UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 17-2770 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendant Federal Election Commission ("FEC" or "Commission") hereby moves to dismiss plaintiffs' complaint, which invokes the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(A), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), in an attempt to challenge the Commission's handling of their administrative complaint. This Court lacks subject matter jurisdiction over this matter because FECA does not authorize judicial review of plaintiffs' claims here, where the Commission secured redress for plaintiffs' administrative complaint through a conciliation agreement. In addition, to the extent that the Commission's handling of their administrative complaint is judicially reviewable, FECA provides the exclusive mechanism for that review. APA review is therefore precluded and plaintiffs have failed to state a claim pursuant to that statute.[1]

[1] The Federal Election Commission (Commission) has historically voted by a majority vote (pursuant to 52 U.S.C. §§ 30106(c) and 30107(a)(6)) to authorize an appearance by the Office of General Counsel (OGC) on behalf of the Commission in a suit commenced pursuant to 52 U.S.C. § 30109(a)(8). There are, however, two general categories of cases that may come

Respectfully submitted,

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before a court in which there are insufficient votes to pursue a matter arising from an administrative complaint. In the first category of cases, litigation is commenced against the Commission after it does not approve a recommendation by OGC to find "reason to believe" that a violation of the FECA or of its regulations occurred, and the file was consequently closed. 52 U.S.C. § 30109(a)(8). In the second category of cases, the litigation is commenced against the Commission after OGC recommends dismissing the matter, and the Commission closes the file after three or more Commissioners approve OGC's recommendation or there are otherwise three or fewer Commissioners voting to find reason to believe. In both instances, the reason for the inaction of the Commission is that there were not four or more Commissioners' votes to find "reason to believe" regarding the allegations in the administrative complaint.

Judicial review of the FEC dismissal of an administrative complaint requires the Court to examine the agency's reasoning as expressed by Commissioners or, in some circumstances, by OGC. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). In the first category of cases described above, the court must be supplied with a "statement of reasons" of those Commissioners who voted against, or abstained from voting for, the OGC recommendation, who the court has called the "controlling group." *Id.*; *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under Section [30109(a)(8)] . . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *Common Cause v. FEC*, 655 F. Supp. 619 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988).

In the second category of cases described above, any member or members of the group of Commissioners who approve OGC's dismissal recommendation may issue their own statement(s) of reasons to provide the basis for his or her action. If one or more members who supported dismissal do not file a statement containing the basis of his or her action, the rationale provided in OGC's report shall be among those considered by the Court. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 & n.19 (1981) (staff report may provide a basis for the Commission's action). Although the views of the Commissioners who voted to pursue enforcement are not defended by OGC, their statements of reasons are made part of the administrative record as long as they are filed by the time the record is certified, and when filed shall be available for the Court's consideration.

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March 30, 2018

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

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INTRODUCTION

Plaintiffs Citizens for Responsibility and Ethics in Washington and Anne L. Weismann seek judicial review of the Federal Election Commission's ("FEC" or "Commission") handling of an administrative complaint they filed with the agency. Plaintiffs alleged that certain entities made or accepted a contribution in the name of another in violation of the Federal Election Campaign Act ("FECA"). 52 U.S.C. § 30122. The Commission investigated and secured redress for their administrative complaint through a multi-party conciliation agreement, but plaintiffs nevertheless challenge the Commission's actions as arbitrary, capricious, an abuse of discretion, and contrary to law.

Plaintiffs bring their suit under FECA and the Administrative Procedure Act ("APA"). They challenge the scope of the Commission's investigation, including that the Commission did not have the required number of votes to find reason to believe that certain additional persons violated FECA, that it did not bring a civil action in district court to enforce a subpoena against those persons, and its alleged failure to confirm that these persons were the true source of the contribution at issue in plaintiffs' administrative complaint. But FECA provides for judicial review in only two limited circumstances, neither of which applies here. Critically, FECA does not authorize judicial review of plaintiffs' challenge because the Commission did not dismiss plaintiffs' administrative complaint. Rather, the Commission investigated the administrative complaint and resolved the alleged violations in a global conciliation agreement with all persons identified in the administrative complaint and one entity who the Commission had found reason to believe was the "Unknown Respondent" that had been described in the administrative complaint. Plaintiffs' use of the APA is similarly unavailing. FECA's preclusive effect renders the APA unavailable as a vehicle to challenge Commission enforcement proceedings, including for claims that are outside the carefully delineated challenges permitted by Congress under

FECA. Accordingly, plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC 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). It is required under FECA to make decisions through majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

B. FECA's Administrative, Enforcement, and Judicial-Review Provisions

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the Act. *Id.* § 30109(a)(1); *see also* 11 C.F.R. § 111.4. FEC administrative enforcement matters are required by FECA to be kept confidential until the administrative process is complete. 52 U.S.C. § 30109(a)(12)(A) ("Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."); 11 C.F.R. § 111.21. Upon receiving a complaint, the Commission must notify any person alleged in the complaint to have committed a FECA violation (*i.e.*, the

