UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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## I. INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") has moved to dismiss the amended complaint of Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan because they lack standing and have failed to state a claim. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(6). In response to the Commission's showing that they have not suffered an informational injury under Article III, plaintiffs conclusorily assert that they seek additional factual information when in truth they seek a legal ruling that certain disbursements — about which they are fully aware — constitute prohibited in-kind contributions. In essence, plaintiffs seek a recharacterization of already-reported spending that would not provide them with any further factual information. Even if plaintiffs had standing to complain about the Commission's dismissal of their administrative complaint, their substantive disagreement with the Commission's view of the underlying facts and its exercise of prosecutorial discretion falls far short of meeting plaintiffs' heavy burden of demonstrating that the Commission abused its discretion when it weighed the evidence and declined to pursue what was at worst a *de minimis* violation of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA" or "Act").

Plaintiffs also fail to show that they have suffered an injury in fact from the D.C. Circuit's interpretation of 2 U.S.C. § 437g(a)(8), which gives an aggrieved party 60 days from the date the Commission dismisses an administrative complaint to file a petition challenging the dismissal in this district court. Plaintiffs do not deny that were able to bring this action even though they did not receive immediate notice of the Commission's dismissal of their administrative complaint, and they do not allege any concrete injury from the timing of the Commission's issuance of its statements of reasons. In any event, neither FECA nor court

decisions construing it require the Commission to provide its notice or statement of reasons on the same day that it dismisses an administrative complaint.

## II. PLAINTIFFS LACK CONSTITUTIONAL STANDING TO SEEK REVIEW OF THE DISMISSAL OF THEIR ADMINISTRATIVE COMPLAINT

In its memorandum supporting its motion to dismiss ("FEC Mem."), the Commission showed that Melanie Sloan and CREW have not suffered the Article III injury in fact necessary for this Court to review the merits of the Commission's dismissal of their administrative complaint. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing requirements). Plaintiffs' opposition does not undermine that showing. Sloan has all the factual information to which FECA entitles her as a voter, and she and CREW cannot rely on their alleged roles as detectors and publicists of campaign finance violations to support their claims to constitutional standing.

### A. FECA Requires the Commission to Keep Certain Matters Confidential

In arguing that they have standing to seek judicial review under 2 U.S.C. § 437g(a)(8), plaintiffs imply that the Commission is hiding information that it must make public. For example, plaintiffs describe the Commission's votes in enforcement matters as "secret," a product of "closed-door" proceedings, and insinuate that the voting procedure is therefore suspect. (*E.g.*, CREW Opp. at 1, 13, 28, 29.) But the Commission does not vote in public on these matters because that is what the statute requires: Absent consent by the person notified or investigated, FECA requires confidentiality until, at the earliest, the enforcement matter is closed. 2 U.S.C. § 437g(a)(12)(A).[1] *See, e.g., Stockman v. FEC*, 138 F.3d 144, 147 n.3 (5th Cir.

[1] Section 437g(a)(12)(A) provides: "Any notification or investigation . . . shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."

1998) (refusing to quote the subject of investigation — the "administrative respondent" — in ongoing investigation where respondent refused to consent to making responses public).

As the D.C. Circuit held in *In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001), "both 2 U.S.C. § 437g(a)(12)(A) and 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation." FECA's "confidentiality mandate" serves in part to protect innocent persons accused of wrongdoing from "damaging publicity." *AFL-CIO v. FEC*, 333 F.3d 168, 174, 175 (D.C. Cir. 2003). Indeed, Commission members and employees (or any other persons) who violate the confidentiality provision can be fined $2,000 or, if the violation is knowing and willful, $5,000. 2 U.S.C. § 437g(a)(12)(B). *See, e.g.*, *Stockman*, 138 F.3d at 149 (stating that, contrary to respondent's claim, FEC did not violate Act's confidentiality provision).

Plaintiffs also criticize the Commission for redacting portions of General Counsel's Report #2. (Opp. at 9.) The redacted passages discuss the conciliation process that FECA requires the Commission to treat as confidential, even after a matter has been dismissed. *See* 2 U.S.C. § 437g(a)(4)(B)(i). Thus, the statute does not entitle the public to see the redacted passages.

