UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-259 (BAH)
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
CROSSROADS GRASSROOTS POLICY STRATEGIES,	)	REPLY
Intervenor-Defendant.	)	

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

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The Federal Election Commission ("Commission" or "FEC") has moved to dismiss the direct challenge to 11 C.F.R. § 109.10(e)(1)(vi) made by plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak because the statute of limitations deprives this court of jurisdiction to hear that claim. Plaintiffs concede that the statute of limitations applicable to the Commission's original promulgation of that regulation expired long ago. Plaintiffs argue that this Court can still hear the claim, however, due to a limited exception for parties that are affected when an agency applies a regulation in a way that directly harms them. But plaintiffs' challenge to an FEC decision that its regulation does not reach the alleged conduct of a third party does not meet the standards required for that narrow exception to the government's sovereign immunity, and so that claim remains time barred. Plaintiffs are free to challenge the regulation by petitioning the Commission to change it and, if the agency declines, challenging that denial. The Court should therefore dismiss Claim Two of plaintiffs' complaint.

I. FACIAL CHALLENGES TO FEC REGULATIONS GENERALLY MUST BE BROUGHT WITHIN SIX YEARS AFTER PROMULGATION

As explained in the Commission's opening memorandum, a challenge to one of the FEC's regulations ordinarily is foreclosed for lack of subject matter jurisdiction unless it is filed within six years after the regulation was promulgated. (FEC's Mem. of P&A in Supp. of Its Partial Mot. to Dismiss ("FEC Mem.") (Docket No. 12) at 6-7 (citing 28 U.S.C. § 2401(a); *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023 (D.C. Cir. 2008); *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)). The regulation plaintiffs challenge, 11 C.F.R. § 109.10(e)(1)(vi), was promulgated 36 years ago.

The Commission's earlier brief also discussed the exception to that general rule under which parties can bring otherwise time-barred challenges to regulations by first "petition[ing] the agency for amendment or rescission of the regulations and then . . . appeal[ling] the agency's decision." (FEC Mem. at 7 (quoting *NLRB Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987)).) Plaintiffs did not address this exception in their response, and therefore they have waived any argument that they can rely on a rulemaking petition filed by others or that bringing such a petition now would be futile. *See, e.g., Hopkins v. Women's Div. Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (citations omitted); *see also* FEC Mem. 9-12 (discussing why neither an earlier rulemaking petition nor a claim of futility make plaintiffs' second claim timely).

II. PLAINTIFFS LACK STANDING TO CHALLENGE 11 C.F.R. § 109.10(e)(1)(vi) PURSUANT TO THE LIMITED EXCEPTION TO THE STATUTE OF LIMITATIONS FOR PARTIES DIRECTLY HARMED BY APPLICATION OF AGENCY REGULATIONS

Plaintiffs' defense to this motion hinges solely upon the limited exception to the statute of limitations for situations in which an "aggrieved" and "personally injured" party with standing "may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them" in a proceeding involving the agency's application of the regulation. *NLRB Union*, 834 F.2d at 195; *RCA Global Commc'ns, Inc. v. FCC*, 758 F.2d 722, 730 (D.C. Cir. 1985); *P & V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 143 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008). But this exception to the general rule is unavailable to plaintiffs here.

A party must meet several threshold requirements to bring a direct challenge to a

regulation that would otherwise be barred by the statute of limitations without first petitioning the agency to change the regulation. The party bringing such a challenge must of course "possess[ ] standing." *NLRB Union*, 834 F.2d at 195. The challenge must be "properly brought before this court for review of further [agency] action applying it." *Id.* at 196 (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)). The party bringing the action must be "aggrieved" by application of the regulation. *RCA Global Commcn's*, 758 F.2d at 730 (finding parties "aggrieved" by application of regulation may challenge validity of regulation outside of "statutory time limits"). And any facial challenge must be accompanied by an as-applied challenge by someone that is "personally injured by [the] agency['s] action." *P & V Enters.*, 466 F. Supp. 2d at 143 (quoting *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995)).

Plaintiffs do not meet these requirements. The judicial review provision at 52 U.S.C. § 30109(a)(8)(A) is the sole authority that gives plaintiffs statutory standing to sue the FEC for the dismissal of its administrative complaint. And as the Commission explained, the power of a court reviewing the dismissal of an administrative complaint pursuant to 52 U.S.C. § 30109(a)(8)(A) "is limited." (FEC Mem. at 10-11 (quoting *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).) The reviewing court can only declare that the dismissal was "contrary to law" and order the Commission to "conform with" the court's declaration. 52 U.S.C. § 30109(a)(8)(C). As noted in the FEC's prior brief, even if the Court holds that the Commission has erred, it cannot mandate a particular outcome on remand; the Commission may reach the same outcome based on a different rationale. (FEC Mem. at 10-11 (citing *FEC v. Akins*, 524 U.S. 11, 25 (1998).)

