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

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 in Support of Motion to Dismiss.

Respectfully submitted,

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October 12, 2010

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

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The Federal Election Commission ("Commission" or "FEC") moves this Court to dismiss the 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' claim (Complaint ¶¶ 47-49) that the Commission unlawfully failed to explain its recent 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. Plaintiffs also lack Article III standing to pursue this claim because they have suffered no concrete injury as a result of the timing of the FEC's explanation of its dismissal, and because, in any event, plaintiffs have not alleged any particular connection to the activities described in their administrative complaint that could have caused them any cognizable injury.

In addition, the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA" or "Act"), provides no jurisdiction for plaintiffs to pursue their generalized claim (Compl. ¶¶ 50-56) that the Commission engages in a "pattern and practice" of not explaining dismissals of administrative complaints within 60 days. The Act permits certain suits by administrative complainants about their own complaints, but does not provide the equitable relief (Compl. Prayer for Relief (3) and (4)) that plaintiffs seek on behalf of many administrative complainants, past, present, and future. Nor does the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), provide a basis for plaintiffs to pursue their "pattern and practice" allegations, which also fail to state a claim upon which relief can be granted. Moreover, plaintiffs lack Article III and prudential standing to pursue their generalized claim because a federal litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975).

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.

I. 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.

Under 2 U.S.C. § 437g(a)(8)(A), there is limited judicial review of FEC enforcement decisions. Specifically, administrative complainants who satisfy standing and other jurisdictional requirements may file suit to challenge "a failure of the Commission to act on such complaint[s]" within 120 days after the complaint was filed, and may also 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). Dismissal suits must be filed "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). Thus, "[a]part from § 437g(a)(8)(C), there is no private right of action to enforce FECA against an alleged violator." *Perot*, 97 F.3d at 558 n.2 (citations omitted).

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 Committee*, 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 ("The Commission voted to adopt the General Counsel's recommendations, but did not issue a separate joint statement. We therefore infer that the General Counsel's report sets forth the Commission's rationale for ending its inquiry into CREW's administrative complaint") (footnote and citations omitted)).

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, 449 (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 and its treasurer violated various provisions of FECA and its implementing regulations.[1] The Commission designated the complaint Matter Under Review ("MUR") 5908 for administrative purposes. In January 2009, the Commission found "reason to believe" that several respondents in MUR 5908 violated certain provisions of the Act, but following the recommendations of the General Counsel,

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

determined to take no action with respect to other allegations in the administrative complaint.[2] Following an administrative investigation as to the remaining allegations, the Commission's General Counsel made additional recommendations.[3] On June 29, 2010, the Commission concluded that there was insufficient evidence to establish whether probable cause existed 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.[4]

Five of the six Commissioners voted to dismiss the administrative complaint; the sixth Commissioner did not vote. *Id.* In a letter dated July 23, 2010, the Commission notified plaintiffs of the dismissal of MUR 5908.[5] 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

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

Specifically, the Commission found reason to believe that Duncan Hunter violated 2 U.S.C. §§ 432(e)(1) and 441a(f), and 11 C.F.R. §§ 100.72 and 100.131; that Hunter for President, Inc. and Bruce Young, in his official capacity as Treasurer, violated 2 U.S.C. §§ 434(a)(3) and 441a(f); and that Peace Through Strength Political Action Committee ("PTS PAC") and Meredith G. Kelley, in her official capacity as Treasurer, violated 2 U.S.C.§ 441a and 11 C.F.R. § 110.2(b)(1). On the same date, however, the Commission also determined, in accord with the General Counsel's recommendations, to "[t]ake no action at this time with respect to the allegation that [PTS PAC] and Meredith G. Kelley, in her official capacity as Treasurer, violated 2 U.S.C. § 434(b) and 11 CFR §§ 104.3(b) and 104.9(a)." Certification for MUR 5908 (Jan. 30, 2009).

