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.	No. 1:10-cv-01350-RMC MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MOTION
TO DISMISS AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6), defendant Federal Election Commission moves to dismiss this case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The grounds for the motion are fully set forth in the accompanying memorandum.

Respectfully submitted,

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November 15, 2010

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FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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I. INTRODUCTION

Defendant Federal Election Commission ("Commission" or "FEC") moves this Court to dismiss the amended complaint of Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiffs lack standing to pursue their claim that the Commission's dismissal of their administrative complaint in MUR 5908 was contrary to law because they have alleged no concrete and particularized injury. Plaintiffs appear to seek only to have the Commission compel two political committees (the leadership committee and presidential campaign committee of Congressman Duncan Hunter) to report disbursements for about $10,000 in travel expenses as in-kind contributions. However, the D.C. Circuit has held that re-labeling of known activity does not create informational injury and cannot support standing. Even if plaintiffs had standing, they could not show that the Commission abused its discretion when it found that there was insufficient evidence that the disbursements were unlawful; in any case, any potential violation of law was *de minimis* and subject to the agency's exercise of its prosecutorial discretion not to proceed.

Plaintiffs also lack standing to pursue their claim that the Commission must provide administrative complainants with notice and an explanation of dismissals of their complaints 60 days before the deadline for them to seek judicial review of the dismissal under 2 U.S.C. § 437g(a)(8), a provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA" or "Act"). Plaintiffs have alleged no specific and concrete injury from not having had 60 days in which to review these materials in deciding whether to seek judicial review in MUR 5908. Even if plaintiffs could establish an injury in fact, they cannot show redressability. They have already brought their claims to court twice, and the Court can do nothing now to provide plaintiffs

additional relief regarding the time they had to consider the Commission's reasons for dismissing their administrative complaint. Moreover, plaintiffs lack standing to pursue their "policy and practice" claims on behalf of others under section 437g(a)(8), which permits complainants to seek review only of the dismissals of their own complaints. On the merits, plaintiffs' "policy and practice" allegation fails to state a claim upon which relief can be granted under section 437g(a)(8) or the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA"), because plaintiffs' claim is contrary to FECA's plain language and D.C. Circuit precedent.

For all these reasons, plaintiffs' complaint is not justiciable and should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

II. BACKGROUND

A. Legal Background

The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress authorized the Commission to "formulate policy" under FECA, *see, e.g.*, 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions. 2 U.S.C. §§ 437d(a)(7), (8); 437f; 438(a)(8). *See also Buckley v. Valeo*, 424 U.S. 1, 110-111 (1976). The Commission is also authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1)-(2), and has exclusive jurisdiction to initiate civil enforcement actions in the United States district courts. 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging violations of the Act. 2 U.S.C. § 437g(a)(1)*; see also* 11 C.F.R. § 111.4. The complaint can lead to Commission enforcement proceedings and possible civil suit by the agency with

respect to the alleged violations. *See generally* 2 U.S.C. §§ 437g(a)(2)-(6). However, before the agency may file suit, the Act requires that it take the following steps: find "reason to believe" a violation has occurred; conduct an investigation of the matter; find "probable cause to believe" a violation has occurred; and lastly, attempt to resolve the matter through conciliation. *See id.* Under 2 U.S.C. § 437g(a)(12), Commission enforcement activity generally must remain confidential until the relevant matter is closed, after which materials related to the matter are placed on the public record.

Section 437g(a)(8)(A) authorizes only limited judicial review of FEC enforcement decisions. Specifically, administrative complainants must satisfy standing and other jurisdictional requirements to file suit to challenge "a failure of the Commission to act on such complaint[s]" within 120 days after the complaint was filed or to challenge the dismissal of their complaints by the Commission. 2 U.S.C. § 437g(a)(8)(A). *See, e.g. CREW v. FEC*, 401 F. Supp. 2d 115 (D.D.C. 2005) (section 437g(a)(8) suit dismissed on standing grounds), *aff'd,* 475 F.3d 337 (D.C. Cir. 2007). A complainant must file a dismissal suit "within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B).

"A court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). The sole remedy the district court may grant in such a case is a declaration "that the dismissal of the complaint or the failure to act is contrary to law" and an order "direct[ing] the Commission to conform with such declaration within 30 days." 2 U.S.C. § 437g(a)(8)(C). *See Perot v. FEC*, 97 F.3d 553, 557-558 (D.C. Cir. 1996). If the Commission fails to conform to the court's declaration, the

administrative complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." 2 U.S.C. § 437g(a)(8)(C).

When the Commission follows the recommendation of its General Counsel and dismisses an administrative complaint, the General Counsel's report to the Commission provides the basis for judicial review. *FEC v. Democratic Senatorial Campaign Comm. ("DSCC"),* 454 U.S. 27, 38 & n.19 (1981) (rationale for the Commission's action may be gleaned by the reviewing court from the staff reports). *See also CREW*, 475 F.3d at 338-339. However, when the Commission rejects the General Counsel's recommendation to pursue a possible violation of the Act, the reasoning of the Commissioners who voted to dismiss the complaint, sometimes described as the "declining-to-go-ahead" Commissioners or the "controlling group," provides the basis for judicial review. *Common Cause,* 108 F.3d at 415-416; *FEC v. National Republican Senatorial Comm.,* 966 F.2d 1471, 1476 (D.C. Cir. 1992); *Common Cause v. FEC*, 842 F.2d 436, 439 (D.C. Cir. 1988). That reasoning is generally explained in a statement of reasons.

B. Procedural History

1. Plaintiffs' Administrative Complaint

In March 2007, plaintiffs filed an administrative complaint with the Commission alleging that Peace Through Strength Political Action Committee ("PTS PAC") and its treasurer violated various provisions of FECA and its implementing regulations.[1] The administrative complaint alleged that PTS PAC, the leadership PAC of Congressman Duncan Hunter,[2] financed both travel by Congressman Hunter and television advertisements in early primary and caucus states

[1] Administrative Complaint, MUR 5908 (Mar. 14, 2007) ("Admin. Compl."), available at http://eqs.nictusa.com/eqsdocsMUR/10044274374.pdf.

[2] A "Leadership PAC" is a political committee established by an elected official to support other candidates and party committees and to fund political pursuits of the officeholder apart from his own re-election. *See* 11 C.F.R. § 100.5(e)(6); *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 140 (D.D.C. 2005).

during late 2006 and early 2007 while Hunter was "testing the waters" whether to become a candidate for President of the United States in the 2008 elections.[3] The complaint was not explicit whether the travel costs violated the Act, but it alleged that PTS PAC's disbursements for the television advertisements resulted in at least $12,275 in excessive in-kind contributions by PTS PAC to Congressman Hunter and the Hunter Committee for his 2008 presidential campaign. Admin. Compl. ¶¶ 32-35 (Count III).

The Commission designated plaintiffs' administrative complaint Matter Under Review ("MUR") 5908 for administrative purposes. In January 2009, the Commission found "reason to believe" that several violations had occurred, including excessive contributions by PTS PAC in connection with the travel expenses; however, following the recommendations of the General Counsel, the Commission determined to take no action with respect to other allegations in the administrative complaint, including those related to the advertisements.[4] Following an administrative investigation as to the remaining allegations, the Commission's General Counsel made additional recommendations.[5] On June 29, 2010, the Commission concluded that there

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[3] Under the Act, an individual becomes a candidate for federal office (and thus triggers registration and reporting obligations under the Act) when his or her campaign either receives $5,000 in contributions or makes $5,000 in expenditures. 2 U.S.C. § 431(2). However, there is a limited exception for amounts raised and spent while an individual is "testing the waters" to decide whether to become a candidate. In that case, the Commission's regulations provide that the terms "contributions" and "expenditures" do not include funds received or payments made solely to determine whether an individual should become a candidate. 11 C.F.R. §§ 100.72(a), 100.131(a). Thus, before making a final decision whether to become a candidate, an individual may raise or spend more than $5,000 without triggering candidate status if his or her activities are permissible "testing the waters" activities, which include but are not limited to conducting polls, making telephone calls, and traveling. *Id.*

[4] *See* First General Counsel's Report, MUR 5908 (Jan. 18, 2008), available at http://eqs.nictusa.com/eqsdocsMUR/10044274452.pdf; Certification of Commission Action, MUR 5908 (Jan. 30, 2009), available at http://eqs.nictusa.com/eqsdocsMUR/10044274470.pdf.