Plaintiffs' role in the administrative proceeding at issue here and that proceeding's

ultimate effect on them are too attenuated to support a direct challenge to the regulation at issue. Plaintiffs filed the administrative complaint that initiated the administrative enforcement proceedings against Crossroads Grassroots Policy Strategies ("Crossroads GPS"), but they were not a party to that proceeding. "Any person" that believes a violation of FECA has taken place may file a complaint with the Commission that identifies an alleged violation. 52 U.S.C. § 30109(a)(1). The filing of an administrative complaint is generally the end of the participation in the enforcement matter by the administrative complainant. Anything the Commission does after that — whether that be finding reason to believe a violation has occurred, conducting an investigation, or dismissing a matter entirely — occurs without any further input from the administrative complainant. In no sense can an administrative complainant be considered a party to the proceedings before the Commission. Nor does the FEC have the authority to award damages or any other direct remedy to an administrative complainant. The administrative complainant is not even aware of what is happening in the proceedings until they have reached a conclusion, because the enforcement process is confidential. *Id.* at § 30109(a)(12). For all of these reasons, the position of FEC administrative complainants like the plaintiffs differs materially from the parties in the cases plaintiffs cite that were permitted to pursue a direct challenge to a regulation that would otherwise have been time-barred.

Furthermore, plaintiffs cannot maintain a facial challenge here, but their complaint purports to do just that. It asks the Court to "[d]eclare that 11 C.F.R. § 109.10(e)(1)(vi) is contrary to law, arbitrary and capricious, and invalid." (Compl. Requested Relief ¶ 3 (Docket No. 1).) It also states that "Plaintiffs are therefore entitled to relief in the form of a declaratory order that . . . 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid." (Compl. ¶ 124.) Plaintiffs rely on *Weaver v. Federal Motor Carrier Safety Administration*, 744 F.3d 142 (D.C. Cir. 2014),

which involved a challenge to an agency's application of a regulation in a way that resulted in alleged harm to the plaintiff truck driver's safety record. *Id*. at 145. That decision involved direct application of a regulation to the plaintiff, and the court made clear that such an as-applied challenge is required in order to support a challenge to a regulation after the statute of limitations has elapsed. *Id.* ("[F]acial challenges to the rule or the procedures by which it was promulgated are barred. . . . [W]hen an agency seeks to apply the rule, those affected *may challenge that application*." (emphasis added)). Plaintiffs also cite *P & V Enterprises*, a case in which a developer brought a facial challenge to a regulation that would have required the developer to obtain a permit to develop certain lands. (Pls.' Mem. in Opp'n to Defs. FEC's and Crossroads GPS's Mot. to Dismiss ("Pls.' Mem.") at 7 (Docket No. 18).) But the *P & V* court rejected that facial claim because the plaintiff had never sought a permit and thus had not made the as-applied claim that would be required to sustain such a challenge. *P & V Enters.*, 466 F. Supp. 2d at 143, ("[A] litigant with standing to bring an as-applied challenge to the regulations . . . may at the same time 'challenge [the] regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them.'"). Thus, only a party that brings an as-applied challenge to a regulation is permitted to bring an associated facial challenge when the statute of limitations has expired. *Id.*

Plaintiffs in this case, however, have not brought an "as-applied" challenge to the regulation. They are asking the Court to declare that the regulation violates FECA by failing to regulate enough activity generally. Plaintiffs now claim that they also bring an "as applied" challenge because the matter involves the potential application of the regulation to Crossroads GPS. (Pls.' Mem. at 8-9.) But plaintiffs cite no case in which a challenge to an agency decision *not* to pursue enforcement of a regulation against a third party has been deemed an "as applied"

challenge by a plaintiff. Plaintiffs lack standing to bring an as-applied challenge to the regulation because the Commission has not applied the regulation to them. The nature of 52 U.S.C. § 30109(a)(8)(A) means that plaintiffs' standing here is limited to asking this Court to find that the FEC acted unlawfully by dismissing their administrative complaint.

Moreover, plaintiffs have not been "personally injured" in the same manner as the competitor claimants in other cases they cite. Plaintiffs rely heavily on *AT&T v. FCC*, 978 F.2d 727, 729-31 (D.C. Cir. 1992), a case that they describe as "very similar to the one here." (Pls.' Mem at 8.) But it is easily distinguishable. In that case, AT&T had filed a complaint with the FCC against its competitor MCI for allegedly violating the law by "charging certain customers special negotiated rates that it had not filed with the FCC." *AT&T*, 978 F.2d at 730. The complaint process before the FCC is very different from the enforcement process with the FEC — the FCC statute "expressly sets up the [FCC] as an adjudicator of private rights" and gives "AT&T the right to press a claim for damages suffered due to violation of the Act." *Id.* at 732 (footnote omitted). "AT&T sought both damages and a cease and desist order" based on the argument that "MCI's actions injured AT&T by putting AT&T at a competitive disadvantage." *Id.* at 730. AT&T was the equivalent of a civil litigant against MCI, and the FCC's failure to act on AT&T's administrative complaint due to an unlawful rule directly injured AT&T. *See also Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7-8 (D.C. Cir. 2009) (case cited by plaintiffs in which party was directly injured by allegedly unlawful auction procedures in which it would have been a participant); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1496 (D.C. Cir. 1988) (case cited by plaintiffs in which a shipper claimed to have been directly injured by allegedly unlawful rules that governed its "competitive access" in the railroad industry.)

