UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 14-1419 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

The Federal Election Commission ("Commission" or "FEC") demonstrated in its Memorandum of Points and Authorities in Support of its Motion to Dismiss that portions of the complaint filed in this review of agency action seek relief beyond the narrow scope of the Federal Election Campaign Act's ("FECA" or "Act") judicial-review provision, 52 U.S.C. § 30109(a)(8) (2 U.S.C. 437g(a)(8)). Those portions of the Complaint thus fail to state a claim and should be dismissed.[1] Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and its Executive Director Melanie Sloan have failed to rebut that showing. Indeed, plaintiffs' response to the FEC's motion explicitly notes that "CREW does not challenge dismissal" of the Administrative Procedure Act ("APA") portions of the first two counts of the four-count complaint. (Pls.' Opp'n to FEC Mot. to Dismiss at 3 n.4 (Docket No. 11) ("Pls.' Opp'n").) Plaintiffs' brief further reveals an utter lack of authority to support their remaining APA claims.

[1] Effective September 1, 2014, the provisions of FECA formerly codified in Title 2 of the United States Code were recodified in Title 52. This submission will indicate in parentheses the former Title 2 citations.

All of plaintiffs' claims challenge the legal analyses articulated in statements by three of the FEC's six Commissioners explaining the agency's rationale for dismissing certain administrative complaints filed with the Commission. In particular, plaintiffs challenge determinations that certain entities were not subject to regulation as federal "political committees," because those entities did not have as their "major purpose" the nomination or election of federal candidates. *See* 52 U.S.C.§ 30101(4) (2 U.S.C. § 431(4)); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). Plaintiffs acknowledge that FECA's judicial-review provision, 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)), provides the "exclusive" procedure for challenging FEC dismissal decisions, and that challenges to such dismissal decisions "may be reviewed only under the FECA." (Pls.' Opp'n at 16.) Plaintiffs nevertheless maintain that they are entitled to seek relief pursuant to the APA, in addition to section 30109(a)(8), because an article published a few months ago in the *New York Times* characterized FEC split-vote decisions as "'unofficial law'" and plaintiffs themselves believe that such FEC decisions are "actually . . . *de facto* policies and regulations." (Pls.' Opp'n at 1.) Plaintiffs are wrong. Those unsupported characterizations are contradicted by FECA and explicit caselaw to the contrary.

Statements of reasons like the ones plaintiffs challenge here are neither agency policies nor regulations. They are the explanations by Commissioners of their rationales for finding the allegations in administrative complaints insufficient to pursue further. The statements do not purport to state any policies or rules on behalf of the Commission, nor could they; under FECA, such non-majority statements of Commissioners *cannot* establish any rules or policies on behalf of the agency. FECA's judicial-review procedures provide the exclusive mechanism for plaintiffs to raise their legal arguments challenging the Commission's dismissal of their two administrative complaints. If plaintiffs are correct that the dismissal decisions they challenge

were "arbitrary, capricious, and contrary to law" (Pls.' Opp'n at 15), plaintiffs can obtain a declaratory judgment and an order remanding the matters to the Commission. In other words, FECA's judicial-review provision affords plaintiffs adequate relief and supplemental review under the APA is neither necessary nor appropriate.

All of plaintiffs' APA claims fail to state a claim for relief to which plaintiffs are entitled. This Court should therefore grant the Commission's motion and dismiss those claims. (*See* Mem. in Supp. of FEC's Mot. to Dismiss (Docket No. 5) ("FEC Mem.") at 18.)

ARGUMENT

I. STATEMENTS OF REASONS EXPLAINING FEC DISMISSALS RESULTING FROM SPLIT-VOTE DECISIONS ARE "NOT LAW" AND CANNOT BE CHALLENGED AS RULEMAKINGS OR POLICY DECISIONS UNDER THE APA

Plaintiffs' APA challenge rests on the incorrect premise that the FEC has "abandon[ed]" the "case-by-case analysis" it uses to determine organizations' political-committee status under FECA, and substituted, "[i]n its stead, . . . a bright-line test approach that considers only express advocacy conducted during an ill-defined and ever-changing time period." (Pls.' Opp'n at 2, 15.) Over and over, plaintiffs characterize this supposed change as a "*de facto*" rulemaking, regulation, or policy decision, which plaintiffs then reference as the basis of their purported APA claims. (*Id.* at 1, 2, 3, 15, 17, 18, 20; *see also* Compl. ¶¶ 2, 111-14, 119-22.)

