UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and MELANIE SLOAN Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 1:10-cv-01350 (RMC)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

Defendant Federal Election Commission (FEC or Commission) has moved to dismiss the amended complaint in this matter on jurisdictional grounds and for failure to state a claim for relief. The Commission's motion with regard to Count II reflects a remarkably cynical and cavalier view of its role in enforcing and administering the provisions of the Federal Election Campaign Act ("FECA") and a fundamental misunderstanding about the nature of notice pleading. Claiming unfettered and nearly unreviewable discretion to ignore statutory provisions at will, the FEC asks the Court to sanction its arbitrary and irrational policy and practice of treating the day on which the Commission, in a closed-door proceeding, votes to dismiss a complaint as the "date of the dismissal" for purposes of triggering the statutory period for the complainant to seek judicial review, regardless of when the Commission communicates the outcome of and basis for that vote to the complainant. Although this policy has the predictable effect of depriving parties of their statutorily guaranteed 60-day period for filing a complaint in district court, the FEC justifies it on the basis of its administrative convenience – a justification

the FEC submits would excuse even its failure to provide parties with *any* explanation for dismissals.

The FEC also insists the Court cannot even reach the merits of this claim because the plaintiffs lack standing. That the FECA limits judicial review only to suits concerning a particular administrative complaint – the centerpiece of the FEC's standing argument – ignores Circuit precedent that authorizes judicial review over Commission actions under the Administrative Procedure Act (APA) as well as the FECA. The FEC's additional standing arguments equally lack merit. Plaintiffs do not, as the FEC contends, seek to vindicate the rights of others; plaintiffs' citations to the many cases in which the FEC has failed to provide the requisite statutory notice of dismissal merely evidence the existence of the challenged FEC policy and practice.

Count I challenges the FEC's dismissal of a particular administrative complaint in MUR 5908 but, here too, the FEC argues plaintiffs lack standing to do so. Under the FEC's formulation of standing, virtually no complainant would have standing to sue. On the merits, the FEC insists the issue boils down solely to an exercise of prosecutorial discretion to which the Court must defer. But deference is not warranted here, where the agency has ignored the evidence of record, reached unsupported factual and legal conclusions, and employed a process shrouded in secrecy.

STATUTORY BACKGROUND

Congress established the FEC as an independent, executive branch agency to oversee the administration of the FECA. *See* 2 U.S.C. § 437c. The Commission's powers and responsibilities include "conduct[ing] investigations and hearings expeditiously." 2 U.S.C. §

437d(a)(9). Under the FECA, any person who believes there has been a violation of the Act can file a sworn complaint with the Commission. 2 U.S.C. § 437g(a)(1). Upon receipt of a complaint, the Commission must notify the person or persons alleged in the complaint to have violated the Act within five days. *Id.* The respondent then has 15 days to demonstrate the FEC should take no action on the complaint. *Id.*

Based on the complaint, response, and any recommendation of the FEC Office of General Counsel, the Commission may vote on whether there is "reason to believe" a violation of the Act has occurred. 2 U.S.C. § 437g(a)(2). If the Commission makes a "reason to believe" finding, it must notify the respondent of that finding and "make an investigation of such alleged violation." *Id.*

Following an investigation, the general counsel may recommend that the Commission vote on whether there is "probable cause" to believe the Act has been violated. 2 U.S.C. § 437g(a)(3). The general counsel must notify the respondent of any such recommendation and provide a brief setting forth the general counsel's position on the legal and factual issues presented. *Id.* Within 15 days of receiving this brief, a respondent may submit a brief on the legal and factual issues and replying to the general counsel's brief. *Id.*

Upon consideration of these briefs, the Commission may then determine whether there is "probable cause" to believe a violation of the Act has occurred. 2 U.S.C. § 437g(a)(4)(A)(I). If the Commission makes a probable cause finding, the Commission must attempt for at least 30 days, but not more than 90 days, to resolve the matter "by informal methods of conference,

conciliation and persuasion," *id.*,[1]

If the Commission is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in United States district court. 2 U.S.C. § 434g(a)(6)(A). In any action instituted by the Commission, the district court may grant injunctive relief and impose monetary penalties. 2 U.S.C. §§ 437g(a)(6)(B)-(C).

If, at any stage of the proceedings, the Commission dismisses a complaint, any "party aggrieved" may seek judicial review of that dismissal by filing a petition with the U.S. District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). All petitions from the dismissal of a complaint by the FEC "shall be filed . . . within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B). The FECA also authorizes a party filing an administrative complaint to seek judicial review of the FEC's "failure . . . to act" after 120 days have elapsed. 2 U.S.C. § 437g(a)(8)(A). The district court lacks jurisdiction over any petition for review filed more than 60 days after the date of dismissal. *Spannaus v. Fed. Election Comm'n*, 990 F.2d 643, 644 (D.C. Cir. 1993).

The district court reviewing either the FEC's dismissal or its failure to act may declare the FEC's actions (or inactions) "contrary to law." 2 U.S.C. § 437g(a)(8). The court may also order the FEC "to confirm with such declaration within 30 days." *Id.* If the FEC fails to abide by the court's order, a complainant may bring a private right of action in its own name "to remedy the violation involved in the original complaint." *Id.*

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[1] If the Commission makes a probable cause finding during the 45-day period prior to an election, the Commission must attempt informal resolution for at least 15 days. 2 U.S.C. § 437g(a)(4)(A)(ii).

FACTUAL BACKGROUND

MUR 5908

On March 14, 2007, plaintiffs Citizens for Responsibility and Ethics in Washington (CREW) and CREW's Executive Director Melanie Sloan filed a complaint with the FEC against Peace Through Strength Political Action Committee (PTS PAC) and its treasurer, Meredith Kelley, for violations of the FECA. The complaint alleged: (1) PTS PAC, the political action committee of Rep. Duncan Hunter, who was then a candidate for president of the United States, had knowingly received 11 contributions exceeding the FECA's individual contribution limit for "testing the waters" activities in violation of 2 U.S.C. § 441a(f); (2) PTS PAC had failed to register as a candidate committee in violation of 2 U.S.C. § 433(a); (3) PTS PAC had made an excessive in-kind contribution in violation of 2 U.S.C. § 441a(a)(2)(A) and 11 C.F.R. § 110.2(b)(1); and (4) to the extent PTS PAC had failed to report disbursements of at least $12,275 for certain television advertisements it had violated 11 C.F.R. §§ 104.3(b) and 104.9(a).[2]

More than three years later, by letter dated July 23, 2010, and received by CREW on July 27, 2010, FEC Assistant General Counsel Mark Shonkwiler notified CREW of the FEC's dismissal of CREW's complaint, designated as MUR 5908 ("Shonkwiler Letter").[3] The Shonkwiler Letter was the first substantive communication CREW received from the FEC regarding its complaint in MUR 5908. According to the Shonkwiler Letter, the FEC had found reason to believe Peace Through Strength Political Action Committee, Treasurer Meredith G. Kelley – the respondents named in the complaint – as well as Duncan Hunter, Hunter for

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[2] A copy of the complaint is attached as Exhibit 1.

[3] A copy of this letter is attached as Exhibit 2.

President, Inc. and Treasurer Bruce Young – not named as respondents in the complaint – violated specified provisions of the FECA and FEC regulations. Shonkwiler Letter at 1. The Shonkwiler Letter further advised that notwithstanding these findings, on June 29, 2010, "the Commission determined to take no further action as to the Respondents and closed the file in this matter." *Id.* Finally, the Shonkwiler Letter advised CREW and Ms. Sloan of their right to seek judicial review "of the Commission's dismissal of this action" pursuant to 2 U.S.C. § 438g(a)(8). *Id.*

Under the time-line of Commission actions outlined in the Shonkwiler Letter, the Commission had determined to take no further action on the complaint in MUR 5908 24 days earlier. If June 29, 2010 is considered to be "the date of the dismissal" pursuant to 2 U.S.C. § 437g(a)(8)(B), as the FEC's policy dictates, CREW and Ms. Sloan had only 34 days remaining in which to file a complaint at the time they received this notice, notwithstanding the 60-day period for seeking judicial review provided in the statute.

