UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*,	
Plaintiffs,	Civ. No. 16-2201 (EGS)
v.	
FEDERAL ELECTION COMMISSION,	FEC'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND
Defendant.	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

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July 17, 2017

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INTRODUCTION

Defendant Federal Election Commission ("Commission" or "FEC") opposes plaintiffs' Motion for Leave to File Amended Complaint (Docket No. 21) because their moot case cannot be revived and the amendment they seek is futile in any event. Plaintiffs' motion is an attempt to sidestep the jurisdictional requirements of Article III. In their original complaint, plaintiffs asserted that the Commission's alleged failure to act on their administrative complaint was contrary to law. But as the Commission explains in its simultaneously filed motion to dismiss, now that the agency has completed final action on plaintiffs' administrative complaint, the claims in their operative court complaint are moot and should be dismissed. *See* FEC's Mot. to Dismiss (Docket No. 24); *All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (finding an action alleging that the FEC had failed to act moot once the FEC completed its final action). Rather than filing a new action, plaintiffs seek leave to amend or supplement their complaint with different claims. (*See* Mem. of P. & A. in Supp. of Pls.' Mot. for Leave to File Am. Compl. ("Mot. to Amend") (Docket No. 21-1); Proposed Am. Compl. (Docket No. 21-2).) However, the Court should deny the requested leave because its jurisdiction over the case has ceased to exist. Courts must simply dismiss in that circumstance; attempts to revive moot suits through amendments to complaints are not permitted.

The Court should also deny plaintiffs' motion because amending or supplementing the complaint as they seek to do is futile. The claims plaintiffs seek to add allege that the Commission acted contrary to law by dismissing an administrative complaint seeking enforcement against 37 named respondents of a statutory provision that seven circuits have declared unconstitutional and not one has found enforceable. Plaintiffs candidly admit that they seek an affirmative change in the law. But dismissal decisions are reviewed under a highly

deferential standard that only requires the FEC to have acted reasonably. In the face of uniform, consistent case law from a majority of the circuit courts — and a minority of none — it was plainly reasonable for the Commission to have declined to pursue the FECA violations occurred here against dozens of contributors and political speakers. Plaintiffs' frivolous new claims could not survive a motion to dismiss and adding them to the complaint would be futile.

Moreover, justice does not require granting plaintiffs' motion. Plaintiffs seek to convert their delay lawsuit into a review of the merits of the Commission's dismissal of their administrative complaint, but the claims in the proposed amended complaint depend mainly on a different set of facts and legal theories. Allowing plaintiffs to circumvent the requirement to file a new lawsuit simply because it would involve the same parties and a few common background facts would not advance judicial economy. Moreover, allowing substitution of plaintiffs' claims would prejudice the FEC by cutting its response time to 14 days from the 60 days to which the agency is entitled under Federal Rule of Civil Procedure 12(a)(2). And denying leave to amend or supplement the complaint would not prejudice plaintiffs, who would simply face the ordinary burdens of new litigation and little if any resulting delay in light of all relevant factors.

BACKGROUND

I. THE FEC AND THE FEDERAL ELECTION CAMPAIGN ACT

The Commission is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA") and other federal campaign-finance statutes. Congress authorized the Commission to investigate possible violations of the Act. 52 U.S.C. § 30109(a)(1)-(2).[1] The

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table,

Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any responses filed by respondents, the Commission evaluates whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe, the FEC may investigate the alleged violation; otherwise, the agency dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). Any administrative investigation under this provision is confidential until the administrative process is complete. *Id.* § 30109(a)(12).

Administrative complainants may challenge the FEC's handling of their complaints in two limited situations. *See* 52 U.S.C. § 30109(a)(8)(A). First, a party who has filed an administrative complaint may sue the Commission in the event of "a failure of the Commission to act on [the administrative] complaint during the 120-day period beginning on the date the complaint is filed . . . ." *Id.* The Court of Appeals has held that the 120-day period is a jurisdictional threshold, not a timetable within which the Commission must resolve an administrative complaint. *See FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986) (explaining the Court's "unequivocal[] reject[ion]" of the argument that FECA required the FEC to act on an administrative complaint within 120 days and embracing the FEC's "entirely correct" view that "the Commission's handling of a complaint should be judged under the deferential standards of review prescribed in the [Administrative Procedure Act]") (emphasis omitted). The second

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http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. This submission cites provisions of the FECA as codified in new Title 52.

situation in which an administrative complainant may file suit is where the Commission decides to dismiss the complaint. In that event, FECA allows the complainant to challenge the dismissal in court. 52 U.S.C. § 30109(a)(8)(A).