[5] *See* General Counsel's Report #2, MUR 5908 (May 3, 2010), available at http://eqs.nictusa.com/eqsdocsMUR/10044274508.pdf.

was insufficient evidence to establish that "probable cause" existed (2 U.S.C. § 437g(a)(4)(A)) and, exercising its prosecutorial discretion in light of the minimal nature of any potential violation and other factors, determined to take no further action and close the file. Five of the six Commissioners voted to dismiss the administrative complaint; the sixth Commissioner did not vote.[6]

In a letter dated July 23, 2010, the Commission notified plaintiffs of the dismissal of MUR 5908.[7] The notification stated, *inter alia*, that the Commission had "instituted an investigation," but, "after considering the circumstances of this matter," had determined to take no further action and had closed the file on June 29. *Id.* The July 23 letter also informed plaintiffs that materials related to the matter would be placed on the public record within 30 days. *Id.*

On Monday, August 23, 2010, the five Commissioners who voted to dismiss the administrative complaint in MUR 5908 issued a joint statement of reasons, and the Commission made public portions of its file that further explain its June 2010 decision, as well as earlier decisions in the matter.[8] The Commission posted documents from its administrative file on its website on August 23 and 24, and sent the statement of reasons to the administrative

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[6] Certification of Commission Action, MUR 5908 (June 30, 2010), available at http://eqs.nictusa.com/eqsdocsMUR/10044274525.pdf; Statement of Reasons of Chairman Petersen and Commissioners Hunter, McGahn, Walther and Weintraub, MUR 5908 (Aug. 23, 2010) ("Statement of Reasons"), attached as Exhibit ("Exh.") 1 to this memorandum and also available at http://eqs.nictusa.com/eqsdocsMUR/10044274546.pdf.

[7] Letter from Camilla Jackson Jones to Melanie Sloan, MUR 5908 (July 23, 2010), available at http://eqs.nictusa.com/eqsdocsMUR/10044274527.pdf.

[8] Statement of Reasons. *See* 11 C.F.R. § 111.20(a); *see also* Notice 2003-25, Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426, 70427 (Dec. 18, 2003), available at http://www.fec.gov/agenda/agendas2003/notice2003-25/fr68n243p70426.pdf; Notice 2009-28, Statement of Policy Regarding Placing First General Counsel's Reports On The Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009), available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf.

complainants by facsimile and first-class mail on August 24.[9] CREW reposted portions of these materials on a CREW website on August 27, 2010.[10]

2. Plaintiffs' First Judicial Complaint

On August 11, 2010, less than two weeks after learning that their administrative complaint had been dismissed, plaintiffs initiated this lawsuit. (Complaint ("Compl.") (Doc. 1).) The complaint was filed eleven days before the Commission's regulatory deadline for making public materials from MUR 5908 and seventeen days before the statutory deadline (August 28, 2010) for filing suit under 2 U.S.C. § 437g(a)(8)(B).[11]

The sole issue plaintiffs raised in their original judicial complaint was the *timing* of the Commission's explanation of its dismissal of plaintiffs' administrative complaint in MUR 5908 and of other administrative complaints. Plaintiffs relied on FECA and the APA.

First, plaintiffs contended that the Commission's dismissal of MUR 5908 was contrary to law because the Commission did not explain its dismissal within the 60-day period under 2 U.S.C. § 437g(a)(8)(B), thereby allegedly depriving them of that statutory right to judicial review. (Compl. ¶14*; see also id.* ¶¶ 48-49.) In their prayer for relief, plaintiffs sought both a declaration pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's "dismissal of MUR 5908

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9 *See generally* http://eqs.nictusa.com/eqs/searcheqs (enter case number 5908). *See also* FEC Exh. 1, Letter from Assistant General Counsel Mark D. Shonkwiler to Melanie Sloan enclosing Statement of Reasons in MUR 5908 (Aug. 24, 2010).

10 *See* FEC Complaints, Fix the FEC, http://www.fixthefec.org/complaints (second entry dated August 27, 2010).

11 Under the Commission's procedures, since the Commission notified plaintiffs that their administrative complaint was dismissed by letter dated July 23, 2010, the date for making documents from the administrative file in the matter public was not until 30 days thereafter, *i.e.*, Sunday, August 22, 2010, eleven days after plaintiffs filed this lawsuit. *See* 11 C.F.R. § 111.20(a); Notice 2003-25, Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426, 70427 (Dec. 18, 2003), available at http://www.fec.gov/agenda/agendas2003/notice2003-25/fr68n243p70426.pdf

without providing a Statement of Reasons or other explanation for the dismissal is contrary to law" and an order "[r]emand[ing] the matter to the FEC with an order to conform to the declaration within 30 days." (Compl. at 14-15.)

Second, plaintiffs alleged (Compl. ¶¶ 32-46) that the Commission engages in a "pattern and practice" of "knowingly failing to issue" an explanation for dismissing an administrative complaint within 60 days of dismissing the complaint; plaintiffs described other Commission enforcement matters that were closed in 2008 and 2009, only one of which involved an administrative complaint filed by CREW or Sloan. (Compl. ¶¶ 32-46*; see also id.* ¶¶ 52-56.) Plaintiffs sought declaratory and injunctive relief as to these "pattern and practice" allegations. (Compl. at 15 (Prayer for Relief (3)-(4)).)

3. The Commission's First Motion to Dismiss

On October 12, 2010, the Commission moved to dismiss plaintiffs' judicial complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (FEC Mot. to Dismiss (Oct. 12, 2010) (Doc. 4).) The Commission argued that plaintiffs' claim that the agency failed to explain its dismissal of their administrative complaint became moot in August 2010 when the Commission made public a "statement of reasons" and other materials that explain its decision in MUR 5908. FEC Mem. (Oct. 12, 2010) (Doc. 4-1) at 9-11. These disclosures occurred before the statutory 60-day deadline for filing suit under section 437(g)(a)(8). The Commission argued that plaintiffs also lacked Article III standing to pursue this claim because they suffered no concrete injury as a result of the timing of the FEC's explanation of its dismissal, and because plaintiffs alleged no particular connection to the activities described in their administrative complaint that could have caused them any cognizable injury. *Id.* at 11-17.

In addition, the Commission argued that FECA provided no jurisdiction for plaintiffs to pursue their generalized claim that the Commission engages in a "pattern and practice" of not explaining dismissals of administrative complaints within 60 days. As the Commission explained, the Act does not provide for the equitable relief that plaintiffs sought on behalf of other past and future administrative complainants. *Id.* at 18-20. The Commission also argued that the APA provided no basis for plaintiffs to pursue their "pattern and practice" allegations, which also failed to state a claim upon which relief can be granted. *Id.* at 21-23. And the Commission argued that plaintiffs lack Article III and prudential standing to pursue their generalized claim on behalf of other complainants. *Id.* at 23-26.

4. Plaintiffs' Amended Complaint

On October 28, 2010, plaintiffs filed a new, two-count amended complaint. (Amended Complaint ("Am. Compl.") (Doc. 9).) *See* Fed. R. Civ. P. 15(a)(1)(B).[12] In their amended complaint, plaintiffs no longer claim that the Commission failed to provide an explanation within 60 days of the dismissal of their administrative complaint. Instead, plaintiffs' new "Claim One" challenges the dismissal decision on the merits, alleging that it was "arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A)." (*See* Am. Compl. ¶ 71.) In addition, plaintiffs' amended complaint expands their prior claim that the Commission had an unlawful "pattern and practice" of failing to provide explanations for dismissals of administrative complaints within 60 days of the dismissal. Plaintiffs now allege in their new Claim Two that 2 U.S.C. § 437g(a)(8) requires the FEC to provide complainants notice

[12] Plaintiffs also filed an opposition to the Commission's first motion to dismiss, arguing that the filing of their amended complaint superseded their original complaint and thereby mooted the Commission's motion to dismiss. (Plaintiffs' Opposition to Defendant's Motion to Dismiss (Oct. 28, 2010) (Doc. 8).) On November 3, 2010, the Court *sua sponte* denied the Commission's motion to dismiss without prejudice.

of any dismissal of their complaint and the basis for such a dismissal a full 60 days prior to the deadline for seeking judicial review. (*See id*. ¶¶ 74-78.) Describing the dismissals of additional administrative complaints filed by third parties in prior years (*id.* ¶¶ 56-67), plaintiffs claim that the Commission has an unlawful "policy and practice of failing to provide the statutorily mandated 60 days' notice of dismissals and the basis for such dismissals" (*id.* ¶ 77). Plaintiffs seek a declaration that the Commission's actions are contrary to law and an "injunction compelling defendant FEC to provide 60 days' notice of dismissals and a Statement of Reasons or other explanation for dismissing any complaint." (Am. Compl. ¶ 78*; see also id.* at 21 (Prayer for Relief ¶¶ 3-4).)

III. THE COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' amended complaint should be dismissed. Plaintiffs lack standing to pursue their claim that the Commission's dismissal of their administrative complaint in MUR 5908 was contrary to law because they have alleged no concrete and particularized injury. Instead, they seek merely to have the Commission compel two political committees to report known activity differently. Even if the plaintiffs could demonstrate standing, under the applicable highly deferential standard of review, they cannot show that the Commission acted contrary to law when it concluded that there was insufficient evidence to find a violation of FECA. And because any potential violation was *de minimis*, the agency acted well within its discretion in deciding not to proceed.

Plaintiffs also lack standing to pursue their claim that FECA requires the Commission to provide administrative complainants with notice and an explanation of dismissals of their complaints 60 days before the deadline for seeking judicial review under 2 U.S.C. § 437g(a)(8).

