UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 14-1419 (CRC)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

INTRODUCTION

Defendant Federal Election Commission (FEC or Commission) is widely viewed as a largely ineffective agency that has abandoned its enforcement role, allowing groups and candidates to flout the campaign finance regime imposed by the Federal Election Campaign Act (FECA or the Act). Nearly every Commission vote on an enforcement matter of any consequence results in a three-three split along party lines. But this deadlock, far from signaling paralysis, has actually resulted in *de facto* policies and regulations that constitute what has been called "a rapidly expanding universe of unofficial law."[1]

This lawsuit challenges that *de facto* regulatory regime as reflected in part in the FEC's overall interpretation of the "major purpose test" to determine those organizations that are operating as political committees and therefore subject to the FECA's disclosure requirements.

[1] Nicholas Confessore, Election Panel Enacts Policies By Not Acting, *New York Times*, Aug. 25, 2014, *available at* http://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html?_r=0.

Brought under the Administrative Procedure Act (APA), CREW's[2] challenge to the *de facto* regulation/policy rests on the FEC's abandonment of a case-by-case analysis, rooted in the application of several identified factors and prior enforcement actions, in favor of a bright-line test. This approach, however, directly contradicts the rationale the FEC offered a court in this district several years ago in defense of the agency's failure to promulgate a bright-line regulation. Even more significantly, this test contravenes the FECA itself, as interpreted by the courts and the FEC in prior enforcement actions. The FEC cannot have it both ways: either it must use the formal regulatory process, with notice and comment, before adopting a bright-line regulation that complies with law or it must hew to the approach it offered, and the court upheld, as an acceptable alternative to a regulation.

The FEC has now moved to dismiss those parts of the Complaint brought under the APA for failure to state a claim upon which relief can be granted.[3] According to the FEC, none of the APA claims can survive because the FECA provides the exclusive basis for this Court's review and limits the scope of available relief. This argument, however, rests on a completely false

---

[2] CREW is the acronym for plaintiff Citizens for Responsibility and Ethics in Washington.

[3] The FEC has yet to answer the remaining portions of the Complaint. The D.C. Circuit does not appear to have decided whether a partial motion to dismiss requires the defendant to answer the rest of the Complaint within the original time for a response, and other courts have split on the issue. *Compare Gerlach v. Michigan Bell Tel. Co.*, 448 F. Supp. 1168 (E.D. Mich. 1978) (Rule 12(a) does not suspend a defendant's obligation to respond to claims that are not part of a partial motion to dismiss) *with Brocksopp Eng'g Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485 (E.D. Wis. 1991) (partial motion to dismiss suspends time to answer claims not subject to the motion). In any event, commentators agree the best practice is to move to extend the time to respond to that portion of the complaint not addressed in the motion to dismiss, something the FEC also has failed to do here. *See, e.g.*, S. Jarret Raab and Allison B. Hudson, The Partial Motion to Dismiss: Is Piecemeal Litigation Required in Federal Court Under Rule 12?, *The Federal Lawyer*, Dec. 2012, at 25-27.

construction of CREW's APA claims that falls apart upon even minimal scrutiny. The heart of CREW's APA claims is not that "a specific portion of the legal analyses" in two specific enforcement matters is contrary to law, Federal Election Commission's Memorandum of Points and Authorities in Support of Its Motion to Dismiss (D's Mem.), at 9, but rather that these analyses evidence a much broader policy and/or *de facto* regulation governing how the FEC applies the major purpose test.[4] That *de facto* regulation was adopted without notice and comment, contravenes the approach the FEC represented to the public and to reviewing courts it would take – an approach that applied specifically identified factors and followed the lead of prior enforcement cases – as well as governing law, and itself represents the kind of bright-line test the FEC eschewed in declining to adopt a regulation.

Properly understood, CREW's APA claims are subject to APA review, as they involve *de facto* rulemaking actions that are not encompassed by the judicial review provisions of the FECA. *See* D's Mem. at 11 n.3 (conceding rulemaking actions are subject to judicial review under the APA). Moreover, while the FEC may disagree with the merits of those claims,[5] such a disagreement is not properly resolved on a Rule 12(b)(6) motion based solely on the argument the APA does not authorize this Court's review or the relief sought.