If a court finds that the Commission's dismissal or failure to act was "contrary to law," it may order the Commission to conform to the court's decision within 30 days. 52 U.S.C. § 30109(a)(8)(C); *see In re Nat'l Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (per curiam); *Rose*, 806 F.2d at 1084. If the Commission fails to conform within that time period, the administrative complainant may bring a civil action to remedy the violation alleged in the administrative complaint. 52 U.S.C. § 30109(a)(8)(C); *see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

II. ADMINISTRATIVE PROCEEDINGS

As explained in their court complaint, plaintiffs filed an administrative complaint with the FEC on July 7, 2016, alleging that ten specific independent-expenditure-only political committees (commonly known as "super PACs") had accepted contributions from contributors in excess of the $5,000 per contributor limit under 52 U.S.C. § 30116. (Compl. ¶¶ 4-6 (Docket No. 1); Administrative Compl., *House Majority PAC*, Matter Under Review ("MUR") 7101 ("Admin. Compl.") ¶¶ 1-3 (July 7, 2016), https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119429.pdf.) The administrative complaint asked the Commission to reconsider its acquiescence to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"), which held that contribution limits under section 30116 were unconstitutional as applied to independent-expenditure-only political committees. The administrative complaint went on to ask that the Commission find that 39 specific contributions to the named super PACs from 27 identified

contributors constituted violations of FECA, and that the Commission "seek . . . declaratory and/or injunctive relief against future acceptance of excessive contributions" by the named respondents. (Compl. ¶¶ 1-2, 11-23, 38-77, 78; Admin. Compl. ¶¶ 7-8, 44-96.) On March 16, 2017, the FEC's Office of General Counsel submitted a report recommending that the Commission find no reason to believe that any administrative respondent had violated FECA. (*See* First General Counsel's Report, *House Majority PAC*, MUR 7101 (Mar. 17, 2017), https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119515.pdf.) On May 25, 2017, the Commission voted five-to-zero to adopt that recommendation and dismiss the administrative complaint. (Certification for MUR 7101 (May 25, 2017), https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119428.pdf.) The day after the Commission's vote, counsel for the FEC notified plaintiffs by phone that the Commission had dismissed the administrative complaint and that pursuant to FEC regulations, plaintiffs would be receiving the basis for that decision by mail. (Jt. Stipulation at 2 (Docket No. 19).) On or about June 1, 2017, plaintiffs received by mail notification of the Commission's decision along with the Factual and Legal Analysis providing the basis for that decision. (*Id.*)

III. PLAINTIFFS' JUDICIAL COMPLAINT

On November 4, 2016, exactly 120 days after filing their administrative complaint, plaintiffs filed this action seeking declaratory and injunctive relief against the FEC. (Compl. ¶¶ 84, 86 (Docket No. 1).) Plaintiffs' judicial complaint asked the Court to declare that the FEC's failure to act on their administrative complaint within 120 days was contrary to law under 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 706(1). (Compl. ¶¶ 84, 86.) Plaintiffs also asked the Court "to order the FEC to conform with [such] declaration within 30 days." (*Id.* ¶ 7.)

During their scheduling conference, the parties disagreed regarding whether plaintiffs could continue this case in the event the Commission took final administrative action. (Jt. Scheduling Report at 2 (Docket No. 14).) The Court deferred resolution of that question in its Scheduling Order dated March 22, 2017 (Docket No. 16), by permitting plaintiffs only to file a motion to amend or supplement their complaint should they seek substantive review of an adverse final decision of the Commission. (Scheduling Order at 2 (Docket No. 16) (providing that "plaintiffs may. . . file a motion to amend or supplement their complaint").) The Scheduling Order allowed plaintiffs and defendant to each propound up to twenty interrogatories. (*Id*.) On May 10, 2017, plaintiffs served interrogatories solely related to the issue of whether the FEC had unlawfully failed to act or delayed agency action. On May 22, the FEC propounded interrogatories on plaintiffs directed at their standing. (*See* FEC's First Set of Interrogs. (Docket No. 21-3).)

After the dismissal of MUR 7101, the parties agreed to a date by which plaintiffs could seek leave to file a motion to amend or supplement the complaint and also agreed to a stay of other proceedings in the case. (Docket Nos. 19-20.) On June 22, 2017, plaintiffs moved for leave to file an amended complaint within that agreed deadline. (Docket No. 21.)

ARGUMENT

I. STANDARD OF REVIEW

A. Mootness and Complaint Amendments When Courts Lack Jurisdiction

Article III, section 2, of the Constitution requires that federal courts decide only "'actual ongoing controversies.'" *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). When an action no longer presents a live case or controversy, it becomes moot and the court must dismiss that case for lack of

subject matter jurisdiction. *See McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

If a court determines it lacks jurisdiction, it may not grant leave to amend or supplement the complaint. *See Am. Wild Horse Pres. Campaign v. Salazar*, 800 F. Supp. 2d 270, 273 (D.D.C. 2011) (citing *Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112, 115 (D.D.C. 1999)); *Caruso v. Zugibe*, No. 14 CV 9185 (VB), 2015 WL 5472643, at *2 (S.D.N.Y. July 21, 2015), *aff'd*, 646 F. App'x 101 (2d Cir. 2016). "Essentially a plaintiff may correct the complaint to show that jurisdiction does in fact exist; however, if there is no federal jurisdiction, it may not be created by amendment." 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.14[3] (3d ed. 1999).

