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

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| REPRESENTATIVE TED LIEU, *et al.*, | ) | |
| Plaintiffs, | ) | Civ. No. 16-2201 (EGS) |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, | ) | MOTION TO DISMISS |
| Defendant. | ) | |

**FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION**

Defendant Federal Election Commission ("Commission") hereby moves to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) because the claims are moot and this Court thus lacks subject matter jurisdiction. In support of this motion, the Commission submits a Memorandum in Support of Its Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction and a Proposed Order.

Respectfully submitted,

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July 17, 2017

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

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| REPRESENTATIVE TED LIEU, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civ. No. 16-2201 (EGS)<br><br>MEMORANDUM IN SUPPORT OF FEC'S MOTION TO DISMISS |

**FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION**

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## INTRODUCTION

Plaintiffs brought this action under 52 U.S.C. § 30109(a)(8) alleging that the Federal Election Commission ("Commission" or "FEC") had failed to act on their administrative complaint, but now that the Commission has taken final action on that complaint, the case is moot and no longer presents a case or controversy that satisfies the requirements of Article III. *See All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (dismissing case regarding FEC's alleged failure to act as moot because the FEC had completed its final action). Because plaintiffs' claims are moot, the Court is required to dismiss the case for lack of subject matter jurisdiction.[1]

## BACKGROUND

### I. THE FEC AND THE FEDERAL ELECTION CAMPAIGN ACT

The Commission is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA") and other federal campaign-finance statutes. Congress authorized the Commission to investigate possible violations of the Act, 52 U.S.C. §§ 30109(a)(1)-(2).[2] The

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[1] Rather than pursue their original allegations of delay, plaintiffs state that they seek to "replac[e]" them. (Mem. of P. & A. in Supp. of Pls.' Mot. for Leave to File Am. Compl. at 2 (Docket No. 21-1).) As explained in the FEC's concurrently filed opposition to plaintiffs' Motion for Leave to File Amended Complaint ("Mot. to Amend") (Docket No. 21), however, when the Court no longer has jurisdiction over a case it may not permit amendments or supplements to the complaint. Plaintiffs' effort to introduce a new live dispute through its motion should be denied. In the alternative, as the FEC explains there, such an amendment would be futile and justice does not require that it be allowed.

[2] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. This submission cites provisions of the FECA as codified in new Title 52.

Commission 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).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any responses filed by respondents, the Commission evaluates 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 FEC may investigate the alleged violation; otherwise, the agency 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).

Administrative complainants may challenge the FEC's handling of their complaints in two limited situations pursuant to 52 U.S.C. § 30109(a)(8)(A). First, a party who has filed an administrative complaint may file suit against 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.* The second situation in which an administrative complainant may file suit occurs where the FEC decides to dismiss the complaint. In that event, FECA allows the complainant to challenge the dismissal. *Id*.

If a court finds that the Commission's 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); *FEC v. Rose*, 806 F.2d 1081, 1084 (D.C. Cir. 1986). If the Commission fails to conform within that time period, the administrative complainant may

bring a civil action to remedy the alleged violation. 52 U.S.C. § 30109(a)(8)(C); *see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

## II. ADMINISTRATIVE PROCEEDINGS

As explained in their court complaint, plaintiffs filed an administrative complaint with the FEC on July 7, 2016, alleging that ten specific independent-expenditure-only political committees (commonly known as "super PACs") had accepted contributions from contributors in excess of the $5,000 per contributor limit under 52 U.S.C. § 30116. (Compl. ¶¶ 4-6 (Docket No. 1).) The administrative complaint asked the Commission to reconsider its acquiescence to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), which held that contribution limits under section 30116 were unconstitutional as applied to independent-expenditure-only political committees. The administrative complaint went on to ask that the Commission find that 39 specific contributions to the named super PACs from 27 identified contributors constituted violations of FECA, and that the Commission "seek . . . declaratory and/or injunctive relief against future acceptance of excessive contributions" by the named respondents. (Compl. ¶¶ 1-2, 11-23, 38-77, 78.) On March 16, 2017, the FEC's Office of General Counsel submitted a report recommending that the Commission find no reason to believe that any administrative respondent had violated FECA. (*See* First General Counsel's Report, *available at* https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119515.pdf.) On May 25, 2017, the Commission voted five-to-zero to adopt that recommendation and dismiss the administrative complaint. (Certification for Matter Under Review ("MUR") 7101, May 25, 2017, https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119428.pdf.) The day after the Commission's vote, counsel for the FEC notified plaintiffs by phone that the Commission had dismissed the

administrative complaint and that pursuant to FEC regulations, plaintiffs would be receiving the basis for that decision by mail. (Jt. Stipulation at 2 (Docket No. 19).) On or about June 1, 2017, plaintiffs received by mail notification of the Commission's decision along with the Factual and Legal Analysis providing the basis for that decision. (*Id*.)

## III. PLAINTIFFS' JUDICIAL COMPLAINT

On November 4, 2016, exactly 120 days after filing their administrative complaint, plaintiffs filed this action seeking declaratory and injunctive relief against the FEC. (Compl. ¶¶ 84, 86 (Docket No. 1).) Plaintiffs' judicial complaint asked the Court to declare that the Commission's failure to act on their administrative complaint was contrary to law under 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 706(1). (*Id*.) Plaintiffs also asked the Court "to order the FEC to conform with [such] declaration within 30 days." (*Id*. ¶ 7.)