"respondent") and provide fifteen days for a response. 52 U.S.C. § 30109(a)(3). After considering the complaint and any response, the Commission must then determine whether to find there is "reason to believe" that the respondent has committed a violation of FECA and conduct "an investigation of such alleged violation," which it may do by an affirmative vote of four Commissioners. *Id*. § 30109(a)(2); *see also id.* § 30106(c). If a person refuses to obey a subpoena during the course of an investigation, the Commission may petition a United States district court for an order requiring compliance. *Id.* § 30107(b).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated, a determination that also requires an affirmative vote of at least four Commissioners. *Id*. § 30109(a)(4)(A)(i). After a finding of probable cause to believe that the respondent has committed a FECA violation, the Commission is statutorily required to "attempt, for a period of at least 30 days," but "not more than 90 days," to "correct or prevent such violation by informal methods of conference, conciliation, and persuasion." *Id*. § 30109(a)(4)(A)(i). The Commission may also enter into a conciliation agreement prior to finding probable cause to believe if the respondent writes to express a desire to enter into negotiations. 11 C.F.R. § 111.18(d). The Commission may enter into a conciliation agreement only with the affirmative vote of at least four Commissioners. 52 U.S.C. § 30109(a)(4)(A)(i). If the FEC is unable to reach a conciliation agreement with a respondent, FECA authorizes the FEC to institute a de novo civil enforcement action in federal district court, upon an affirmative vote of at least four Commissioners. *Id.* § 30109(a)(6)(A).

FECA permits an administrative complainant to challenge the FEC's handling of an administrative complaint in two limited situations. First, a party who has filed an administrative complaint may bring a judicial-review action against 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 [administrative] complaint is filed." 52 U.S.C. § 30109(a)(8)(A). Second, if there is "an order of the Commission dismissing" an administrative complaint, the complainant may file suit in this District against the Commission to obtain judicial review of the Commission's dismissal. *Id*. If a court finds that the Commission's failure to act or dismissal was "contrary to law," it may order the Commission to conform to the court's decision within 30 days. *Id*. § 30109(a)(8)(C).

II. PLAINTIFFS' ADMINISTRATIVE COMPLAINT, THE FEC'S INVESTIGATION, AND CONCILIATION

On February 27, 2015, plaintiffs filed with the Commission an administrative complaint against American Conservative Union ("ACU"), Now or Never PAC, James C. Thomas, III in his official capacity as treasurer, and an "Unknown Respondent," alleging that these entities violated FECA. (Compl. ¶ 24 (Docket No. 1).) Plaintiffs alleged that the Unknown Respondent contributed to Now or Never PAC in the name of ACU, that ACU permitted its name to be used to effect this contribution, and that Now or Never PAC knowingly accepted the contribution in the name of another. (*Id.*) The Commission designated plaintiffs' administrative complaint as FEC Matter Under Review ("MUR") 6920.

On January 26, 2017, the Commission found reason to believe that ACU and an Unknown Respondent violated FECA's prohibition on making or accepting contributions in the name of another and took no action at that time as to Now or Never PAC and its treasurer. (Compl. Exh. 7 (Certification, MUR 6920 (Jan. 27, 2017)).) The Office of General Counsel ("OGC") then conducted an investigation. (Compl. Exh. 2 at 2 (FEC Third General Counsel's Report, MUR 6920 (Sept. 15, 2017)).)

Based on information OGC obtained during its investigation, on July 11, 2017, the Commission substituted the entity Government Integrity, LLC in the place of "Unknown Respondent" into its previous reason-to-believe finding. (Compl. Exh. 6 (Certification, MUR 6920 (July 12, 2017)).) The Commission also approved a Factual and Legal Analysis for supporting its reason to believe that Government Integrity, LLC violated FECA by making a contribution in the name of another; that Thomas in his personal capacity violated FECA by helping or assisting in the making of a contribution in the name of another; and that Now or Never PAC, Thomas in his official capacity as treasurer, and Thomas in his personal capacity violated FECA by accepting a contribution in the name of another and failing to properly report that contribution. (*Id.*)

After subsequent investigation, the Commission found probable cause to believe that ACU violated FECA and authorized OGC to pursue conciliation with ACU. (Compl. Exh. 4 (Certification, MUR 6920 (Sept. 21, 2017)).) The Commission further authorized OGC to engage in pre-probable cause conciliation with Government Integrity, LLC, Now or Never PAC, and Thomas. (*Id*.) The Commission also considered whether to find reason to believe a trust and its trustee, which OGC concluded in its investigation had provided Government Integrity, LLC with the funds that it sent to ACU, Compl. Exh. 2 at 2 (FEC Third General Counsel's Report, MUR 6920 (Sept. 15, 2017)), had made contributions in the name of another or assisted in the making of such contributions, as well as whether to authorize a subpoena enforcement action against them. (Compl. Exh. 4 (Certification, MUR 6920 (Sept. 21, 2017)).) An insufficient number of Commissioners supported taking those actions and the Commission instead agreed not to take any further action on those questions at that time. (*Id.*)

On October 24, 2017, the Commission approved a conciliation agreement with ACU, Government Integrity, LLC, Thomas in his personal capacity, and Now or Never PAC and Thomas in his official capacity as treasurer. (Compl. Exh. 8 (Certification, MUR 6920 (Oct. 24, 2017)).) The Commission then closed the file. (*Id*.) Pursuant to this conciliation agreement, the Commission agreed to resolve the matter upon payment of a $350,000 civil penalty by these respondents. (Compl. Exh. 3 (Conciliation Agreement, MUR 6920 (Oct. 31, 2017)).)