The Commission has *not* abandoned its case-by-case approach to determining political-committee status and consistent outcomes in similar administrative enforcement matters do not establish otherwise. But even setting aside the factual inaccuracy of plaintiffs' premise, there are at least three fundamental problems with plaintiffs' legal argument. First, plaintiffs ignore the explicit mandate from the Court of Appeals that where the FEC's Commissioners are evenly divided on whether to find reason to believe that FECA has been violated, "the three

Commissioners who voted to dismiss must provide a statement of their reasons for so voting" in order "to make judicial review a meaningful exercise." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134-35 (D.C. Cir. 1987). This is as true in the American Action Network ("AAN") and Americans for Job Security ("AJS") enforcement matters that plaintiffs challenge as it is in any other FEC enforcement matter.

Second, legal analyses articulated by a group of *three* FEC Commissioners in such a statement of reasons, or anywhere else, *could not* amount to an agency policy or regulation, de facto or otherwise. Under FECA's plain language, a group of three Commissioners lacks the power to conduct the kind of rulemaking or to establish the policy change that plaintiffs allege. *See* 52 U.S.C. § 30106(c) (2 U.S.C. § 437c(c)) (explaining four-vote requirement for Commission actions and expressly referencing rulemaking authority); *id.* § 30107(a)(8) (§ 437d(a)(8)) (describing FEC rulemaking authority). The Court of Appeals has thus explained that these required statements from declining-to-go-ahead Commissioners in three-three dismissals are "*not law*" and that such statements "would not be binding legal precedent or authority for future cases." *Common Cause v. FEC*, 842 F.2d 436, 449 & n.32 (D.C. Cir. 1988) (emphasis added). The statute explicitly requires that decisions of the Commission "with respect to the exercise of its duties and powers under the provisions of th[e] Act shall be made by a *majority* vote of the members of the Commission," and that certain specified actions require "the affirmative vote of 4 members of the Commission." 52 U.S.C. § 30106(c) (2 U.S.C. § 437c(c)) (emphasis added); *id.* § 30107(a)(8) (§ 437d(a)(8)) (rulemaking authority).

Ignoring FECA's "[four-vote] requirement . . . would undermine the carefully balanced bipartisan structure which Congress has erected." *Common Cause* 842 F.2d at 449 & n.32. The

fact that a *New York Times* article erroneously characterizes three-three dismissal decisions as "unofficial law" (Pls.' Opp'n at 1, 18) is insufficient to overcome the contrary holding from the Court of Appeals, which, unlike the *Times*, is binding on this Court. If plaintiffs' characterizations were accurate, every three-three FEC dismissal could be challenged by anyone, subverting FECA's narrow judicial-review provision for aggrieved administrative complainants in section 30109(a)(8). *See* 52 U.S.C. § 30109(a)(8)(A) (2 U.S.C. § 437(g)(a)(8)(A)) (permitting only a "party aggrieved by an order of the Commission dismissing a complaint filed by such party" to obtain judicial review of that dismissal decision).

Plaintiffs' third and most fundamental mistake is their failure to distinguish between adjudication and rulemaking. Agencies have "very broad discretion" whether to address an issue by way of adjudication or rulemaking. *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007). In determining whether an action is a rulemaking or an adjudication, the Court of Appeals reviews whether the action explicitly "amend[s] a prior legislative rule" or invokes the agency's general rulemaking authority. *Conference Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). The line dividing adjudication from rulemaking may not always be "bright," *United States v. Fl. East Coast Ry. Co.*, 410 U.S. 224, 245 (1973), but here there can be no question that what occurred was adjudication as contemplated by FECA. *See In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000) (explaining that deference is owed to split-vote FEC enforcement dismissals because FECA's "detailed statutory framework for civil enforcement . . . is analogous to a formal adjudication, which itself falls on the *Chevron* side of the line").