The Shonkwiler Letter also stated that documents "related to the case" would be placed on the public record within 30 days from the date of the letter, a period that would extend to the 54th day of the 60-day period for seeking judicial review. The Shonkwiler Letter stated that "[a] Statement of Reasons further explaining the basis for the Commission's decision will follow," (Shonkwiler Letter at 1), but did not identify the date on which it would follow, or whether that would be within the 60-day period at all.

On August 11, 2010, 43 days after the Commission determined to take no action on CREW's complaint in MUR 5908, CREW and Ms. Sloan filed a complaint before this Court. At that point CREW and Ms. Sloan had not received any documents "related to the case," nor any

explanation for the Commission's actions, nor any representation from the Commission as to when it would provide its Statement of Reasons. The complaint alleged that the dismissal of the complaint in MUR 5908, without providing the complainants an explanation for the dismissal, was arbitrary, capricious, an abuse of discretion, and contrary to law. The complaint also challenged as arbitrary, capricious, and contrary to law the Commission's pattern and practice of failing to provide a timely explanation for its dismissals of complaints, effectively depriving complainants of their full statutory right to review conferred by 2 U.S.C. § 437g(a)(8).

Twelve days later, on August 23, 2010, and only six days before the expiration of the 60-day period in which to seek judicial review, the FEC posted on its website the Certification of the June 29, 2010 Commission vote to dismiss the case and the first and second General Counsel's Reports in MUR 5908. The First General Counsel's Report (1st GC Report or First Report), dated January 18, 2008, is 16 pages in length with no apparent redactions.[4] It concludes that PTS PAC made more than $10,000 in in-kind contributions to the Hunter presidential campaign by funding Congressman Hunter's travel to early primary states, and that these contributions were excessive under the FECA. According to the First Report, Congressman Hunter's receipt of these contributions triggered the requirement that his presidential campaign register with the FEC. But his presidential campaign did not register until months later. 1st GC Report at p. 10.

On the issue of when Congressman Hunter crossed the line from merely "testing the waters" to being an actual presidential candidate, the First Report examined multiple statements he made demonstrating he was a candidate for president as early as October 2006, as well as his

[4] A copy of the First General Counsel's Report is attached as Exhibit 3.

trips to early primary states also beginning in October 2006. *Id.* at 4. For example, the First Report cites Congressman Hunter's statement at an October 30, 2006 news conference, "As I finish my final two years as chairman of the Armed Services Committee and serve you, I am also going to be preparing to run for president of the United States in 2008." *Id.* at 7. Based on this statement and an ensuing interview, the First Report concluded "it appears that Hunter had already decided to become a candidate as of that date [October 30, 2006]." *Id.* at 8.

Additional evidence of record includes Congressman Hunter's response that same week to the question "why are you running" from a *Newsweek* reporter, in which he "answered directly, without denying that he was running, 'because I believe national security and a strong military are more important issues now than they have ever been.'" 1st GC Report at 7. Similarly, during a speech in December 2006, Mr. Hunter discussed what his goals would be as president and is quoted as having said "I'm going to be running." *Id.* at 7-8. Congressman Hunter also discussed his presidential campaign in a visit to Iowa in December 2006, and in an early January trip to New Hampshire, before registering as a candidate, described himself as "the most conservative Republican in the Presidential sweepstakes." *Id.* at 8.

The First Report also notes that notwithstanding Congressman Hunter's apparent status as a candidate as early as October 2006, and his travel from October through December 2006, he did not report any contributions or expenditures for that time period. *Id.* at 10. From this the First Report recommends that the Commission find reason to believe Congressman Hunter, Hunter for President, Inc., and Bruce Young as Treasurer violated the FECA by failing to report contributions received and expenditures made while he was "testing the waters." 1st GC Report at 10-11.

With respect to Congressman Hunter's travel expenses during the period when he was either "testing the waters" or already a candidate, the First Report notes that PTS PAC appears to have paid "some" of these expenses. *Id.* at 11. From this the First Report recommends that the Commission find reason to believe PTS PAC and Meredith Kelley as Treasurer violated the FECA by making excessive in-kind contributions to Congressman Hunter, and Congressman Hunter for President, Inc. and Bruce Young as treasurer violated the Act by accepting those excessive contributions. *Id.* at 11-12.

Finally, on the issue of whether three television ads run by PTS PAC constituted in-kind contributions, the General Counsel was unable to conclude they "were for the purpose of influencing a federal election" and accordingly recommended that the Commission take no action. *Id.* at 13.

The documents posted by the Commission on August 23, 2010, also included a Second General Counsel's Report, dated May 3, 2010 (2d GC Report or Second Report) (attached as Exhibit 4). Pages 13-15 of the 16-page document, which contain the General Counsel's analysis of the facts and application of the law to those facts, have been redacted virtually in their entirety. The Commission also redacted three of the four actions recommended on page 1. As a result, it is impossible to determine the basis for the General Counsel's recommendation that the Commission find no reason to believe PTS PAC and its treasurer violated the FECA and the FEC's implementing regulation.

The Second Report chronicles the evidence gathered during the Commission's two and one-half year investigation. In addition to documents and written responses and affidavits from the respondents, the General Counsel "examined disclosures of receipts and disbursements

related to activities by Hunter and PTS PAC for the November 2006 through January 2007 time period." 2d GC Report at 2. On the issue of the television ads, the reports notes it found "no additional basis" to conclude they violated the law. *Id.* at 3.

A comparison of the first and second reports reveals a critical factual discrepancy central to the statutory violations at issue. The First Report, based on evidence of record, found Congressman Hunter had traveled and made speeches on issues central to his presidential campaign platform from October 2006 through January 2007, 1st GC Report at 4, 7-8, which led to its conclusion he was a candidate, or at least "testing the waters," as early as October 2006. The Second Report, however, dated his travel and speeches only back to November 2006, with no citation to any specific evidence. 2d GC Report at 2. The Second Report also notes the Commission's reason to believe findings identify December 11, 2006 as the earliest date on which Congressman Hunter decided to run as a candidate for president. *Id.* at 5 n.1. In explaining the Commission's selection of December 11, 2006, the Second Report cites to Congressman Hunter's affidavit – not made part of the public record – in which he apparently acknowledged "that the selection of the events and forums" for his earlier travel "was based on the upcoming presidential primaries in those states." *Id.* at 9. According to the Second Report, Congressman Hunter traveled to North and South Carolina during the period December 9-11, 2006. *Id.* at 6. But the selection of the December 11 date makes no sense given Congressman Hunter's travel in November to those same states, 2d GC Report at 4, and his earlier travel in October 2006, 1st GC report at 7. Moreover, the selection of December 11, 2006, as the earliest date on which Congressman Hunter determined to run as a presidential candidate ignores all of his earlier public statements, outlined in the First Report, indicating he already was a candidate

well before that date.

In the Second Report the General Counsel responded to the suggestion of the Hunter Committee that the $10,243 in travel expenses paid for by PTS PAC should be allocated between PTS PAC and Congressman Hunter, with 60% attributable to PTS PAC. As the General Counsel noted, the Committee "offer[ed] no basis for this ration as opposed to any other." Second Report at 8. More critically, "[t]hese events were integral parts of Hunter's preparations to run for president because they served as venues for publicizing his campaign platform and for increasing his support and national profile in the primary states, *without serving any other purpose*." *Id.* (emphasis added).

Despite the FEC's finding that PTS PAC had made illegal excessive contributions to the Hunter for President campaign, neither PTS PAC nor Hunter for President has ever amended its FEC reports to reflect the in-kind contributions by PTS PAC to Hunter for President. In the absence of these corrections to the public record, it is impossible to determine from an examination of PTS PAC's FEC reports that it made in-kind contributions to Hunter for President.