In any event, plaintiffs' 60-day allegation fails to state a claim upon which relief can be granted because FECA does not support plaintiffs' unreasonable interpretation, which is contrary to D.C. Circuit precedent. Accordingly, the Court should dismiss this case pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

A. Legal Standards for Motions to Dismiss for Lack of Subject Matter Jurisdiction

Subject matter jurisdiction is both a statutory requirement and a constitutional requirement under Article III. *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003). Therefore, when reviewing a motion to dismiss for lack of subject matter jurisdiction, each court has "an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 5 (D.D.C. 2004) (internal quotation marks and citation omitted). In evaluating such a motion, courts review the complaint liberally and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004). To determine whether it has jurisdiction over a claim, a court may consider materials outside the pleadings. *Settles v. United States Parole Comm'n.*, 429 F.3d 1098, 1107 (D.C. Cir. 2005). The party claiming subject matter jurisdiction bears the burden of demonstrating that jurisdiction exists. *Khadr v. United States,* 529 F.3d 1112, 1115 (D.C. Cir. 2008).

B. Plaintiffs Have Alleged No Injury Sufficient to Support Article III Standing to Challenge the Dismissal of Their Administrative Complaint in MUR 5908

1. Plaintiffs Must Establish Article III Standing

"Any person" who believes that the Act has been violated may file an administrative complaint with the Commission, 2 U.S.C. § 437g(a)(1), but only complainants who have constitutional standing may seek judicial review under 2 U.S.C. § 437g(a)(8) of the

Commission's actions on the complaint. "Section 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause,* 108 F.3d at 419; *accord, e.g., CREW v. FEC,* 475 F.3d 337 (D.C. Cir. 2007); *Judicial Watch, Inc. v. FEC,* 180 F.3d 277 (D.C. Cir. 1999). *See Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 101 (1998) (holding that a plaintiff's standing must be determined to establish the court's jurisdiction before the court may hear the case and reach the merits); *The Grand Council of the Crees of Quebec v. FERC,* 198 F.3d 950, 954 (D.C. Cir. 2000) (same).

Standing "focuses on the complaining party to determine 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Am. Legal Found. v. FCC,* 808 F.2d 84, 88 (D.C. Cir. 1987)) (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). To withstand a motion to dismiss for lack of standing, a plaintiff must allege facts "demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990) (internal quotation marks omitted). Moreover, "[s]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC,* 128 S. Ct. 2759, 2769 (2008) (internal quotation marks and citations omitted).

To have Article III standing, a plaintiff must establish: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)). The injury alleged

cannot be remote, speculative, or abstract; it must have occurred or be certainly impending. *NTEU v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996).

2. Plaintiffs Fail to Allege a Concrete and Particularized Injury under Article III

Plaintiffs' amended complaint, like their initial complaint, fails to allege an Article III injury. Plaintiffs appear to rest their effort to establish standing entirely on their general claim that the Commission's dismissal of MUR 5908 deprives them of information. (*See* Am. Compl. ¶¶ 8-10.) The Supreme Court has held that certain plaintiffs suffered an injury-in-fact when "[t]here [wa]s no reason to doubt their claim that the information [they lacked] would help them (and others to whom they would communicate it) to evaluate candidates for public office." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also, e.g., Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003) (defining "informational injury" as "that injury caused when voters are deprived of useful political information at the time of voting"). But here, plaintiffs do not meet the requirements for an Article III informational injury because they have not identified any specific information they allegedly lack, let alone how any missing information would be "useful in voting." *Common Cause*, 108 F.3d at 418.

Like the unsuccessful plaintiffs in *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), and similarly situated plaintiffs in other cases in this Circuit, plaintiffs do not seek additional facts. Instead, they seek "a legal conclusion that carries certain law enforcement consequences," *id.* at 1075, specifically the determination that certain travel expenses that plaintiffs already know were paid by PTS PAC should have been reported as in-kind contributions rather than merely as disbursements — the relief plaintiffs request in Claim One of their amended complaint. (*See* Am. Compl. ¶ 72.) Thus, plaintiffs' real desire is "for the Commission to 'get the bad guys,' rather than disclose information." *Common Cause*, 108 F.3d at 418. An interest

in the proper enforcement of the law, however, is not a justiciable interest. "[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." *Id.* at 417; *accord, e.g., Wertheimer*, 268 F.3d at 1074; *Judicial Watch*, 293 F. Supp. 2d at 47.

Although CREW and Sloan generally allege an informational interest (*see* Am. Compl. ¶¶ 8-10), their amended complaint does not allege a concrete injury from any particular missing information. The complaint states that plaintiff Sloan is a United States citizen and a registered voter and asserts that, as such, she "is entitled to receive all the information the FECA requires candidates to report publicly." (Am. Compl. ¶ 10.) But the amended complaint nowhere connects this general assertion about Sloan as a voter to PTS PAC, the focus of plaintiffs' administrative complaint. An injury-in-fact must be "particularized" as well as "concrete." *Lujan*, 504 U.S. at 560 (internal quotation marks and citation omitted). "[P]articularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id*. at 560 n.1. The amended judicial complaint specifies no supposedly missing information that would aid Sloan as an individual voter. And as for CREW, "[u]nlike the plaintiffs in *FEC v. Akins* . . ., who wanted certain information so that they could make an informed choice among candidates in future elections, CREW cannot vote; it has no members who vote; and because it is a § 501(c)(3) corporation under the Internal Revenue Code, it cannot engage in partisan political activity." *CREW*, 475 F.3d at 339.[13]

[13] Plaintiffs' administrative complaint alleged additional reporting defects, but plaintiffs do not pursue those allegations in their judicial complaint and thus cannot rely upon them to demonstrate standing. In any event, none of the formerly alleged defects deprived plaintiffs of information that would support standing. Plaintiffs' administrative complaint alleged that PTS PAC and its treasurer had failed to disclose certain disbursements for television advertisements, but PTS PAC had already disclosed those disbursements on previous reports. (*See* Factual and Legal Analysis for PTS PAC and Meredith G. Kelley, as Treasurer, MUR 5908 (Feb. 19, 2009)

Plaintiffs claim (Am. Compl. ¶ 42) that PTS PAC and Hunter for President should have reported approximately $10,200 in travel expenses paid by PTS PAC as in-kind contributions to Hunter for President, but plaintiffs already have the relevant facts and thus have suffered no informational injury. *See Alliance for Democracy*, 362 F. Supp. 2d at 145 (concluding that "the plaintiffs lack standing because they already have the information they are seeking and therefore have not suffered an informational injury"); *Judicial Watch*, 293 F. Supp. 2d at 47 (footnotes omitted) (noting that the plaintiff contributor was already "aware of the facts underlying his own alleged contributions to [the Senator's] campaign" and concluding therefore that his administrative complaint was "unlikely" to "yield additional facts about [the Senator's] alleged reporting violations"); *CREW*, 475 F.3d at 339-40. Even before plaintiffs filed their administrative complaint, PTS PAC's publicly available campaign finance filings provided some information about travel the committee financed. Statement of Reasons at 2. Nor can plaintiffs claim not to know that Hunter's "leadership PAC" paid for his speaking trips in late 2006 and early 2007. News reports revealed that fact and related facts, and plaintiffs cited those sources in their administrative complaint. Admin. Compl. ¶¶ 8, 25 and accompanying Exh. B, E. Documents from MUR 5908 that the Commission released on its website also include the information. *See* Statement of Reasons and General Counsel's Report #2; *CREW*, 475 F.3d at 339 ("any citizen who wants to learn the details of the transaction . . . can do so by visiting the

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at 6-7, available at http://eqs.nictusa.com/eqsdocsMUR/10044274439.pdf; General Counsel's Report #2 at 11-13; Statement of Reasons at 2.) Thus, plaintiffs suffered no informational injury from the Commission's decision not to pursue those alleged violations. The administrative complaint also alleged that PTS PAC had violated the Act by registering with the FEC as a multicandidate committee rather than as a candidate committee. But because PTS PAC was already registered and filing periodic reports with the Commission, plaintiffs again were not deprived of any information that would create standing.

Commission's website"). And plaintiffs' current judicial complaint *points to no other facts* about MUR 5908 that might serve to support informational standing.

The amended complaint also reveals plaintiffs' real goal: legal determinations that PTS PAC and Hunter for President violated the law by not reporting the travel payments as in-kind contributions. For example, the amended complaint states that CREW "seeks to expose the unethical and illegal conduct of those involved in government." (Am. Compl. ¶ 6.) CREW asserts that it is "hindered in its programmatic activity" when the FEC "fails to properly administer the FECA's reporting requirements, which provide CREW with the only source of information to determine if . . . [a] regulated entity is complying with the FECA." *(Id.* ¶ 9.) Sloan in effect describes herself as a violation detector: She is "personally committed to ensuring the integrity of federal elections." (*Id.* ¶ 11.) She "reviews campaign finance filings and media reports to determine whether candidates and political committees comply with the FECA's requirements," and, when she "discovers a violation of the FECA, she submits complaints against violators." (*Id.*) Thus, the amended complaint asserts that plaintiffs are "harmed when the FEC fails to properly administer the FECA." (*Id.* ¶ 12.) However, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

Plaintiffs' prayer for relief further shows their law enforcement goal. They want the Commission to draw the legal conclusion that PTS PAC's disbursements were unlawful in-kind contributions. *See Wertheimer*, 268 F.3d at 1074-1075 ("[C]ounsel for appellants was asked

what facts, specifically, were not being disclosed. Counsel responded that the 'fact' of 'coordination' was being withheld. But 'coordination' appears to us to be a legal conclusion that carries certain law enforcement consequences."). In particular, plaintiffs request "a declaratory order that defendant FEC's failure to require PTS PAC and Hunter for President to amend their FEC reports to reflect the receipt of in-kind contributions by PTS PAC to Hunter for President is contrary to law in violation of 2 U.S.C. § 437g(a)(8)." (Am. Compl. ¶ 72.)[14] In other words, plaintiffs do not lack factual information, but merely disagree with the Commission about the legal consequences of the information they already have. The Commission found that there was insufficient evidence to conclude that the travel expenses at issue should be considered in-kind contributions, and that even if they were so considered, the amounts were *de minimis* and, in the exercise of its prosecutorial discretion, the agency decided to close MUR 5908. Statement of Reasons at 2. CREW and Sloan obviously disagree with the Commission's legal conclusions and its evaluation of the facts, but those disagreements cannot support plaintiffs' claim of an informational injury.[15] As the D.C. Circuit has held, "[i]f the information withheld is simply the fact that a violation of FECA has occurred," the plaintiff has not suffered the type of injury that satisfies the standing requirement. *Common Cause*, 108 F.3d at 417.