As the Supreme Court and D.C. Circuit have recognized, *see, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Common Cause*, 842 F.2d at 449 n.32; *In re Sealed Case*, 223 F.3d at 780, Congress's bipartisan design of the agency purposefully

requires four Commissioner votes to proceed on an adjudicative enforcement matter, but only three to dismiss, in order to ensure that the agency does not "provide room for partisan misuse," H.R. 12406, H. Rep. No 94-917, 94th Cong., 2d Sess. at 3 (1976); *see id.* ("The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment."). Viewed in this proper context, plaintiffs' claim that a "de facto" regulatory change has occurred, like their equally inaccurate claim that the FEC has generally "abandoned its enforcement role" (Pls.' Opp'n at 1), amounts to nothing more than an erroneous conception of FECA's administrative enforcement process. The challenged statements of reasons do not establish any agency rule or policy, rather they reflect "a highly fact-specific, case-by-case style of adjudication" and the matters plaintiffs challenge are "simply the latest application of this approach." *Conference Group*, 720 F.3d at 965. While plaintiffs are statutorily entitled to challenge the reasoning behind the Commission's three-three dismissals of the AJS and AAN matters as "contrary to law," 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)), they cannot challenge such dismissals under the APA as if they were a rulemaking or policy decision prospectively changing FEC rules, nor can they seek injunctive or any other form of relief beyond the limited relief available under section 30109(a)(8).[2]

[2] As the Commission previously explained (FEC Mem. at 17), plaintiffs lack both a cause of action and standing to challenge the Commission's dismissal of an earlier administrative complaint filed by Public Citizen and other entities not parties to this litigation against Crossroads Grassroots Policy Strategies ("Crossroads"). The Commission also previously explained that any attempt to obtain judicial review of the FEC's dismissal of Public Citizen's administrative complaint against Crossroads in this litigation is time barred. (*Id.* at 17-18.) Plaintiffs do not contest either of these points; instead, they simply characterize the FEC's dismissal of Public Citizen's administrative complaint as a "discrete decision [that] evidence[s] a broader approach of the three-Commission voting bloc." (Pls.' Opp'n at 17.) That *characterization* is insufficient to state a claim, for all of the reasons explained above. *See supra* pp. 3-6; *see also* FEC Mem. at 10-16.

II. FECA'S JUDICIAL-REVIEW PROVISION PROVIDES ADEQUATE RELIEF AND PRECLUDES PLAINTIFFS' OVERLAPPING APA CLAIMS

There is no dispute that section 30109(a)(8) provides "the exclusive means to challenge the FEC's enforcement actions." (Pls.' Opp'n at 16.) Plaintiffs seek to obtain injunctive relief, which FECA precludes, simply by repeatedly labeling a group of dismissal decisions as a "*de facto* policy and/or regulation." *Id.* at 17. Such made-up labels, however, do not convert a challenge to enforcement decisions into a regulatory challenge. Plaintiffs' APA claims propose to do exactly what the Court of Appeals has proscribed: "Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the statute's review provision] and the APA." *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health and Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (citation omitted) ("*El Rio Santa Cruz*"); *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) (explaining that a litigant cannot utilize "both [a statutory review provision] and the APA").

Here, plaintiffs' APA claims seek to duplicate the review provided in section 30109(a)(8), while expanding upon the limited relief available under that provision. But the APA "'[d]oes not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'" *Bowen v. Mass.*, 487 U.S. 879, 903 (1988) (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)); *see id.* ("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."). And where, as here, a statutory judicial-review provision specifies "a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief," the Supreme Court has held that the remedy permitted by the specific statutory provision

is "generally regarded as exclusive." *Hinck v. United States*, 550 U.S. 501, 506 (2007). APA review is available only when there is no such statutory remedy. *Garcia*, 563 F.3d at 522; *see also* FEC Mem. at 10-14.

Plaintiffs are wrong that pursuing their challenge pursuant to section 30109(a)(8) as Congress has mandated provides them "'no meaningful judicial remedy.'" (Pls.' Opp'n at 18 (quoting *New York Times*).) As even plaintiffs recognize, judicial review under section 30109(a)(8) "implicates the same considerations as review under the APA." (*Id.* at 3 n.4.) In other words, FECA's judicial-review provision permits plaintiffs to pursue their argument that the dismissal of their two administrative complaints was contrary to law and, if they satisfy their burden, to obtain an order declaring that the dismissals were contrary to law and requiring the Commission to conform with that declaration. *See* 52 U.S.C. § 30109(a)(8)(C) (2 U.S.C. § 437g(a)(8)).