**B. Melanie Sloan Lacks Standing Based on an Alleged Informational Interest**

Plaintiffs' opposition to the Commission's motion to dismiss asserts that the lack of revised financial reports by PTS PAC and the Hunter Committee has denied Sloan information useful in voting. (*See, e.g.*, Opp. at 11, 18-21.) Sloan, however, has all the facts to which FECA entitles her. When Sloan and CREW filed their amended judicial complaint, the Commission had already released to the public documents in Matter Under Review ("MUR") 5908. Those

documents reveal more facts about PTS PAC's financial support of Hunter's activities than the PAC and Hunter Committee would have been required to disclose in revised reports.[2] Because the "'existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*'" *Lujan*, 504 U.S. at 569 n.4 (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) (emphasis added by *Lujan*)), it is irrelevant what information Sloan had "[a]t the time she filed [the administrative] complaint *with the FEC.*" (Opp. at 19 (emphasis added).)

In particular, General Counsel's Report #2 (Exh. 4 to Doc. 13-1) states that PTS PAC paid a total of approximately $10,200 for travel expenses incurred by then-Congressman Hunter for specific activities in specific states. (*Id*. at 5.) The GC Report provides details about Hunter's itinerary and the expenses paid by PTS PAC, including the names of particular cities and states visited, the dates of particular events, the nature of the events (*e.g.*, "Pheasant Hunt," "Reception," "Tour," "Radio appearance"), and specific topics Hunter addressed (*e.g.*, China trade issues, right-to-life issues). (*Id*. at 5-7.) In contrast, if PTS PAC had simply reported those disbursements as in-kind contributions to Hunter, it would have been required to disclose only the name of the candidate (Hunter), the office the candidate was seeking (presidency), the election in question (primary), the amount or value of the in-kind contributions, and the contributions' general purpose (*e.g.*, "travel").[3] As the recipient of the in-kind contributions, the

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[2] The Commission earlier noted that, according to the D.C. Circuit, the agency "'has no authority to order anyone to report anything.'" (FEC Mem. at 17 n.15, quoting *CREW v. FEC ("CREW I")*, 475 F.3d 337, 340 (D.C. Cir. 2007).) Sloan and CREW offer no contrary authority. (*See* Opp. at 22 n.33.)

[3] *See* FEC Form 3X ("Report of Receipts and Disbursements for Other than an Authorized Committee") and Instructions for Form 3X and Related Schedules at 12 ("Instructions for Schedule B, Itemized Disbursements") (rev. 4/2006 ed.). These reporting forms and instructions and those cited in footnote 4 can be accessed at http://www.fec.gov/info/forms.shtml. *See also* 2 U.S.C. § 434(b); 11 C.F.R. 104.3(b)(3)(i)(A),(B).

Hunter Committee would have been required to report only the name and address of the contributor (PTS PAC), the value of the in-kind contributions, and the general nature of the contributions (*e.g.*, "travel expenses").[4]

Thus, like the plaintiffs in *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 144-145 (D.D.C. 2005), who lacked standing, Sloan already possesses all the factual information that she seeks and to which FECA entitles her. Sloan contends that she lacks "specific information," "'the in-kind contributions by PTS PAC to Hunter for President'" (Opp. at 20, quoting Am. Compl. ¶ 51). But she already knows the fact that the PAC spent $10,200 on Hunter's travel. She only questions whether those payments constitute "in-kind contributions" — a label reflecting a legal, not a factual, conclusion. *See Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001) ("'[C]oordination' appears to us to be a legal conclusion that carries certain law enforcement consequences."). As the Commission explained (Mem. at 13-18), *Wertheimer* controls this case because Sloan's real dispute with the Commission concerns the legal consequences of the information she already has, and she has failed to show that "the legal ruling . . . [she] seek[s] might lead to additional factual information." 268 F.3d at 1074. Plaintiffs attempt (Opp. at 20-21) to distinguish *Wertheimer* and *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997), but in those cases the plaintiffs, like Sloan here, claimed they were denied information to which they were entitled when political groups failed to comply with FECA reporting requirements. *Common Cause*, 108 F.3d at 416-17; *Wertheimer*, 268 F.3d at 1074-75. And, as in *Wertheimer*, the additional reporting Sloan seeks is simply to have a different legal

[4] *See* FEC Form 3X, Schedule A and accompanying instructions ("Instructions for Schedule A, Itemized Receipts") at 10; *see also* FEC Form 3P ("Report of Receipts and Disbursements by an Authorized Committee of a Candidate for the Office of President or Vice President") (rev. 01/2003 ed.) and accompanying instructions for Schedule A-P ("Itemized Receipts") at 8.

description applied to disbursements about which she already knows. That exercise would not provide plaintiffs any new *factual* information.