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

[4] Certification for MUR 5908 (June 30, 2010), available at http://eqs.nictusa.com/eqsdocsMUR/10044274525.pdf; Statement of Reasons of Chairman Petersen and Commissioners Hunter, McGahn II, Walther and Weintraub, MUR 5908 (Aug. 23, 2010), available at http://eqs.nictusa.com/eqsdocsMUR/10044274546.pdf.

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

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.[6] 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 complainants by facsimile and first-class mail on August 24.[7]

2. Plaintiffs' Judicial Complaint

On August 11, 2010, less than two weeks after learning that their administrative complaint had been dismissed, plaintiffs initiated this lawsuit. It 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).[8]

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[6] Statement of Reasons. *See* 11 C.F.R. §§ 5.4(a)(4), 111.20(a); *see also* 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.

[7] *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).

[8] 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. §§ 5.4(a)(4), 111.20(a).

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

First, plaintiffs contend 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 seek both a declaration pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's "dismissal of MUR 5908 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 allege (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 describe 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 seek declaratory and injunctive relief as to these "pattern and practice" allegations. Compl. Prayer for Relief (3)-(4).

II. 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' challenge to the dismissal of their administrative complaint in MUR 5908 is moot because plaintiffs have already received the relief they seek. Plaintiffs challenge only the Commission's alleged failure to provide an explanation for its dismissal within the 60 days

provided under section 437g(a)(8)(B), but plaintiffs filed this suit seventeen days before that deadline, and the FEC in fact provided its explanation on August 23 and 24, 2010, within the deadline. Plaintiffs also lack standing because they have suffered no injury under Article III as a result of the timing or substance of the dismissal of their complaint. In addition, neither FECA nor the APA provides a jurisdictional basis for plaintiffs' generalized "pattern and practice" allegations, which also fail to state a claim under the APA. And plaintiffs lack Article III and prudential standing to make the "pattern and practice" claim concerning third parties. Accordingly, the Court should dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

A. Legal Standards

When reviewing a motion to dismiss for lack of subject matter jurisdiction, each court has "'an affirmative obligation to insure that it is acting within the scope of its jurisdictional authority.'" *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 5 (D.D.C. 2004) (citation omitted). In evaluating such motions, 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, the court may consider materials outside the pleadings. *Settles v. U.S. Parole Commission*, 429 F.3d 1098, 1107 (D.C. Cir. 2005). No action of the parties can confer subject matter jurisdiction on a federal court because 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). 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. The Court Lacks Jurisdiction to Address Plaintiffs' Claim That the Commission Failed to Provide an Explanation of Its Dismissal of MUR 5908

1. Plaintiffs' Claim As to the Dismissal of MUR 5908 Is Moot Because the Commission Has Made Public Its Statement of Reasons and Other Explanatory Materials

When the Commission in August 2010 made public its statement of reasons and other explanatory materials in MUR 5908, plaintiffs' claim regarding the failure to receive that explanation became moot. They now have the relief they sought. Under the Constitution, federal courts are limited to deciding "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "Even where the litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clark v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (quotation marks and citations omitted). A case is moot if a defendant can demonstrate that two conditions are met: (1) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, and (2) there is no reasonable expectation that the alleged wrong will be repeated. *Doe v. Harris*, 696 F.2d 109, 111 (D.C. Cir. 1982) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying facts and law. *Id.* While the movant has the burden of proving mootness, a plaintiff must defend a motion to dismiss brought under Rule 12(b)(1) by proving by a preponderance of the evidence that the court has jurisdiction to hear its claims. *Khadr*, 529 F.3d at 1115. Plaintiffs cannot meet this burden.