Neither plaintiffs' desire to pursue a time-barred challenge to a third dismissal decision that it lacks standing to challenge, *see supra* p. 6 n.2, nor their preference for broader relief than what FECA permits demonstrates that relief under section 30109(a)(8) is inadequate. *See, e.g.*, *Garcia*, 563 F.3d at 522-23 ("[T]he alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'"); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (recognizing that even if situation-specific litigation is "more arduous, and less effective in providing systemic relief, . . . under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy"); *Feinman v. FBI*, 713 F. Supp. 2d 70, 76 (D.D.C. 2010) (declining to permit APA review when FOIA statute specified available remedies); *Love v. Connor*, 525 F. Supp. 2d 155, 160 (D.D.C. 2007) (holding that where narrower relief is provided under an applicable judicial-review statute, "no

action will lie under the APA"). Plaintiffs may disagree with Congress's decision to provide for limited judicial review of FEC enforcement decisions in a manner that protects the bipartisan design of the agency by preserving the statutory requirement of four Commissioner votes to proceed on any adjudicative enforcement matter. *See supra* pp. 4-5. But they have not even attempted to explain why the relief Congress has permitted in section 30109(a)(8) is inadequate.

III. PLAINTIFFS' LEGAL AUTHORITIES FAIL TO ADVANCE THEIR ARGUMENT

Not one of plaintiffs' authorities provides any legal basis for their novel proposal to treat as a "*de facto* policy or regulation" selected statements of reasons authored by three Commissioners that explain those Commissioners' reasons for voting to dismiss particular administrative complaints. Consistencies in such statements of reasons do not transform them into a rulemaking. Indeed, as a general matter, "[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication." *Qwest Servs. Corp.*, 509 F.3d at 536-37; *see Conference Group,* 720 F.3d at 966 (holding that the "fact that an order rendered in an adjudication 'may affect agency policy and have general prospective application' . . . does not make it [a] rulemaking subject to APA" (citations omitted)).

Plaintiffs purport to rely on *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005), but their own description of the case — as "a challenge to an FEC regulation" (Pls.' Opp'n at 16) — highlights why their reliance on it is misplaced. Indeed, *Shays* underscores the fundamental flaw of plaintiffs' argument. In *Shays*, two members of Congress challenged *actual* FEC regulations arguing that the FEC rules improperly narrowed the scope and application of certain statutory requirements. 414 F.3d at 79-82. The Court of Appeals found jurisdiction to review the challenged regulations under the APA and rejected an argument that section 30109(a)(8) provided an adequate remedy for challenging the regulations in the context of future enforcement

proceedings. The court found that duly promulgated regulations — *i.e.*, those issued pursuant to the Commission's statutory rulemaking authority, *see* 52 U.S.C. § 30107(a)(8) (2 U.S.C. § 437d(a)(8)) — could, on their face, "afford a defense" to "FEC non-enforcement." *Id.* at 96. The opposite is true here. If plaintiffs are correct that the dismissal decisions they challenge are "arbitrary, capricious, and contrary to law," such decisions could *not* "afford a defense" to "FEC non-enforcement." *Compare* Pls.' Opp'n at 15, *with Shays*, 414 F.3d at 96. Plaintiffs are thus wrong that "in *these* circumstances the remedy under the FECA . . . leaves open the possibility a regulation's validity could never be challenged." (Pls.' Opp'n at 19 (emphasis added).) There is no regulation being challenged here.