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[14] The proposed declaratory relief covers Hunter for President, but, according to plaintiffs' own description of their administrative complaint, that complaint was "against" only PTS PAC and its treasurer. (*See* Am. Compl. ¶ 1.)

[15] Plaintiffs' request that the Commission be ordered to require the two political committees to report this activity differently shows that plaintiffs have also failed to meet the redressability requirement for Article III standing. "[T]he Commission has no authority to order anyone to report anything. . . . The Commission's responsibility is to disclose what others report." *CREW*, 475 F.3d at 340. Even in a *de novo* enforcement action in federal district court, "[t]here is no requirement that the Commission seek, or that a court grant, a particular form of redress." *Id.* Thus, it is speculative that a favorable decision would redress plaintiffs' alleged injury. *See Friends of the Earth*, 528 U.S. at 180-81.

The *Wertheimer* decision controls this case. There, several individuals associated with "good government" groups alleged that the Commission had failed to identify certain disbursements by the major political parties as impermissible coordinated expenditures. *Id.* at 1071-73. Relying on *Akins*, the plaintiffs contended that the Commission's failure deprived them of "required information about the source and amount of candidates' financing." *Id.* The D.C. Circuit held, however, that the plaintiffs "do not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures." *Id.* at 1075. The plaintiffs lacked standing because they not only failed "to show . . . that they [we]re directly being deprived of any information," but also that "the legal ruling they [sought] might lead to additional factual information." *Id.* at 1074. CREW and Sloan have failed the same way here. Therefore, this Court lacks jurisdiction under 2 U.S.C. § 437g(a)(8) to hear their challenge to the Commission's dismissal of MUR 5908.

C. Plaintiffs Cannot Show that the Dismissal of the Complaint in MUR 5908 Was Contrary to Law or an Abuse of the Commission's Discretion

In Claim One, plaintiffs allege that the Commission's "dismissal of the [administrative] complaint in MUR 5908 [was] arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. 437g(a)(8)(A)." (Am. Compl. ¶ 71.) In particular, plaintiffs' amended complaint focuses on their claim that approximately $10,200 in travel expenses that PTS PAC paid in late 2006 and early 2007 were in-kind contributions to Hunter for President because Congressman Hunter had moved beyond "testing the waters" and become a presidential candidate (*id.* ¶¶ 42-51). Under the highly deferential standard of review applicable in this case, however, plaintiffs cannot meet their burden.

1. Standard of Review under 2 U.S.C. § 437g(a)(8)

In reviewing the Commission's dismissal of plaintiffs' administrative complaint under 2 U.S.C. § 437g(a)(8), "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the [FECA] . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause,* 108 F.3d at 415 (internal citation omitted); *accord Hagelin v. FEC,* 411 F.3d 237, 242 (D.C. Cir. 2005); *In re Carter-Mondale Reelection Comm., Inc.,* 642 F.2d 538, 542 (D.C. Cir. 1980); *Akins v. FEC,* __ F. Supp. 2d __, 2010 WL 3563109 (D.D.C. Sept. 6, 2010). *See DSCC,* 454 U.S. at 31, 37, 39. The "arbitrary and capricious" standard of review is "highly deferential" and "presume[s] the validity of agency action." *American Horse Prot. Ass'n, Inc. v. Yeutter,* 917 F.2d 594, 596 (D.C. Cir. 1990). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC,* 789 F.2d 26, 37 (D.C. Cir. 1986).

The Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC,* 454 U.S. at 37. *See also Hagelin,* 411 F.3d at 243; *Common Cause,* 842 F.2d at 448. Thus, "in determining whether the Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC,* 454 U.S. at 39 (citations omitted). Unless "Congress has directly spoken to the precise question at issue," the Court must defer to a reasonable construction by the Commission. *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-844 (1984); *see also FEC v. National Rifle Ass'n. of Am.,* 254 F.3d 173, 187 (D.C. Cir. 2001). A court will find an abuse of discretion only when the agency cannot meet "its minimal burden of showing a 'coherent and reasonable explanation for its exercise of

discretion.'" *Carter/Mondale Presidential Committee, Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecom. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)). *See also Common Cause v. FEC*, 676 F. Supp. 286, 291 (D.D.C. 1986).

2. The Commission's Dismissal of Plaintiffs' Administrative Complaint Was Lawful

In their administrative complaint, plaintiffs alleged that "[b]etween October 2006 and January 2007, Rep. Hunter traveled to the early presidential primary states of New Hampshire, Iowa and South Carolina on behalf of PTS PAC," and asserted that Hunter was "using PTS PAC to 'test the waters' for his presidential candidacy." Admin. Compl. ¶¶ 8, 25. Plaintiffs' administrative complaint did not specifically allege that any of these disbursements violated the Act. *See* Admin. Compl. ¶¶ 23-37 (Counts I-IV); *id.* at 8-9 (Prayer For Relief). When it reviewed the complaint in January 2009, however, the Commission concluded that, since the Hunter Committee did not report any contributions or expenditures during the time that included Hunter's travel, but PTS PAC did report $20,185 in expenditures which might have been related to the travel, there was "reason to believe" that violations occurred.[16] On January 28, 2009, the Commission therefore found that there was "reason to believe" that PTS PAC and its treasurer violated 2 U.S.C. § 441a and 11 C.F.R. § 110.2(b)(1) by making excessive in-kind contributions to Duncan Hunter for his presidential campaign in the form of payment of his travel costs in South Carolina in December 2006.[17] *See* 2 U.S.C. § 437g(a)(2).[18]

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[16] Under the Act, the limit on cash and in-kind contributions by multi-candidate political committees to federal candidates and their authorized principal campaign committees is $5,000. *See* 2 U.S.C. § 441a and 11 C.F.R. § 110.2(b)(1).

[17] *See* Certification (Jan. 30, 2009) at 1; Factual and Legal Analysis for PTS PAC at 3-5.

[18] The Commission also found "reason to believe" that Hunter and the Hunter committee violated the Act and Commission regulations by accepting and failing to report the alleged in-kind contributions. Certification (Jan. 30, 2009) at 1; Factual and Legal Analysis for the Honorable Duncan Hunter, MUR 5908 (Feb. 19, 2009) at 7, available at

The Commission conducted an investigation, *see* 2 U.S.C. § 437g(a)(2), and the Commission's General Counsel then made recommendations to the Commission, General Counsel's Report #2. In June 2010, the Commission declined to follow these recommendations and instead determined to take no further action and close the entire file in the entire matter. Certification (June 30, 2010). It is this decision which plaintiffs now challenge. Because the Commission rejected the General Counsel's recommendations, the Commissioners' statement of reasons serves as the basis for review of that decision. *See supra* p. 4.

The Commission's statement of reasons (Exh. 1) shows that the agency's decision to dismiss plaintiffs' administrative complaint in MUR 5908 was reasonable and not contrary to law. The statement includes specific factual findings and legal conclusions regarding the alleged violations that support the Commission's decision to dismiss the complaint, as well as an explanation of the Commission's decision to exercise its prosecutorial discretion. The Commission summarized its reasoning:

> The Commission has determined that there is insufficient evidence to establish whether there is probable cause to believe that Congressman Hunter became a candidate before January 2007, or whether [the] travel disbursements by PTS PAC constituted in-kind contributions to the Hunter Committee. In addition, there is insufficient evidence to conclude whether Congressman Hunter failed to timely file his Statement of Candidacy. Moreover, the Commission notes that the Hunter Committee filed its Statement of Organization and disclosure reports in a timely manner, and all of the travel expenses at issue were publicly disclosed on PTS PAC's disclosure reports.
>
> Even if the investigation had established a violation of the Act, given the relatively small amount of the disbursements at issue, the evidence suggesting that

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http://eqs.nictusa.com/eqsdocsMUR/10044274473.pdf; Factual and Legal Analysis for Hunter for President, Inc. and Bruce Young, as Treasurer, MUR 5908 (Feb. 19, 2009) at 7, available at http://eqs.nictusa.com/eqsdocsMUR/10044274484.pdf; Statement of Reasons at 1. The Commission also considered allegations that certain television advertisements by PTS PAC were excessive in-kind contributions and were not properly reported, but the Commission declined to find reason to believe as to those allegations at that time. Certification (Jan. 30, 2009); Factual and Legal Analysis for PTS PAC at 3-6. Plaintiffs have not challenged that decision.