Thus, contrary to Sloan's assertion (Opp. at 19), her position differs markedly from that of the plaintiffs in *FEC v. Akins*, 524 U.S. 11 (1998), who had Article III standing. As current and future voters, the *Akins* plaintiffs sought information that they could obtain only if, as the first step, the reviewing court reached the merits and declared the Commission's dismissal unlawful. *See id.* at 20. To explain its decision to dismiss the *Akins* plaintiffs' administrative complaint against the American Israel Public Affairs Committee ("AIPAC"), the Commission had not needed to include in its reports and statements the particular factual information that the plaintiffs most wanted and to which they and the rest of the public might be entitled — a list of AIPAC's financial supporters and a list of all the candidates that the organization assisted. *Id.* at 21. As a result, "the plaintiffs in *Akins* had been completely denied access to any information about the AIPAC's receipt and disbursement of funds, and thus had no way to determine whether a particular candidate was even supported by the AIPAC." *Alliance for Democracy*, 362 F. Supp. 2d at 147. The *Akins* plaintiffs therefore had informational standing to bring their petition for a declaration that the FEC's dismissal of their complaint was unlawful. *Akins*, 524 U.S. at 26. By contrast, Sloan lacks no comparable information.

Finally, even if plaintiffs were correct and the legal conclusion they seek were a fact, Sloan has not attempted to explain how PTS PAC's reporting of Hunter's travel expenses as in-kind contributions would be useful to Sloan as a voter. *See CREW I*, 475 F.3d at 340 (noting that, where a plaintiff's purported standing to challenge a Commission dismissal rested on learning the value of a mailing list, the "list's precise value — if that could be determined — would add only a trifle to the store of information about the transaction already publicly

available"). Mr. Hunter is no longer a Member of Congress, and plaintiffs have not alleged that he is a candidate for any future federal office or that information about the PAC's alleged in-kind contributions to Hunter would be relevant to any other candidate's campaign. Thus, plaintiffs' conclusory allegation that the information they supposedly lack would be useful in voting is too speculative to provide standing under Article III.

> When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events . . . and those which predict a future injury that will result from present or ongoing actions — those types of allegations that are not normally susceptible of labeling as "true" or "false." Our authority to reject as speculative allegations of future injuries is well-established.

*United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 (D.C. Cir. 1989) (footnote omitted) (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969)).

**C. CREW Lacks Standing Based on an Alleged Informational Interest**

CREW does not contest the Commission's showing (Mem. at 14) that CREW cannot base its claim to standing on an alleged lack of information useful in voting. *CREW I* resolved that issue. *See* 475 F.3d at 339. CREW is not a citizen; it is an organization without members and, as a section 501(c)(3) corporation under the Internal Revenue Code, it cannot engage in partisan political activity. CREW describes itself as an organization devoted to "ensuring the integrity of those officials and protecting the right of citizens to be informed about the activities of government officials." (Am. Compl. ¶ 5.) As the D.C. Circuit noted in *CREW I*, however, in holding that CREW did not have standing to pursue an earlier section 437g(a)(8) suit, "any citizen who wants to learn the details . . . can do so by visiting the Commission's website . . . ." *CREW I*, 475 F.3d at 339. Thus, CREW cannot base its standing on its purported interest in conveying information to the general public.

Plaintiffs' opposition also does not deny that, under Supreme Court and D.C. Circuit precedent, an interest in the "information" that an administrative respondent violated the Act cannot support constitutional standing to challenge the Commission's dismissal of an administrative complaint. *See, e.g.*, *Lujan*, 504 U.S. at 573-74; *Common Cause*, 108 F.3d at 417.

In sum, plaintiffs in effect concede that CREW lacks constitutional standing to seek judicial review of the dismissal of plaintiffs' administrative complaint.