---

[4] To be clear, CREW does not challenge dismissal of any APA claim pertaining exclusively to Counts One and Two, which concern the FEC's dismissal of CREW's administrative complaints against the American Action Network (AAN) and Americans for Job Security (AJS). As even the FEC concedes, this Court's review of those claims implicates the same considerations as review under the APA. D's Mem. at 14 n.4. Thus, even without the APA the Court's analysis and the scope of the relief it can award do not change.

[5] *See, e.g.*, D's Mem. at 16 arguing on the merits a group of three Commissioners lacks the authority to establish a policy or regulation on behalf of the FEC.

STATUTORY AND REGULATORY BACKGROUND

The FECA imposes on "political committees" registration, organization, and disclosure requirements. 52 U.S.C. §§ 30102, 30103, 30104.[6] The Act and implementing FEC regulations define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year[.]" 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). Further, only organizations with a "major purpose" of nominating or electing federal candidates can be "political committees." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

The FECA defines the term "expenditure" to include, *inter alia*, "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office[.]" 52 U.S.C. § 30101(9)(A). The Supreme Court has clarified that "expenditures" for the purpose of this definition include only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. The FECA and FEC regulations further define an "independent expenditure" as one made for a communication "expressly advocating the election or defeat of a clearly identified candidate," and "that is not made in cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party or committee or its agents." 52 U.S.C. § 30101(17)(A) and (B); 11 C.F.R. § 100.16. A "contribution" for these purposes is defined under the FECA as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the

[6] CREW's Complaint was filed before the recodification of the FECA, which was effective as of September 1, 2014. This brief cites to the FECA as currently codified.

purpose of influencing any election for Federal office[.]" 52 U.S.C. § 30101(8)(A).

Taken as a whole, the FECA establishes a two-part test for status as a political committee that asks: (1) whether the organization has made more than $1,000 in expenditures or received more than $1,000 in contributions during a calendar year, and (2) whether the major purpose of the organization is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79.

The FECA and FEC regulations require all political committees to register with the FEC within 10 days of becoming a political committee. 52 U.S.C. § 30103(a); 11 C.F.R. § 102(d). Further, under the FECA and implementing regulations, political committees must file periodic reports with the FEC that, among other things: (1) identify all individuals contributing an aggregate of more than $200 a year to the organization, and the amount of each individual contribution; (2) identify all political committees making a contribution to the organization, and the amount of each contribution; (3) detail all the outstanding debts and obligations of the organization; and (4) list all of the expenditures of the organization. 52 U.S.C. § 30104(a)(4); 11 C.F.R. § 104.1(a).

The FEC considered but rejected other regulatory changes. On March 11, 2004, the FEC published a Notice of Proposed Rulemaking (NPRM) seeking comment on a number of issues surrounding the definitions of "contribution," "expenditure," and "political committee." Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736-60 (March 11, 2004). Among other things, the NPRM sought comment on possible "tests" to determine the "major purpose" of an organization. *Id.* at 11,745-49. In response, the FEC received more than 100,000 comments "express[ing] a variety of viewpoints about the definitions of 'political committee' and 'expenditure,' the impact of the proposed tests on political issue advocacy, and the necessity and

practicability of a proposed rule." *Shays v. FEC*, 424 F. Supp. 2d 100, 107 (D.D.C. 2006) (quoting 69 Fed. Reg. 69,056) (*Shays I*).

In November 2004, while adopting new regulations and revising others, the FEC announced it was declining to revise its regulatory definition of "political committee" to define "major purpose." Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004). The FEC noted it had been applying the "major purpose test" "for many years without additional regulatory definitions, and will continue to do so in the future." *Id.*

The FEC's refusal to adopt a bright-line test for "major purpose" was challenged in litigation, *Shays I*, where the court ruled that the agency had failed to offer "a reasoned explanation for its decision" to engage in a case-by-case decision making rather than a rulemaking. 424 F. Supp. 2d at 116-17. The matter was remanded to the FEC to explain its decision, which it did through a Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supp. E&J). The Supp. E&J explained that the FEC conducts a fact-intensive, case-by-case analysis of an organization to determine if its major purpose is the nomination or election of federal candidates. *Id.* at 5601. An organization can meet the major purpose test through sufficiently extensive spending on federal campaign activity. *Id. See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