> the disbursements may have been legitimate PTS PAC expenses, the fact that the Statement of Candidacy was filed, at most, only three-days late and the timely filing of the Hunter Committee's Statement of Organization and disclosure reports, the Commission voted to exercise its prosecutorial discretion and take no further action in this matter and close the file.

Statement of Reasons at 2.

With respect to the travel expenses that are the focus of plaintiffs' court challenge, the Commission noted that its administrative investigation in MUR 5908 established that PTS PAC made only approximately $10,200 in expenditures for travel expenses during the time that Congressman Hunter was testing the waters for his presidential campaign. Statement of Reasons at 2-3. PTS PAC and the other administrative respondents stated that Congressman Hunter undertook this travel in his capacity as honorary chairman of PTS PAC to publicize the PAC's views on public policy issues, and that the travel was undertaken in connection with PTS PAC's advertising campaign. *Id.* The Commission concluded that there was insufficient evidence to conclude that there was "probable cause" to believe, *see* 2 U.S.C. § 437g(a)(4) — a higher standard than "reason to believe" under section 437g(a)(2) — that the travel disbursements by PTS PAC were excessive in-kind contributions to the Hunter Committee. Statement of Reasons at 2.[19]

The Commission also concluded that any disbursements benefiting both the presidential campaign and PTS PAC would have been allocable between the two committees. So if PTS PAC and the Hunter Committee had benefited equally from the disbursements, permissible

[19] The Commission also concluded that "[e]ven if the investigation had established that PTS PAC's payments for Congressman Hunter's travel in October 2006 to January 2007 were all in-kind contributions to the Hunter Committee, those payments did not exceed $5,000 until January 5, 2007 at the earliest." Statement of Reasons at 4. Thus, the Commission concluded that even if the expenditures by PTS PAC constituted in-kind contributions to Hunter, he did not become a candidate for president, and thereby become required to file a statement of candidacy, until a few days before his statement of candidacy was actually filed. *Id.*

allocation would reduce the amount of potentially excessive contributions to just over $100.[20] In light of the relatively small amount potentially in violation, the Commission voted to exercise its prosecutorial discretion and take no further action as to the allegations regarding excessive in-kind contributions by PTS PAC to Hunter and the Hunter committee. Statement of Reasons at 3.[21] This decision was entirely reasonable in light of the "'venerable maxim *de minimis non curat lex* ("the law cares not for trifles") [which] is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.'" *CREW*, 475 F.3d at 340 (quoting *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992)).

Plaintiffs' amended complaint (¶¶ 42-46, 51) devotes a few paragraphs to the Commission's statement of reasons, but plaintiffs' criticisms fail to meet their heavy burden of showing that the Commission's decision was an abuse of discretion. First, plaintiffs cite (*id.* ¶ 44) the Commission's "reason to believe" finding that PTS PAC may have violated the Act by making excessive in-kind contributions to Hunter in connection with the travel disbursements,

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[20] If the $10,200 is allocated equally between the two committees, the amount allocable to each committee would be only $5,100. The $5,100 allocable to PTS PAC would exceed the committee's $5,000 limit on contributions to Hunter and the Hunter Committee by only $100.

[21] Similarly, with respect to PTS PAC's expenditures for television advertisements, the Commission's statement of reasons noted that the agency had found in January 2009 that there was "insufficient basis to find reason to believe that the television advertisements paid for by PTS PAC were related to Hunter's presidential election campaign, thereby constituting excessive contributions to the Hunter Committee, and the Commission voted to take no action as to those allegations." Statement of Reasons at 1-2 (citing Factual and Legal Analysis for PTS PAC at 6-7). The statement of reasons added that "[t]he Commission's investigation did not establish that these advertisements violated the Act." *Id.* at 2. The statement of reasons cited the May 2010 General Counsel's Report, which concluded that "[a]lthough the content and timing of the advertisements appeared to have some nexus with Hunter's soon-to-be declared campaign, in that they were narrated by Hunter and aired in some of the primary states, [that] was not sufficient basis for this Office to recommend that the Commission find reason to believe the advertisements violated the Act." General Counsel's Report #2 at 3. Again, plaintiffs do not challenge this conclusion.

but that was, by definition, only a preliminary finding: a low threshold indicating that an investigation is warranted. Plaintiffs state that the Commission "concluded, without citing to any evidence, that because these travel disbursements also advanced PTS PAC's core mission, they were allocable between the two committees." (Am. Compl. ¶ 43.) However, plaintiffs ignore the fact that the respondents stated in writing that Hunter undertook this travel in his capacity as honorary chairman of PTS PAC to publicize the PAC's views on public policy issues, Statement of Reasons at 2 (citing Hunter Affidavit), and the Commission concluded that "[n]othing revealed in the Commission's investigation contradicts the conclusion that the travel disbursements advanced PTS PAC's core mission," *id.* at 3. Plaintiffs fail to cite any evidence undermining the Commission's conclusion that the travel expenses furthered PTS PAC's mission, which supports the conclusion that the travel expenses were at least partially allocable to PTS PAC. Plaintiffs also fail to refute the Commission's estimation that, if allocable, the expenditures would have been allocable equally between the two committees. Thus, plaintiffs have not refuted the Commission's conclusion that, most likely, the excessive contribution would have been only $100.

Plaintiffs' amended complaint (¶ 44) also argues that in determining whether there was sufficient evidence to establish that Congressman Hunter had failed to timely file his Statement of Candidacy, the Commission "[i]gnor[ed] the multiple examples of statements by Congressman Hunter set forth in the First General Counsel's Report indicating he was a candidate for president months before his presidential campaign registered with the FEC." However, even the reported late 2006 statements of Congressman Hunter that plaintiffs cite (*id.* ¶ 49) do not clearly show a final decision to run or that he actually was a candidate, as opposed to a person preparing or planning to run. For example, the Congressman's single

statement at a news conference — "I am also going to be preparing to run for president" (*see id.*) — is doubly couched: He does not say he *is* running now, but that he is "going to be preparing" to run. The Commission's determinations were entirely reasonable, even if other reasonable minds might have reached a different conclusion.[22]

Plaintiffs also assert that "[d]espite 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." (Am. Compl. ¶ 51.) However, the "finding" plaintiffs cite was not a finding of illegality, but merely that there was "reason to believe" a violation had occurred, based upon the administrative complaint and the responses to the complaint before the Commission conducted its investigation. The "reason to believe" determination is a threshold determination that further investigation is warranted, not a final agency determination on the issue. *See Spannaus v. FEC*, 641 F. Supp. 1520, 1529 (S.D.N.Y. 1986) (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980); other citations omitted). In any case, plaintiffs' administrative complaint included no allegation that the Hunter Committee committed reporting violations, so plaintiffs cannot challenge the Commission's dismissal on this point under section 437g(a)(8).

[22] Plaintiffs' "Claim One" and prayer for relief do not include a request that either Congressman Hunter or the Hunter Committee be pursued for an alleged failure to file a timely statement of candidacy. Indeed, the administrative complaint did not name either Congressman Hunter or the Hunter Committee as respondents, and did not allege that either had violated the Act. Thus, the only possible relevance of the timing of Congressman Hunter's statement of candidacy is its indirect effect on determining the extent of the alleged excessive in-kind contributions from PTS PAC — *i.e.*, the earlier he crossed the line from "testing the waters" to actual candidate, the sooner any allocable portion of travel expenses would be considered an in-kind contribution to the Congressman in his capacity as a candidate for president.

The Commission's dismissal of MUR 5908 was a proper exercise of the agency's prosecutorial discretion, and plaintiffs' amended complaint does not directly argue to the contrary. The Commission, like other federal agencies, has prosecutorial discretion. *CREW*, 475 F.3d at 340 ("No one contends that the Commission must bring actions in court on every administrative complaint. The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion.") (citing *Akins*, 524 U.S. at 25.)). The exercise of authority to determine the direction and extent of an investigation "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). These decisions require assessing

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. *See also In re Sealed Case*, 838 F.2d 476, 510 (D.C. Cir. 1988) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985), *rev'd on other grounds sub. nom.*, *Morrison v. Olson*, 487 U.S. 654 (1988)). Congress has not required the Commission to allocate its investigatory resources in any specific way, and "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 470 U.S. at 831-832. Thus, under the Act, the Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim or to bring a civil action under the statute." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other issues*, 842 F.2d 436 (D.C. Cir. 1988). In *Orloski*, 795 F.2d at 168, the D.C. Circuit concluded that the Commission is entitled to decide not even to begin an investigation based on a "subjective evaluation of claims." "It is not for the judiciary to ride roughshod over agency procedures or sit

as a board of superintend[e]nce directing where limited agency resources will be devoted. [Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

The Commission's decision not to pursue the allegations on which plaintiffs focus in this case was clearly a proper exercise of the agency's prosecutorial discretion. Plaintiffs seek to have two political committees re-label about $10,000 in reported activity from late 2006 and early 2007 as in-kind contributions, rather than merely disbursements. Even if this spending were considered in-kind contributions to a candidate who had finished "testing the waters," the amount above the statutory limit would have been somewhere between about $100 and $5,000. In view of the Commission's many other duties and the deferential standard of review, the agency acted well within its discretion in declining to proceed. Claim One of plaintiffs' amended complaint should be dismissed.