When plaintiffs filed this suit on August 11, 2010, more than two weeks before the 60-day deadline under section 437g(a)(8), the Commission had not yet explained its dismissal of the administrative complaint. However, on August 23 and 24, 2010, the five Commissioners who voted to dismiss the administrative complaint issued a joint statement of reasons and the Commission made public portions of its administrative file on MUR 5908; these materials further explain the Commission's decisions in the matter, and all were released before the deadline for plaintiffs to file suit under section 437g(a)(8). Indeed, plaintiffs were on notice from the Commission's July 23 notification letter that documents from the Commission's administrative file would be made public within 30 days, and those documents were in fact made public on the first business day after that deadline. Furthermore, a copy of the Commissioners' statement of reasons was sent by mail and facsimile to plaintiffs the next day, August 24.

Since the Commission has provided plaintiffs the only relief they seek regarding MUR 5908 — an explanation for the Commission's dismissal decision — plaintiffs' claim for relief is now moot. Release of the documents from the Commission's file and issuance of the statement of reasons has "completely and irrevocably eradicated" the effects of the alleged violation. *Friends of Animals v. Salazar*, 670 F. Supp. 2d 7, 11-12 (D.D.C. 2009) (citations omitted). "[N]o justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments." *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Natural Resources Defense Council v. NRC*, 680 F.2d 801, 813-814 (D.C. Cir. 1982)). Plaintiffs' request for injunctive relief cannot keep their claim about MUR 5908 alive. "As the Supreme Court has recognized in several decisions, '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *City of Houston*,

Texas. v. HUD, 24 F.3d 1421, 1429 n.6 (D.C. Cir. 1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992)). Moreover, plaintiffs do not allege that any other administrative complaints filed by them are awaiting statements of reasons from the Commission, so there is no reasonable basis to conclude that the Commission might fail to provide timely explanations of hypothetical dismissals of plaintiffs' hypothetical future complaints.[9] Thus, the only concrete claim in plaintiffs' complaint is moot.

2. Plaintiffs Lack Article III Standing to Challenge the Dismissal of Their Administrative Complaint in MUR 5908

Those who seek review of Commission decisions under 2 U.S.C. § 437g(a)(8) must have standing under Article III of the Constitution. "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; *Judicial Watch, Inc .v. FEC,* 180 F.3d 277 (D.C. Cir. 1999). A plaintiff's standing must be determined to establish the court's jurisdiction before the court may hear the case and reach the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 101 (1998); *The Grand Council of the Crees of Quebec v. FERC,* 198 F.3d 950, 954 (D.C. Cir. 2000). 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. at 498). 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."

[9] Instead, plaintiffs allege only that the Commission's purported failure to provide an explanation for the dismissal decision in MUR 5908 was part of a "pattern and practice of arbitrarily and capriciously failing to provide the basis for its dismissal of complaints" within the 60-day period. Compl. ¶ 38. As we explain *infra* pp. 17-26, for several reasons this "pattern or practice" claim, involving administrative complaints filed by persons who are not parties before this Court, should also be dismissed.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). 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.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan*, 504 U.S. at 560-561). 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). Where a plaintiff asserts a procedural right, he must show that he has suffered a personal and particularized injury that impairs one of his concrete interests. *Int'l Brotherhood of Teamsters v. TSA*, 429 F.3d. 1130, 1135 (D.C. Cir. 2005). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S. Ct. 1142, 1151 (2009).

a. Plaintiffs Have Suffered No Article III Injury from the Timing of the Commission's Explanation of the Dismissal of MUR 5908

Plaintiffs contend that the Commission's alleged failure to provide an explanation for the agency's decision to dismiss their administrative complaint within the 60-day period in 2 U.S.C. § 437g(a)(8)(B) prevented them from obtaining judicial review of the dismissal decision. Compl. ¶¶ 2, 14. However, as we have shown, the Commission explained its dismissal before the 60 days expired. In particular, the Commission made public its statement of reasons and

documents from the Commission's file in the administrative matter sufficiently in advance of the statutory deadline for filing suit. If plaintiffs had waited two weeks before filing this action, they would have received the Commission's explanation and could have challenged it in a timely complaint; or, if after receiving the Commission's explanation plaintiffs wanted to challenge it, they could have amended their existing complaint accordingly. *See* Fed. R. Civ. P. 15(a). Thus, the Commission has not caused plaintiffs to suffer any injury that could be redressed by the Court. The FEC has already provided the explanation plaintiffs purportedly seek, and they have had procedural options to challenge the merits of the dismissal of MUR 5908. Plaintiffs therefore lack standing to pursue their claim as to the timing of the Commission's explanation of its dismissal of MUR 5908.