III. PLAINTIFFS' JUDICIAL COMPLAINT

On December 22, 2017, plaintiffs filed the instant complaint against the Commission seeking judicial review of the Commission's handling of MUR 6920 under 52 U.S.C. § 30109(a)(8) and the APA. Plaintiffs purport to challenge the Commission's alleged failure to find reason to believe that the aforementioned trust and its trustee (collectively, the "John Does") violated FECA by making a contribution in the name of another, Compl. ¶ 37, that the Commission failed to authorize "the enforcement of subpoenas against uncooperative witnesses," *id.* ¶ 45, and that the Commission did not "confirm[]" that the John Does were the true source of the contribution to Now or Never PAC, *id.* ¶¶ 43, 44. Plaintiffs challenge the FEC's actions on their administrative complaint as arbitrary, capricious, an abuse of discretion, and contrary to law. Plaintiffs noticed this suit as a related case to the pending litigation brought by the John Does, and the case was assigned to this Court. On March 1, 2018, the John Does filed a motion to intervene which is currently pending before the Court, along with a proposed motion to dismiss. (Mot. to Intervene by John Doe 1 and John Doe 2 and Proposed Mot. to Dismiss (Docket Nos. 11, 11-1).)

ARGUMENT

Plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. The complaint purports to combine challenges under FECA's narrow

judicial review provision, 52 U.S.C. § 30109(a)(8), and the APA, 5 U.S.C. § 706. (Compl. ¶¶ 1, 5, 39, 46.) But neither FECA nor the APA authorizes plaintiffs' challenge to the Commission's investigative choices or resolution of their administrative complaint through settlement. Plaintiffs cannot invoke a cause of action under 52 U.S.C. § 30109(a)(8) because the Commission did not dismiss the administrative complaint. Rather, the Commission investigated the suspect contribution identified in plaintiffs' administrative complaint and resolved plaintiffs' allegations in a conciliation agreement which contained a $350,000 penalty. Moreover, because FECA provides a specific judicial review provision, the APA is unavailable as a vehicle to challenge Commission enforcement decisions, including those that Congress did not make reviewable under FECA's carefully delineated procedures.

I. STANDARDS OF REVIEW

A. Dismissal for Lack of Subject Matter Jurisdiction

The absence of subject matter jurisdiction requires dismissal. As the Supreme Court has explained, "[w]ithout jurisdiction the court cannot proceed at all in any cause. . . . [W]hen [jurisdiction] 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 Env't*, 523 U.S. 83, 94 (1998) (citation and internal quotation marks omitted). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

Though the "party seeking to invoke the jurisdiction of the federal court bears the burden of establishing the court's jurisdiction, . . . the court also has an 'affirmative obligation to ensure that it is acting within the scope of its . . . authority.'" *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 302-03 (D.D.C. 2017) (citing *U.S. Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24

(D.C. Cir. 2000); quoting *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001)). Therefore, plaintiffs' "'factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Jafarzadeh*, 270 F. Supp. 3d at 303 (quoting *Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14 (alteration in original)). In determining whether the Court has subject matter jurisdiction over an action, the Court "may look outside the Complaint to 'undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Am. Fed'n of Gov't Employees Local 2798 v. Pope*, 808 F. Supp. 2d 99, 106 (D.D.C. 2011) ("*AFGE Local 2798*") (quoting *Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992)), *aff'd*, No. 11-5308, 2012 WL 1450584 (D.C. Cir. Apr. 12, 2012) (per curiam).

Where, as here, the underlying statute provides no judicial review of the challenged agency action, the action should be dismissed for lack of subject matter jurisdiction. *See Tex. All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 411 (D.C. Cir. 2012) (affirming district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) after finding that the statute at issue "precludes judicial review [of the agency's regulation] . . . and that the district court therefore lacked subject matter jurisdiction"); *Hall v. Dep't of Labor*, No. 16-846 (BAH), 2018 WL 646884, at *1 (D.D.C. Jan. 30, 2018) (dismissing for lack of subject matter jurisdiction action brought for review of agency decision when underlying statute did not authorize judicial review); *AFGE Local 2798*, 808 F. Supp. 2d at 107 (finding that judicial review provision of agency's authorizing statute did not contemplate review of agency's decision not to issue administrative enforcement complaint and dismissing case for lack of subject matter jurisdiction).