B. Amended and Supplemental Pleadings Generally

Federal Rule of Civil Procedure 15 governs amended and supplemental pleadings. Rule 15(d) authorizes the court, "on just terms, [to] permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event" that occurred after the filing of the original complaint. And Rule 15(a)(2) permits amendment to pleadings "when justice so requires." Courts have held that when a "[p]laintiff seeks to add claims relating to events that occurred after the filing of [its] original complaint . . . [the] motion is better construed as a motion to [supplement]" under Rule 15(d). *SAI v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 125–26 (D.D.C. 2015); *see also United States v. Hicks*, 283 F.3d 380, 385 (D.C. Cir. 2002). Motions under both rules are, however, subject to the same standard. *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008).

The decision to grant or deny leave to supplement "is vested in the sound discretion of

the trial court." *Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971)). Motions for leave to file supplemental pleadings "are to be 'freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.'" *Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006) (quoting 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1504, at 186–87 (2d ed. 1990)).

However, a court may deny a motion to file a supplemental complaint as futile "if the proposed claim[s] would not survive a motion to dismiss." *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012). "'An amendment would be futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.'" *Gharb v. Mitsubishi Elec. Corp.*, 148 F. Supp. 3d 44, 53 (D.D.C. 2015) (quoting *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002)).

II. THE COURT LACKS JURISDICTION TO GRANT PLAINTIFFS LEAVE TO AMEND OR SUPPLEMENT THE ORIGINAL COMPLAINT

As the Commission explains in its simultaneously filed motion to dismiss, plaintiffs' existing claims became moot when the Commission completed final action on MUR 7101. (*See* FEC's Mot. to Dismiss.) The Court thus no longer has jurisdiction over this action and it is "by definition . . . without power to act," so it cannot grant leave to amend or supplement. *Fox v. Bd. of Trs. of State Univ. of New York*, 148 F.R.D. 474, 487 n.30 (S.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994). Jurisdiction is the "power to declare the law," and when it "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 94 (1998) (quoting *Ex parte*

McCardle, 74 U.S. 506, 514 (1868)); Fed. R. Civ. P. 12(h)(3).

Plaintiffs do not dispute the mootness of the claims in the operative complaint. But rather than agreeing to voluntarily dismiss the action, plaintiffs now seek to "replac[e]" their moot claims with new claims that substantively challenge the Commission's dismissal on a different statutory basis. (Mot. to Amend at 2.)

Plaintiffs should not be permitted to "substitute[e] an entirely new cause of action and a new basis for jurisdiction" after jurisdiction over the action has ceased to exist. *Broad v. DKP Corp.*, No. 97 CIV. 2029 (LAP), 1998 WL 516113, at *5–7 (S.D.N.Y. Aug. 19, 1998) (finding that "Constitutional and procedural constraints prevent" a court from allowing amendment of a moot case), *aff'd*, 182 F.3d 898 (2d Cir. 1999). "While a plaintiff may amend a complaint to add facts that show that jurisdiction exists, if there is no federal jurisdiction in a case, it may not be created by amendment." *Am. Wild Horse*, 800 F. Supp. 2d at 273 n.1 (citing *Lanz*, 84 F. Supp. 2d at 115); *see also Caruso*, 2015 WL 5472643, at *2 (denying leave to amend because when a "court lacks subject matter jurisdiction over [the original] action, it cannot grant leave to amend") (quoting *Fox v*, 148 F.R.D. at 487 n.30); *H.B. v. Byram Hills Cent. Sch. Dist.*, No. 14 CV 6796 (VB), 2015 WL 5460023, at *5–6 (S.D.N.Y. July 20, 2015) ("because the Court lacks subject matter jurisdiction over this action, plaintiffs' motion for leave to amend the complaint must be denied"), *aff'd*, 648 F. App'x 122 (2d Cir. 2016); *Broad*, 1998 WL 516113, at *4–7; *Pressroom Unions–Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 894 (2d Cir. 1983) ("Because [he] was without jurisdiction, the judge appropriately denied the request to amend the complaint."); Moore, *supra*, at ¶ 15.14[3]. In *American Wild Horse*, where plaintiff brought an action under the Administrative Procedure Act ("APA") challenging an agency decision, the court dismissed the case as moot after the operative

agency decision was rescinded, rejecting plaintiff's argument that it was entitled to amend to add claims based on other actions by the agency. *Am. Wild Horse*, 800 F. Supp. 2d at 272 (rejecting plaintiff's request to "retain jurisdiction" and allow amendment because "the lawsuit [is] not an all-purpose objection" to the agency's actions concerning a particular subject). In short, Rule 15 does not allow federal jurisdiction to be created by amendment.[2]

Because jurisdiction ceased to exist when plaintiffs' claims were rendered moot, the Court should deny their motion for leave to file an amended complaint.