b. Even If Plaintiffs Had Challenged the Commission's Dismissal of MUR 5908 on the Merits, They Have Failed to Allege That They Suffered Any Injury from the Dismissal Itself Under Article III

Even if plaintiffs had challenged the Commission's dismissal of MUR 5908 on the merits, they have failed to show that they would have Article III standing to challenge the Commission's decision not to pursue FECA violations they alleged in their administrative complaint. Plaintiffs have not shown that the agency's decision caused any "concrete" or "particular" injury to them because they have alleged no direct connection between themselves and those involved in the activities about which they complained. Because there is no allegation explaining how plaintiffs' alleged procedural injury deprived them of a "concrete interest that is affected by the deprivation," they have alleged only "a procedural right *in vacuo* — … insufficient to create Article III standing." *Summers,* ___ U.S. ___, 129 S. Ct. at 1151.

Plaintiffs' administrative complaint described actions by several persons and entities (collectively, the "respondents"): (1) then-Congressman Duncan Hunter of California; (2) Peace Through Strength Political Action Committee ("PTS PAC"), a nonconnected, multicandidate

political committee that first registered with the Commission in 2002 (*see* 2 U.S.C. § 433) and was affiliated with Representative Hunter; (3) Hunter for President, Inc., the authorized principal campaign committee for Representative Hunter's 2008 presidential bid; and (4) the two committees' respective treasurers.[10] However, PTS PAC and its treasurer were the only persons plaintiffs' administrative complaint alleged had violated the Act or Commission regulations. Specifically, the administrative complaint alleged that, while Representative Hunter was considering a potential presidential bid in the 2008 elections, PTS PAC should have registered as Hunter's principal campaign committee and abided by the rules applicable to such committees; in turn, PTS PAC allegedly violated the Act by accepting contributions that exceeded the limit on contributions by individuals to candidate committees and by making excessive in-kind contributions to Representative Hunter and the Hunter committee in the form of expenditures for certain television advertisements. Finally, the administrative complaint alleged that PTS PAC violated the Act by failing to disclose its disbursements for the television advertisements. *See generally* Admin. Compl.

After reviewing the administrative complaint, the Commission's General Counsel recommended that the Commission find reason to believe that Congressman Hunter, Hunter for President, PTS PAC, and their respective committee treasurers violated certain provisions of the Act and Commission regulations in connection with activity described in the administrative complaint. *See* First General Counsel's Report at 15. The First General Counsel's Report, however, also recommended that the Commission take no action at that time against PTS PAC and its treasurer regarding the committee's alleged failure to disclose its disbursements for the television advertisements described in plaintiffs' administrative complaint. *Id.* at 12-14, 15.

[10] *See* Admin. Compl. at 2-9 ; 2 U.S.C. § 432(a).

The Commission voted 5-0 to adopt the General Counsel's recommendations, and it approved documents summarizing the Commission's factual and legal analysis in the matter. *See* Certification (Jan. 30, 2009). The factual and legal analysis for PTS PAC and its treasurer concluded that disbursements for the advertisement had already been reported by the committee.[11]

Following an administrative investigation, the Commission's Office of General Counsel submitted another report to the Commission, "General Counsel's Report #2," which contained additional recommendations to the Commission. On June 29, 2010, the Commission concluded that there was insufficient evidence to find probable cause to believe that violations of the Act had occurred, and determined by a 5-0 vote to take no further action and close its file in the matter.[12]