Through the Supp. E&J the FEC also provided additional guidance on the factors the agency uses to determine an organization's major purpose. They include, *inter alia*, public and non–public statements about the organization's purpose and activities; public and non-public fundraising appeals; and the proportion of spending related to "federal campaign activity"

compared to the proportion spent on "activities that [a]re not campaign related." 72 Fed. Reg. at 5601; *see also Shays v. FEC*, 511 F. Supp. 2d 19, 22-23 (D.D.C. 2007) (*Shays II*) (discussing Supp. E&J). In addition to this fact-intensive analysis, the FEC pointed to its enforcement actions taken since 2004, which "provide[] guidance to organizations about . . . the major purpose doctrine." 72 Fed. Reg. at 5604. The FEC summarized the justifications for its refusal to adopt a bright line test as follows:

> Any organization can look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases for guidance as to how the Commission has applied the statutory definition of 'political committee' together with the major purpose doctrine. The public documents available regarding the 572 settlements in particular provide more than mere clarification of legal principles; they provide numerous examples of actual fundraising solicitations, advertisements, and other communications that will trigger political committee status . . . To the extent uncertainty existed, these 572 settlements reduce any claim of uncertainty because concrete factual examples of the Commission's political committee status analysis are now part of the public record.

Id. Based on this record, the *Shays II* court concluded the Commission's revised explanation for its failure to issue a regulation adopting a bright-line "major purpose" test was not arbitrary or capricious under the APA. 511 F. Supp. 2d at 29.

Under the FECA, any person who believes the Act has been violated may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, any response thereto, and any recommendation from the FEC's Office of General Counsel (OGC), the FEC may then vote on whether there is "reason to believe" a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). The Commission conducts a further investigation only where four of the six-member Commission vote in favor of a "reason to believe" finding. *Id.* If the vote splits

three to three, the D.C. Circuit considers the votes of the three commissioners voting against finding reason to believe a "controlling group for purposes of the decision[.]" *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134-35 (D.C. Cir. 1987).

If at any stage of the proceedings the FEC dismisses a complaint, any "party aggrieved" may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B). The district court reviewing the FEC's dismissal of a complaint may declare the FEC's actions "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The court also may order the FEC "to conform with such declaration within 30 days[.]" *Id.* If the FEC fails to abide by the court's order, the FECA provides the complainant with a private right of action, brought in its own name, "to remedy the violation involved in the original complaint." *Id.*

FACTUAL BACKGROUND

American Action Network

On June 7, 2012, plaintiffs CREW and Melanie Sloan filed a complaint with the FEC against AAN for violations of the FECA (MUR 6589). The complaint alleged, as demonstrated by its extensive spending on federal campaign activities, AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates. As a result, AAN violated the FECA by failing to register as a political committee. The complaint alleged further AAN violated the FECA by failing to file periodic reports with the FEC identifying, *inter alia*, all individuals contributing an aggregate of more than $200 a year to AAN and the amount of each individual contribution; all political committees that made a contribution to AAN and the

amount of each such contribution; AAN's outstanding debts and obligations; and all of AAN's expenditures. *See* Complaint (Compl.), ¶ 69.

On January 17, 2013, the FEC's OGC issued its First General Counsel's Report (AAN Report) recommending that the Commission find reason to believe AAN had as its major purpose the nomination or election of federal candidates during 2010, and therefore had violated the FECA by failing to organize, register, and report as a political committee. Compl. at ¶ 70. On the issue of AAN's major purpose, the AAN Report stated that under the FEC's case-by-case approach, which considers an entity's "'overall conduct,' including its disbursements, activities and statements," the proportion of AAN's spending related to federal campaign activity "is alone sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates." *Id.* at ¶ 72. According to the AAN Report, this conclusion is consistent with past enforcement actions in which the FEC has "determined that funds spent on communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy, should be considered in determining whether that group has federal campaign activity as its major purpose," as well as "the Commission's longstanding view – upheld by the courts – that the required major purpose test is not limited solely to express advocacy (or the functional equivalent of express advocacy)." *Id.*