B. Dismissal for Failure to State a Claim

Plaintiffs' complaint should also be dismissed in part because it fails to state a claim. Dismissal under Federal Rule of Civil Procedure 12(b)(6) is "appropriate when a complaint fails 'to state a claim upon which relief can be granted.'" *Strumsky v. Wash. Post Co.*, 842 F. Supp. 2d 215, 217 (D.D.C. 2012) (quoting Fed. R. Civ. P. 12(b)(6)). "[A] complaint must contain sufficient factual allegations that, if accepted as true, 'state a claim to relief that is plausible on its face.'" *United States ex rel. Scott v. Pac. Architects & Eng'rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Though the Court "must liberally construe the complaint in favor of the plaintiff and must grant the plaintiff 'the benefit of all inferences that can be derived from the facts alleged,' . . . a court need not 'accept as true a legal conclusion couched as a factual allegation.'" *Chatman v. United States Dep't of Def.*, 270 F. Supp. 3d 184, 188 (D.D.C. 2017) (quoting *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 529, 530 (D.C. Cir. 2015)).

In evaluating a motion to dismiss for failure to state a claim, "a court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *Pac. Architects & Eng'rs, Inc.*, 270 F. Supp. 3d at 152 (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

II. FECA DOES NOT GRANT SUBJECT MATTER JURISDICTION FOR REVIEW OF THE COMMISSION'S INVESTIGATIVE DECISIONS AND SETTLEMENTS

FECA's plain language, structure, and legislative history make clear that the Court lacks jurisdiction to hear plaintiffs' challenge to actions undertaken during the Commission's investigation or the Commission's successful conciliation of the administrative matter with multiple respondents for a substantial $350,000 penalty. Plaintiffs allege that a "dismissal" arose from a combination of three principal purported Commission "failures": (1) to find reason to believe during the investigation that the John Does violated the Act; (2) to authorize a civil action during the investigation to enforce subpoenas directed to the John Does; and (3) to "ascertain whether the John Doe Trust . . . was the true source of the contribution to Now or Never PAC." (Compl. ¶¶ 3, 38, 43-45.) Section 30109(a)(8) does not authorize this type of review of the FEC's investigation and resolution of the matter. The administrative complaint resulted in a conciliation agreement, not a dismissal. Declining to make definitive factual findings or employ certain discovery methods cannot constitute a dismissal and such decisions are not reviewable. FECA does not authorize judicial review of these actions, which fall squarely within the agency's enforcement discretion. The Court should refuse plaintiffs' request to expand FECA's judicial review provision and to rearrange the FEC's investigative decisions and enforcement priorities.

A. Entering Into a Conciliation Agreement Is Not a Dismissal of an Administrative Complaint

The Court should dismiss plaintiffs' challenge to the Commission's conduct of its investigation into their administrative complaint and the conciliation agreement that ultimately resolved the complaint. Plaintiffs appear to contend that there has been a partial dismissal of their administrative complaint but that is in essence a challenge to the scope of the parties to the conciliation agreement, which FECA does not authorize.

Congress explicitly provided that FEC administrative complainants may seek judicial review only in two narrow circumstances. FECA states that when a complainant is "aggrieved by an order of the Commission dismissing a complaint . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed [the complainant] may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A). Resolution of an administrative complaint through negotiated settlement — a conciliation agreement — is not a dismissal or a failure to act. On the contrary, settlement is a means of fulfillment of the complaint, whereby, after investigation, the Commission negotiates and accepts a settlement containing a remedy for the violations alleged by the complainant. *See* 52 U.S.C. § 30106(b)(1) ("The Commission shall administer [and] seek to obtain compliance with . . . this Act.").

Plaintiffs appear to rely in part on FECA's authorization for an administrative complainant to bring suit after the Commission dismisses an administrative complaint. (*See* Compl. ¶ 3 ("Those failures resulted in the dismissal of Plaintiffs' complaint."); *id.* ¶ 4 ("[T]he dismissal that resulted from those failures [is] contrary to law."); *id.* ¶¶ 22, 23 (invoking "dismissal" basis of FECA's judicial review provision); *id.* ¶ 32 (alleging that the Commission "voted to close the file and dismiss Plaintiffs' complaint").) But FECA's plain language precludes this suit. Applying common usage here, "dismiss" means to refuse to act on an administrative complaint and that, after reviewing the allegations in the administrative complaint, the Commission does not pursue them. *See, e.g.*, Oxford Dictionary, https://en.oxforddictionaries.com/definition/dismiss (defining "dismiss" as to "[r]efuse further hearing to (a case)") (last visited Mar. 30, 2018). The Court should interpret "dismissing" and "dismissal" in section 30109(a)(8) in accordance with its well-established meaning. *Engine*

Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (citation and internal quotation marks omitted)); *Inner City Broad. Corp. v. Sanders*, 733 F.2d 154, 158 (D.C. Cir. 1984) ("To determine the meaning of statutory terms, a court may consider the common usage of the term. Indeed, unless contrary indications are present, a court can assume that Congress intended the common usage of the term to apply." (citation omitted)). On its face, section 30109(a)(8) provides for judicial review only when the Commission dismisses an administrative complaint or when it fails to timely act on such a complaint. Nowhere in this provision did Congress provide for judicial review of conciliation agreements.