Plaintiffs point to no direct, specific connection between themselves and any of the above allegations that could satisfy the requirements of Article III standing. As noted above, plaintiffs' administrative complaint alleged violations of the Act only by PTS PAC and its treasurer. Admin. Compl. ¶¶ 27, 31, 35, 37. In their court complaint, plaintiffs do not indicate how the Commission's failure to pursue the alleged violations by PTS PAC has caused any "concrete" or "particularized" injury to plaintiffs CREW and Sloan, nor how any such injury would be redressed by a favorable decision in this case. Indeed, the only mention of actions taken by PTS PAC and its treasurer occurs in paragraph 27 of plaintiffs' judicial complaint, with no contention about how those alleged actions had any effect whatsoever on plaintiffs. It is well-established

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[11] Factual and Legal Analysis for Peace Through Strength Political Action Committee and Meredith G. Kelley, as Treasurer, MUR 5908 (Feb. 19, 2009) at 6, available at http://eqs.nictusa.com/eqsdocsMUR/10044274495.pdf.

[12] Certification for MUR 5908 (June 30, 2010); Statement of Reasons at 2.

that a plaintiff's desire for an administrative agency to "'get the bad guys'" is insufficient to create standing. *Common Cause*, 108 F.3d at 418.

In their court complaint, plaintiffs allege generally that CREW is "hindered in its programmatic activity" and that Sloan is "harmed" if persons fail to report information as required by FECA or the Commission fails to properly administer the reporting requirements of the Act. (Compl. ¶¶ 7-9.) Although an informational injury can support standing, *see FEC v. Akins*, 524 U.S. 11 (1998), the vague, general allegations plaintiffs make here are insufficient, and they have not alleged a concrete injury from any particular missing information. Moreover, "[u]nlike the plaintiffs in [*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 (citation omitted).

The administrative complaint did allege that PTS PAC and its treasurer had failed to disclose certain disbursements for television advertisements, but the General Counsel's Office concluded, and five Commissioners agreed, that those disbursements had already been disclosed on the committee's previous reports.[13] Thus, plaintiffs suffered no informational injury from the Commission's decision not to pursue those alleged violations. Plaintiffs' administrative complaint also alleged that PTS PAC had violated the Act by registering with the FEC as a multicandidate committee, rather than a candidate committee. But since PTS PAC was already registered and filing periodic reports with the Commission, plaintiffs again were not deprived of any information that would create standing. Rather than seeking additional information, plaintiffs appear to be seeking a "legal determination" that certain expenditures should have been

[13] Factual and Legal Analysis for PTS PAC at 6-7; General Counsel's Report #2 at 11-13; Statement of Reasons at 2.

reported differently or "from a different source." *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). As the D.C. Circuit has explained, however, any such marginal increase in information is too "trivial" to provide standing under Article III. *Id.* Thus, even if plaintiffs had alleged a more specific informational injury, the Commission's dismissal of the allegations in plaintiffs' administrative complaint regarding the manner in which PTS PAC registered with and reported to the Commission cannot establish standing.

C. Plaintiffs' Broad "Pattern and Practice" Allegations Are Not Justiciable and Fail to State a Claim Upon Which Relief Can Be Granted

Plaintiffs complain not only about the dismissal of their own administrative complaint, but also claim that the Commission engages in a general "pattern and practice" of not furnishing explanations before the end of the 60-day period for administrative complainants to seek judicial review under 2 U.S.C. § 437g(a)(8). Citing several other dismissals from 2008 and 2009. (Compl. ¶¶ 32-46, 50-56), the complaint seeks (Prayer for Relief (3)) a declaration that "the failure of the FEC to provide a Statement of Reasons or other explanation for dismissing complaints within 60 days of such dismissals [is] arbitrary, capricious, and contrary to law."[14] The complaint also requests (*id.* at (4)) that the Court "[o]rder the FEC to issue a Statement of Reasons or other explanation for dismissing complaints sufficiently within 60 days of such dismissals so as to permit a complainant to file a petition for review" with this Court. This relief should be denied.