By letter dated August 24, 2010, only six days before the expiration of the 60-day period to seek judicial review. Mr. Shonkwiler forwarded to CREW and Ms. Sloan the Statement of Reasons explaining the basis for the Commission's decision to dismiss the complaint in MUR 5908.[5] The Statement of Reasons was signed by five commissioners, each of whom did not sign the statement until August 23, 2010 – seven days before the expiration of the statutory period for

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[5] His letter and the Statement of Reasons are Exhibit 1 to the FEC's Memorandum in Support of its Motion to Dismiss Plaintiffs' Amended Complaint (D's Mem.).

seeking judicial review. Commissioner Bauerly did not vote.

According to the Statement of Reasons, the Commission's investigation into the issue of excessive contributions revealed that PTS PAC made approximately $10,200 in disbursements for travel expenses incurred during the same time Congressman Hunter was "testing the waters" for his presidential campaign. Statement of Reasons at pp. 2-3. If made on behalf of the Hunter Committee, these disbursements would have resulted in $10,200 of unreported, in-kind contributions, of which up to $5,200 would have been excessive. Nevertheless, the Commission determined, without citing to any evidence, that because these disbursements also advanced PTS PAC's core mission, they were allocable between the two committees. *Id.* at 3. As a result, the Commission concluded the amount of potentially excessive contributions was just over $100, an amount over which the Commission stated it was exercising its "prosecutorial discretion" by declining to take any further action. *Id.*

On the issue of reporting violations, the Commission found reason to believe a violation of the FECA might have occurred because Congressman Hunter might have decided to become a candidate prior to filing his Statement of Candidacy. Statement of Reasons at 4. Ignoring the multiple examples of statements by Congressman Hunter in the record before the Commission indicating he was a candidate for president months before his presidential campaign registered with the FEC, the Commission stated there was insufficient evidence to establish that Congressman Hunter failed to timely file his Statement of Candidacy. *Id.* Despite this purported lack of evidence, the Commission reached the conclusion that Congressman Hunter's Statement of Candidacy "was filed, at most, only a few days late," and again declined to take any further action for what it termed a "*de minimis*" potential violation. *Id.* Completely unaddressed in the

Commission's Statement of Reasons was a key issue underlying the complaint: the "testing the waters" exception.

The FEC's Policy And Practices

As the FEC essentially concedes in its motion to dismiss, its policy is to treat the date on which the Commissioners vote to dismiss a complaint as the "date of the dismissal" for purposes of 2 U.S.C. § 437g(a)(8)(B). The Commission follows this policy even though "the reasoning of the Commissioners," and not simply their votes, "provides the basis for judicial review." D's Mem. at 4 (citations omitted). The "reasoning of the Commissioners" is not released to the complainant (or to the public) until some indefinite period of the Commission's choosing after the vote to dismiss the complaint. In MUR 5908, this period was 48 days. This lengthy delay between when the Commission made its secret decision to dismiss plaintiffs' complaint and when it provided plaintiffs with the reasoning of the Commissioners who voted to dismiss, deprived CREW and Ms. Sloan of almost the entirety of the full 60-day period to seek judicial review guaranteed them by statute.

This is not the first time the FEC has denied CREW the full 60 days in which to seek judicial review of the FEC's dismissal of its complaint. On December 15, 2008, the FEC hand-delivered to CREW a letter notifying CREW that the FEC had dismissed CREW's complaint, designated as MUR 5541, against a group called The November Fund, and others.[6] According to the December 15 letter, the dismissal had taken place, in secret, by vote of the Commission on October 21, 2008. By the time the Commission notified CREW of its actions, 55 of the 60 days afforded CREW to determine whether to file a complaint had elapsed.

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[6] The letter is available http://eqs.sdrdc.com/eqsdocsMUR2804422180.

In its December 15 letter, the FEC did not provide CREW with its Statement of Reasons for the dismissal of CREW's complaint and instead stated "[a] Statement of Reasons further explaining the basis for the Commission's decision will follow." *See id.* Thereafter, the FEC issued its first Statement of Reason on December 19, 2008[7] – one day before the 60-day statutory period was to expire – and its second Statement of Reasons on January 22, 2009[8] – 33 days *after* the expiration of the 60-day period for filing a complaint pursuant to 2 U.S.C. § 437g(a)(8).

This is a pattern and practice by the FEC, and CREW and Ms. Sloan are by no means the only complainants the agency has deprived of the full 60 days afforded them by statute to consider and seek judicial review. This is because the FEC has a policy and practice of refraining from providing complainants with timely notice of its decisions to dismiss complaints and the basis for those dismissals. For example, on October 27, 2008, the National Right to Work Foundation filed a complaint with the FEC against the Service Employees' International Union, MUR 6124.[9] The FEC dismissed the complaint in MUR 6124 on April 27, 2010.[10] By letter dated May 18, 2010 – 21 days after the dismissal and with 39 days remaining of the 60-day period for seeking judicial review – the FEC advised the complainant of its dismissal of MUR 6124.[11] The FEC did not provide a Statement of Reasons explaining the basis for its dismissal

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[7] The first Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/28044222185.

[8] The second Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/29044223819.

[9] The complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/10044271521.

[10] *See* http://eqs.sdrdc.com/eqsdocsMUR/10044271557.

[11] *See* http://eqs.ssdrdc.com/eqsdocsMUR10044271559.

until August 9, 2010 – 14 days after the deadline for seeking judicial review.[12]

As another example, on July 22, 2008, Wicker for Senate filed a complaint with the FEC against Ronnie Musgrove for Senate, MUR 6044.[13] The Commission dismissed the complaint on May 15, 2009.[14] By letter dated June 2, 2009 – 18 days after the dismissal and with 42 days remaining of the 60-day period for seeking judicial review – the FEC advised the complainant of its dismissal of MUR 6044.[15] The FEC did not provide a Statement of Reasons explaining the basis for its dismissal until July 14, 2009 – the last day of the 60-day statutory period for seeking judicial review.[16]

Further, on May 2, 2008, the Democratic Congressional Campaign Committee filed a complaint with the FEC against Peter Teahen, Friends of Peter Teahen, and Teahen Funeral Home, Inc., MUR 6013.[17] The FEC dismissed the complaint on March 11, 2009.[18] By letter dated March 17, 2009 – six days after the dismissal and with 54 days remaining of the 60-day period for seeking judicial review – the FEC advised the complainant of its dismissal of MUR

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[12] The Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/10044274214.

[13] The complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/290442442609.

[14] *See* http://eqs.sdrdc.com/eqsdocsMUR/29044242634.

[15] The letter is available at http://eqs.sdrdc.com/eqsdocsMUR/29044242638.

[16] *See* http://eqs.sdrdc.com/eqsdocsMUR/29044250029.

[17] The complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/29044232358.

[18] *See* http://eqs.sdrdc.com/eqsdocsMUR/29044232371.

6013.[19] But the FEC did not provide its first Statement of Reasons until May 12, 2009[20] – two days after the expiration of the 60-day period for seeking judicial review – and its second Statement of Reasons until June 11, 2009 – 32 days after the expiration of the 60-day period.[21]

Similarly, on October 12, 2006, Democracy 21 and the Campaign Legal Center filed a complaint with the FEC against the Economic Freedom Fund and Majority Action, MUR 5842.[22] The Commission dismissed the complaint on April 14, 2009.[23] By letter dated April 24, 2009 – 10 days after the dismissal and with 50 days remaining of the 60-day period for seeking judicial review – the FEC advised the complainants of its dismissal of MUR 5842.[24] The FEC did not provide its first Statement of Reasons until May 21, 2009[25] – 23 days before the expiration of the 60-day period for seeking judicial review – and its second Statement of Reasons until June 10, 2009[26] – only three days before the expiration of the 60-day period.

The California Democratic Party and the Senate Majority Project filed complaints with

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[19] The letter is available at http://eqs.sdrdc.com/eqsdocsMUR/29044232373.

[20] The first Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/29044242596.

[21] The second Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/29044242603.

[22] The complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/29044240593.

[23] *See* http://eqs.sdrdc.com/eqsdocsMUR/29044240853.

