UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE,	)	
Plaintiff,	)	Civ. No. 19-1722 (APM)
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 plaintiff's 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. § 702. Plaintiff Free Speech For People ("FSFP") challenges the Commission's alleged failure to act upon an administrative complaint under FECA. But FSFP lacks Article III standing because it has failed to allege a concrete and particularized injury. Furthermore, to the extent that the Commission's handling of FSFP's administrative complaint is judicially reviewable, FECA provides the exclusive mechanism for that review. APA review is therefore precluded, and FSFP has failed to state a claim pursuant to that statute. A supporting memorandum of points and authorities and a proposed order accompany this motion.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

/s/ Tanya Senanayake
Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Kevin P. Hancock
Acting Assistant General Counsel
khancock@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

August 23, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 19-1722 (APM) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Kevin P. Hancock
Acting Assistant General Counsel
khancock@fec.gov

Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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INTRODUCTION

Plaintiff Free Speech For People ("FSFP") seeks relief for the alleged failure of defendant Federal Election Commission ("Commission" or "FEC") to timely act on an administrative complaint under the Federal Election Campaign Act ("FECA" or "Act"), but FSFP fails to establish any concrete and particularized injury and has no Article III standing. According to the court complaint, FSFP filed an administrative complaint with the FEC in February 2018 alleging violations of FECA, and later filed two amendments to that complaint in April and July 2018. (Pls.' Compl. for Declaratory and Injunctive Relief ("Compl.") ¶¶ 1, 14, 16, 18 (Docket No. 1).) FSFP asserts that the Commission has unlawfully failed to act on the administrative complaint in violation of 52 U.S.C. § 30109(a)(8)(A) (*id.* ¶ 29.), but fails to meet its burden of demonstrating a basis for standing.

FSFP's generalized desire to see the FEC apply the law against others on FSFP's preferred timeline is insufficient to establish standing. FSFP does not claim any specific injury to its programmatic activities. Additionally, for two independent reasons, FSFP cannot show any informational injury. First, FSFP does not claim that the administrative respondents' alleged failure to report an in-kind contribution resulted in a failure to disclose any information that is not already publicly available. As FSFP concedes in its court complaint, FSFP is already aware of "many facts suggest[ing]" the alleged source, recipient, and amount of the $150,000 payment that its administrative complaint claims took place. (Compl. ¶ 23.) Thus, even if the FEC were to issue the legal determination that FSFP seeks concluding that this alleged payment broke the law, FSFP does not show how that determination would actually provide it with any new facts of which it was not already aware.

Second, and in any event, FSFP has also not alleged that any newly revealed information would be helpful to FSFP *in voting*, as it must to establish informational injury. Indeed, FSFP

itself cannot vote and it does not allege that it has any members. Rather, FSFP merely alleges that information that has already been reported should have been characterized differently or submitted by additional reporting entities, which is not enough to establish standing. Accordingly, FSFP's suit should be dismissed for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Moreover, to the extent FSFP's suit relies on the Administrative Procedure Act ("APA"), it should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. FSFP brings suit under FECA and the APA (Compl. ¶¶ 4-5), but FSFP's reliance on the APA is unavailing. FECA's preclusive effect renders the APA unavailable as a vehicle to challenge the Commission's handling of administrative enforcement proceedings, as confirmed by every court to rule on the issue.

Accordingly, the FEC's motion to dismiss should be granted.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election 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). The agency 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 Reporting Requirements and Restrictions on Contributions to Federal Candidates Including Coordinated Expenditures

FECA regulates the financing of federal election campaigns by imposing, *inter alia*, disclosure requirements and restrictions on the making and accepting of contributions. 52 U.S.C. §§ 30104, 30116(a), 30118.