Evaluating the content of AAN's specific electioneering communications, the AAN Report concluded they evidence AAN's major purpose is the nomination or election of federal candidates, as all featured a clearly identified candidate, supported or opposed a candidate, and ran in the candidates' districts shortly before a primary or general election. Compl., ¶ 74. The AAN Report measured AAN's activities for this purpose based on a calendar year period, rather

than AAN's fiscal tax years, explaining a calendar year test "provides the firmest statutory footing for the Commission's major purpose determination – and is consistent with FECA's plain language." *Id.* at ¶ 75. The AAN Report noted the FECA defines "political committee" by reference to expenditures made or contributions received "during a calendar year." *Id.*

Despite the detailed analysis of the AAN Report, on June 27, 2014, the Commission by a vote of three to three along party lines failed to find reason to believe AAN had violated the FECA, and by a vote of six to zero closed the file. *Id.* at ¶ 78. According to the statement of reasons of the three Republican commissioners voting against finding "reason to believe" – Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen – AAN's public statements, organizational documents, and overall spending issue demonstrate its major purpose "has been issue advocacy and grassroots lobbying and organizing." Compl., ¶ 79. In reaching this conclusion, the controlling decision makers considered only AAN's spending on express advocacy or its functional equivalent in comparison to its spending on activities unrelated to campaigns, contrary to the FEC's prior guidance, including its Supp. E&J, its prior advisory opinions, and prior court decisions. *Id.* at ¶ 80. Further, the three voting against finding reason to believe considered AAN's entire "lifetime of existence and activities," rather than its activities in a fiscal or calendar year, in determining its major purpose. *Id.*

The statement of reasons of the three commissioners voting to find reason to believe pointed out the impasse between the two blocks of commissioners has prevented the FEC from enforcing its own written policy, and the reasoning of the three controlling decision makers ignores prior Commission precedent, which examines not only an organization's public statements but also its "full range of campaign activities." *Id.* at ¶ 81. Moreover, according to

the three member minority, the "ongoing stalemate" over the FEC's major purpose policy overlooks its "entire purpose" – "disclosure." Compl., ¶ 82.

Americans For Job Security

On March 8, 2012, plaintiffs CREW and Melanie Sloan filed a similar complaint with the FEC against AJS for violating the FECA by failing to register as a political committee and file periodic reports with the FEC, despite a major purpose of nominating or electing federal candidates (MUR 6548). *See id.* at ¶ 83. On May 2, 2013, the FEC's OGC issued its First General Counsel's Report (AJS Report) recommending that the Commission find reason to believe because AJS had as its major purpose federal campaign activity during 2010, it had violated the FECA by failing to organize, register, and report as a political committee. *Id.* at ¶ 84. On the issue of AJS's major purpose, the AJS Report concluded under the FEC's case-by-case approach the proportion of AJS's spending related to its federal campaign activity "is alone sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates." *Id.* at ¶ 86. As with the AAN Report, the AJS Report explained this conclusion is consistent with past enforcement actions in which the FEC has "determined that funds spent on communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy, should be considered in determining whether that group has federal campaign activity as its major purpose," as well as "the Commission's longstanding view – upheld by the courts – that the required major purpose test is not limited solely to express advocacy (or the functional equivalent of express advocacy)." Compl., ¶ 87.

Evaluating the content of AJS's specific electioneering communications, the AJS Report concluded they evidence AJS's major purpose is the nomination or election of federal

candidates, as all featured a clearly identified candidate, supported or opposed a candidate, and ran in the candidates' districts shortly before a primary or general election. *Id.* ¶ 88. The AJS Report measured AJS's activities for this purpose based on a calendar year period, rather than AJS's "entire history," explaining a calendar year test "provides the firmest statutory footing for the Commission's major purpose determination – and is consistent with FECA's plain language." *Id.* at ¶ 89. The AJS Report noted the FECA defines "political committee" by reference to expenditures made or contributions received "during a calendar year." *Id.*

Despite the detailed analysis of the AJS Report, on July 30, 2014, the Commission by a vote of three to three failed to find reason to believe AJS had violated the FECA, and by a vote of six to zero closed the file. Compl., ¶ 78. According to the statement of reasons of the three Republican commissioners voting against finding "reason to believe" – again Chairman Goodman and Commissioners Hunter and Petersen – AJS's major purpose as "an organization that has spent less than ten percent of its funds on express advocacy during its entire existence . . . is an issue-advocacy organization that cannot be regulated as a political committee." *Id.* at ¶ 92. In reaching this conclusion, the controlling decision makers considered only AJS's spending on express advocacy or its functional equivalent in comparison to its spending on activities unrelated to campaigns. *Id.* at ¶ 93. Further, the three voting against finding reason to believe considered AJS's entire "lifetime of existence and activities," rather than its activities in a fiscal or calendar year, in determining its major purpose. *Id.*