## III. PLAINTIFFS CANNOT SHOW THAT THE COMMISSION'S DISMISSAL OF THEIR ADMINISTRATIVE COMPLAINT WAS AN ABUSE OF DISCRETION

Even if plaintiffs could demonstrate standing, they cannot show that the Commission's dismissal of their administrative complaint in MUR 5908 was contrary to law under 2 U.S.C. § 437g(a)(8)(A), as they allege in Claim One of their amended judicial complaint. As the Commission demonstrated (Mem. at 18-27), plaintiffs cannot meet the heavy burden necessary for them to prevail in their challenge to the agency's decision not to pursue allegations that about $10,200 in travel expenses paid by PTS PAC in late 2006 and early 2007 should be considered in-kind contributions to the Hunter for President Committee. The Commission explained (Mem. at 19-20) that judicial review of its decisions to dismiss administrative complaints under the applicable "arbitrary or capricious" standard is "highly deferential." *American Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990); *see Common Cause*, 108 F.3d at 415. As the Commission also noted (Mem. at 26-27), the agency has prosecutorial discretion in deciding whether to dismiss administrative complaints, especially in light of its enforcement priorities and limited resources. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *CREW I*, 475 F.3d at 340. Against this background, the Commission explained in detail (Mem. at 20-25, 27) why its unanimous vote not to proceed in MUR 5908 was consistent with the law. As noted in the Commission's statement of reasons, the agency found the evidence insufficient to establish

"probable cause to believe" that the travel disbursements were in-kind contributions to former Congressman Hunter's campaign. Further, in view of the relatively minor nature of any potential violation, the Commission concluded that dismissal was appropriate as an exercise of the agency's prosecutorial discretion. (*See* FEC Mem. at 21-23; FEC Statement of Reasons, attached as Exh. 1 (Doc. 11-2) to FEC's Motion to Dismiss.)

Plaintiffs do not dispute that judicial review here is highly deferential or that the Commission possesses prosecutorial discretion, but they argue (Opp. at 22-28) that the Commission's analysis of the relevant evidence was flawed. In particular, plaintiffs assert (*id.* at 23-24) that the record does not support the Commission's determination regarding whether the travel expenses were allocable between PTS PAC and the Hunter Committee. However, as we explained (Mem. at 24), the investigation revealed credible evidence that the travel supported PTS PAC's public policy mission, and no evidence contradicted that conclusion. Plaintiffs still cite no such evidence and make no effort to show specifically why the travel did not advance PTS PAC's mission, even if it may also have advanced Congressman Hunter's presidential campaign and thus have been subject to the allocation rules. Nor do plaintiffs explain why, if the expenses were allocable, an even division would be an unreasonable way for the Commission to quantify the extent to which the disbursements advanced the missions of these two political committees, both of which were formed to further the political interests of former Congressman Hunter.

Plaintiffs rely heavily (*see, e.g.*, Opp. at 23-25) on the General Counsel's statements to the Commission regarding the apparent purpose of the travel costs and whether they should be allocated. But the opinions of the Commission's staff are irrelevant here. Although the General Counsel makes independent recommendations to the Commission, it is the Commission, not the

agency's staff, that is empowered to make final decisions about the weight of the evidence and whether to pursue enforcement actions. "The Commissioners are appointed by the President to administer the agency, the agency's staff is not." *San Luis Obispo Mothers For Peace v. NRC*, 751 F.2d 1287, 1327 (D.C. Cir. 1984), *affirmed en banc in relevant part*, 789 F.2d 26, 33 (1986). Thus, "*Chevron* deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee." *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1321 (1998). The D.C. Circuit has rejected as a "rather silly suggestion" the argument than an NLRB decision should be found unreasonable because it conflicted with the General Counsel's advice. "It is of no moment . . . what was the General Counsel's understanding of the case law before the present decision issued, and the court will take no note of it." *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002). This Court should do the same.