D. The Court Lacks Jurisdiction under 2 U.S.C. § 437g(a)(8) to Decide Plaintiffs' Groundless Claim that the Commission Must Provide Administrative Complainants 60 Days to File Suit after Notice and an Explanation of Dismissals

1. Plaintiffs Lack Constitutional and Statutory Standing to Pursue Their Generalized "Policy and Practice" Claim on Behalf of Themselves and Others

Plaintiffs complain that the Commission failed to give them and certain other administrative complainants 60 days' notice of the dismissals of some of their complaints. Regarding the dismissal of MUR 5908, however, plaintiffs have failed to articulate a concrete and particularized injury stemming from the timing of the Commission's notice to plaintiffs. In any event, even if the Court were to find that plaintiffs were injured by having fewer days than they would have preferred to prepare this lawsuit, there is no relief the Court could order that would redress such an injury. Plaintiffs have now filed the instant lawsuit and amended their complaint. They have an opportunity to try to demonstrate standing to challenge the dismissal of

MUR 5908 and to argue that the dismissal was contrary to law. No further remedy is possible. Thus, plaintiffs cannot meet the redressability requirement for constitutional standing regarding the timing of the Commission's notification to them about MUR 5908.

Regarding administrative complaints filed by third parties, plaintiffs appear to rely on section 437g(a)(8) for authority to vindicate the alleged right of all administrative complainants to receive 60 days' notice of the basis for the dismissal of their complaints. Section 437g(a)(8), however, provides no statutory standing for plaintiffs' "policy and practice" allegations regarding other complainants, a claim that appears to be a re-named version of their original court complaint's "pattern and practice" claim. (*See* FEC Mem. (Doc. 4-1) at 17-26.)

A special jurisdictional grant, section 437g(a)(8) departs from the usual rule that an agency's prosecutorial decisions are not judicially reviewable. *See, e.g.*, *Heckler*, 470 U.S. at 831. It grants this Court jurisdiction to review Commission actions in limited circumstances. The Court may only consider a petition filed by an "aggrieved party," that is, someone challenging the Commission's dismissal of or failure to act upon that person's *own* administrative complaint. 2 U.S.C. § 437g(a)(8)(A). The statute also restricts the remedies available. The Court "may declare that the dismissal of the [petitioner's administrative] complaint or the failure to act [on the complaint] is contrary to law and may direct the Commission to conform with such declaration within 30 days. . . ." 2 U.S.C. § 437g(a)(8)(C). *See Perot*, 97 F.3d at 559 ("When the FEC's failure to act is contrary to law, we have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action."). If the Court takes those steps and the Commission fails to conform with the declaration, this Court's role ends. In that event, the administrative complainant may then bring, "in the name of such complainant," a

civil action directly against the administrative respondent "to remedy the violation involved in the original [administrative] complaint." 2 U.S.C. § 437g(a)(8)(C).

Plaintiffs' "policy and practice" allegations in this Court do not come within section 437g(a)(8)'s limited jurisdictional grant because plaintiffs cannot be "aggrieved" by the Commission's treatment of anyone's administrative complaint but their own. Plaintiffs also seek equitable remedies beyond the specific remedies — confined to a particular administrative complaint and complainant — authorized by section 437g(a)(8)(C). Thus, plaintiffs lack statutory standing to pursue such a claim under the Act. *See Steel Co.*, 523 U.S. at 92 (explaining that whether a statute provides a particular person a right to sue is an issue of statutory standing). Simply put, in enacting section 437g(a)(8), Congress did not authorize a court to adjudicate or a petitioner to pursue "policy or practice" allegations like the ones plaintiffs have presented on behalf of other persons. *Cf. Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1354, 1357-359 (D.C. Cir. 2000) (denying constitutional and prudential standing because, among other reasons, Congress apparently intended to preclude litigants from asserting the rights of others; in the Court of Appeals, the organizational plaintiffs sought only to advance the "rights of unnamed aliens who were or might be subject to the [challenged] statute and regulations"). "[W]hen Congress enacts a specific remedy when no remedy was previously recognized, . . . the remedy provided is generally recognized as exclusive." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (holding that remedy for taxpayer lies exclusively in Tax Court). Here, the exclusive remedy that FECA provides for an administrative complainant is a suit to challenge the disposition of that person's own complaint — not those of others.

2. Plaintiffs' Claim that the Commission Must Provide Notice and an Explanation of Administrative Dismissals 60 Days Prior to the Deadline for Seeking Judicial Review Is Groundless

Even if the Court has jurisdiction to address plaintiffs' claim that the Commission must provide notice and an explanation of all its dismissals of administrative complaints 60 days before the deadline for seeking judicial review, the Court should dismiss plaintiffs' claim on the merits. Plaintiffs' claim would in effect require the agency to provide these materials *the same day* the Commissioners vote to dismiss, and their claim is completely unsupported by the statute — despite plaintiffs' repeated assertion that their interpretation is "statutorily mandated." (*See, e.g.*, Am. Compl. ¶ 2.)

Under FECA, "[a]ny petition [for judicial review] shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal." 2 U.S.C. § 437g(a)(8)(B). The section does not also state, "The Commission shall notify the administrative complainant of the dismissal and provide an explanation for the action on the day it dismisses the complaint." Yet plaintiffs allege in effect that section 437g(a)(8)(B) should be construed as if it included those additional words. (*See, e.g.*, Am. Compl. ¶¶ 2, 15.) The "short answer" to that claim "is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Because plaintiffs' interpretation "depends on the addition of words to a statutory provision which is complete as it stands," plaintiffs' position would require "amendment rather than construction of the statute, and it must be rejected here." *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987).

The absence of plaintiffs' proposed requirements in the judicial review provision contrasts starkly with the inclusion of specific time limits for Commission action in other provisions of section 437g. For example, in section 437g(a)(1), Congress directed the

Commission, "[w]ithin 5 days after receipt of a complaint," to notify persons alleged in the complaint to have violated the Act. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and citation omitted).). If Congress had wanted to impose that kind of requirement on the Commission, it would have done so.

In fact, plaintiffs' statutory interpretation is directly at odds with D.C. Circuit decisions interpreting section 437g(a)(8). In *Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993), the court rejected the contention that a petition for review of the dismissal of an administrative complaint was timely because it was filed within 60 days of the date petitioner received the Commission's notification. The Commission had voted to dismiss the complaint on January 9, 1991, a notification letter was dated January 18, the letter arrived at petitioner's post office box on January 28, and petitioner retrieved it on February 2. Petitioner's court complaint was filed on April 2, 1991. *Spannaus v. FEC,* No. 91-0681, 1992 WL 71402, at *1 (D.D.C. Mar. 25, 1992). The D.C. Circuit held that the 60-day review period began with the date of dismissal, and petitioner's contention that it should begin with the date of notification was "inconsistent with the plain meaning of the governing judicial review statute." *Spannaus,* 990 F.3d at 644. Later, in *Jordan v. FEC*, 68 F.3d 518 (D.C. Cir. 1995), the court, citing *Spannaus*, rejected a similar argument and noted that the statute "will support no other result." *Id*. at 519. Thus, the court dismissed a petition as untimely where the notification letter was not received until seven days after the date of the Commission's dismissal. *Id. See also, e.g., Jiminez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (citation omitted) ("As with any question of statutory interpretation, our

analysis begins with the plain language of the statute. . . . It is well established that, when the statutory language is plain, we must enforce it according to its terms.") The *Spannaus* and *Jordan* decisions therefore foreclose plaintiffs' interpretation that the statute requires the Commission to notify plaintiffs of the dismissal of their administrative complaint by a date certain, much less at the very beginning of the 60-day judicial review period.

Indeed, plaintiffs' interpretation would deny the Commission flexibility in timing its voting decisions and subsequent disclosure of its decision-making. Until the Commission votes to dismiss an administrative matter, it may not know how the majority of its members will vote and whether that majority will agree with the recommendations and reasoning of the General Counsel. Thus, until the vote takes place, the Commission may not know whether it will need to write its own statement of reasons or whether it will rely on the reasoning articulated by the General Counsel. *See supra* p. 4. Plaintiffs' interpretation of section 437g(a)(8) would require the Commission to somehow predetermine the very outcome that is subject to a vote, but there is no basis in either the text or structure of FECA to require that procedure, even if it were possible.[23]

Aside from the lack of support for plaintiffs' claim in the language of section 437g(a)(8)(B), the interpretation plaintiffs urge is plainly unreasonable.[24] If accepted, it would

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[23] Moreover, FECA does not even require the Commission to provide a complainant personally with an explanation of a dismissal. Rather, section 437g(a)(4)(B) states that "[i]f the Commission makes a determination that a person has not violated this Act . . . , the Commission *shall make public* such determination" (emphasis added).