Certain groups that qualify as "political committees," including the campaign committees of federal candidates, are required to comply with continuous reporting requirements. *See* 52 U.S.C. §§ 30101(4)(A), (8)(A)(i), (9)(A)(i), 30104(a)-(b). In addition, federal candidates may not solicit, receive, direct, transfer, or spend funds in connection with either federal or non-federal elections, unless the funds comply with the Act's federal contribution limits, source restrictions, and reporting requirements. *See id.* § 30125(e). Under the Act, a "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A). Also, expenditures made by a person in coordination with a particular candidate are generally considered in-kind contributions to that campaign, and they are therefore limited in the same way as direct monetary contributions, because the campaign receives the same benefit from having money spent at its direction as it would by having money contributed to it directly. *Id.* § 30116(a)(7)(B).

The Act prohibits any person from making contributions to any candidate and his or her authorized campaign committee with respect to a federal election that in the aggregate exceed an inflation-adjusted limit, which was set at $2,700 for the 2016 election cycle. 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). The Act also prohibits corporations from

contributing any amount to a federal candidate. *Id.* § 30118(a). Candidates and political committees may not knowingly accept any excessive or corporate contribution. *Id.* §§ 30116(f), 30118(a).

C. 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 statute. 52 U.S.C. § 30109(a)(1); *see* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent whose conduct is at issue, the Commission considers 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 Commission may investigate the alleged violation; otherwise, the Commission 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).

If an investigation is conducted, the FEC must then determine whether there is "probable cause" to believe that FECA has been violated. Like a reason-to-believe finding, a probable-cause finding requires an affirmative vote of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30109(a)(4)(A)(i).

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*. This 120-day period is a jurisdictional threshold before which suit may not be brought, not a timetable within which the Commission must resolve an administrative complaint. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). The second situation

in which an administrative complainant may file suit is where the Commission decides to dismiss the complaint. In that event, FECA provides a cause of action for complainants to seek review of the dismissal in court. 52 U.S.C. § 30109(a)(8)(A).

If a court finds that a Commission 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). 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. *Id.*

II. PLAINTIFF'S CLAIMS

The court complaint alleges that plaintiff FSFP is a "national non-partisan, non-profit 501(c)(3) organization . . . ." (Compl. ¶ 6.) FSFP alleges that it filed an administrative complaint with the FEC on February 16, 2018, and that it filed two amendments to this complaint on April 26, 2018, and July 26, 2018. (*Id.* ¶¶ 1, 14, 16, 18.) FSFP also alleges that it named American Media, Inc. ("AMI"), President Trump's authorized campaign committee Donald J. Trump for President, Inc. ("Trump Campaign"), President Trump, and Michael Cohen as administrative respondents in its amended complaint.

According to the court complaint, the administrative complaint alleged that AMI paid $150,000 to Karen McDougal "for the purpose of influencing the 2016 presidential election." (Compl. ¶ 1.) FSFP reports that its administrative complaint alleged, in particular, that "AMI paid Ms. McDougal $150,000 to buy the rights to her life story, including an account of her alleged affair with [President Trump], in order to suppress her story for the purpose of influencing the 2016 election"; that Michael Cohen, "as an agent for the Trump Campaign, facilitated negotiations between AMI and Ms. McDougal, in order to suppress her story for the purpose of influencing the 2016 election"; and that "Mr. Trump, on behalf of the Trump

Campaign, instructed Mr. Cohen to facilitate negotiations between AMI and Ms. McDougal, in order to suppress her story for the purpose of influencing the 2016 election." (*Id.* ¶ 15(a)-(c).) FSFP states that its administrative complaint alleges that the specific payment and surrounding circumstances it described constituted violations of FECA, namely the "making and receipt of an unlawful contribution" (*Id.* ¶ 20 (52 U.S.C. §§ 30118(a); 30116(a)(1)(A))) and the "failure to report a contribution and an expenditure required to be disclosed to the FEC" (*Id.* ¶ 20 (citing 52 U.S.C. § 30104(b)(3)(A))).

On June 13, 2019, FSFP filed this civil suit seeking declaratory and injunctive relief against the FEC. (Docket No. 1.) FSFP asserts a single "Failure to Act, 52 U.S.C. § 30109(a)(8)(A)" cause of action, but asserts jurisdiction under both that FECA provision and under the APA, 5 U.S.C. § 702. (Compl. ¶¶ 4-5, p. 8.)