The Commission ultimately found the evidence insufficient to establish that Congressman Hunter became a presidential candidate, and thus could have received an in-kind contribution as a candidate, prior to January 2007. (*See* FEC Mem. at 20-25.) But plaintiffs argue (Opp. at 24-26) that some information, notably some of Hunter's reported public statements and certain statements in the General Counsel's reports, supports the conclusion that Hunter may have become a candidate in late 2006. However, plaintiffs fail to explain why the only reasonable conclusion to be drawn from Hunter's reported statements is that he was a candidate prior to January 2007. Rather, as we explained (Mem. at 24-25), the statements upon which plaintiffs rely do not clearly prove that Hunter had made a final decision to run. Tellingly, plaintiffs concede that the late 2006 example to which the Commission pointed in its opening brief, in which Hunter reportedly said he was "going to be preparing to run," is "arguably

ambiguous." (Opp. at 25 n.36.) But plaintiffs also argue (*id.*) that "the record here contains more," presumably referring to other statements mentioned earlier in their brief (*see id.* at 8). However, plaintiffs fail to explain how these other statements — such as one in which plaintiffs say Hunter responded to a reporter "without denying that he was running," and another from December 2006 in which he was quoted as saying "I'm going to be running" (*id.*) — establish that he had finished the "testing the waters" phase and crossed the line to being a committed candidate. The absence of a denial is hardly equivalent to a confirmed decision. Moreover, as explained above, the views of the General Counsel carry no weight in this Court's review of the Commission's decision. In any event, the First General Counsel's Report upon which plaintiffs rely most heavily contains only preliminary recommendations about whether to initiate an administrative investigation and does not purport to offer definitive conclusions or recommendations. *See* 2 U.S.C. § 437g(a)(2).

In sum, plaintiffs appear to concede (Opp. at 2, 12, 26, 27) that the Commission's decision to take no further action regarding the travel costs was an exercise of prosecutorial discretion. They simply disagree with the way the Commission evaluated the evidence and its own enforcement priorities, and plaintiffs evidently would have made a different decision. But that is not a sufficient basis upon which to set aside an agency's law enforcement decision; the proper test is not whether the decision was one that plaintiffs or even a court would have made, but whether the decision was "'sufficiently reasonable' to be accepted by a reviewing court." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (citation omitted).

Plaintiffs also appear to argue (Opp. at 26-27) that the Commission's motion to dismiss should be denied because the amended complaint conforms to the basic requirements of Fed. R. Civ. P. 8(a). However, the Commission has not argued that the case should be dismissed

because of technical deficiencies in plaintiffs' pleading, but because the complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Plaintiffs alleged that the Commission's decision in MUR 5908 was flawed, and the Commission's memorandum in support of its motion to dismiss explained why its decision was reasonably supported by the record and a proper exercise of discretion.[5] (*See* FEC Mem. at 20-27.) In response to that explanation, plaintiffs must now do more than put the Commission on notice of their claims; rather, plaintiffs must demonstrate why the Commission's legal conclusion was contrary to law.

> [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).] (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)).

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). The relevant paragraphs in plaintiffs' amended complaint (*see* ¶¶ 42-51), however, simply describe the Commission's statement of reasons and take issue with its legal conclusions. Because plaintiffs cannot demonstrate that the reasoning in that statement was contrary to law, their Claim One fails.

Plaintiffs also assert (Opp. at 27) that the "entire record is so shrouded in secrecy as to make it nearly impossible to ascertain what the Commission considered and why." But a wealth

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[5] The Commission's statement of reasons was referenced in plaintiffs' complaint and can be considered by the Court when ruling on the pending motion. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004 and Supp. 2007)); *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 47 n.1 (1st Cir. 2009) (courts evaluating Rule 12(b)(6) motions consider "documents sufficiently referred to in the complaint" (citation omitted)).

of publicly available evidence explains what the Commission did and why, including the statement of reasons, the detailed General Counsel's reports, the disclosure reports of PTS PAC and the Hunter Committee, and other materials regarding MUR 5908 that are posted on the Commission's website. (MUR 5908 documents are accessible at http://eqs.nictusa.com/eqs/searcheqs.) The publicly released version of General Counsel's Report #2 reflects limited redactions, but as we have explained, *supra* pp. 2-3, FECA's prohibition against releasing information regarding conciliation in the enforcement process required those redactions. *See* 2 U.S.C. § 437g(a)(4)(B)(i). Like other federal agencies, the Commission is entitled to a presumption of regularity, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Here, plaintiffs have offered no reason why these redactions, which are very minor relative to the information available to plaintiffs regarding the agency's decision-making in the matter, undermine the considerable deference owed to the Commission.

For all the foregoing reasons, plaintiffs have failed to demonstrate that the Commission's decision to take no further action and close the file in MUR 5908 was unlawful. Accordingly, Claim One of plaintiffs' amended complaint should be dismissed.