[24] Even if FECA were interpreted as merely silent on the point at issue, the Court would still have to construe the provision in the Commission's favor. Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), when a statute does not "directly address[ ] the precise question at issue," courts must defer to an agency's filling of a statutory gap. *Id*. at 843, 844. An agency's reasonable interpretation of its foundational statute prevails even over a challenger's equally reasonable interpretation. *See, e.g., Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 458 (D.C. Cir. 1996).

interfere with the Commission's judgment as to how best to use its limited resources. For example, under plaintiffs' interpretation, after the Commission voted to close MUR 5908 on Tuesday, June 29, 2010, it appears that the agency would have been required by the next day to create and issue an explanation of its decision, and to collect, redact, and prepare for public release all other materials from the administrative record that explain the decision. Even if the Commission and its staff put aside other projects and worked only on MUR 5908, it is not clear that these tasks could be completed under the extraordinarily expedited schedule plaintiffs propose.

Of course, the Commission should not have to abandon its other responsibilities — *see, e.g.*, 2 U.S.C. §§ 437c(b)(1), 437d, 437f — to attend only to the ramifications of its dismissal of plaintiffs' complaint. And Congress has imposed a deadline for Commission action on some of its statutorily mandated tasks, including but not limited to other aspects of the agency's enforcement procedures (*see, e.g.*, 2 U.S.C. §§ 437f(a), 437g(a)(1)-(4), 438(a)(4)), but not for the Commission's notification of administrative complainants. In light of its mission and obligations, the Commission has adopted an interim policy of placing documents from closed enforcement matters "on the public record as soon as practicable," and "endeavor[s] to do so within thirty days of the date on which notifications are sent to complainants and respondents."[25] The D.C. Circuit has generally declined to use its equitable powers to micromanage an agency's

[25] Notice 2003-25, Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426-70428 (Dec. 18, 2003), available at http://www.fec.gov/agenda/agendas2003/notice2003-25/fr68n243p70426.pdf. The Commission issued this Interim Policy Statement in response to the D.C. Circuit's invalidating 11 C.F.R. § 5.4(a)(4), which stated that certain materials in enforcement cases would be placed on the Commission's "public record" "no later than 30 days from the date on which all respondents are notified the Commission has voted to close" a particular case. *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). The court invalidated the regulation for constitutional reasons unrelated to the timing clause.

efforts to balance priorities, even in the face of a clear statutory timetable. *See, e.g.*, *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (viewing the agency delay as a consequence of the agency's allocation of its budgetary resources). Moving one person to the head of the queue necessarily demotes other persons in line. Plaintiffs cite no statutory language requiring the Commission to place them or any other administrative complainants at the head of the queue so that they receive an explanation of the dismissals at the very start of the 60-day period.

In sum, plaintiffs' claim has no statutory basis, is contrary to D.C. Circuit precedent, and should be dismissed for failure to state a claim upon which relief can be granted.

E. Plaintiffs Cannot Pursue Their "Policy and Practice" Allegations under the Administrative Procedure Act

In addition to invoking 2 U.S.C. § 437g(a)(8)(A), plaintiffs rely on the federal question jurisdictional statute, 28 U.S.C. § 1331, and the APA, 5 U.S.C. §§ 702, 706, to pursue their "policy and practice" claim. (Am. Compl. ¶ 3.)[26] This claim fares no better under the APA than under FECA's section 437g(a)(8).

1. Because FECA Forbids the Relief Plaintiffs Seek, the APA Cannot Provide the Requested Remedy

A waiver of the government's sovereign immunity, 5 U.S.C. § 702 entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to "judicial review thereof." That provision also specifies, however, that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." That exception to authority under the APA applies here. As demonstrated *supra* pp. 29-30, FECA's limited judicial review provision for challenges to the Commission's disposition of an

[26] Plaintiffs also cite 28 U.S.C. § 1336, but that provision applies only to Surface Transportation Board orders.

administrative complaint forbids the broad declaratory and injunctive relief that plaintiffs seek. As FECA's plain language and the D.C. Circuit's *Spannaus* and *Jordan* decisions indicate (*see supra* pp. 31-32), 2 U.S.C. § 437g(a)(8) does not require the Commission to notify an administrative complainant of the dismissal of her complaint 60 days before the deadline for filing an action to review the Commission's dismissal. It would thus contradict FECA to require the Commission to notify a complainant and provide the Commission's statement of reasons on the very day the Commission decides to dismiss the complaint. Consequently, the proviso to the APA's waiver of sovereign immunity applies, and the Court cannot grant the proposed "policy or practice" relief that FECA forbids. In other words, the APA cannot be used to circumvent section 437g(a)(8)'s procedures — which give the Commission flexibility — and FECA's comprehensive scheme for the Commission's processing of enforcement matters. *See generally* 2 U.S.C. § 437g. Plaintiffs therefore have no cause of action under the APA.

2. Plaintiffs Lack Prudential Standing to Sue under the APA on Behalf of Third Parties

As noted earlier, plaintiffs have not alleged how they were "adversely affected or aggrieved" by the Commission's actions — a precondition for invoking the APA's waiver of sovereign immunity, 5 U.S.C. § 702. But even if their allegations suffice for that purpose, plaintiffs cannot meet the requirements of the limited exceptions to the prudential rule against third-party standing. Plaintiffs' "policy and practice" claim and the requested equitable relief rest on the interests of persons not before the Court — other administrative complainants whose complaints have been or may be dismissed. The federal courts generally prohibit a party from raising the rights or interests of third persons in challenging allegedly illegal governmental action. *See, e.g., Warth v. Seldin*, 422 U.S. at 499; *Rumber v. District of Columbia*, 595 F.3d 1298, 1301 (D.C. Cir. 2010).

A party seeking third-party standing must demonstrate both a "close" relationship with the person whose interests or rights are in issue, and a "hindrance" to that person's ability to protect his or her own interests. *See, e.g., Kowalski v. Tesmer,* 543 U.S. 125, 129-30 (2004). CREW and Sloan do not qualify for these exceptions. They have not alleged a "close" relationship with other FEC administrative complainants. By contrast, for example, trade associations and other membership organizations have been allowed, in certain circumstances, to protect the rights of their members. *See, e.g., NAACP v. State of Alabama ex rel. Patterson,* 357 U.S. 449 (1958) (holding that NAACP could assert members' constitutional right of association). However, nothing in plaintiffs' amended complaint alleges or suggests any connection at all between CREW or Sloan and other administrative complainants. In the absence of any relationship — let alone a "close" one — plaintiffs cannot justify their attempt to protect the interests of other complainants.[27] Furthermore, "third parties themselves usually will be the best proponents of their own rights." *Singleton v. Wulff,* 428 U.S. 106, 114 (1976) (plurality opinion of Blackmun, J.). The court complaint here provides no basis for concluding that these plaintiffs have a greater ability to litigate the alleged right of other administrative complainants to 60 days' notice and explanation than those complainants themselves. Plaintiffs have not alleged, for example, that other administrative complainants who wish to litigate this issue face any special hindrance. Plaintiffs thus lack prudential standing to pursue their "policy and practice" claim.

[27] Moreover, CREW does not allege that it is a membership organization seeking standing to vindicate the rights of its members. To bring such a claim, CREW would need to demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977).

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the amended complaint in this matter.

Respectfully submitted,

Phillip Christopher Hughey
Acting General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Harry J. Summers
Assistant General Counsel

/s/ Robert W. Bonham III
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FOR THE DEFENDANT
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999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

November 15, 2010

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.	No. 1:10-cv-01350-RMC

FEC EXHIBIT 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FAX (202-588-5020) and CERTIFIED MAIL

AUG 2 4 2010

Melanie Sloan
Executive Director
Citizens for Responsibility and Ethics in Washington
1400 Eye St, N.W., Suite 450
Washington, D.C. 20005

RE: MUR 5908

Dear Ms. Sloan:

On July 23, 2010, you were informed that the Commission had closed the file in this matter. Enclosed, please find a Statement of Reasons issued by the Commission to explain the basis for its decision. If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at 202-694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Statement of Reasons

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5908
Duncan Hunter;	)	
Hunter for President, Inc. and Bruce Young, in his official capacity as Treasurer;	)	
Peace through Strength PAC and Meredith G. Kelley, in her official capacity as Treasurer	)	

STATEMENT OF REASONS

CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER, DONALD F. McGAHN II, STEVEN T. WALTHER AND ELLEN L. WEINTRAUB

I. INTRODUCTION

This matter arises out of a complaint alleging that former Congressman Duncan Hunter, Peace Through Strength Political Action Committee and Meredith G. Kelley, in her official capacity as Treasurer ("PTS PAC"), and Hunter for President, Inc. and Bruce Young, in his official capacity as Treasurer (the "Hunter Committee") (collectively, "Respondents"), violated the Federal Election Campaign Act of 1971, as amended, ("FECA" or the "Act"). The Complaint alleges that, during approximately the same time that Congressman Hunter was testing the waters for a potential presidential bid, PTS PAC paid for, and the Hunter Committee accepted, in-kind contributions in the form of expenditures for Hunter's presidential campaign travel activities and television advertisements that exceeded the Act's contribution limits. Additionally, the Complaint alleges that Congressman Hunter and the Hunter Committee failed to file a Statement of Candidacy, Statement of Organization and disclosure reports in a timely manner, as required by the Act.