III. PLAINTIFFS' PROPOSED AMENDED COMPLAINT ESTABLISHES THAT THE AMENDMENT THEY SEEK WOULD BE FUTILE

If the Court had jurisdiction to grant plaintiffs' motion, it should still be denied because any amendment to assert claims challenging the Commission's dismissal of their administrative complaint would be futile. *See, e.g.*, *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)). "Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss." *Id.* This case involves judicial review of an agency action, so the futility analysis called for by a motion to amend is an appropriate juncture for the Court to consider the legal question presented by plaintiffs' proposed claims. And on the merits, plaintiffs' claims are obviously frivolous and cannot survive a motion to dismiss.

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[2] The outcome here does not change regardless of whether the Court considers plaintiffs' motion a motion to amend under Rule 15(a) or a motion to supplement under Rule 15(d). As plaintiffs have noted, motions under both rules are subject to the same standard. (Mot. to Amend at 5 (quoting *Wildearth Guardians*, 592 F. Supp. 2d at 23; *see also Hicks*, 283 F.3d at 385 (noting that "the distinction [between the rules] is in most instances of little moment").) And while Rule 15(d) allows courts to accept supplemental pleadings even if the original pleading is defective, for the reasons given in the cases cited above, the rule does not permit supplementation when a court lacks jurisdiction over the original claims.

A. This Court Need Not Wait for Dispositive Briefing to Consider the Merits of the Proposed Complaint

The Court can and should reach the merits of plaintiffs' proposed dismissal claims now. Since this is a review of agency action, "[t]he entire case on review is a question of law, and only a question of law. And because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Indeed, courts considering Commission motions to dismiss for failure to state a claim in cases challenging the dismissal of administrative complaints have routinely considered the merits of those claims. *See, e.g.*, *La Botz v. FEC*, 61 F. Supp. 3d 21, 32-35 (D.D.C. 2014) (granting motion to dismiss for failure to state a claim because the dismissal decision was "not contrary to law or an abuse of discretion"). Moreover, the standard for reviewing a motion for leave to amend like the one plaintiffs have filed incorporates the standard for a Rule 12(b)(6) motion, as such a proposed amendment is futile if the proposed claim would not survive a motion to dismiss. *James Madison Ltd.*, 82 F.3d at 1099. And because "the legal questions raised by a 12(b)(6) motion and a motion for summary judgment are the same" in the context of review of agency action, *Shalala*, 988 F.2d 1222-23, the entire case is ripe for review at this stage. There is, therefore, no need to accept plaintiffs' suggestion that the Court reserve judgment on the legal issue implicated by the new proposed claims. (Mot. to Amend at 10.)

It is also a more efficient use of judicial resources to address the merits of plaintiffs' proposed amendment at this time. Even assuming plaintiffs are otherwise eligible to amend their complaint, there is no reason to require the Commission to prepare an answer and the parties to engage in rounds of additional dispositive briefing when the legal issues are ripe for decision now.

B. The Commission's Dismissal Decision Was Not Contrary to Law, and Plaintiffs' Suggestion Otherwise Is Frivolous

1. The Commission's Dismissal Decision Need Only Be Reasonable

Count I of plaintiffs' proposed amended complaint seeks to assert a cause of action under 52 U.S.C. § 30109(a)(8), which permits "any party aggrieved by an order of the Commission dismissing a complaint" to seek judicial review of that order in this district. However, the Court may set aside the Commission's dismissal order only if it is "contrary to law." *Id.* § 30109(a)(8)(C). Under the contrary to law standard, the Commission's decision to dismiss an administrative complaint cannot be disturbed unless the decision was based on "an impermissible interpretation of the Act" or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). In other words, the Commission's decision need not be the best decision or the decision the court would make in the first instance — it need only be "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981). This standard is "[h]ighly deferential" to the Commission's decision. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted).

Notwithstanding this deferential standard of review, the opening sentence of plaintiffs' proposed amended complaint asserts that the "fundamental issue in this case is whether multi-million dollar contributions to" super PACs "pose any risk of corruption or the appearance of corruption." (Proposed Am. Compl. ¶ 1 (Docket No. 21-2).) That statement reflects a fundamental misunderstanding of FECA and the contrary to law standard. The question is not, as plaintiffs would have it, whether the Court agrees with *SpeechNow* or the cases following it, or even if the Court would have reached the same decision "if the question initially had arisen in

a judicial proceeding." *See Democratic Senatorial Campaign Comm.*, 454 U.S. at 39. Rather, the Commission's dismissal decision must be affirmed so long as it is reasonable.