## IV. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' "POLICY AND PRACTICE" CLAIM, WHICH ALSO FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

As we explained (Mem. at 30-34), FECA does not require the Commission to provide administrative complainants 60 days' notice prior to the deadline for seeking judicial review under 2 U.S.C. § 437g(a)(8). In response, plaintiffs do not point to any language in that or any other FECA provision that specifies such a notice requirement. Rather, plaintiffs argue that the Commission has a "policy . . . to treat the day on which the Commission dismisses a complaint

in a closed-door meeting as the date of dismissal for purposes of triggering the statutory 60-day period for seeking judicial review." (Opp. at 28; *see also id.* at 29.) In fact, however, the treatment of the date of dismissal as the trigger for the 60-day period is not a Commission policy, but a command of the statute as interpreted by the D.C. Circuit. *Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) ("The judicial review prescription in this case is precise: the 60-day review period runs from the 'date of dismissal.' 2 U.S.C. § 437g(a)(8)(B)."); *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995); *see also* FEC Mem. 31-32. For several reasons, this Court lacks jurisdiction to reconsider this precedent in the context of plaintiffs' case. In any event, Claim Two also fails to state a claim upon which relief can be granted.

### A. Plaintiffs Lack Both Statutory and Constitutional Standing

Plaintiffs assert jurisdiction under 2 U.S.C. § 437g(a)(8) and the Administrative Procedure Act ("APA"), but neither statute provides jurisdiction over the policy and practice claim. (*See* Am. Compl. ¶ 3.) Although plaintiffs "do not concede" that 2 U.S.C. § 437g(a)(8) fails to authorize review of their broad "policy" challenge (Opp. 31), they mount no argument against that conclusion. (*See* FEC Mem. at 28-29.) Instead, they rely on the APA: "[T]his Court would have jurisdiction under the APA to review Count II." (Opp. 31.)[6] But because plaintiffs' claim is really a challenge to the D.C. Circuit's interpretation of 2 U.S.C. § 437g(a)(8), not any policy or regulation of the Commission, it is not subject to APA review. Moreover, plaintiffs fail to rebut the Commission's showing that the APA cannot be used to circumvent section 437g(a)(8)'s procedures or FECA's comprehensive scheme for the processing of enforcement matters. (FEC Mem. at 35.)

[6] As the courts have long held, the APA itself does not confer jurisdiction. *See, e.g.*, *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 n.3 (1991) ("The judicial review provisions of the APA are not jurisdictional.").

Contrary to plaintiffs' contention (Opp. at 32-33), *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996), does not support their argument that the APA authorizes judicial review of their policy and practice claim. Because FECA has no provisions governing judicial review of regulations, *Perot* makes the uncontroversial point that an action challenging a regulation "should be brought under the judicial review provisions of the Administrative Procedure Act." *Id*. at 560. The D.C. Circuit in *Perot* did not liken policy and practice claims to challenges to regulations. Indeed, the appellate court never mentioned that kind of claim. Moreover, as explained above, the timing "policy" that plaintiffs challenge is actually a statutory interpretation by the D.C. Circuit, and *Perot* does not suggest that the APA provides jurisdiction to review such precedent.

Even if plaintiffs' policy claim could properly be raised under the APA, that statute's "presumption of available judicial review is subject to an implicit limitation" — limits on jurisdiction under Article III such as ripeness. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57-58 (1993) (citing *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967), and *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990)). Here, this Court lacks jurisdiction over plaintiffs' APA-based Claim Two, whether analyzed in terms of ripeness or standing. *See* 13B Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure Jurisprudence* §§ 3531.12, 3532.1 (discussing close connection between the justiciability categories of ripeness and standing).

As the Supreme Court has noted, the ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Catholic Social Services*, 509 U.S. at 57 n.18. The Court further explained that "'injunctive and declaratory judgment remedies'" — what CREW and Sloan seek here — "'are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless

these arise in the context of a controversy "ripe" for judicial resolution.'" *Id.* at 57 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). In their opposition, plaintiffs have now clarified that they "designed" their APA-based claim for declaratory and injunctive relief "to prospectively ensure" that the Commission complies with its allegedly statutory obligations "for all aggrieved parties." (Opp. at 30.) But whether these plaintiffs or any other future "aggrieved" party will experience "in a concrete way" the allegedly harmful effects of which plaintiffs complain is speculative. *Abbott Labs.*, 387 U.S. at 148-49. As we explained (Mem. at 27-28), plaintiffs were able to file the instant lawsuit before the end of the 60-day period, and the Court cannot now award any relief to "remedy" the alleged injury of their not having received earlier notice of the Commission's dismissal of their administrative complaint. Thus, they have no injury in fact regarding this particular administrative complaint, and any speculation that they may not receive sufficient notice in the future is unripe. Plaintiffs also disavow any interest in "vindicat[ing] the rights of other administrative complainants not before this Court" (Opp. at 30), but even if they had not made such disavowal, potential claims of other future complainants would similarly be unripe.

For many of the same reasons that their policy and practice claim is unripe, CREW and Sloan lack standing to bring the claim. Although they assert they have suffered a past injury in fact, they cannot demonstrate a future injury in fact that is imminent and not conjectural. *See Chang v. United States*, __ F. Supp. 2d __, 2010 WL 3700551 (D.D.C. 2010) (relying upon *Lyons* and *United Transp. Union* in holding that plaintiffs lacked Article III standing to seek prospective equitable relief in their challenge to governmental policy and practice).

Plaintiffs apparently believe that, if their policy and practice claim fails, no administrative complainant could ever challenge the rule that the 60-day period begins on the date of the

Commission's dismissal of an administrative complaint. (*See, e.g.*, Opp. at 30.) But, contrary to plaintiffs' assertion (*id.*), administrative complainants face no "Catch-22" foreclosing judicial review. While it is true that a plaintiff like Sloan, who was able to file her judicial complaint on time, has no standing to challenge the 60-day rule, if the Commission failed entirely to notify an administrative complainant before the 60 days had run, then that person would presumably be able to satisfy the injury-in-fact standing requirement under Article III. As the D.C. Circuit noted:

> Jordan's last point is that starting the clock on the date of dismissal might allow the Commission to avoid review by withholding notice of its decision until the 60-day period expired. We will face that hypothetical case if and when it arises.

*Jordan*, 68 F.3d at 519. That situation, however, remains hypothetical.

Plaintiffs cite no MUR in which the Commission failed to notify an administrative respondent within the 60-day filing period. In fact, the number of days between the Commission's voting and its notifying an administrative respondent averages about 21 days for the Matters Under Review that plaintiffs' court complaint cites anecdotally — and that calculation includes the anomalous 55 days in one of the MURs. (Am. Compl. ¶¶ 52-66.) Even if that average accurately reflects the larger universe of all dismissed administrative complaints (which even plaintiffs do not suggest), an administrative complainant who wishes to challenge the dismissal of its complaint has time to file a petition for review.

Plaintiffs mistakenly assert, however, that administrative complainants would violate Federal Rule of Civil Procedure 11 if they filed a section 437g(a)(8) petition without knowing the grounds for the Commission's dismissal. (Opp. at 35-36.) But the complainants need only allege that they have not yet received the Commission's explanatory documents and that the information they currently have supports a challenge to the dismissal. Administrative

complainants typically rely on publicly available financial filings and news reports in their complaints to the Commission, and the complainants can refer to those sources in their court petitions. *See, e.g., Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 294 n. 9 (2005) ("There is nothing necessarily inappropriate . . . about filing a protective action."); *cf. In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007) (explaining that, in the context of the state secrets privilege, the court has recognized that where "the plaintiff is not in possession of the privileged material, 'dismissal of the relevant portion of the suit would be proper only if the plaintiff[ ] w[as] manifestly unable to make out a *prima facie* case without the requested information'" (alterations in original; internal citation omitted)). In filing a protective petition, the complainant "exercise[s] due diligence in preserving his legal rights." *Spannaus*, 990 F.2d at 645 (internal quotation marks and citation omitted). Thus, under these procedures, plaintiffs face no alleged deprivation of any supposed due process right.

If the case proceeds and the Commission provides no explanation for its dismissal, the courts — rather than blaming the plaintiff for filing its lawsuit prematurely — would likely remand the matter with instructions to the Commission to explain its action. *See Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 & n.5 (D.C. Cir. 1987). When the complainant receives Commission materials explaining the grounds for the dismissal of the administrative complaint, the complainant can file an amended judicial complaint, as plaintiffs did here. *See* Fed. R. Civ. P. 15. Or, if those materials satisfactorily answer the complainant's objections to the dismissal, the complainant can dismiss its protective court filing. Thus, under any of these scenarios, a plaintiff would face no risk of violating Rule 11.