Moreover, despite numerous references to conciliation throughout section 30109, the provision conspicuously fails to authorize review of these negotiated settlements. That omission evinces congressional intent to preclude review. *Nat'l Ass'n of Broads. v. F.C.C.*, 569 F.3d 416, 421 (D.C. Cir. 2009) (noting a "general presumption that an omission is intentional where Congress has referred to something in one subsection but not in another" (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) ("The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction." (citation and internal quotation marks omitted)). By its terms, FECA does not authorize judicial review of conciliation agreements that result from the Commission's acting on a complaint.

FECA also reflects a congressional intent that conciliation is to be a culmination of the enforcement process. FECA requires that, after a finding of probable cause to believe that a

respondent has committed a FECA violation, the Commission "attempt, for a period of at least 30 days," but "not more than 90 days," to "correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 52 U.S.C. § 30109(a)(4)(A)(i). This attempt at conciliation is a prerequisite for filing a civil action for relief. FECA's legislative history reflects congressional intent that conciliation is a means to redress violations alleged in administrative complaints:

> Together the requirement of four votes for affirmative action, the broad investigatory powers granted . . . the conciliation procedure mandated, and the substantial civil remedies provided represent a delicate balance designed to effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable.

H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 4 (1976), *reprinted in* FEC, Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977).[1]

[1] Additionally, plaintiffs' interpretation of what Commission action constitutes a "dismissal" would render the Act internally inconsistent. If, as plaintiffs contend, the Commission's vote regarding the Doe entities on September 20, 2017, constituted a dismissal under the Act, then plaintiffs were required to file their court complaint within 60 days of this vote, on November 20, 2017. 52 U.S.C. § 30109(a)(8)(B) (requiring that petitions for judicial review under this provision "shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal"); *Spannaus v. FEC*, 990 F.2d 643, 644-45 (D.C. Cir. 1993) (per curiam) (affirming district court's determination based on the plain meaning of FECA's judicial review provision that sixty-day period for administrative complainants to file their complaint for judicial review of a Commission decision begins to run on the date that the Commission votes to dismiss the administrative complaint, rather than on the date that the complainant receives notice of the vote). But FECA also requires that Commission action on a MUR be kept confidential until the resolution of the case, precluding notice of this vote until after the investigation. 52 U.S.C. § 30109(a)(12)(A). Congress did not intend the word "dismissal" to encompass the Commission votes regarding the course of the investigation that plaintiffs suggest here given the mandates of other FECA provisions. *Accord Johnson v. Cumis Ins. Soc., Inc.*, 624 F. Supp. 1170, 1174 (D.D.C. 1986) ("It is a well-settled tenet of statutory construction that statutes should be construed so as to avoid such internal inconsistencies and absurd results." (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))).

Importantly, FECA leaves the approval of conciliation agreements entirely to the Commission in its prosecutorial discretion. Despite the statute's detailed conciliation requirements, Congress did not provide in FECA any guidelines with regard to the terms of such agreements, such as whether the Commission must insist that all respondents be included in a conciliation agreement, or must pursue minimum civil penalties, or must include respondents' admissions of liability. FECA leaves the approval or rejection of conciliation agreements, and the preliminary negotiation of the terms and scope of these agreements, entirely to the Commission. FECA's legislative history supports the intent to leave the Commission with complete discretion on the negotiation of conciliation agreements. As the Chairman of the Committee on Rules and Administration explained with respect to the 1979 FECA amendments:

> The Commission is entrusted with the responsibility of passing on complaints. Section [30109(a)(8)] provides that an order dismissing a complaint is reviewable in court solely to assure that the Commission's action is not based on an error of law. . . . But [section 30109(a)(8)'s] two limited bases for judicial intervention are *not intended to work a transfer of prosecutorial discretion from the Commission to the Courts*.

125 Cong. Rec. 36,754 (1979) (emphasis added), *reprinted in* FEC, Legislative History of Federal Election Campaign Act Amendments of 1979, at 549 (1983), *available at* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf. The decision to accept or reject a conciliation agreement is exactly the type of settlement decision that falls within the scope of agency prosecutorial discretion. *Heckler v. Chaney*, 470 U.S. 821 (1985).

Even where the Commission does not include some respondents in a conciliation agreement, that action would not constitute a dismissal of the administrative complaint because, as here, the Commission obtained redress for the alleged violations in a manner entirely within its enforcement discretion. Plaintiffs may wish that the Commission had taken different action with respect to the John Does, but the scope of parties to the conciliation agreement is a matter

committed to the Commission's discretion. As the plain language of FECA and its legislative history demonstrate, Congress never intended judicial review under section 30109(a)(8) to provide a jurisdictional basis for administrative complainants to collaterally attack the Commission's enforcement discretion in resolving cases through conciliation. Despite numerous references to conciliation and an explicit preference for conciliation over other means of administrative complaint resolution, FECA contains no language authorizing review of these negotiated settlements.