[24] The letter is available at http://eqs.sdrdc.com/eqsdocsMUR/29044240856.

[25] The first Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/29044241152.

[26] The second Statement of Reasons is available at http://eqs.sdrdc.com/eqsdocsMUR/29044242676.

the FEC against Senator and then-presidential candidate John McCain on March 6, 2006 (MUR 5712)[27] and August 17, 2006 (MUR 5799)[28] alleging solicitation of so-called "soft money" in violation of the Bipartisan Campaign Reform Act of 2002. The FEC dismissed the complaints in both MUR 5712 and MUR 5799 on March 18, 2009.[29] By letter dated April 6, 2009 – 19 days after the dismissal and with 41 days remaining of the 60-day period for considering and seeking judicial review – the FEC advised the complainants of its decisions to dismiss the complaints.[30] But the FEC did not provide a Statement of Reasons explaining either dismissal until nearly one year later, on March 5, 2010, long after the expiration of the 60-day period for filing a complaint.[31] Theses are just some of the many examples of the FEC's unlawful policy challenged here.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE FEC'S DISMISSAL OF MUR 5908.

In Count 1, plaintiffs seek judicial review of the FEC's decision to dismiss the administrative complaint filed against PTS PAC and Hunter for President, MUR 5908. The FEC asks this Court to dismiss this Count, claiming that plaintiffs have failed to allege a concrete and

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[27] This complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/29044240021.

[28] This complaint is available at http://eqs.sdrdc.com/eqsdocsMUR/29044240322.

[29] *See* http://eqs.sdrdc.com/eqsdocsMUR/2904424031 (MUR 5712) and http://eqs.sdrdc.com/eqsdocsMUR/29044240584 (MUR 5799).

[30] *See* http://eqs.sddrdc.com/eqsdocsMUR/29044240313 (MUR 5712) and http://eqs.sdrdc.com/eqsdocsMUR/29044240586 (MUR 5799).

[31] *See* http://eqs.sdrdc.com/eqsdocsMUR/10044262366 (MUR 5712) and http://eqs.sdrdc.com/eqsdocsMUR/10044262386 (MUR 5799).

particularized injury. Under this theory of standing virtually no complainant could seek judicial review of the Commission's decision to dismiss a complaint, especially where the election in which the respondent candidate was running has long since passed. Accepting the Commission's standing arguments also requires this Court to adopt an extraordinarily constrained view of the agency's role in administering the FECA.

The Supreme Court's decision in *Fed. Election Comm'n v. Atkins*, 524 U.S. 11 (1988), provides the analytical framework for determining the standing of plaintiffs like Ms. Sloan and CREW, alleging informational injuries from the failure of PTS PAC and Hunter for President to report the illegal excessive contributions by PTS PAC. *See* Amended Complaint, ¶ 51. Ms. Sloan, a registered voter who votes in both local and national elections, seeks "all the information the FECA requires candidates to report publicly." *Id.* at ¶ 10. And CREW, whose mission is to "expose the unethical and illegal conduct of those involved in government," is "hindered in its programmatic activity when an individual, candidate, political committee, or other regulated entity fails to disclose campaign finance information in reports of receipts and disbursements required by the FECA." *Id.* at ¶¶ 6, 8.[32]

In *Atkins*, the Supreme Court examined similar claims by complainants challenging the Commission's dismissal of their complaint alleging that the American Israel Public Affairs Committee (AIPAC) was a "political committee" and therefore subject to the FECA's disclosure requirements. The Court first interpreted the statutory provision authorizing suit by any

[32] Although the D.C. Circuit concluded CREW, as a non-voter, did not have standing in *CREW v. Fed. Election Comm'n*, 475 F.3d 337, 339-40 (D.C. Cir. 2007), its reasoning was based in large part on its conclusion that the information CREW was seeking largely already was publicly available. Here CREW seeks critical information that neither PTS PAC nor Hunter for President has yet to report.

"aggrieved party" broadly, reasoning that congressional use of the word "aggrieved" historically reflects an "intent to cast the standing net broadly." *Atkins*, 524 U.S. at 19 (citations omitted). The Court concluded the informational injury alleged by the plaintiffs, seeking "to evaluate the role that AIPAC's financial assistance might play in a specific election," fell within the broad standing net cast by Congress when it enacted section 437g(a)(8). *Id.* at 20.

The informational injury alleged by plaintiff Melanie Sloan here is at least as strong, if not stronger, than that alleged by the *Atkins* plaintiffs. At the time she filed her complaint with the FEC, Ms. Sloan was seeking information about the expenditures and contributions of then-candidate for president Duncan Hunter. As a voter in presidential elections, the requested information undoubtedly would have helped both her, CREW – with its mission of disseminating information to the public – and "others to whom they could communicate it [] to evaluate candidates for public office." *Atkins*, 524 U.S. at 20. Plaintiffs have therefore satisfied their burden of establishing standing through their allegations of injury in fact, which the Court must accept as true. *See*, *e.g.*, *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 127 (D.C. Cir. 1994); *see* also *Kean for Congress Comm. v. Fed. Election Comm'n*, No. 04-0007, slip op. at 7, 15 (D.D.C. Jan. 25, 2005) (plaintiff established its standing under *Atkins* where it had alleged a statutory right to information under the FECA and shown how the information would be helpful to it).

In arguing to the contrary, the FEC mischaracterizes the injuries pled by the plaintiffs and attempts unsuccessfully to shoehorn this case into the fact patterns of cases where this Circuit has concluded plaintiffs lack standing. First, the FEC claims plaintiffs lack standing because of their failure to "identif[y] any specific information they allegedly lack, let alone how any

missing information would be 'useful in voting.'" D's Mem. at 13 (citation omitted). To the contrary, paragraph 51 of the amended complaint identifies the specific information lacking here: the "in-kind contributions by PTS PAC to Hunter for President." As for the usefulness of this information, one need look no further than paragraphs 10 and 11 of the amended complaint setting forth Ms. Sloan's status as a voter in national elections and her need for this information in that capacity. Under *Atkins*, denial to plaintiffs of information to which they are statutorily entitled and which would be useful for evaluating candidates for election constitutes a sufficient injury in fact to meet their burden of establishing their standing to sue.

The two cases on which the Commission most relies to challenge plaintiffs' standing, *Wertheimer v. Fed. Election Comm'n*, 268 F.3d 1070 (D.C. Cir. 2001), and *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413 (D.C. Cir. 1997), involve significantly different facts. In *Wertheimer*, the D.C. Circuit concluded the plaintiff lacked standing because, as his counsel conceded during oral argument, plaintiff was not seeking the disclosure of specific facts, but rather the "fact" that certain transactions constituted coordinated expenditures, and if he prevailed he would have received no additional information. 268 F.3d at 1074-75. Here, by contrast, plaintiffs have identified specific facts they are seeking beyond the mere enforcement of the law, namely the specific in-kind contributions PTS PAC made to Hunter for President. *See* Amended Complaint at ¶ 51. If plaintiffs prevail, a finding that PTS PAC and Hunter for President failed to disclose the expenditure and receipt of in-kind contributions should result in amended filings by those entities with the FEC, an action that will provide plaintiffs with the requested information and cure their informational injury.

Common Cause is equally inapposite as the plaintiff there was seeking the imposition of

monetary penalties by the FEC, not the disclosure of information. 108 F.3d at 418. By contrast, as the court in *Common Cause* noted, a plaintiff alleging an infringement of an asserted "interest in knowing how much money a candidate spent in an election" may have suffered "a legally cognizable injury in fact." *Id.* The plaintiffs here have suffered the correlative injury of being deprived of information about the amount of in-kind contributions a presidential candidate received, an injury sufficient to support their standing to sue under *Atkins*.

The FEC also claims plaintiffs lack standing because they already have the facts they are seeking. This misapprehends the information available to plaintiffs and the public and the record before this Court. As even the FEC concedes, PTS PAC's publicly available campaign finance filings provide only "*some* information about travel the committee financed." D's Mem. at 15 (emphasis added). And while news reports revealed some relevant facts, *id.*, they certainly do not substitute for the detailed filings the FECA requires. Moreover, as discussed *infra* at 27, the Commission's description of the facts at issue, set forth in both the general counsel's reports and the statement of reasons, omits critical details and contains gaping holes. In short, they provide no basis from which to conclude plaintiffs have all the information they seek.