2. The Commission Reasonably Followed Uniform Judicial Precedent in Dismissing Plaintiffs' Administrative Complaint

Applying the correct standard of review, the Commission's decision to follow the unanimous decisions of "every circuit court that has considered this issue" (Factual & Legal Analysis at 10) is obviously a reasonable decision. To date, at least seven circuits, including the D.C. Circuit, have addressed whether the First Amendment prohibits limitations on contributions to groups that make only independent expenditures. Each one of those circuits agreed that contributions could not be limited.[3] As some of these courts observed, this is a "well-worn path," *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013), and "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

The basic logic of these cases directly refutes the allegations in plaintiffs' administrative complaint. Each court recognized that the Supreme Court's decision in *Citizens United* concluded, as a matter of law, that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 314 (2010). Based on that holding, each court concluded that "contributions

[3] *See, e.g.*, *Republican Party of N.M. v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698-99 (9th Cir. 2010); *SpeechNow*, 599 F.3d at 694; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008); *cf. Ala. Democratic Conference v. Att'y Gen. of Ala.*, 838 F.3d 1057, 1066 (11th Cir. 2016) ("Other Circuits, applying the logic of *Citizens United* [*v. FEC*, 558 U.S. 310 (2010)], have uniformly invalidated laws limiting contributions to PACs that made only independent expenditures."), *cert. denied sub nom. Ala. Democratic Conference v. Marshall*, 137 S. Ct. 1837 (2017).

to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *E.g.*, *SpeechNow*, 599 F.3d at 694; *see also N.Y. Progress & Prot. PAC*, 733 F.3d at 487 ("It follows [from *Citizens United*] that a donor to an independent expenditure committee . . . is even further removed from political candidates and may not be limited in his ability to contribute to such committees.").

Whatever the Commission — or this Court — might have done if writing on a blank slate, this unbroken line of cases is more than sufficient to meet the contrary to law standard. Indeed, "[t]he separation of powers doctrine *requires* administrative agencies to follow the law of the circuit with jurisdiction over a cause of action." *Grant Med. Ctr. v. Burwell*, 204 F. Supp. 3d 68, 78 (D.D.C. 2016), *appeal docketed sub nom. Grant Med. Ctr. v. Price*, No. 16-5314 (D.C. Cir. Oct. 31, 2016). "This is especially true where, as here, the" judicial "precedent, and subsequent interpretation, is based on constitutional concerns." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

Plaintiffs implicitly concede that the Commission's dismissal is consistent with current law, not contrary to it. In their motion for leave to amend, plaintiffs candidly "acknowledge that the supplemented claims seek a modification of existing law, *viz.*, the D.C. Circuit's decision in *SpeechNow*." (Mot. to Amend at 10.) The necessary corollary to that statement, of course, is that the Commission's dismissal decision followed the law as it stood at the time the decision was made — indeed, as it stands to this day. This concession is fundamentally inconsistent with plaintiffs' entire case, and renders their claims meritless as a matter of law. Plaintiffs cannot explain how a Commission dismissal decision can be both compelled by the reasoning of every recent judicial ruling that has been rendered on the applicable legal issue and yet also contrary to law. Even if the legitimacy of the legal conclusions contained in *SpeechNow* were properly at

issue here, this Court would be bound to follow the binding precedent of that unanimous en banc D.C. Circuit opinion, as did the Commission.

The Commission was also not required to continue to enforce the statutory provision at issue in circuits that have yet to rule on the constitutionality of contribution limits to independent expenditure-only committees. In their administrative complaint, plaintiffs suggested that the Commission should decline to acquiesce to the D.C. Circuit's *SpeechNow* ruling in those jurisdictions that had yet to address the issue. (*See* Admin. Compl. at 4.) As a general matter, courts have accepted that an administrative agency may in certain circumstances decline to follow the law of one or more circuits to permit a legal issue to percolate among the circuits and, perhaps, increase the likelihood of Supreme Court review. *See, e.g.*, *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 21-22 (D.C. Cir. 2016); *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992). That justification is permissible in some contexts, particularly where the law remains unsettled. *See Johnson*, 969 F.2d at 1093. But on the legal claim at issue here, a majority of circuits have uniformly rejected the claim, and none have adopted it. *Id.* ("[N]ow that three circuits have rejected the Board's position, and not one has accepted it, further resistance would show contempt for the rule of law."). The legal issue here is thus a particularly poor candidate for nonacquiescence.

Even if the Commission does retain some *ability* to engage in nonacquiescence on this issue, the Commission was not "*required* to make this choice." *Grant Med. Ctr.*, 204 F. Supp. 3d at 80. This follows from the basic principle that an "agency is not required to choose the 'best' solution, only a reasonable one." *Id.* In the context of deciding whether to acquiesce to a court's ruling, the agency "is in the best position to weigh the conflicting interests involved." *Id.*

Given the uniformity of those courts that have decided that issue, it was eminently reasonable for the Commission to continue to follow *SpeechNow* nationwide.