Yet this type of challenge is exactly what plaintiffs attempt here. Though they bring this action under the guise of a challenge to "the dismissal of Plaintiffs' complaint," Compl. ¶ 3, this action is in fact a collateral attack on the conciliation agreement that a Commission majority voted to approve. In contrast to other cases in which the Commission lacked a four-vote majority to find reason to believe and then closed its file, thereby effectively dismissing a complaint, here the challenged Commission actions were followed by further enforcement action and approval of a conciliation agreement. (Indeed, the Commission votes about which plaintiffs complain were followed immediately by affirmative votes to "[t]ake no action *at this time*" as to OGC's recommendations regarding the John Does. (*See* Compl. Exh. 4 at 3 (MUR 6920 Certification (Sept. 21, 2017) (emphasis added)).)) Entering into a conciliation agreement is not a dismissal.

Moreover, section 30109(a)(8) does not provide review of the Commission's decision to include or not to include an unnamed non-respondent in a conciliation agreement. To require otherwise would be inconsistent with the concept of conciliation and would risk requiring the agency to pursue enforcement to the satisfaction of all administrative complainants. That result would not only be antithetical to well-established principles of agency enforcement deference,

see infra pp. 23-25, but it would also be contrary to Congress's express choice of FEC's membership and voting requirements to ensure that Commission "enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976), *reprinted in* FEC, Legislative History of Federal Election Campaign Act Amendments of 1976, at 803 (1977); 52 U.S.C. § 30106(a)(1) (requiring that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party").

Rather than effectuating any dismissal or refusing to pursue enforcement, here the Commission acted upon plaintiffs' administrative complaint by negotiating a conciliation agreement with a $350,000 civil penalty for the violations alleged in plaintiffs' administrative complaint. The conciliation agreement belies plaintiffs' assertion that their complaint was dismissed.

B. Declining to Make Findings of Fact or Enforce Discovery Does Not Constitute a Dismissal

The alleged failures plaintiffs identify also include the manner in which the FEC conducted its investigation and whether certain fact-finding occurred, but no combination of such discretionary investigative steps or alleged failures to take the investigation as far as plaintiffs would have preferred constitute a Commission dismissal of the administrative complaint. FECA leaves to the Commission the day-to-day conduct of investigations of alleged FECA violations. *See infra* pp. 17. Nowhere in the Act did Congress allow administrative complainants a voice in the conduct of investigations, as plaintiffs seek here. Section 30109(a)(8) does not permit plaintiffs to complain that the Commission failed to elicit an explicit admission of guilt or declined to require that a respondent amend its FEC filings. Here, plaintiffs' attempt to challenge the FEC's decision whether to enforce a subpoena through civil

litigation against the John Does is well outside of section 30109(a)(8)'s provision for review of Commission dismissals or failures to act.

Plaintiffs' challenge to the Commission's decision not to file a subpoena enforcement action against the John Does illustrates why such determinations fall squarely within the Commission's discretion to direct the manner in which it examines allegations in administrative complaints and are not subject to second-guessing by plaintiffs. Such investigative decisions rely upon factors such as the Commission's opinion on how important the vindication of agency authority is in a particular case and the availability of agency resources, which the Commission is uniquely positioned to evaluate. Courts in this district have thus repeatedly affirmed the agency's discretion in conducting investigations. *See Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) ("[T]he Court believes that the FEC is in a better position to evaluate its own resources and the probability of investigatory difficulties than is [the plaintiff]."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources." (citing *Heckler*, 470 U.S. at 831-32)); *cf. FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) (noting that the Commission, "[l]ike the federal courts . . . appears to have more than one case on its docket" and it "is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted"). Thus, decisions whether to litigate compliance with a subpoena or make a conclusive factual finding rely upon factors within the agency's exclusive purview, such as its resources and priorities, as well as the risks of pursuing further enforcement and the value of settlement, clarity, and finality. *Cf. In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (noting that the "agency is in a unique — and authoritative — position to view its

projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way").

The Commission's sole authority under FECA to determine the course of its own investigations reflects the Commission's inherent authority to determine its enforcement priorities and the allocation of its resources within its statutory mandate. Allowing plaintiffs' claims to proceed here would directly undermine the practical and policy considerations that FECA contemplates.

C. The Commission Conciliated With All Persons Identified in the Administrative Complaint and an Entity Substituted as the Unknown Respondent in the Commission's Prior Findings

Concluding that the administrative complaint was dismissed is particularly unwarranted here given the broad range of the conciliated agreement. Whether the John Does even were or should have been technically designated as respondents has been a subject of dispute, including amongst the Commissioners. (*See, e.g.*, Compl. Exh. 5 (Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman, MUR 6920 (Dec. 20, 2017)).) Their exclusion from the conciliation agreement is thus a poor candidate to be considered a dismissal.