During their scheduling conference, the parties disagreed regarding whether plaintiffs could continue this case in the event the Commission took final administrative action. (Jt. Scheduling Report at 2 (Docket No. 14).) The Court deferred resolution of that question in its Scheduling Order of March 22, 2017, by permitting plaintiffs only to file a motion to amend or supplement their complaint should they seek substantive review of an adverse final decision of the Commission. (Scheduling Order at 2 (Docket No. 16) (providing that "plaintiffs may . . . file a motion to amend or supplement their complaint").) After the dismissal of MUR 7101, the parties agreed to a date by which plaintiffs could move to file such a motion and also agreed to a stay of other proceedings in the case. (Docket Nos. 19-20.) Plaintiffs moved for leave to file an amended complaint within that agreed deadline, on June 22, 2017. (Mot. to Amend (Docket No. 21).)

## ARGUMENT

### I. STANDARD OF REVIEW

Under Article III, section 2, of the Constitution, federal courts may decide only "'actual, ongoing controversies.'" *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). "A case becomes moot — and therefore no longer a 'Case' or 'Controversy' for purposes of Article III — 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

Cases must be dismissed as moot "[w]hen all the relief sought has been obtained." *Cueto v. Dir., Bureau of Immigration & Customs Enf't*, 584 F. Supp. 2d 147, 149–50 (D.D.C. 2008). That is because federal courts have no "power to render advisory opinions [or] ... decide questions that cannot affect the rights of the litigants in the case before them." *All. for Democracy*, 335 F. Supp. 2d at 42 (quoting *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997)). Thus, "[e]ven where the litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012) (quoting *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990)). Moreover, the court must evaluate mootness "'through all stages' of the litigation in order to ensure there remains a live controversy." *21st Century Telesis*, 318 F.3d at 198 (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)); *McBryde v. Comm. to Review Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant

no meaningful relief, the case must be dismissed as moot"); *Newdow v. Roberts*, 603 F.3d 1002, 1008 (D.C. Cir. 2010) (reiterating the "basic constitutional requirement" that a dispute before a federal court be "'an actual controversy . . . extant at all stages of review' and 'not merely at the time the complaint is filed'") (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)). Even issues of "great public interest" do not confer federal jurisdiction over a moot case. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citations and internal quotation marks omitted). And mootness of an action forecloses declaratory as well as injunctive relief. *All. for Democracy*, 335 F. Supp. 2d at 43-46.

If a case becomes moot, a party may move to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Rumber v. District of Columbia*, 598 F. Supp. 2d 97, 111-12 (D.D.C. 2009) (citing *Comm. in Solidarity with People of El Salvador v. Sessions*, 929 F.2d 742, 744 (D.C. Cir. 1991)), *aff'd*, 595 F.3d 1298 (D.C. Cir. 2010). While the movant has the burden of proving mootness, a plaintiff must defend a motion to dismiss brought under Rule 12(b)(1) by establishing through a preponderance of the evidence that the court has jurisdiction over its claims. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). The court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction" under Rule 12(b)(1). *Citizens for Responsibility and Ethics in Washington v. SEC*, 858 F. Supp. 2d 51, 57 (D.D.C. 2012) (citations omitted).

## II. THIS ACTION IS MOOT BECAUSE THE COMMISSION HAS ACTED ON PLAINTIFFS' ADMINISTRATIVE COMPLAINT

The claims in plaintiffs' judicial complaint are now moot because the Commission has completed final action on their administrative complaint. Plaintiffs' lawsuit was brought pursuant to the portion of 52 U.S.C. §30109(a)(8) allowing for limited judicial review of whether

an alleged "failure to act" by the Commission is "contrary to law."[3] Under section 30109(a)(8), the sole relief the district court may grant is a declaration that "the failure to act is contrary to law" and an order "direct[ing] the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C); *see Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("When the FEC's failure to act is contrary to law, we have interpreted § [30109(a)(8)(C)] to allow nothing more than an order requiring FEC action") (citing *Rose*, 806 F.2d at 1084); *All. for Democracy*, 335 F. Supp. 2d at 43. However, where the FEC has completed final action on the administrative complaint, "it can no longer be said to have 'failed to act'" and "there is no relief that the Court could provide under [the statutory provision]." *All. for Democracy*, 335 F. Supp. 2d at 42-43.

Here, there is no dispute that the Commission has completed final action in the underlying administrative matter. (*See* supra pp. 4.) Therefore, there is no ongoing "'failure to act'" by the Commission, plaintiffs have received the relief they requested, and it is no longer possible for the Court to grant additional relief in response to plaintiffs' claims. *All. for Democracy*, 335 F. Supp. 2d at 43. In sum, because there is no longer a live controversy between the parties, this case is moot and should be dismissed.[4] *See id.*; Fed. R. Civ. P.

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[3] The claims in the operative complaint contain no challenge pursuant to the other portion of section 30109(a)(8) for judicial review of Commission dismissals of administrative complaints.

[4] As in *Alliance for Democracy*, no exception to the mootness doctrine applies. The "capable of repetition, yet evading review" exception has two requirements: (1) "the challenged action must be too short to be fully litigated prior to cessation or expiration"; and (2) there must be a "reasonable expectation that the same complaining party [will] be subject to the same action again." *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (citation and internal quotation marks omitted; alteration in original). Delay cases like this one are not too short to be fully litigated, and indeed, such cases have been fully reviewed by courts. *See, e.g.*, *Nat'l Cong. Club v. FEC*, Nos. 84-5701, 84-5719, 1984 WL 148396, *1 (D.C. Cir. 1984); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951 (D.C. Cir. 1998). There is also no evidence

12(h)(3); *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996) (holding that when intervening events "make it impossible to grant the prevailing party effective relief," the case becomes moot and the court no longer has jurisdiction).

**CONCLUSION**

For the foregoing reasons, plaintiffs' action is moot and the Court should grant the Commission's motion to dismiss for lack of jurisdiction.

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that plaintiffs are likely to be subject to the same action again by filing additional complaints on which the FEC might fail to act.