On July 30, 2014, the three commissioners voting for reason to believe issued the same statement of their reasons as they issued in the AAN matter with the same caution that the "ongoing stalemate" over the FEC's major purpose policy overlooks its "entire purpose" –

"disclosure." Compl., ¶ 95.

This Complaint

While plaintiff's Complaint speaks for itself, the FEC's misleading or inaccurate characterizations of some aspects of the Complaint must be addressed. First, plaintiffs do not "purport" to seek relief under the APA, D's Mem. at 9, their Complaint is brought expressly under the APA. *See* Compl., ¶¶ 1, 2. Second, plaintiffs are not challenging "a single specific portion of the legal analyses in the statements of reasons issued by" the three controlling members in the AAN and AJS matters. D's Mem. at 9. Rather, plaintiffs' complaint challenges

> as arbitrary, capricious, and contrary to law the FEC's *policy and/or de facto regulation*, adopted without notice and an opportunity to comment, interpreting the "major purpose" test for determining which organizations are operating as political committees under the FECA as limited to a consideration of express advocacy (or its functional equivalent) only conducted during an ill-defined and ever-changing period of time.

Compl., ¶ 2 (emphasis added).

Further, plaintiffs do not "purport" to seek declaratory and injunctive relief for this claim, D's Mem. at 9, but rather do, in fact, ask the Court to "[d]eclare the policy and/or de facto regulation of the FEC . . . arbitrary, capricious, an abuse of discretion, and contrary to law," and further to "[e]njoin the FEC" from relying on this policy and/or de facto regulation. Compl., ¶¶ 5, 6. Finally, contrary to the FEC's characterization, plaintiffs' complaint does, in fact, rely on the APA to challenge the Commission's dismissal of their AAN and AJS complaints (*compare* D's Mem. at 10 *with* Compl., ¶ 1), although plaintiffs are no longer pursuing relief under the APA for Counts One and Two. *See supra* at 3 n.4.

ARGUMENT

STANDARD OF REVIEW

In ruling on a motion to dismiss brought under Rule 12(b)(6) for failure to state a claim, the reviewing court must construe the complaint "in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *CREW v. Cheney*, 593 F. Supp. 2d 194, 210 (D.D.C. 2009) (citation omitted). Further, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court may consider only those facts alleged in the complaint, including documents attached to or incorporated in the complaint, as well as matters of public record and those of which the court may take judicial notice. *See, e.g., EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Evaluating defendant's motion to dismiss under these standards it is clear the government has failed to carry its burden.

PLAINTIFFS' COMPLAINT PROPERLY STATES CLAIMS SUBJECT TO JUDICIAL REVIEW AND RELIEF UNDER THE APA.[7]

The APA, 5 U.S.C. § 704, authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a

[7] Because plaintiffs no longer are pursuing relief under the APA for Counts One and Two pertaining to the FEC's dismissal of CREW's complaints against AAN and AJS, plaintiffs do not respond herein to defendant's arguments addressing those counts specifically. As the FEC appears to concede, however, those counts may proceed under the review provisions of the FECA. *See* D's Mem. at 14 n.4 ("The Commission does not dispute that the same considerations [under the FECA] are implicated by review of agency decisions under the APA[.]").

court[.]" The statute further defines the term "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Courts reviewing agency actions under the APA are authorized to

> (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, and conclusions found to be [] (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]

5 U.S.C. § 706. The Supreme Court has emphasized that finality for purposes of APA review is evaluated in a "pragmatic" and "flexible" way. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967).