As previously explained, *supra* p. 5, based upon the investigation by OGC, the Commission substituted Government Integrity, LLC as "Unknown Respondent" in its earlier reason-to-believe finding. (Compl. Exh. 6 (Certification, MUR 6920 (July 12, 2017)).) Government Integrity LLC and all of the persons identified in the administrative complaint (ACU, Now or Never PAC, and Thomas) were all parties to the subsequent conciliation agreement. *See supra* p. 6. Even if a dismissal could occur by virtue of some persons named in an administrative complaint not being party to a conciliation agreement, plaintiffs do not make a compelling case for that novel holding given how many parties were included here.

Common Cause v. FEC provides no authority to the contrary because the court there did not explicitly address whether FECA provides jurisdiction for the different context in that case, where the Commission conciliated with respect to some, but not all, violations of law that the administrative complaint alleged had been committed by the respondent. 729 F. Supp. 148 (D.D.C. 1990). As the Supreme Court has "repeatedly held," "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *see also Wagner v. FEC*, 717 F.3d 1016 (D.C. Cir. 2013) (quoting *Lewis*); *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) ("It is a well-established rule that cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists." (internal quotation marks omitted)).[2]

Additionally, plaintiffs' argument that the use of "Unknown Respondent" in their administrative complaint results in a potential challenge to the Commission's handling of the matter would improperly expand the scope of review under section 30109(a)(8). Administrative complaints must "clearly identify as a respondent each person or entity who is alleged to have committed a violation." 11 C.F.R. § 111.4(d)(1); *id.* § 111.5(b) (providing that FEC's OGC may

[2] The John Does make another jurisdictional argument, noting that section 30109(a)(4)(A)(i) provides that a conciliation agreement, unless violated, "'is a complete bar to any further action by the Commission'" including the bringing of a civil proceeding. (*See* Proposed Mot. to Dismiss at 12 (Docket No. 11-1) (quoting 52 U.S.C. § 30109(a)(4)(A)(i).) A conciliation agreement on some violations does not in fact prevent a subsequent enforcement action against the same party for other alleged violations arising out of the same facts, *see, e.g.*, *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1474-75 (D.C. Cir. 1992), but that is a distinct question from the issue here. FECA's provision for conciliation agreements involves specific "violation[s]" by particular "person[s]," 52 U.S.C. § 30109(a)(4)(A)(i), and the Commission can thus pursue other violations not included in a conciliation agreement. FECA's judicial review provision, on the other hand, involves "order[s] of the Commission dismissing a complaint," *id.* § 30109(a)(8). Congress thus has not provided jurisdiction where an administrative complainant may have wished that other parties were included in a conciliation agreement but there was no such "order . . . dismissing a complaint." *Id.*

reject an administrative complaint that does not conform to the requirements of section 111.4). Though the use of fictitious names is permitted where justified in complaints filed with the FEC, allowing administrative complainants to broadly construe unknown respondents and question their omission from conciliation agreements would constitute an unauthorized expansion beyond what Congress contemplated in section 30109(a)(8). Under plaintiffs' argument, any complainant could utilize the term "unknown respondent" in its administrative complaint as a vehicle to challenge the depth of the Commission's investigation into the "true source" of an alleged violation no matter how many persons who have transferred funds to each other conciliate with the Commission. Plaintiffs' attempt to expand FECA's judicial review provision in this manner should be rejected.

III. TO THE EXTENT PLAINTIFFS' CHALLENGE ARISES UNDER THE APA, IT MUST BE DISMISSED BECAUSE FECA PROVIDES THE EXCLUSIVE VEHICLE FOR JUDICIAL REVIEW

Plaintiffs' claims fare no better under the APA and should be dismissed for failure to state a claim. Dismissal of a claim is appropriate where, accepting the factual allegations in the complaint as true and drawing all reasonable inference in the plaintiffs' favor, the allegation fails as a matter of law to state a claim on which relief can be granted. *See supra* p. 9. Plaintiffs purport to rely on the APA as an independent basis for challenging the Commission's alleged "dismissal" of their administrative complaint. (Compl. ¶ 1 (citing 5 U.S.C. § 706).) However, no separate APA claim exists here because FECA provides an adequate and exclusive judicial review mechanism. Even in cases such as this one, where FECA itself does not permit review of

plaintiffs' claims because the suit is not authorized by FECA's judicial review provision, *see supra* pp. 10-20, the Act still precludes plaintiffs' APA claim.[3]

FECA provides the exclusive mechanism for judicial review of any FEC dismissal of an administrative complaint and any claimed failure to act on such a complaint. Judicial review of agency action under the APA is available only where "made reviewable by statute" and where there is "no other adequate remedy" for final agency action. 5 U.S.C. § 704. "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Thus, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Id*. (internal quotation marks omitted); *see Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 846 F.3d 1235, 1244-45 (D.C. Cir. 2017) (same). To determine the proper basis for judicial review, courts examine the relevant statute's language, structure, and legislative history. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (explaining that a "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" may demonstrate that other forms of judicial review are "impliedly precluded"); *Klayman v. Obama*, 957 F. Supp. 2d 1, 20 (D.D.C. 2013) (concluding that the Foreign Intelligence Surveillance Act precluded plaintiffs' claim for judicial review pursuant to the APA).