Plaintiffs' situation here differs greatly. Plaintiffs may be able to show informational injury, but they are not competitors of those whose conduct is at issue, and they were not directly injured by the Commission's decision not to apply the regulation to Crossroads GPS; the FEC is not an adjudicator of tangible private commercial rights, unlike the agencies in the cases on which plaintiffs rely; plaintiffs did not directly participate in the FEC's enforcement proceedings against Crossroads GPS; and plaintiffs lack standing to bring an independent "as-applied" challenge.

Indeed, this narrow exception to the normal operation of the statute of limitations was not developed to assist parties in situations like that of the plaintiffs. The exception is intended to address the potential unfairness of applying such a limit to a party that would have had no reason to know it had an interest in challenging a regulation at the time it was promulgated. *See Am. Trading Transp. Co. v. United States*, 791 F.2d 942, 950 n.11 (D.C. Cir. 1986) ("No time limit bars appellants from challenging a regulation that, they allege, is currently being used in a particular proceeding to harm them in a way they could not have anticipated at the time the rule was adopted."); *see also* 33 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice and Procedure: Judicial Review § 8355 (2016 Supplement) ("blocking challenges during enforcement proceedings could be grossly unfair to persons who lack notice of a rule's issuance or likely impact"). CREW is an advocacy organization with a longstanding focus on political and election activity. (Compl. ¶¶ 7-15.) It now brings a generalized complaint, in its Claim Two, that the FEC's regulation does not cover enough activity. But CREW has had the opportunity for many years to petition the FEC to amend or rescind that regulation. The same informational injury it asserts in this case could be asserted every time the FEC relies upon the regulation in declining to pursue enforcement action against any party, not just Crossroads GPS.

Plaintiffs cannot argue that they lacked the opportunity to challenge the regulation using normal procedures before now. *See Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

Accordingly, plaintiffs' direct challenge to the FEC's regulation should be dismissed.

III. ADOPTING PLAINTIFFS' ARGUMENT WOULD ALLOW PARTIES TO EASILY CIRCUMVENT THE GENERAL RULE PROTECTING THE GOVERNMENT'S SOVEREIGN IMMUNITY

Plaintiffs argue that preventing them from bringing a direct challenge to the FEC regulation as part of this case would be an "absurdity" and cause "manifest injustice" because it would "'effectively deny many parties ultimately affected by a rule an opportunity to question its validity.'" (Pls.' Mem. at 10 (*quoting NLRB Union*, 834 F.2d at 196).) That is incorrect. As explained in the Commission's prior memorandum (FEC Mem. at 7-10) and earlier in this reply, *supra* pp. 1-2, parties including plaintiffs have a clear path to challenging a regulation that they believe conflicts with the agency's statutory authority. That path is to petition the agency to amend or rescind the regulation, and if that effort is unsuccessful, to sue the agency for failing to do so. *See, e.g.*, *NLRB Union*, 834 F.2d at 196. This procedure affords the agency the opportunity to reconsider the lawfulness of its regulation, utilizing notice and comment procedures and public hearings if deemed necessary, without judicial intervention. The fact that plaintiffs have chosen not to take these well-recognized procedural steps does not make following the law an "absurdity." (Pls.' Mem. at 10.)

On the other hand, adopting the position plaintiffs advocate here would permit administrative complainants to easily circumvent the statute of limitations without affording the

Commission the opportunity to engage in a review of the lawfulness of its own regulation.[1] The six-year statute of limitation in 28 U.S.C. § 2401(a) for challenging agency regulations is a "jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus*, 824 F.2d at 55. This carefully struck legislative balance would be upended if a party could simply evade it by filing an administrative complaint accusing a third party of violating the law despite acting consistently with an agency regulation, and then bringing a facial challenge to the regulation if the Commission dismisses that administrative complaint. Congress never intended parties to be able to circumvent the statute of limitations so easily, and this Court should not permit plaintiffs to do so here.

IV. CONCLUSION

For all the foregoing reasons and those stated in the FEC's prior memorandum, the Court should dismiss Claim Two of plaintiffs' complaint, which challenges the lawfulness of 11 C.F.R. § 109.10(e)(1)(vi) pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

Respectfully submitted,

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[1] 52 U.S.C. § 30109(a)(8)(A) permits administrative complainants to sue the Commission if it fails to act on an administrative complaint within 120 days.