At bottom, the Commission's arguments flow from a callous disregard for the legal and practical significance of the FECA's reporting requirements. While distinguishing between contributions and expenditures lies at the heart of the FEC's mission, the FEC brushes these distinctions aside, suggesting individuals and entities like the plaintiffs can learn nothing useful from knowing precisely which expenditures an entity made and which contributions a candidate received. But, as the last few elections illustrate all too vividly, following the money trail of expenditures and contributions is extraordinarily revealing of the interests behind a particular

candidate. This is the information plaintiffs seek and its deprivation more than adequately supports their standing.[33]

II. THE FEC'S DISMISSAL OF MUR 5908 WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND CONTRARY TO LAW.

Count One of the Amended Complaint challenges as arbitrary, capricious, an abuse of discretion, and contrary to law the FEC's dismissal of the complaint in MUR 5908. While in deciding the merits of this claim the Court presumptively must afford the Commission deference, "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (citations omitted). Reviewing courts also look to the consistency or inconsistency between the Commission's action and "any discernible purpose of the Act [the FECA]). *Id.* at 41. Moreover, the Commission's dismissal of a complaint can be set aside where "'the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment,'" *Hagelin v. Fed. Election Comm'n*, 411 F.3d 237, 242 (D.C. Cir. 2005), *quoting AT&T Corp. v. Fed. Commc'n Comm'n*, 220 F.3d 607, 616 (D.C. Cir. 2000), or the Commission's decision "'was arbitrary and capricious.'" *Common Cause v. Fed. Election Comm'n*, 906 F.2d 705, 706 (D.C. Cir. 1990), *quoting Orloski v. Fed. Election Comm'n*, 795 F.2d 156, 161 (D.C. Cir. 1986). The FEC's decision to dismiss

[33] The FEC also argues that because the FEC lacks power to order a party to "report anything," citing *CREW v. Fed. Election Comm'n,* 475 F.3d at 340, it is speculative whether a favorable decision will redress the plaintiffs' injuries. D's Mem. at 17 n.15. Grounded in an extraordinarily cynical and limited view of the Commission's authority, this argument presupposes parties before the Commission will ignore the agency's findings and orders – a supposition without legal support – and essentially undermines the entire regulatory authority the FECA grants to the FEC.

MUR 5908 cannot withstand scrutiny under these factors.

Count 1 of the plaintiffs' administrative complaint alleged that PTS PAC knowingly received 11 contributions exceeding the FECA's individual contribution limit for "testing the waters" activities in violation of 2 U.S.C. § 441a(f). After a several-year investigation, the FEC concluded PTS PAC had made travel expense disbursements totaling $10,200. But, contrary to the findings of the general counsel, the FEC decided these disbursements should be allocated between PTS PAC and Hunter for Congress. From this the Commission declined to take any further action because this allocation resulted in an excessive contribution of just over $100. The record does not support these conclusions.

According to the Statement of Reasons – the document that purportedly explains the basis for the Commission's dismissal – these disbursements should be allocated between the two committees because they benefit both at least equally. Statement of Reasons at 3. This conclusion, however, rests not on any facts or evidence in the record, but is simply drawn from thin air. In examining this same issue the general counsel concluded to the contrary that the events funded by PTS PAC "were integral parts of Hunter's preparations to run for president because they served as venues for publicizing his campaign platform and for increasing his support and national profile in the primary states." 2d GC Report at 8. Moreover, there was no evidence "that Hunter would have been present at any of those events, absent the presidential campaign." *Id.* Most significantly, these events did not serve "any other purpose." *Id.* In reaching the contrary conclusion, the FEC cited to no new evidence undermining the general counsel's conclusions, but made a simple "estimation"[34] without a rationale or support that the

[34] D's Mem. at 24.

disbursements should be allocated equally. Because this unsupported "estimation" forms the basis for the Commission's decision not to proceed "[i]n light of the relatively small amount potentially in violation," Statement of Reasons at 3, that decision must be set aside as arbitrary, capricious, and an abuse of discretion.

The Commission's Statement of Reasons also addressed the issue of when Congressman Hunter became a presidential candidate, an event that triggers the FECA's registration and reporting obligations, relevant to Counts 2 and 3 of the administrative complaint.[35] Here, Congressman Hunter filed his Statement of Candidacy on January 23, 2007 – a filing that according to the Statement of Reasons "was, at most, three days late," rendering any potential violation "*de minimis*." Statement of Reasons at 4. Again, however, the factual record before the Commission (and this Court) does not support this conclusion.

As set forth *supra* at pp. 7-8, the First Report examined multiple statements by Mr. Hunter demonstrating he was a candidate for president as early as October 2006, as well as his trips to early primary states also beginning in October 2006. *See* 1st GC Report at 4. Based on this substantial evidence, the First Report concluded "it appears that Hunter had already decided to become a candidate as of that date [October 30, 2006]." *Id.* at 8. The First Report also notes that notwithstanding Congressman Hunter's apparent status as a candidate as early as October 2006, and his travel from October through December 2006, he did not report any contributions or expenditures for that time period. *Id.* at 10. From this the First Report recommends that the Commission find reason to believe Congressman Hunter, Hunter for President, Inc., and Bruce

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[35] Count 2 alleges a failure to register as a candidate committee in violation of 2 U.S.C. § 433(a), and Count 3 alleges that PTS PAC made an excessive in-kind contribution in violation of 2 U.S.C. § 441a(a)(2)(A) and 11 C.F.R. § 110.2(b)(1).

Young as Treasurer violated the FECA by failing to report contributions received and expenditures made while he was "testing the waters." *Id.* at 10-11.

The Second Report, as discussed *supra* at 10, arrived at a slightly different date for when Congressman Hunter became a candidate: November 2006. This date, however, was not based on any new evidence or citation to any specific evidence whatsoever. *See* 2d GC Report at 2. And the Commission's selection of December 11, 2006 as the earliest date on which Congressman Hunter decided to run as a candidate for president, apparently based on an affidavit from Congressman Hunter not made part of the public record, *id.* at 5 n.1, makes no sense and ignores all of his earlier public statements, outlined in the First Report, indicating he already was a candidate well before that date.[36]

Notwithstanding the abundant evidence of record that Congressman Hunter became a candidate well before January 2007, the Commission dismissed the administrative complaint based on a determination "there is insufficient evidence to establish whether there is probable cause to believe that Congressman Hunter became a candidate before January 2007." Statement of Reasons at 2. From this the Commission concluded "there is insufficient evidence to conclude whether Congressman Hunter failed to timely file his Statement of Candidacy." *Id.* Despite this purported lack of evidence, however, the Commission somehow was able to reach a conclusion that Congressman Hunter's Statement of Candidacy "was filed, at most, only a few days late." *Id.* These factual determinations are arbitrary, capricious, and contrary to the record

[36] In its motion to dismiss, the FEC takes issue with this evidence, culling out a single statement that it argues is "doubly couched" and subject to conflicting interpretations on when Congressman Hunter became a candidate for president. D's Mem. at 24-25. As discussed above, however, the record here contains more than this one arguably ambiguous statement.

before the FEC and this Court.

Despite the clear disconnect between the facts as developed in the more than two-year-long investigation and the Commission's Statement of Reasons, the FEC argues here it is entitled to dismissal of Count I of the amended complaint because that complaint contains only "a few paragraphs to the Commission's statement of reasons" and fails to meet plaintiffs' "heavy burden of showing that the Commission's decision was an abuse of discretion." D's Mem. at 23. The Commission also faults plaintiffs for "not directly argu[ing] to the contrary" that the dismissal "was a proper exercise of the agency's prosecutorial discretion." D's Mem. at 26. These arguments misconstrue plaintiffs' burden of providing notice of their claims as required by Fed. R. Civ. P. 8.