The frivolousness of plaintiffs' position is especially apparent given the enforcement context they have chosen. They seek more than simply to challenge an advisory opinion, as this Circuit has permitted, *Unity08 v. FEC*, 596 F.3d 861, 864-65 (D.C. Cir. 2010), or to change the generally applicable law. Rather, they seek to require the Commission to instigate enforcement actions against ten organizations that engage in independent candidate advocacy and 27 of their financial supporters, all of whom have been complying with clear, binding judicial precedent and Commission guidance on the question at issue. (*See* Proposed Am. Compl. ¶ 1.) Yet they cannot point to a single judicial authority since *Citizens United* that would even arguably support the enforcement of a provision so uniformly declared unconstitutional. Pursuing enforcement in that context is so unwarranted that, had the Commission attempted it, it might have been exposed to an award of legal fees under the Equal Access to Justice Act. That statute permits the award of legal fees against an administrative agency unless its position in the litigation was "substantially justified." 28 U.S.C. § 2412. One court in this district has already ordered the Commission to pay nearly $125,000 in legal fees for arguing that it could restrict political committees that make direct contributions to candidates from also raising unlimited contributions for independent expenditures. *See Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012). That court criticized the FEC for "failing to appreciate binding precedent," including *Citizens United* and *SpeechNow*. *Id.* at 61. In light of this precedent, the Commission reasonably concluded that it should not expose itself to the possibility of a court awarding further legal fees against it for adopting a position a court may conclude was not substantially justified in this area of the law. (*See* Factual & Legal Analysis at 14, n.51.)

3. The Commission Reasonably Decided to Act In Accord With Its Own Prior Opinion Letter

The Commission's dismissal of plaintiffs' administrative complaint was also reasonable in light of the Commission's Advisory Opinion 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). In that opinion, the Commission accepted the rulings in *Citizens United* and *SpeechNow*, and concluded that independent expenditure-only political committees could accept unlimited contributions. *Id.* at *2.

The Commonsense Ten advisory opinion justifies the Commission's dismissal decision for two reasons. First, the Commission reasonably concluded that the issuance of the opinion letter established that FECA as construed by the courts permitted the conduct described in plaintiffs' administrative complaint. The Commission therefore determined that there was no "reason to believe" the statute had been violated, the threshold determination FECA requires the Commission to make when considering administrative complaints. (*See* Factual & Legal Analysis at 11-14.)

Second, even without the clear and directly applicable judicial precedent, it was reasonable for the Commission to conclude that its advisory opinion prevented the relief plaintiffs sought. FECA provides a safe harbor for "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 52 U.S.C. § 30108(c)(1)(B). Under that safe harbor, those who rely in good faith on a Commission advisory opinion "shall not, as a result of any such act, be subject to any sanction provided" under FECA. *Id.* § 30108(c)(2).

Plaintiffs do not contest that their administrative complaint sought enforcement of FECA against persons who are entitled to protection under the safe harbor. Instead, they "disclaimed

any intent of asking the FEC to seek civil penalties" for past conduct, "but rather asked the FEC to pursue only declaratory and/or injunctive relief against future acceptance of excessive contributions." (Proposed Am. Compl. ¶ 80.)

FECA, however, does not explicitly limit the term "sanction" to civil penalties or other means of redressing past conduct. (*See* Factual & Legal Analysis at 12 n.45.) As the Commission noted, courts in other contexts have construed the term "sanction" as broad enough to include injunctive and declaratory relief, including with respect to limits on future activities. (*Id.* (citing *Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010) (noting that "the imposition of a nonmonetary obligation" can be "one kind of 'sanction'"); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) ("A sanction is commonly understood to be 'a restrictive measure used to punish a specific action or to prevent some future activity.'") (quoting Webster's Third New International Dictionary 2009 (1976)).) The Commission also observed that a broad definition of "sanction" to preclude the type of relief plaintiffs sought "would also be consistent with the relatively broad definition found in the" APA, which defines the term to include an agency "'prohibition, requirement, limitation, or other condition affecting the freedom of a person' and other 'compulsory or restrictive action.'" (Factual & Legal Analysis at 12 n.45 (citing 5 U.S.C. § 551(10)).) Finally, the Commission cited the inherent unfairness of interpreting the term sanction to permit enforcement proceedings and potential litigation against those who relied in good faith on a Commission advisory opinion. (*Id.*) "Such a conclusion upends the purpose of the advisory opinion process" by denying the regulated community "assurance that they can carry out activity deemed permissible by the Commission without the possibility of some form of regulatory enforcement action." (*Id.*)

The Commission's construction of the term "sanction" also demonstrates the reasonableness of its dismissal in this case. In light of the ambiguous scope of the term in the context of FECA, the Commission's construction of the term is entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) so long as it is reasonable. *See Orloski*, 795 F.2d at 161-62 (applying *Chevron* to Commission interpretations of FECA); *cf. U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 621 (1992) (observing that the word sanction is "spacious enough to cover" multiple meanings). As explained above, in interpreting the term, the Commission considered FECA's advisory opinion safe harbor, case law, and other statutory regimes governing administrative agencies. The Commission also considered the effect its construction would have on the regulated community. Applying those considerations, the Commission reasonably concluded that it should not pursue the case in light of its prior blessing of the very conduct at issue in plaintiffs' administrative complaint.