[14] Only one of those other administrative matters, MUR 5541, was filed by plaintiffs. (*See* Compl. ¶¶ 32-37.) As plaintiffs admit, the notification of the dismissal in that matter was delayed due to an out-of-date mailing address for CREW, but the Commission still hand delivered a copy of the notification letter before the expiration of the 60-day period. (*Id*. ¶¶ 33, 35.)

1. FECA Provides No Jurisdiction for Plaintiffs to Pursue Their Generalized "Pattern and Practice" Claim on Behalf of Others Who Have Filed Administrative Complaints

Plaintiffs lack statutory standing to pursue their "pattern and practice" claim. The Act's special jurisdictional grant, 2 U.S.C. § 437g(a)(8), departs from the usual rule that an agency's prosecutorial decisions are not judicially reviewable, s*ee, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and 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." Compl. ¶ 24.

Plaintiffs' "pattern 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 dismissal of anyone's administrative complaint but their own. As the quotations above from the court complaint reveal, the allegations broadly cover the Commission's procedures for handling administrative complaints, and plaintiffs seek equitable relief 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 the issue of whether a statute provides a particular person a right to sue is a question of statutory standing). There is no indication that Congress intended to create a remedy so expansive that it would permit the relief plaintiffs seek on behalf of third parties. Indeed, such a remedy would raise serious separation of power concerns because it would expand the narrow confines of section 437g(a)(8) to allow court supervision of an agency's overall practices at the request of a single plaintiff.

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department . . .."

Lujan, 504 U.S. at 577 (quoting *Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 489 (1923)). *See also Allen v. Wright*, 468 U.S. 737, 752 (1984) ("law of Art. III standing is built on a single basic idea — the idea of separation of powers").

Simply put, in enacting section 437g(a)(8), Congress did not authorize a court to adjudicate or a petitioner to pursue a "pattern or practice" allegation like the one 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 FECA provides for an administrative complainant is a suit to challenge the disposition of that person's own complaint — not those of others.

2. The APA Provides No Basis for Plaintiffs to Pursue Their "Pattern and Practice" Allegations, Which Also Fail to State a Claim Upon Which Relief Can Be Granted

Plaintiffs' claim under the APA of a "pattern and practice" of unreasonable delay must also be dismissed. A "pattern and practice" of delay is not "agency action unlawfully withheld or unreasonably delayed" within the meaning of the APA, which authorizes challenges to "discrete" federal agency action but does not contemplate entangling the courts in managing the day-to-day business of the agencies. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 891 (1990) (stating that, under the APA, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm"); *The Wilderness Soc'y v. Norton,* Civil Action No. 03- 64-RMC, 2005 WL 3294006 (D.D.C. Jan. 10, 2005) (dismissing a pattern or practice allegation that an agency failed to prepare certain plans required by statute: "The APA does not allow a suit to enforce a general statutory command" (citing *S. Utah Wilderness Alliance,* 542 U.S. at 66-67).) Thus, plaintiffs' claim under the APA is not justiciable and fails to state a claim upon which relief can be granted.

Courts have rejected claims similar to plaintiffs' claim here. For example, in *Del Monte Fresh Produce N.A., Inc. v. United States,* 706 F. Supp. 2d 116 (D.D.C. 2010), an importer of fresh produce claimed that the Food and Drug Administration ("FDA") had engaged in an unlawful pattern and practice of delay in sampling and inspecting produce. The plaintiff claimed that the FDA "often allows too much time to pass before completing those inspections, causing

Del Monte's produce to become less fresh and therefore to lose value." *Id.* at 118. As examples of this delay, Del Monte described six instances between early 2008 and early 2009 in which the FDA requested a sample of a shipment of produce but did not issue the notice alerting the importer of the agency's decision to release the particular shipment until so many days had passed that Del Monte was harmed. *Id.* The importer sought a judgment "'declaring that FDA has engaged in a pattern or practice that constitutes agency action unlawfully withheld and/or unreasonably delayed.'" *Id.* (quoting Del Monte's complaint).