Plaintiffs' attempt to compare this case to *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*Real Truth*"), cert. denied, 133 S. Ct. 841 (2013), is similarly flawed. As plaintiffs here observe (Pls.' Opp'n at 17), the plaintiff in that case challenged, *inter alia*, an *actual* Commission policy decision not to adopt a regulatory definition of the statutory term "political committee." *See Real Truth*, 681 F.3d at 555 n.4. The Fourth Circuit explained that Real Truth's challenge was based on a formal Commission policy, published in the Federal Register, and a final agency rule, which collectively "explain the Commission's [political-committee]-status enforcement policy." *Id.* The notice in the Federal Register, for example, explicitly stated that it operated to "place[] the regulated community on notice of the state of the law regarding . . . the major purpose doctrine." Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007); *see In the Matter of Supplemental Explanation and Justification in the Political Committee Status Rulemaking*, Certification (Jan. 31, 2007) (approving policy statement by a vote of four Commissioners), *available at* http://sers.fec.gov/fosers/ (search

"political committee" and select second-listed "vote to approve") (copy attached as Exh. 1).[3] And the Commission's Final Rule explained the reasons the Commission decided "not [to] alter its existing method of determining [political-committee] status." *Real Truth*, 681 F.3d at 556 (citing Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,056-63 (Nov. 23, 2004)); *see In the Matter of Final Rules and Explanation and Justification for Political Committee Status*, Certification (Nov. 17, 2004) (approving final rules by a vote of four Commissioners), available at http://sers.fec.gov/fosers/ (search "political committee" and select first-listed "vote to approve") (copy attached as Exh. 2). As explained above and in the Commission's memorandum in support of its motion to dismiss, such formal agency rules and policy statements are not analogous to a three-Commissioner statement of reasons explaining those Commissioners' reasons for not voting to pursue the allegations in a particular administrative complaint.

Plaintiffs' reliance on *El Rio Santa Cruz*, 396 F.3d at 1265, is also misplaced; that case, like the others plaintiffs cite, underscores the error of their arguments. In *El Rio Santa Cruz*, the court reviewed a statute that provided for removal of certain tort claims to Federal court. *Id.* at 1269-70. In determining that the removal provision was not the exclusive method for reviewing agency decisions under the statute, the Court of Appeals concluded that Congress neither intended to provide removal as a remedy, nor was it an actual remedy that would preclude APA review. *Id.*; *compare* 52 U.S.C. § 30109(a)(8)(C) (2 U.S.C. § 437g(a)(8)(C)) (providing

[3] As the Commission previously explained (*see* FEC Mem. at 18 n.5), the Court make take judicial notice of public records, including publicly available certifications of Commission votes, when resolving a motion to dismiss. *See Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007) ("[P]ublic records [are] subject to judicial notice on a motion to dismiss.").

explicitly for limited judicial review of Commission decisions and for declaratory relief and remand). In contrast, every court that has considered the nature of FECA's judicial-review provision has concluded it is exclusive. (*See* FEC Mem. at 13 (citing *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998); *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996)).)[4]

At bottom, plaintiffs criticize Commission votes on enforcement matters that result in three-to-three split votes, principally relying on an article from the *New York Times*. (Pls.' Opp'n at 1 n.1, 18.) But whatever plaintiffs' level of disagreement with the Commission's enforcement decisions, press statements characterizing the Commission's decisions do not convert them into formal rules subject to an APA challenge.

CONCLUSION

FECA provides the exclusive basis for judicial review of the administrative dismissal decisions that plaintiffs challenge in this action, and that provision limits the scope of review and

[4] The Commission's answer to what remains of plaintiffs' complaint following this Court's resolution of the Commission's motion to dismiss will be due 14 days after this Court decides that motion. *See* Fed. R. Civ. P. 12(a)(4) ("the responsive pleading must be served within 14 days after notice of the court's action"). Plaintiffs acknowledge (Pls.' Opp'n at 2 n.3) the absence of any decision in this Circuit requiring a defendant to carve out and answer portions of a complaint where it has moved to dismiss other portions of that pleading. Indeed, the weight of authority on this point "is to the effect that the filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint, not just to the claims that are the subject of the motion." Charles Alan Wright, et al., 5B Fed. Prac. & Proc. Civ. § 1346 (3d ed. 2014); *see, e.g.*, *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 638 (N.D. Iowa 2006) ("[T]here is a strong implication from the language of Rule 12(a)(4) itself that the rule extends the time to answer the complaint, as a whole, when a Rule 12(b) motion to dismiss is filed, even if the Rule 12(b) motion does not challenge all of the claims asserted in the complaint.").

relief available here. This Court should dismiss the portions of counts one and two of plaintiffs' complaint that seek relief pursuant to the APA and counts three and four of plaintiffs' complaint in their entirety.

Respectfully submitted,

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