In section 30109(a)(8), Congress delineated the scope of judicial review available in an action challenging alleged FEC impropriety in handling an administrative complaint. The statute

[3] Plaintiffs' APA claim could alternatively be dismissed for a lack of subject matter jurisdiction pursuant to Rule 12(b)(1) rather than Rule 12(b)(6), as courts have "not always been consistent in maintaining the[] distinctions" between the two rules. *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) (internal quotation marks omitted).

specifies that (a) the statutory cause of action is available only to a complainant (b) whose complaint was dismissed; (c) any petition for judicial review must be filed in the United States District Court for the District of Columbia; (d) the available relief is a judicial declaration that "the failure to act . . . is contrary to law" and an order "direct[ing] the Commission to conform with such declaration"; and (e) the safety valve in the event the agency fails to conform with such an order is a private right of action by the complainant. 52 U.S.C. § 30109(a)(8)(C). Because FECA contains this explicit and detailed review provision, there is clearly an "adequate remedy" as described in the APA, 5 U.S.C. § 704. FECA's "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" precludes other forms of judicial review, including review under the APA. *See Block*, 467 U.S. at 349. Where, as here, Congress has "fashion[ed] . . . an explicit provision for judicial review" of certain agency action or failure to take action and has "limit[ed] the time to raise such a challenge," the Court of Appeals has found that "it is 'fairly discernible' that Congress intended that particular review provision to be exclusive." *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014); *see Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009).

Every court that has considered the nature of the judicial-review procedures in section 30109(a)(8) has found that those FECA procedures are exclusive. In fact, the D.C. Circuit has confirmed that section 30109(a)(8) is "as specific a mandate as one can imagine" and accordingly concluded that "the procedures it sets forth — procedures purposely designed to ensure fairness not only to complainants but also to respondents — must be followed before a court may intervene." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). The Fifth Circuit similarly found "substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]" in section 30109(a)(8). *Stockman v. FEC*, 138 F.3d 144, 156 (5th

Cir. 1998). More recently, this District Court has twice held that the review procedure in section 30109(a)(8) precludes an APA claim for dismissal of an administrative complaint. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) (FECA provides an adequate remedy so there is no parallel claim for relief under the APA); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("*CREW* 2015") ("This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA.").

FECA's overall structure and legislative history confirm Congress's intent to limit the scope of judicial review of matters within the FEC's area of responsibility. FECA grants the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Act, 52 U.S.C. § 30106(b)(1), and it establishes a specific system of judicial review that "funnels all challenges to the FEC's handling of complaints through the U.S. District Court for the District of Columbia," *CREW* 2015, 164 F. Supp. 3d at 119 (citing 52 U.S.C. § 30109(a)(8)(A)). "The legislative history of [FECA] confirms that '[t]he delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.'" *Stockman*, 138 F.3d at 154 (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)). The specificity of section 30109(a)(8), which carves out two narrow areas of limited review, is consistent with courts' repeated refusals to review agency enforcement decisions using APA review.

Though not permitted by FECA, plaintiffs' challenges to the scope of the Commission's conciliation agreement, subpoena enforcement efforts, and fact-finding are still nevertheless not permitted under the APA. That statute provides that "[a] person suffering legal wrong because of

agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Excluded from this court's review, however, are agency actions that are 'committed to agency discretion by law.'" *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007). "Enforcement actions" generally fall within this reviewability exclusion because "'a court would have no meaningful standard against which to judge the agency's exercise of discretion' in deciding how to enforce the statutory provisions." *Id*. (quoting *Heckler*, 470 U.S. at 830). In fact, "'a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.'" *Orlov v. Howard*, 523 F. Supp. 2d 30, 37 (D.D.C. 2007) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). "[A] complaint seeking review of agency action 'committed to agency discretion by law' has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6)." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (internal citation omitted); *id.* at 855 ("[I]n cases that involve agency decisions not to take enforcement action, we begin with the presumption that the agency's action is unreviewable."); *see also Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009) (holding that the APA provides no cause of action to review an agency's revocation of an employee's security clearance where that decision is "committed to agency discretion by law"). The Commission's decisions at issue here include the Commission's decision not to institute a subpoena enforcement action against the John Does during the course of the investigation and its approval of a global conciliation agreement that did not include the John Does. These decisions fall squarely within the agency's discretion. *See Stark*, 683 F. Supp. at 840 ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources." (citing *Heckler*, 470 U.S. at 831-32)). Allowing APA

review of such decisions would eviscerate the careful limitations Congress established in section 30109(a)(8). The Court should reject plaintiffs' request to base jurisdiction on the APA.

In sum, section 30109(a)(8) provides the exclusive mechanism for challenging the Commission's dismissal of administrative complaints and limits the scope of relief available to plaintiffs in this action. The portions of plaintiffs' complaint that purport to rely on the APA or seek relief beyond what is permitted in section 30109(a)(8) thus fail to state a claim and should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

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