Granting the government's motion to dismiss, the court rejected the argument that, because a single failure to act is reviewable under the APA, a pattern and practice of many such failures also is reviewable for unreasonable delay. *Del Monte,* 706 F. Supp. 2d at 118-119. The court held that the importer's claim was not justiciable under the APA. The Supreme Court, the district court stated, "has made explicit that a court may only review an agency's failure to act, or unreasonable delay in acting, if the action not taken, or taken too late, is discrete." *Del Monte,* 706 F. Supp. 2d at 119 (citing *S. Utah Wilderness Alliance,* 542 U.S. at 64). Quoting *Southern Utah Wilderness Alliance,* 542 U.S. at 66-67, the court explained that, "'[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved — which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out . . . day-to-day agency management.'" *Del Monte,* 706 F. Supp. 2d at 119. The district court refused to review Del Monte's claim because that task would lead to just the sort of "entanglement" in the "management of the agency's business that the Supreme Court has instructed is inappropriate" for the federal judiciary to undertake. *Id.*

In *Institute for Wildlife Protection v. Norton*, 337 F. Supp. 2d 1223 (W.D. Wash. 2004), the court applied the principles of *National Wildlife Federation* and *Southern Utah Wilderness Alliance* to dismiss a claim of a pattern and practice of delay similar to the claim here. The plaintiffs in that case alleged that the government had engaged in a pattern and practice of delay in responding to citizen petitions submitted in support of listing the Western Gray Squirrel as an endangered species under the Endangered Species Act, in violation of the APA, 5 U.S.C. § 706(1). Citing four specific examples of past government inaction regarding their citizen petitions, the plaintiffs claimed that the government would "surely do it again in the near future, as they have taken no steps to address the funding problems they have brought upon themselves, nor have they changed the very lengthy times they take to make these simple, initial findings." *Inst. for Wildlife Prot.*, 337 F. Supp. 2d at 1229 (citation omitted).

Although the plaintiffs had referred to four prior instances of government inaction, the court held that the plaintiffs were not challenging any final agency action, but instead sought to make "wholesale improvements" to the agency's citizen review process — an attempt prohibited by *National Wildlife Federation* and its progeny. As the court explained, "the holding of *Lujan* [*v. Nat'l Wildlife Fed'n*] . . . denies jurisdiction to hear 'pattern and practice claims' regarding how an agency conducts its business on a system-wide level." *Inst. for Wildlife Prot.*, 337 F. Supp. 2d at 1229 (internal quotation marks and citation omitted). Instead,

> [p]laintiffs may direct their attacks against a particular agency action, [b]ut it is at least entirely certain that the flaws in the entire "program" — consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well — cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.

Id. at 1229 (citations omitted).[15]

Like the plaintiffs in *Del Monte* and *Institute for Wildlife Protection*, plaintiffs CREW and Sloan allege a "pattern and practice" of agency delay, citing specific instances of past delays by the Commission in issuing a statement of reasons for a dismissal.[16] But plaintiffs in effect seek a wholesale improvement, in the form of greater speed, in the Commission's process of issuing explanations for dismissing administrative complaints. As the Commission has shown, allegations of a pattern and practice of delay are not actionable under the APA, and plaintiffs' request for injunctive and declaratory relief is not justiciable. To hold otherwise would "entangle" this Court in the Commission's labor-intensive process for issuing public explanations of its dismissal decisions. Thus, plaintiffs' "pattern and practice" claim should be dismissed.