Counts Three and Four of the Complaint state claims under the APA. Specifically, they challenge as arbitrary, capricious, and contrary to law the FEC's abandonment of its prior precedent, as set forth in its prior adjudication of individual cases and the factors delineated in the Supp. E&J, all of which it used to justify its prior refusal to adopt a bright-line test for determining "major purpose." In its stead, the Commission has now adopted a bright-line approach that considers only express advocacy conducted during an ill-defined and ever-changing time period to determine an organization's major purpose. Compl., ¶¶ 111-112 (Count Three), 119-120 (Count Four). As alleged in the Complaint, this approach constitutes a *de facto* policy and/or regulation that was adopted without prior notice and an opportunity for public comment, and conflicts with governing law. *Id.* at ¶¶ 113 (Count Three), 121 (Count Four). To remedy these violations plaintiffs seek declaratory and injunctive relief. *Id.* at ¶¶ 114, 122 and Prayer for Relief at (3) and (4).

Despite the clarity of these allegations, the Commission argues they must be dismissed because they fall outside the exclusive scope of the FECA, 52 U.S.C. § 30109(a)(8). D's Mem.

at 14. This argument rests on a complete mischaracterization of these claims in an attempt to shoehorn them into the FECA's judicial review provisions and remedies, which are the exclusive means to challenge the FEC's enforcement actions. *See, e.g.*, *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998), quoting *National R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). But while enforcement claims may be reviewed only under the FECA, regulatory claims such as those brought here fall outside the FECA's enforcement scheme and are subject to APA review. *See, e.g.*, *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (court had jurisdiction under the APA to review a challenge to an FEC regulation as an impermissible interpretation of the FECA). *See also Shays I*, 424 F. Supp. 2d at 109 (challenge to FEC's refusal to issue a regulation reviewable under the APA).

Accordingly, the Commission's lengthy arguments concerning the FECA's exclusive review provisions, D's Mem. at 10-14, simply are not relevant. Those provisions are limited to "certain agency action," *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014) (cited in D's Mem. at 12), specifically enforcement matters, not regulatory challenges like that brought here. Similarly, the deference Congress intended the FEC's enforcement decisions receive, D's Mem. at 12, applies to "how and when" the FEC enforces the FECA, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 485-86 (1985) (*NCPAC*) (cited in D's Mem. at 13), not to regulatory actions like that challenged here. *See Shays I and II*.

The FEC attempts to avoid APA review by characterizing Counts Three and Four as "selectively focus[ing] on a particular *aspect* of the dismissal decisions" in AAN and AJS. D's Mem. at 15 (emphasis in original). To the contrary, as the express language of the Complaint makes clear, plaintiffs are challenging the FEC's rejection of its case-by-case "major purpose"

analysis set forth in the Supp. E&J, which applied factors delineated in the Supp. E&J and precedent from prior enforcement actions, and considered the organization's conduct during a specified calendar or fiscal year period. This is a far cry from a particular dismissal decision; it raises an across-the-board challenge to how the FEC approaches the "major purpose" issue.

In certain respects this case is similar to the challenge presented in *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), which the court held was properly reviewed under the APA. The plaintiff in that case was challenging, in part, the Commission's policy decision not to adopt a regulation defining "political committee." *Id.* at 555 n.4. The FEC argued such a claim was not final agency action reviewable under the APA, but the court disagreed, reasoning that the FEC's policy choice:

> is undoubtedly a 'consummation of the agency's decisionmaking process' that can determine a party's rights and obligations, namely the obligations of PAC status.

Id. (quotation omitted). Here, too, the challenged *de facto* policy and/or regulation helps determine a party's rights and obligations, specifically the obligation to register as a political committee and file periodic disclosure reports.

That the Commission's approach is reflected in its treatment of at least three enforcement matters – the AAN and AJS complaints and a complaint brought against Crossroads Grassroots Political Strategies (*see* Compl., ¶¶ 96-98) – does not transform this case into an enforcement challenge. Those discrete decisions evidence a broader approach of the three-Commission voting bloc and an overall refusal to follow "[t]he Commission's established approach to evaluating political committee status," and "the analytic approach enunciated in the 2007 Supp.