Under the notice pleading provisions of Rule 8, a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has construed this provision to require only "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" not "'detailed factual allegations.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 and 555 (2007). This is because the "simplified notice pleading standard" of Rule 8(a) "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Soreman*, 543 U.S. 506, 512 (2002).

The amended complaint here falls well within the requirements of Rule 8(a). Paragraphs 42 through 51 lay out the precise ways in which the Commission's dismissal falls short, including describing the lack of record evidence, inconsistencies in what the evidence shows and

what the Commission cited as the bases for its dismissal, as well as how the evidence supports the allegations in the administrative complaint. Nor can plaintiffs be faulted for failing to "directly argue" against the arguments defendant makes here in support of its motion to dismiss (D's Mem. at 26), given the purpose of notice pleading as set forth in Fed. R. Civ. P. 8(a) and interpreted by the Supreme Court.

Beyond these specific problems with the Commission's dismissal of MUR 5908, the entire record is so shrouded in secrecy as to make it nearly impossible to ascertain what the Commission considered and why. The Second Report, generated after a lengthy investigation, contains critical redactions, including three of the four recommendations the general counsel made and, most significantly, nearly three whole pages of analysis. Other aspects of the process contain similarly gaping holes. Very little of the evidence garnered from the Commission's two-year investigation is available publicly. While the general counsel's report and the Statement of Reasons allude to evidence before the Commission, neither provides much, if any, detail. For example, the Second Report references "documents and written responses" submitted during the investigation, 2d GC Report at 2, including an affidavit from Duncan Hunter, but provides only a few phrases from that affidavit. *See id.* at 4. The general counsel provided an equally truncated description of what his office reviewed: "Respondents' submissions" and "disclosures of receipts and disbursements related to activities by Hunter and PTS PAC for the November 2006 through January 2007 time period." 2d GC Report at 2. But apart from the expenditures the Hunter Committee incurred for certain specified travel, *id.* at 5, the record is silent as to whether other expenditures were made and for what.

At bottom, we simply do not know what the facts adduced from the lengthy investigation

showed. The lack of thoroughness and substantial evidence to support the dismissal, gaps in the factual record, and the inconsistencies in the Commission's reasoning undermine its claim of virtually unfettered discretion and compel the conclusion the FEC's dismissal of MUR 5908 was arbitrary, capricious, an abuse of discretion, and contrary to law. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 37 (1981); *Hagelin v. Fed. Election Comm'n*, 411 F.3d at 242.

III. THE COURT HAS JURISDICTION TO HEAR PLAINTIFFS' CHALLENGE TO THE FEC'S POLICY AND PRACTICE OF FAILING TO PROVIDE THE STATUTORILY MANDATED 60 DAYS' NOTICE OF DISMISSAL.

Count II of the amended complaint challenges the FEC's undisputed policy and practice – as reflected in its treatment of MUR 5908 and a host of other MURs – of failing to provide an "aggrieved party" with the statutorily guaranteed 60 days in which to seek judicial review of its dismissal of a complaint. The Commission claims plaintiffs lack standing and the Court lacks jurisdiction to hear this claim, mischaracterizing what plaintiffs are challenging and ignoring controlling precedent that provides for review under the APA.

The FEC's policy – which it essentially admits in response to this lawsuit[37] – is to treat the day on which the Commission dismisses a complaint in a closed-door meeting as the date of dismissal for purposes of triggering the statutory 60-day period for seeking judicial review. In nearly all cases the Commission then waits days or weeks before communicating the outcome of that vote to the parties, and typically waits weeks or months longer before providing the basis for

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[37] For purposes of this motion to dismiss, the Court must, of course, accept all the facts as pled in the absence of factual evidence to the contrary. *See*, *e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Here the FEC has neither provided such contrary evidence nor even suggested it does not follow the policy at issue in Count II.

any dismissal. Plaintiffs challenge as arbitrary, capricious, and contrary to law this policy of using the date of a secret vote to trigger the time period in which an aggrieved party has to file a complaint in district court because it deprives parties of their full period of review guaranteed by statute, 2 U.S.C. § 437g(a)(8).

According to the Commission, plaintiffs' filing of this lawsuit evidences their lack of standing, as it makes their claim non-redressable. D's Mem. at 27-28. But this ignores the true nature of Count II, which challenges the Commission's overall policy and practice in every case, not simply MUR 5908, to treat the day the Commission votes on a dismissal as the "date of the dismissal" for purposes of section 437g(a)(8). The effect of this policy *in virtually every case* is to deny aggrieved parties the full 60-day period in which to consider whether or not to file a complaint in district court. In some cases, such as this one, aggrieved parties will get notice of what the Commission has done and why only days before the 60-day period ends. In others, such as MUR 6124 involving a complaint brought by the National Right to Work Foundation against the Service Employees' International Union, where the FEC advised the aggrieved parties of its dismissal of the complaint 21 days after the dismissal, but did not provide a Statement of Reasons explaining the basis for its dismissal until 11 days *after* the 60-day period for judicial review had expired,[38] aggrieved parties will get full notice only after their time to seek further review has expired. In each case, as a result of the FEC's ongoing policy, complainants will have less than 60 days in which to consider and seek judicial review, or will be deprived entirely of any informed right of review.

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[38] *See* http://eqs.sdrdc.com/eqsdocsMUR/10044271559 (notice of dismissal) and http://eqssdrdc.com/eqsdocsMUR/10044274214 (Statement of Reasons).

The Commission's defense is a Catch-22 that means its actions would never be subject to challenge, because either a plaintiff files suit within the 60-day period and, under the Commission's formulation, lacks standing because the claim is then not redressable, or files after the expiration of the 60-day period, which leads automatically to dismissal of the complaint as untimely, *see Spannaus v. Fed. Election Comm'n*, 990 F.2d 643, 644 (D.C. Cir. 1993) (district court lacks jurisdiction over any petition for review filed more than 60 days after the date of dismissal). As discussed below, because plaintiffs' challenge to a Commission policy survives the dismissal of any particular complaint, plaintiffs have standing and the APA authorizes this Court's review.

The Commission's standing argument also ignores the nature of the relief plaintiffs are seeking to redress the policy at issue in Count II. Contrary to the Commission's suggestion, plaintiffs do not seek to vindicate the rights of other administrative complainants not before this Court. *See* D's Mem. at 28, 35.[39] Nor are they seeking to redress the "the timing of the Commission's notification to them about MUR 5908." *Id.* Rather, as set forth in the amended complaint, plaintiffs seek declaratory and injunctive relief under the APA designed to prospectively ensure the FEC's compliance with its statutory obligations under the FECA for all aggrieved parties. *See* Amended Complaint, Prayer for Relief, ¶¶ 3-4. And plaintiffs seek this relief as an individual and an entity that routinely file complaints with the FEC. *See* Amended

[39] The FEC erroneously construes the evidence of the FEC's illegal policy set forth in the Amended Complaint (¶¶ 57-66) as presenting challenges by plaintiffs to each specific MUR cited and seeking relief for each of those cases. *See* D's Mem. at 28, 29. To the contrary, the listed MURs are cited only as representative examples of the FEC's policy and how it is implemented in practice. Moreover, as discussed, plaintiffs' requested relief is prospective in nature, meaning it would have no effect on these cases.

Complaint at ¶¶ 6 ("CREW . . . files complaints with the FEC when it discovers violations of the FECA"), 7 (noting nine complaints of CREW then pending before the FEC for final action), and 11 ("When Ms. Sloan discovers a violation of the FECA, she submits complaints against violators pursuant to her rights under the law, 2 U.S.C. § 437g(a)(1)"). As the Amended Complaint illustrates, plaintiffs seek to vindicate their own ongoing interests, not those of other complainants.