3. Plaintiffs Lack Article III and Prudential Standing to Pursue Their Generalized "Pattern and Practice" Claim

As we have explained, those bringing suit under 2 U.S.C. § 437g(a)(8) must demonstrate Article III standing. *See supra* pp. 13-17. Plaintiffs have not even attempted, however, to show how the Commission's decisions about administrative complaints filed by third parties about the

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[15] If plaintiffs here are assuming that the Commission in the future will not issue explanations for dismissing administrative complaints within 60 days of voting to dismiss, plaintiffs' "pattern and practice" claim is speculative and unripe. *See, e.g., Doe v. Doe Agency*, 608 F. Supp. 2d 68, 72 (D.D.C. 2009) (finding plaintiffs' request for prospective relief unripe in a pattern and practice claim: "Based on this prediction, plaintiffs request that the Court establish a time frame for the completion by the Doe Agency of all future classification reviews. Plaintiffs' speculative claims regarding hypothetical future violations are not ripe. . . . [T]hese contingencies [may]never occur . . . .") (citation omitted); *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (Citation omitted)).

[16] Plaintiffs cite a few isolated examples from the hundreds of administrative enforcement cases closed by the Commission in the past few years. *See* Selected Enforcement Statistics for Fiscal Years 2003-2008, available at http://www.fec.gov/em/enfpro/enforcestatsfy03-08.pdf; Supplemental Statistics, available at http://www.fec.gov/em/enfpro/enforcestatsfy09-10.pdf.

actions of other third parties have caused plaintiffs any cognizable injury-in-fact that an order of this Court could redress. "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome . . ., not . . . in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Am. Legal Found.*, 808 F.2d at 91 (internal quotation marks omitted) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (other citation omitted)). Plaintiffs lack that direct stake as to the complaints of others and therefore cannot meet their burden to demonstrate standing under Article III.

Plaintiffs also cannot meet the requirements of the limited exceptions to the prudential rule against third-party standing. Plaintiffs' "pattern and practice" claim and the requested equitable relief rest on the interests of persons not before the Court — past, present, and future 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). This prohibition is a "judicially self-imposed limit[ ] on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. at 751.

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 they have 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. Alabama ex rel.*

Patterson, 357 U.S. 449 (1958) (holding that NAACP could assert members' constitutional right of association). Courts have also held that physicians may assert the rights of their patients. *See, e.g., Griswold v. Connecticut,* 381 U.S. 479 (1965) (holding that doctors accused of being accessories to the crime of contraceptive use by their patients could raise their patients' constitutional right to contraception). And school operators may be able to assert claims on behalf of parents. *See, e.g,, Pierce v. Soc. of Sisters,* 268 U.S. 510 (1925) (private school operators could raise the rights of parents to direct the upbringing and education of their children by enrolling them in plaintiffs' schools). However, nothing in plaintiffs' 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.[17]

Finally, "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 a speedier explanation than those complainants themselves. Plaintiffs have not alleged that other administrative complainants who wish to litigate this issue face any special hindrance. Moreover, those other complainants' position differs markedly, for example, from that of the members of the NAACP (in *NAACP v. Alabama ex rel. Patterson*), who, by suing individually, would lose the very

[17] 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).

privacy of association that they wanted to protect. Only the NAACP could effectively vindicate the members' rights. For all of these reasons, plaintiffs lack standing to pursue their "pattern and practice" claim.

III. CONCLUSION

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

Respectfully submitted,

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October 12, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and MELANIE SLOAN,	No. 1:10-cv-01350-RMC
Plaintiffs,	
v.	
FEDERAL ELECTION COMMISSION,	[PROPOSED] ORDER
Defendant.	

[PROPOSED] ORDER

For the reasons set forth in the Memorandum Opinion dated _____, 2010, it is this _____ day of _____, 2010, hereby

ORDERED that the Federal Election Commission's Motion to Dismiss is **GRANTED**, and it is further

ORDERED that the above-captioned case be **DISMISSED.**

SO ORDERED.

Dated: _____, 2010

_____
ROSEMARY M. COLLYER
United States District Judge

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