In sum, plaintiffs lack statutory standing under FECA and the APA to bring their challenge to the precedent holding that the 60-day clock under section 437g(a)(8) begins to run

when the Commission dismisses an administrative complaint, and they fail to demonstrate that they have suffered an Article III injury in fact that presents a controversy ripe for judicial review.

### B. Even If It Is Reviewable, Plaintiffs' Policy and Practice Claim Should Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted

Plaintiffs repeatedly assert that 2 U.S.C. § 437g(a)(8) "guarantees" them and other administrative complainants a procedural right to receive notice of the dismissal of their complaint and an explanation of that dismissal a "minimum" of 60 days before the statutory deadline for filing a petition for judicial review of the dismissal. (*See* Am. Compl. ¶¶ 2, 15, 52, 56, 69, 74-78; *see also, e.g.*, Opp. at 29.) As the Commission earlier explained (Mem. at 30-32), however, the plain language of 2 U.S.C. § 437g(a)(8)(B) forecloses plaintiffs' assertion. The provision does not state that the Commission must give notice to the administrative complainant or provide documents explaining the basis for the Commission's dismissal at the beginning of the 60-day judicial review period. Nor does it state that the period for filing runs from the date of notification or explanation. Indeed, the provision does not mention notice or an explanation. "The judicial review prescription in this case is precise: the 60-day period runs from the 'date of dismissal.'" *Spannaus*, 990 F.2d at 644.

The Commission can only dismiss or terminate a MUR by an official affirmative vote of at least four Commissioners. *See* 2 U.S.C. § 437c(c). Thus, the "date of dismissal" is the date the Commission votes to dismiss or close a matter, a conclusion the D.C. Circuit reached more than fifteen years ago. *Jordan*, 68 F.3d at 519. The court there held that Jordan's petition "must be dismissed for lack of jurisdiction" because he filed the petition 63 days after "[t]he Commission voted to dismiss Jordan's [administrative] complaint." "The statute," the court stated, "will support no other result." *Id*.

Plaintiffs never directly address the statute's plain language. They cite no legislative history that casts doubt on a straightforward reading. They do not acknowledge that, "where filing deadlines are concerned, 'a literal reading of Congress' words is generally the only proper reading of those words.'" *Spannaus*, 990 F.2d at 644 (quoting *United States v. Locke*, 471 U.S. 84, 93 (1985)). And plaintiffs' attempt to distinguish *Spannaus* and *Jordan* fails. (Opp. at 36-37.) In *Spannaus*, they note (Opp. at 36), "the date of dismissal was 'undisputed,'" and the court therefore "had no occasion" to address what the "date of dismissal" means. But the court in *Jordan* viewed *Spannaus* as "implicitly reject[ing]" the argument that the judicial review period begins on the date of the notification letter or its receipt. *Jordan*, 68 F.3d at 519.[7] And *Jordan* rests on the plain language of the statute, not on the distinction between an action taken directly by the Commission (the vote to dismiss) and an action by its staff on its instructions (the notice letter).

In sum, the statute's plain language and the D.C. Circuit's *Jordan* and *Spannaus* opinions contradict plaintiffs' assertion (*see, e.g.*, Opp. at 1) that an arbitrary and capricious Commission policy determines when the judicial review period begins. Plaintiffs' opposition offers this Court only their policy preferences and a potential rewrite of section 437g(a)(8)(B). They would prefer, for example, that the Commission operate more like a court. (Opp. at 39-40.) Congress, however, did not write a provision to that effect.

[7] Publicly available records confirm that the date of dismissal identified in *Spannaus* was the date the Commission voted to close the case. *See* MUR 2163 (American Jewish Committee), certification dated Jan. 10, 1991, available at the FEC's Public Records Office (certifying Jan. 9, 1991, Commission vote). The D.C. Circuit later noted this fact in stating that *Spannaus* "indicated that the 60-day clock began ticking eight days earlier — on the date of the Commission's vote." *Jordan*, 68 F.3d at 519 (citing *Spannaus*, 990 F.2d at 644).

## V. CONCLUSION

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

Respectfully submitted,

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