Further, the Commission claims plaintiffs are not "aggrieved parties" within the meaning of the FECA because the relief they seek for Count II does not fall within the limited remedies recognized by that Act, and Count II is therefore non-reviewable. D's Mem. at 28-29. According to the FEC, plaintiffs can only be "aggrieved parties" for purposes of challenging the Commission's treatment of their own, specific administrative complaint, D's Mem. at 29. From this the FEC reasons that granting the requested relief here "rests on the interests of persons not before the Court – other administrative complainants whose complaints have been or may be dismissed," *id.* at 35, meaning that plaintiffs fall outside the category of "aggrieved parties" authorized to bring suit under the FECA.

As discussed above, plaintiffs seek to vindicate their own interests, not those of third parties not before the Court. In any event, even if Congress through the FECA had not authorized plaintiffs' challenge to the FEC's policy at issue – which plaintiffs do not concede – this Court would have jurisdiction under the APA to review Count II, to give proper effect to the statutory right to judicial review conferred on any "party aggrieved" by 2 U.S.C. §

437g(a)(8)(A).[40] Plaintiffs have brought Count II specifically under the APA. *See* Amended Complaint, ¶ 2:

> This is an action for declaratory and injunctive relief under the APA, 5 U.S.C. § 706, and 2 U.S.C. § 437g(a), challenging as arbitrary, capricious, and contrary to law the policy of the FEC, as reflected in its implementing regulations and ongoing practices, of failing to provide complainants with the statutorily mandated minimum of 60 days' notice of its dismissal of complaints and the basis for those dismissals.

The D.C. Circuit has recognized that where, as here, the FECA does not provide expressly for judicial review, an action may be brought under the judicial review provisions of the APA, 5 U.S.C. § 701, *et seq. Perot v. Fed. Election Comm'n*, 97 F.3d 553, 560 (D.C. Cir. 1996). The plaintiffs in *Perot* were challenging in part a regulation the FCC promulgated that exempted certain activity from the definition of "expenditure" under the FECA. *Id.* The D.C. Circuit noted the absence in the FECA of "provisions governing judicial review of regulations," which led it to conclude that "an action challenging its implementing regulations should be brought under the judicial review provisions of the Administrative Procedure Act." *Id.* Here, too, where plaintiffs are challenging a policy of the FEC that has the effect of a regulation, although adopted without notice and comment, review of their challenge to that policy properly lies under the APA.

Of note, the Commission's memorandum in support of its motion to dismiss contains no reference to or discussion of *Perot*, despite its status as binding Circuit precedent. Instead, the

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[40] Circuit precedent supports the Court's review under the FECA as well. *See*, *e.g.*, *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (recognizing judicial review under the FECA where "[n]othing in the text of the FECA's judicial review prescription" precluded review of the kind of dismissal at issue (one resulting from a deadlock vote)).

Commission argues that because the FECA "forbids the broad declaratory and injunctive relief that plaintiffs seek," the Court lacks jurisdiction to review this matter under the APA. D's Mem. at 35. Indeed, the Commission goes so far as to argue that requiring it to simultaneously provide complainants with notice of the Commission's vote of dismissal and its statement of reasons would "contradict" the FECA. *Id.* To the contrary, nothing in the language of the FECA, either expressly or impliedly, forbids the relief plaintiffs seek, and the *Perot* case makes clear that where, as here, the FECA is silent as to the availability of judicial review, the APA can provide a basis for suit.

In the final analysis, the Commission's argument against review under the APA rests not on any principle of standing or language in the FECA precluding review, but the Commission's merits argument that requiring it to comply with the language and intent of section 437g(a)(8) would deprive the Commission of needed "flexibility." *Id.* As discussed below, this argument is factually inaccurate and reflects a fundamental disregard for the Commission's statutory responsibilities.

IV. THE FEC'S POLICY AND PRACTICE OF DENYING AGGRIEVED PARTIES 60 DAYS IN WHICH TO SEEK JUDICIAL REVIEW IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The FEC's defense of its policy and practice of denying aggrieved parties 60 days in which to seek judicial review rests on a claim of nearly unfettered discretion to ignore the FECA at will simply because the agency deems some if its provisions not administratively convenient. The Commission's defense also reflects a fundamental misunderstanding of the nature of the plaintiffs' challenge and the relief they seek, which would not, contrary to the Commission's claim, require this Court to inject itself into the day-to-day operations of the FEC.

The statutory language at issue grants to "aggrieved parties" the right to petition from any dismissal of a complaint by the FEC "within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B). Cases interpreting this provision reinforce the significance of the 60-day period: any complaint filed outside that time period must be dismissed as untimely. *See Spannaus v. Fed. Election Comm'n*, 990 F.2d at 644. The dispute here centers on whether the FEC is free to define the "date of the dismissal" in a way that deprives, or threatens to deprive, aggrieved parties of their full statutory rights under section 437g(a)(8).

There is no dispute that the FEC considers "the date of the dismissal" to be the date on which the Commission holds its secret vote, no matter how long it delays advising the parties of the outcome of or explanation for that vote. Nor is there any dispute that in most cases, the FEC waits at least days, and sometimes weeks, before advising the parties of the outcome of a Commission vote. Equally undisputed is the weeks, if not months, the FEC typically consumes before providing the parties with an explanation for the Commission's vote of dismissal. The undisputed effect of the FEC's policy and practice is to shorten, sometimes down to merely a handful of days, if not eliminate the time afforded aggrieved parties to consider whether to seek judicial review.

To address this problem plaintiffs are not asking the Court to rewrite the statute, as the Commission maintains (D's Mem. at 30-31), but simply to give full effect to the statutory language as enacted by Congress. Aggrieved parties cannot effectively exercise their right to consider and seek judicial review if the Commission fails to afford them adequate time – defined by Congress in section 437g(a)(8) as 60 days – to evaluate whether to seek review and on what grounds. Of necessity, that evaluation must include consideration of the grounds provided by the

voting Commissioners for their decision to dismiss a complaint. The D.C. Circuit, in *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, recognized the critical importance of the Commission's explanation for any dismissal vote. Without a statement of reasons from the Commission when it "does not act in conformity with its General Counsel's reading of Commission precedent," a reviewing court "cannot intelligently determine whether the Commission is acting 'contrary to law.'" *Id. See also City of Gallup v. Fed. Energy Regulatory Comm'n*, 702 F.2d 1116, 1123 (D.C. Cir. 1983) ("The reasons stated by the agency for its actions are an essential element of judicial review . . ."); *cf. Common Cause v. Fed. Election Comm'n*, 906 F.2d 705, 706-7 (D.C. Cir. 1990) (where the Commission had adopted the General Counsel's recommendation to find no probable cause without providing an opinion, the court deemed it "impossible to discern whether the FEC applied the applicable statute and regulation," and remanded the matter to the FEC). Just as a reviewing court cannot evaluate the merits of a Commission action without knowing the grounds for that action, so too an aggrieved party cannot evaluate the merits of a vote of dismissal and whether to seek judicial review without knowing the grounds for the dismissal.

Indeed, filing a complaint in district court challenging a dismissal without knowing the grounds for the dismissal likely would violate a plaintiff's obligations under Fed. R. Civ. P. 11. Under that rule, an attorney's signature on a pleading – defined by Rule 7(a) to include a complaint – represents to the court, among other things, that the factual contentions in the pleading either "have evidentiary support" or "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Without knowing the factual record developed by the Commission and the factual underpinnings of the

Commission's vote of dismissal – the situation where a party has yet to receive the Commission's statement of reasons – an aggrieved party lacks the ability to certify that its claims have the requisite evidentiary support.[41] Nor can such a party represent that the "claims, defenses, and other legal contentions" in the complaint "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," as Rule 11 requires, without knowing the legal basis for the Commission's vote of dismissal also set forth in the statement of reasons. *See* Rule 11(b)(2). The FEC's policy of delaying issuance of its statement of reasons, often long past the expiration of the 60-day period, leaves an aggrieved party with a true Hobson's choice: proceed with a complaint, risking sanctions under Rule 11, or forfeit any judicial review. This is far from a theoretical dilemma, as the Commission often votes only after significant investigation by the general counsel and the development of facts not previously known or available to the complainant. Yet the Commission would have an aggrieved complainant proceed without any knowledge of what that investigation uncovered and its relevance to the legal claims at issue.