On January 28, 2009, the Federal Election Commission found reason to believe that PTS PAC made excessive in-kind contributions to the Hunter Committee, in violation of 2 U.S.C. § 441a, and that the Hunter Committee accepted and failed to report those excessive in-kind contributions, in violation of 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 100.72 and 100.131. The Commission also found reason to believe that Congressman Hunter and the Hunter Committee failed to timely file a Statement of Candidacy, Statement of Organization and disclosure reports, as required by 2 U.S.C. §§ 432(e)(1), 433(a) and 434(a)(3), respectively, and authorized an investigation of Respondents' potential violations of the Act. However, at that time, there was

insufficient basis to find reason to believe that the television advertisements paid for by PTS PAC were related to Hunter's presidential election campaign, thereby constituting excessive contributions to the Hunter Committee, and the Commission voted to take no action as to those allegations. PTS PAC Factual and Legal Analysis at 6-7.

The Commission's investigation into the remaining issues has concluded. The Commission has determined that there is insufficient evidence to establish whether there is probable cause to believe that Congressman Hunter became a candidate before January 2007, or whether travel disbursements by PTS PAC constituted in-kind contributions to the Hunter Committee. In addition, there is insufficient evidence to conclude whether Congressman Hunter failed to timely file his Statement of Candidacy. Moreover, the Commission notes that the Hunter Committee filed its Statement of Organization and disclosure reports in a timely manner, and all of the travel expenses at issue were publicly disclosed on PTS PAC's disclosure reports.

Even if the investigation had established a violation of the Act, given the relatively small amount of the disbursements at issue, the evidence suggesting that the disbursements may have been legitimate PTS PAC expenses, the fact that the Statement of Candidacy was filed, at most, only three-days late and the timely filing of the Hunter Committee's Statement of Organization and disclosure reports, the Commission voted to exercise its prosecutorial discretion and take no further action in this matter and close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Duncan Hunter was a member of Congress representing California's 52nd Congressional District, and at one time, a candidate for the 2008 presidential election. PTS PAC is a non-connected, multi-candidate political committee established by Hunter as his leadership PAC in 2002, and for which Hunter serves as honorary chairman. PTS PAC's declared mission is to provide financial support to Congressional candidates who espouse President Reagan's views, and to bring public attention to the PAC's views on a number of national public policy issues including national defense, immigration, international trade, energy, and the preservation of religious symbols from judicial interference. MUR 5908, Response of PTS PAC (Apr. 30, 2007) at 1-2. Hunter for President, Inc. is the principal authorized candidate committee for Congressman Hunter's presidential campaign.

In late-2006 through January 2007, Congressman Hunter was testing the waters for a potential presidential bid. During the same period, PTS PAC aired television advertisements in several states, including the so-called "early primary states." These advertisements concerned immigration and national security issues, and featured Duncan Hunter as the narrator. The Commission's investigation did not establish that these advertisements violated the Act. GCR #2 at 3. At the same time, Congressman Hunter traveled to locations around the country. According to Respondents, Hunter undertook this travel in his capacity as honorary chairman of PTS PAC to publicize the PAC's views on public policy issues. See Hunter Affidavit (Ex. 1 to PTS PAC Response). PTS PAC paid for and reported approximately $10,200 in expenditures

related to this travel, which Respondents claim was undertaken in connection with PTS PAC's issue advertising campaign.

B. Legal Analysis

1. Excessive Contributions

The Act states that an individual becomes a candidate for federal office, thus triggering the Act's registration and reporting obligations, when his or her campaign either receives $5,000 in contributions or makes $5,000 in expenditures. 2 U.S.C. § 431(2). An individual may raise or spend more than $5,000 without triggering candidate status only if he or she is engaged in permissible "testing the waters" activities and gives no indication that a decision to run has already been made. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). However, a potential candidate who is testing the waters is still subject to the prohibitions, limitations and reporting requirements of the Act, and must report all campaign-related receipts and disbursements incurred during the testing the waters period once he achieves candidate status. *Id.*

The Act provides that no multicandidate political committee shall make contributions to any candidate and his authorized political committee, which, in the aggregate, exceeds $5,000 per calendar year, *see* 2 U.S.C. § 441a(a)(2)(A), and no candidate or political committee shall knowingly accept contributions in violation of the limitations and prohibitions of the FECA. 2 U.S.C. § 441a(f).

The Commission's investigation indicates that PTS PAC made approximately $10,200 in disbursements for travel expenses incurred during approximately the same time that Congressman Hunter was testing the waters for his presidential campaign. Specifically, between the months of October 2006 and January 2007, Congressman Hunter made six trips where he was involved in events and where he made public statements regarding issues of longstanding concern to PTS PAC. These disbursements were paid entirely by PTS PAC. PTS PAC is subject to a maximum contribution limit of $5,000. Therefore, if any of the disbursements at issue were on behalf of the Hunter Committee, they would have resulted in up to $10,200 in in-kind contributions that were not reported, of which up to $5,200 would have been excessive. On the other hand, if the disbursements were made solely on behalf of PTS PAC, then no in-kind contribution would have resulted.

Nothing revealed in the Commission's investigation contradicts the conclusion that the travel disbursements advanced PTS PAC's core mission. The Commission notes further that any disbursements benefitting both the presidential campaign and PTS PAC would have been allocable between the two committees. Even if one assumes that PTS PAC and the Hunter Committee benefitted equally from the disbursements, such an allocation would reduce the amount of potentially excessive contributions to just over $100. In light of the relatively small amount potentially in violation, the Commission voted to exercise its prosecutorial discretion, pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and take no further action as to the allegations regarding excessive in-kind contributions.

2. Reporting Violations

The Act provides that a political committee must file reports of all receipts and disbursements, including contributions from other political committees. *See* 2 U.S.C. § 434(a) & (b). Once an individual achieves candidate status by raising or spending more than $5,000 and engaging in activities indicating that he or she has decided to run for a particular office, the candidate and his committee are subject to the registration and reporting requirements of the Act.

Within fifteen days of becoming a candidate, the individual must file a Statement of Candidacy with the Commission that designates the candidate's principal campaign committee. 2 U.S.C. § 432(e)(1); *see also* 11 C.F.R. § 101.1(a). The principal campaign committee must file a Statement of Organization no later than ten days after it has been designated by the candidate, 2 U.S.C. § 433(a), and disclose all reportable amounts from the beginning of the "testing the waters" period in the first financial disclosure report filed by the committee, regardless of the date the funds were received or the payments made. *See* 2 U.S.C. § 434(a)(3), 11 C.F.R. § 104.3(a) and (b). The candidate has a duty to maintain a record of contributions received and expenditures made while "testing the waters," and report those contributions and expenditures once he or she registers his or her principal campaign committee with the Commission. 11 C.F.R. §§ 100.72 and 100.131.

The complaint in this matter alleged that Congressman Hunter may have already decided to become a candidate prior to filing his Statement of Candidacy. The Commission found reason to believe that a violation of the Act may have occurred. However, the subsequent investigation did not produce sufficient evidence to establish that Congressman Hunter failed to timely file his Statement of Candidacy.

Even if the investigation had established that PTS PAC's payments for Congressman Hunter's travel in October 2006 to January 2007 were all in-kind contributions to the Hunter Committee, those payments did not exceed $5,000 until January 5, 2007 at the earliest.[1] Since a Statement of Candidacy need not be filed until fifteen days after $5,000 is raised or spent for the campaign, and Congressman Hunter filed his Statement of Candidacy on January 23, 2007, his Statement was, at most, three days late.[2] Moreover, the Hunter Committee timely filed its Statement of Organization on January 25, 2007, and its first disclosure report on April 15, 2007. Finally, the Commission notes that PTS PAC disclosed all of the travel disbursements at issue.

Because Hunter's Statement of Candidacy was filed, at most, only a few days late, any potential violation would be *de minimis,* and accordingly the Commission voted to exercise its prosecutorial discretion and take no further action as to the alleged reporting violations.

* * *

[1] The Hunter Committee did not receive over $5,000 in direct contributions until January 25, 2007.
[2] If one were to assume that PTS PAC and the Hunter Committee benefitted equally from the disbursements, Hunter would not have received over $5,000 in contributions until January 12, 2007, in which case Hunter's Statement of Candidacy would have been timely filed.

For the aforementioned reasons, the Commission voted to close the file in this matter.

8/23/10
Date

Matthew S. Petersen
Chairman

8/23/10
Date

Caroline C. Hunter
Commissioner

8/23/10
Date

Donald F. McGahn II
Commissioner

8/23/10
Date

Steven T. Walther
Commissioner

8/23/10
Date

Ellen L. Weintraub
Commissioner

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Facsimile Transmission

FAXED 8/24/10

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TIME: ____

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From:	Name:	Mark D. Shonkwiler, Asst. GC

Number of pages (following cover page): 6

Message: MUR 5908

Please contact the Office of General Counsel at (202) 694-1650 *if you do not receive all pages.*