E&J, adopted by a majority vote, and consistently upheld by the courts."[8] As set forth in the Complaint, this refusal has become so ingrained in the Commission as to constitute a *de facto* regulation and/or policy properly subject to review under the APA

This approach also is ingrained in the public's understanding of how the FEC works. An August 25, 2014 news article references the more than 200 times in the prior six years the Commission has split votes. Confessore, *New York Times*, Aug. 25, 2014. But far from suggesting agency paralysis, "the 3-to-3 votes have created a rapidly expanding universe of unofficial law" that is so pervasive lawyers for campaigns "advise clients that a 3-to-3 split comes close to official commission policy." *Id.* Indeed, one enterprising firm markets the split as "(Almost) a 'Win.'" *Id.*

Regulating through the administrative fiat of a bloc of three commissioners also means that "ultimately . . . there is no meaningful judicial remedy[.]" Confessore, *New York Times*, Aug. 25, 2014. This, of course, appears to be the Commission's goal here as well: to evade any judicial review of its *de facto* policy and/or regulation by insisting its contents are reviewable, if at all, only "in the context of section 30109(a)(8) cases." D's Mem. at 15. As explained above, however, this argument rests on the untenable proposition that plaintiffs here are challenging the FEC's "case-by-case adjudications" solely in the AAN and AJS matters, *id.*, and ignores the gist of Counts Three and Four of the Complaint – a challenge to the FEC's substitution of an

[8] In the Matters of Americans for Job Security and American Action Network, MUR 6538 and 6589, Statement of Reasons of Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub (July 30, 2014), at 5, 7, *available at* http://eqs.fec.gov/eqsdocsMUR/14044361995.pdf.

improper bright-line rule, adopted without notice and comment, for the case-by-case approach approved by the court in *Shays II*, 511 F. Supp. 2d at 29-31.

The Commission's citation to the *Shays II* decision as supporting its argument, D's Mem. at 15, is curious, given that court's recognition of the key differences between rulemaking and adjudication. Those differences include the fact that "many regulated entities comply with codified regulations without having to be prosecuted." *Id.* at 29. Moreover, while the *Shays II* court accepted the FEC's case-by-case approach as sufficient under the APA, the court made clear its belief that "as a matter of policy . . . rulemaking is viable for the major purpose test[.]" *Id.* at 31. The Commission's other citations are equally inapplicable. *NCPAC*, 470 U.S. at 485-86 (cited at D's Mem. at 13), addressed the FECA's exclusive jurisdiction provision "to determine how and when to enforce the Act," a clear reference to FECA's enforcement scheme. Likewise, *Durkin for U.S. Senate Comm. v. FEC*, No. C80-503D, 2 Fed. Election Camp. Fin. Guide (CCH), ¶ 9147, at 51,113-14 (D.N.H. Oct. 30, 1980) (cited at D's Mem. at 13), challenged the FEC's refusal to expedite an investigation, an exercise of the FEC's enforcement authority, not a regulatory challenge like that brought here.

Not only is there no support for the overly expansive interpretation of the FECA's judicial review provisions the Commission advances here, but relief under that statute clearly would be inadequate, as it would extend only to a specific complaint, leaving in place a regulatory approach that is unlawful in all respects, not just as applied to a specific entity at a specific point in time. The D.C. Circuit has recognized in these circumstances the remedy under the FECA is inadequate because it leaves open the possibility a regulation's validity could never be challenged as "the court might well uphold FEC non-enforcement" of a specific matter

"without ever reaching the regulation's validity." *Shays I*, 414 F.3d at 96.

Indeed, it is precisely in situations like this that APA review is available, as the APA was enacted to "'provide[] a broad spectrum of judicial review of agency action,'" *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903-04 (1988)), particularly where a remedy afforded by a statute is "too 'doubtful.'" *Id.* at 1274 (quoting *Bowen*, 487 U.S. at 901). *See also Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) ("An alternative remedy will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'") (citation omitted). Here, a remedy under the FECA is not only "too doubtful," but would fall far short of addressing the *de facto* regulation/policy CREW's complaint challenges. As a necessary consequence, across-the-board regulatory challenges like that brought here constitute an "agency rule" cognizable as "agency action" under the APA that should be set aside where the regulation in question is arbitrary, capricious, and contrary to law. 5 U.S.C. §§ 551(13), 706.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss should be denied.

Respectfully submitted,

/s/ Anne L. Weismann

Anne L. Weismann
(D.C. Bar No. 298190)
Melanie Sloan
(D.C. Bar No. 434584)
Citizens for Responsibility and Ethics in Washington
409 7th Street, N.W., Suite 300
Washington, D.C. 20004
(202) 408-5565
aweismann@citizensforethics.org

November 24, 2014