The Commission also contends that Circuit precedent is at odds with the plaintiffs' challenge to a Commission policy that deprives aggrieved parties of their full statutory rights, citing *Spannaus* and *Jordan v. Fed. Election Comm'n*, 68 F.3d 518 (D.C. Cir. 1995). *See* D's Mem. at 31-32. In *Spannaus*, however, the date of dismissal was "undisputed," and therefore the court had no occasion to consider the issue presented here. 990 F.2d at 643. In *Jordan* the court

[41] Complainants such as plaintiffs here are at a particular disadvantage as they play no part in developing the administrative record, are shut out completely from the administrative process, and ultimately are provided only that information the Commission decides to place in the public record.

was faced with choosing either the date of the general counsel's letter informing the plaintiff of the Commission's vote or the date of the Commission's vote to dismiss as the operative date for purposes of triggering the 60-day period for seeking judicial review. Reasoning that section 437g(a)(8)(B) speaks only of an action by the Commission, not the general counsel, the court had no choice but to rely on "the only action 'by the Commission' here . . . the vote to dismiss." 68 F.3d at 519. The court in *Jordan* expressly reserved judgment on the issue of whether the clock would start to run on the date of dismissal if the Commission tried to "avoid review by withholding notice of its decision until the 60-day period expired." *Id.* Neither *Spannaus* nor *Jordan* presented the specific issue raised here – whether the Commission's policy and practice of using the vote to dismiss as the date on which the clock starts to run deprives an aggrieved party of its rights to review guaranteed by the FECA.

Here, the Commissioners' issuance of a statement of reasons is both an action "by the Commission" and a necessary step for this Court's review of the merits of any dismissal. *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131. Despite its critical importance to the review process for both aggrieved parties and a reviewing court, the Commission insists on the need for "flexibility in timing its voting decisions and subsequent disclosure of its decision-making." D's Mem. at 32. According to the Commission, interpreting the statute to require it to give aggrieved parties 60 day's notice of any dismissal "would require the Commission to somehow predetermine the very outcome that is subject to a vote." *Id.* The Commission argues further that such an interpretation is "plainly unreasonable" and would "interfere with the Commission's judgment as to how best to use its limited resources." *Id.* at 32-33.

These arguments cannot withstand close scrutiny. First and foremost, the Commission's stated desire for the maximum amount of "flexibility" must yield to the statutory rights and commands in the FECA, which include an aggrieved party's right to 60 days' notice of an dismissal in order to effectively evaluate whether or not to seek further review. Nor, contrary to the Commission's claim, are the plaintiffs seeking to impose on the Commission a specific regime that would require it to "predetermine" the outcome of a vote. D's Mem. at 32. The Commission for unstated reasons has elected to treat the date of its secret vote as the "date of the dismissal." Nothing in the statute compels this practice or precludes the Commission from designating as the "date of the dismissal" the date on which it provides parties with its statement of reasons. Indeed, such a designation would be most consistent with the language of section 437g(a)(8).

The Commission's recent treatment of MUR 6200, a complaint brought by CREW alleging violations of the FECA by Senator John Ensign, Michael and Sharon Ensign, the Ensign for Senate Committee, the Battle Born PAC, and Lisa Lisker as treasurer of both the Ensign for Senate Committee and the Battle Born PAC, belies the Commission's claim here that it cannot issue a Statement of Reasons at the same time as it votes for dismissal. On November 18, 2010, the Commission advised CREW of the Commission's vote of November 16, 2010 – certified on November 18, 2010 – to dismiss the complaint. *At the same time*, the Commission forwarded to CREW the Statement of Reasons setting forth the basis for the Commission's decision, which the voting commissioners signed on November 17, 2010.[42] These actions by the Commission in the first complaint brought by CREW to come before it since plaintiffs filed this lawsuit prove

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[42] These documents are attached as Exhibit 5.

the reasonableness, ease, and practicality of the relief requested here. Having now demonstrated the ability to distribute a proposed Statement of Reasons in advance of the Commission meeting to vote on dismissal, the FEC can no longer claim such a course is not possible.[43]

The FEC's arguments also fail to acknowledge the current regime under which the federal court system operates that serves the interests of the courts in judicial economy and litigants in having clarity on any deadline for appellate review. Rule 58 of the Federal Rules of Civil Procedure requires district courts to set forth "[e]very judgment and amended judgment" in a "separate document," subject to limited exceptions. The "sole purpose" of the separate judgment rule "was to clarify when the time for an appeal begins to run." *United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998), citation omitted. The provision was first adopted in 1963 "to prevent uncertainty 'over what actions . . . would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty.'" *Id.*, citation omitted. Of significance here, the Rule requires district court judges to issue a separate judgment regardless of when they announce their ruling, and there is no evidence this requirement interferes in any way with the courts' need for flexibility. Similarly, the time for seeking further review of a U.S. Court of Appeals ruling runs from "the date of entry of the judgment or order sought to be reviewed," Sup. Ct. R. 13(3), not when the appellate panel holds its vote. *See also* Fed. R. App. P. 41 (requiring clerk to release opinions of the appellate courts "immediately upon their announcement from the bench, or as the Court otherwise directs.").

The regime under which federal courts operate completely undermines the Commission's

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[43] The Commission essentially follows this same procedure in issuing advisory opinions: it circulates multiple drafts before the Commission meeting, and when it appears no draft will get a majority the Commission postpones the vote to try and revise the opinion.

claim here that it cannot function effectively unless it is excused from the requirement of issuing an explanation of any dismissal before the 60-day period for seeking judicial review expires. The Commission goes so far as to claim it need not provide complainants with any explanation for a dismissal, D's Mem. at 32 n.23, a claim that reflects its callous disregard for the requirements of the FECA, as interpreted by the D.C. Circuit. *See Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131. Nor would fulfilling this requirement cause the Commission to "abandon its other responsibilities." D's Mem. at 33. As explained here, full compliance with section 437g(a)(8) requires only that the Commission treat as the "date of the dismissal" the date on which it issues its statement of reasons. Such a policy and practice would neither deprive the Commission of any needed flexibility nor require it to place any particular administrative complainant "at the head of the queue," as it claims (D's Mem. at 34). Further, plaintiffs are not asking this Court to "micromanage" the FEC, D's Mem. at 33-34,[44] but simply to require the Commission to comply with its statutory obligations and discontinue its policy and practice of depriving aggrieved parties of the rights guaranteed them under section 437g(a)(8).

Finally, the FEC's policy and practice challenged here threatens to deprive plaintiffs and other aggrieved parties of due process of law. Without question plaintiffs have a protected property interest in pursuing judicial review of the Commission's dismissal of their administrative complaints. *See*, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances."). Just as plainly, where

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[44] In this regard it bears noting that plaintiffs are not complaining of few days' delay, but a delay of weeks, months, and sometimes longer in the Commission's issuance of the statement of reasons explaining the basis for its dismissal of a complaint.

plaintiffs and other aggrieved parties are deprived of the statutorily guaranteed 60-day period to consider whether to seek judicial review, they have not received all the process they are due, particularly where the Commission fails to provide any statement of reasons within 60 days of its secret vote of dismissal. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quotation omitted). *Cf. Spannaus v. Fed. Election Comm'n*, 1992 U.S. Dist. LEXIS 3558, at *4 (D.D.C. (1992) (recognizing possibility of deprivation of due process "where a party receives notice so near the filing deadline"). Moreover, this is not a case where the Commission has no other alternatives to treating the date of the secret vote as the "date of dismissal." As discussed above, the best option and one that both gives full effect to section 437g(a)(8) and accommodates the administrative needs of the Commission is to treat as the date of dismissal the date on which the Commission issues its statement of reasons. *See Gonzalex-Julio v. Immigration and Naturalization Serv.,* 34 F.3d 820, 823-24 (9th Cir. 1994).

CONCLUSION

For the foregoing reasons, the Court should deny defendant's motion to dismiss the amended complaint.

Respectfully submitted,

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