C. Commission Dismissal Decisions Are Not Reviewable Under the Administrative Procedure Act

Amendment is also futile with respect to Count II of the proposed amended complaint, which seeks to claim that the Commission's dismissal violated the APA, because no such claim is available. (*See* Proposed Am. Compl. ¶¶ 89-90 (citing 5 U.S.C. § 706(2)).) As the Supreme Court has made clear, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (internal quotation marks omitted). Therefore, so long as a statute provides an "adequate alternative" mechanism for judicial review, the specific review provision precludes review under the APA. *Citizens for Responsibility & Ethics in Washington v. DOJ*, 846 F.3d 1235, 1244-45 (D.C. Cir. 2017).

FECA's procedures for judicial review of Commission decisions to dismiss a complaint fall squarely within this rule, precluding judicial review under the APA. *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 16-259 (BAH), 2017 WL 1080920, at *9-10 (D.D.C. Mar. 22, 2017) (holding that FECA precludes APA review of Commission decisions to dismiss enforcement complaint); *Citizens for Responsibility & Ethics in Washington v. FEC*, 164 F. Supp. 3d 113, 119-20 (D.D.C. 2015) (same). FECA grants the Commission "exclusive jurisdiction" over civil enforcement of campaign finance laws, 52 U.S.C. § 30106(b), and also establishes a specific system of judicial review which "funnels all challenges to the FEC's handling of complaints through the U.S. District Court for the District of Columbia," *Citizens for Responsibility & Ethics in Washington*, 164 F. Supp. 3d at 119 (citing 52 U.S.C. § 30109(a)(8)(A)). This "comprehensive judicial review provision precludes review of FEC enforcement decisions under the APA." *Id.* at 120. Plaintiffs' attempt to add such a claim here is thus futile.

IV. JUSTICE DOES NOT REQUIRE GRANTING PLAINTIFFS LEAVE TO AMEND OR SUPPLEMENT

While Rule 15(a) instructs courts to freely grant leave to amend when justice so requires, the Court need not grant such leave where, as here, it would not "promote the economic and speedy disposition of the entire controversy between the parties" and would "prejudice the rights" of the Commission. *Hall*, 437 F.3d at 101.

Although plaintiffs repeatedly claim that allowing them to add new claims against the Commission would advance judicial economy (Mot. to Amend at 2, 3, 5-7), plaintiffs overstate the commonality between the claims in the original and the proposed amended complaints. Plaintiffs' delay and dismissal cases do overlap in the high-level sense that they both arise out of provisions of the same statute. Plaintiffs filed this action seeking declaratory and injunctive

relief and alleging that the FEC's failure to act on their administrative complaint within 120 days was contrary to law under 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 706(1). (Compl. ¶¶ 84, 86.) At issue, then, was the time the Commission took to act on plaintiffs' administrative complaint. But the substantive merits of the Commission's resolution of the administrative matter were never at issue in the judicial complaint. Even plaintiffs' interrogatories to the Commission focused on examining the Commission's process for resolving administrative matters and the speed with which it acted on such matters, not on the substance of the Commission's review. (*See* Pls.' First Set of Interrogatories (Exh. A).)

Plaintiffs' proposed amended complaint, in contrast, seeks judicial review of the Commission's decision under a separate provision of 52 U.S.C. § 30109(a)(8) and asks the Court to declare that the Commission acted contrary to law when it dismissed plaintiffs' administrative complaint and found no reason to believe that any respondent committee or contributor had violated FECA. (*See* Proposed Am. Compl. ¶¶ 87-90.) Plaintiffs' dismissal claims involve entirely different subject matter — *i.e.*, whether the Commission's interpretation of FECA was impermissible or its decision was otherwise arbitrary or capricious, or an abuse of discretion — and do not depend on the same factual allegations.[4]

This Court previously recognized the distinct and unrelated nature of the delay and dismissal cases in *Alliance for Democracy*. There, plaintiffs sought to designate their action

[4] Plaintiffs note that factual allegations supporting the merits of the administrative complaint appear in both their original and proposed amended judicial complaints (Mot. to Amend at 4), but simply repeating similar factual allegations does not make the claims related. Plaintiffs also suggest that because the FEC's interrogatories in this action "related to the substantive allegations in Plaintiffs' administrative complaint," it shows that this action has always been about the substance of the administrative matter. (*Id*. at 6.) However, the FEC's reasonable inquiries into the basis for plaintiffs' derivative standing in this action cannot be seen as reflecting any position by the agency on whether the core allegations in the delay and dismissal claims are the same. And in any event, the interrogatories, which solely focus on standing issues, do not demonstrate that the delay and dismissal claims are related.

