(6)). “[A] complaint must contain sufficient factual allegations that, if accepted as true, ‘state a claim to relief that is plausible on its face.’” *United States ex rel. Scott v. Pac. Architects & Eng’rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “‘A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Though the Court “‘must liberally construe the complaint in favor of the plaintiff and must grant the plaintiff ‘the benefit of all inferences that can be derived from the facts alleged,’ . . . a court need not ‘accept as true a legal conclusion couched as a factual allegation.’” *Chatman v. U.S. Dep’t of Def.*, 270 F. Supp. 3d 184, 188 (D.D.C. 2017) (quoting *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 787 F.3d 524, 529, 530 (D.C. Cir. 2015)).

II. PLAINTIFFS’ ATTEMPTED RELIANCE ON THE APA IS PRECLUDED BECAUSE FECA PROVIDES THE EXCLUSIVE VEHICLE FOR JUDICIAL REVIEW OF THE FEC’S HANDLING OF ADMINISTRATIVE ENFORCEMENT MATTERS

Plaintiffs purport to rely on the APA as an independent basis for challenging the Commission’s alleged failure to act on their administrative complaint. (Compl. ¶ 2 (citing 5 U.S.C. § 706).) However, reliance on the APA is not permissible here because FECA provides

an adequate and exclusive judicial review mechanism.¹ Plaintiffs should be confined to 52 U.S.C. § 30109(a)(8), the primary basis for jurisdiction on which they rely.²

Judicial review of final agency action is available under the APA only where such action is “made reviewable by statute” and there is “no other adequate remedy.” 5 U.S.C. § 704. “Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Thus, the APA “does not provide additional judicial remedies in situations where [] Congress has provided special and adequate review procedures.” *Id.* (internal quotation marks omitted); *see Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1244-45 (D.C. Cir. 2017) (same). To determine the proper basis for judicial review, courts examine the relevant statute’s language, structure, and legislative history. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (explaining that a “detailed mechanism for judicial consideration of particular issues at the behest of particular persons” may demonstrate that other forms of judicial review are “impliedly precluded”); *Klayman v. Obama*, 957 F. Supp. 2d 1, 20 (D.D.C. 2013) (concluding that the Foreign Intelligence Surveillance Act precluded plaintiffs’ claim for judicial review pursuant to the APA).

FECA provides the exclusive mechanism for judicial review of any claimed failure by the Commission to act on an administrative complaint. In 52 U.S.C. § 30109(a)(8), Congress

¹ Plaintiffs’ APA 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. *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) (internal quotation marks omitted).

² Consistent with 52 U.S.C. § 30109(a)(8)(C), plaintiffs ask the Court to declare that the FEC’s failure to act on the administrative complaint was “contrary to law” and order the FEC to act within 30 days. (Compl., Requested Relief ¶¶ 1-2.)

delineated the scope of judicial review available in an action challenging alleged FEC impropriety in handling an administrative complaint. The statute specifies that (a) the statutory cause of action is available only to a complainant (b) whose complaint the FEC has allegedly failed to act upon; (c) any petition for judicial review must be filed in the United States District Court for the District of Columbia; (d) the available relief is a judicial declaration that “the failure to act is contrary to law” and an order “direct[ing] the Commission to conform with such declaration”; and (e) the safety valve in the event the agency fails to conform with such an order is a private right of action by the complainant. 52 U.S.C. § 30109(a)(8)(C).

Because FECA contains this explicit and detailed review provision, there is clearly an “adequate remedy” as described in the APA, 5 U.S.C. § 704. FECA’s “detailed mechanism for judicial consideration of particular issues at the behest of particular persons” precludes other forms of judicial review, including review under the APA. *See Block*, 467 U.S. at 349. Where, as here, Congress has “fashion[ed] . . . an explicit provision for judicial review” of certain agency action or failure to take action and has “limit[ed] the time to raise such a challenge,” the Court of Appeals has found that “it is ‘fairly discernible’ that Congress intended that particular review provision to be exclusive.” *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014); *see Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009).

FECA’s overall structure and legislative history confirm Congress’s intent to limit the scope of judicial review of matters within the FEC’s area of responsibility. FECA grants the Commission “exclusive jurisdiction with respect to the civil enforcement” of the statute. 52 U.S.C. § 30106(b)(1). As the D.C. Circuit has explained, section 30109(a)(8) is “as specific a mandate as one can imagine.” *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). And it establishes a specific system of judicial review that “funnels all challenges to the FEC’s

handling of complaints through the U.S. District Court for the District of Columbia.” *CREW v. FEC*, 164 F. Supp. 3d 113, 119 (D.D.C. 2015) (“*CREW 2015*”) (citing 52 U.S.C. § 30109(a)(8)(A)). “The legislative history of [FECA] confirms that ‘[t]he 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.’” *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998) (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)).

Courts evaluating potential APA review of the Commission’s administrative enforcement have accordingly found the judicial-review procedures in 52 U.S.C. § 30109(a)(8) to be exclusive. *See CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) (“Undertaking judicial review under the APA would enable administrative complainants to make an end run around the scheme established by Congress”); *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) (“*CREW 2017*”) (FECA provides an adequate remedy so there is no parallel claim for relief under the APA); *CREW 2015*, 164 F. Supp. 3d at 120 (“This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA.”). The Fifth Circuit found “substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]” in section 30109(a)(8). *Stockman*, 138 F.3d at 156.

52 U.S.C. § 30109(a)(8) thus provides the exclusive mechanism for challenging any alleged delay by the Commission in handling administrative complaints and limits the scope of relief available to plaintiffs in this action. The portion of plaintiffs’ claim that purports to rely on the APA is thus precluded as a matter of law and should be dismissed. *See CREW 2017*, 243 F. Supp. 3d at 104-05 (dismissing “the portions” of two counts “seeking relief under the

APA”). A partial dismissal here clarifies that even if plaintiffs prevail, they will not be entitled to any relief other than a declaration and order as authorized under 52 U.S.C. § 30109(a)(8)(C).

CONCLUSION

For the foregoing reasons, plaintiffs’ challenge under the APA should be dismissed for failure to state a claim upon which relief can be granted.

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