challenging the agency's dismissal of the administrative complaint at issue as a "related case" of their delay lawsuit. *See* Notice of Designation of Related Civil Cases, *All. for Democracy v. FEC*, No. 04-cv-00127-RBW, Docket No. 2 (D.D.C. Jan. 26, 2004). The Commission objected that the chronology of Commission actions and allocation of resources at issue in the delay case differed factually from the violations of law that had been alleged in the administrative complaint and were at issue in the dismissal case. Defendant FEC's Objection to Related Case Designation at 2-4, *All. for Democracy v. FEC*, No. 04-cv-00127-RBW, Docket No. 9 (D.D.C. Feb. 26, 2004). Similarly, the Commission pointed out that the event or transaction that gave rise to the delay case was the FEC's allegedly tardy processing of the administrative complaint, not the alleged FECA violations to be taken up in the dismissal case. *Id.* at 4. This Court declined to treat the delay and dismissal cases as related, apparently sustaining the Commission's objection, and the case was reassigned without opinion on March 31, 2004 to Judge Reggie B. Walton. Docket Notation, *All. for Democracy v. FEC*, No. 04-cv-00127-RBW, (D.D.C. Mar. 31, 2004); *see also* LCvR 40.5(c)(3) (providing that a judge to whom a case has been assigned shall rule on objections to related case designations). Here, too, the original and the proposed claims involve different facts and transactions and are insufficiently related for granting leave to supplement to serve judicial economy.

The Court should also deny leave to supplement because plaintiffs' proposed amendment would subject the Commission to undue prejudice. *See Foman*, 371 U.S. at 182. If plaintiffs are granted leave, the Commission would be required to respond to plaintiffs' new claims within 14 days under Federal Rule of Civil Procedure 15(a)(3), rather than having the benefit of 60 days from service on the U.S. Attorney to respond under Rule 12(a)(2) if plaintiffs were to file a new action. Plaintiffs' motion does not involve the typical amendment that seeks to clarify factual

allegations or cure minor defects in the pleading. Rather, the proposed complaint adds new claims distinct from those in the original complaint. The FEC should not be deprived of the extended response time it is otherwise entitled to as a federal government agency by virtue of plaintiffs' decision to first bring a delay lawsuit.

In addition, contrary to plaintiffs' assertions, filing a new action would not unduly delay resolution of their claims. Indeed, it is unreasonable for plaintiffs to complain about any purported delay from filing a new action when their own motion is preventing them from "obtain[ing] a resolution on the merits expeditiously." (Mot. to Amend at 9.) In other words, plaintiffs certainly could have agreed to voluntarily dismiss this action as the Commission proposed when it informed plaintiffs of the Commission's dismissal decision on May 26, 2017. Instead, plaintiffs waited almost a month to file a motion seeking to amend or supplement.

Plaintiffs' protests about paying filing fees and serving summonses in a new action also merit little weight considering plaintiffs' decision to bring the delay lawsuit exactly 120 days after filing their administrative complaint, on the first day this Court would even have jurisdiction over the matter. Plaintiffs claim that if the FEC had completed final action on MUR 7101 "within the 120-day period contemplated by FECA, . . [they] would have included claims challenging that dismissal in November." (*Id.* at 6.) But as referenced above, FECA does not require the Commission to complete final action within 120 days. *See, e.g.*, *Rose*, 806 F.2d at 1092 (explaining the Court's "unequivocal[] reject[ion]" of the argument that FECA required FEC to act on an administrative complaint within 120 days and embracing the FEC's "entirely correct" view that "the Commission's handling of a complaint should be judged under the deferential standards of review prescribed in the APA") (emphasis omitted). Had plaintiffs waited a reasonable time for the FEC's resolution of their administrative matter, there would

have been no need to file two separate actions. And it was plaintiffs' broad allegations in this matter that led to the identification of 47 administrative respondents, each of which was entitled to FECA's procedural protections, which can entail substantial time consumption.

In any event, plaintiffs overstate the burden they would face should the Court deny their motion. Plaintiffs complain about being subject to the filing fees for a new action, but they do not assert any financial hardship constituting an undue burden. Further, as one court has noted, where "the only practical consequence of the denial of [a] motion to supplement would be to save plaintiffs the filing fee of the new suit . . . [t]hat is hardly enough reason to preclude [the] case from coming to its prompt conclusion." *Bloche v. Dep't of Def.*, No. Civ. A. 07-2050 (HHK/JMF), 2009 WL 1330388, at *3 (D.D.C. May 13, 2009) (denying a motion to supplement). Plaintiffs also complain that they would have to serve summonses pursuant to Federal Rule of Civil Procedure 4(i) and file *pro hac vice* motions for their attorneys. But plaintiffs have failed to show that either of these requirements, which are general prerequisites for bringing federal actions, amount to an undue burden.

In sum, justice does not require the Court to grant plaintiffs leave to amend or supplement their original complaint.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court deny plaintiffs' motion for leave to amend.

Respectfully submitted,

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July 17, 2017

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