ARGUMENT

Plaintiff's complaint should be dismissed for lack of jurisdiction and, alternatively, in part for failure to state a claim. FSFP has no Article III standing because it has failed to establish any concrete and particularized injury. Additionally, FSFP claims jurisdiction under both FECA's judicial-review provision, 52 U.S.C. § 30109(a)(8), and the APA, 5 U.S.C. § 702 (Compl. ¶¶ 4-5). However, the APA is unavailable as a vehicle to challenge the Commission's handling of administrative enforcement matters because FECA provides a specific and adequate judicial-review provision, and thus plaintiff's APA claim should be dismissed.

I. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) BECAUSE FSFP LACKS ARTICLE III STANDING

A. Standard of Review

Federal courts are limited "to deciding actual ongoing controversies." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (internal quotation marks and

citations omitted). There is no such controversy when a plaintiff lacks standing. FSFP bears the burden of establishing this Court's subject matter jurisdiction, including showing that it has constitutional standing. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015); *see also FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (citations and internal quotation marks omitted)).

To survive the FEC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Arpaio*, 797 F.3d at 19 (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), and "the necessary factual predicate may not be gleaned from the briefs and arguments," *FW/PBS*, 493 U.S. at 235 (citation and internal quotation marks omitted). However, this Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings" to determine whether a plaintiff can show standing. *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 28-29 (D.D.C. 2006) (citation and internal quotation marks omitted).

To demonstrate Article III standing, a plaintiff must specifically establish that: "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*

Inc., 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)).

"Particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. And when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to establish. *Id*. at 562. *Accord Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (per curiam); *see also Linda R.S. v. Richard D. and Texas*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Standing "focuses on the complaining party to determine 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Am. Legal Found. v. FCC*, 808 F.2d 84, 88 (D.C. Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Thus, courts "may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 415 (D.C. Cir. 1994). A plaintiff must demonstrate "that he has 'a personal stake in the outcome,' . . . distinct from a 'generally available grievance about government.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962) and *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam)).

Furthermore, Article III standing is a constitutional requirement that cannot be altered by Congress. Despite the fact that Congress passed section 30109(a)(8)(A)'s failure-to-act provision, "[i]t makes no difference that the procedural right has been accorded by Congress." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Although passage of such a right "can loosen the strictures of the redressability prong" of the standing inquiry, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.*

Plaintiffs bringing citizen suits must show that they are injured "in a concrete and personal way"; actions that seek "to vindicate the public's nonconcrete interest in the proper administration of the laws" which are "at the behest of Congress" but without "any showing of concrete injury" would "exceed [Article III's] limitations." *Id*. (citation and internal quotations omitted). Thus, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement" because "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. FSFP's Effort to Compel the FEC to Determine that Other Parties Violated the Law Does Not Present a Legally Cognizable Injury to FSFP

FSFP cannot establish Article III standing because the only purported injury it has alleged is a generalized desire to see the FEC apply the law against others. FSFP fails to show that it has suffered any concrete or particularized injury from the allegedly illegal activity by the four administrative respondents FSFP has identified. Rather, FSFP simply wants this Court to compel the FEC to enforce the law against the alleged violators. Such concerns cannot be the basis for standing because there is no "justiciable interest in having the Executive Branch act in a lawful manner." *Common Cause*, 108 F.3d at 419.

FSFP has failed to show a sufficient connection between FSFP and the illegal activity alleged in its administrative complaint, despite the jurisdictional requirement that a complaint must include such information. *See supra* pp. 7-8. FSFP simply describes itself as a "national non-partisan, non-profit 501(c)(3) organization that works to restore republican democracy to the people" that is "frustrated in carrying out its mission when outside political spending or a campaign's involvement in facilitating such spending is concealed , and when the FEC fails to enforce FECA's requirements for disclosing that spending." (Compl. ¶ 6.) In particular, FSFP

claims that, due to the alleged "lack of an FEC determination as to the role of Mr. Trump and/or the Trump Campaign, FSFP has not had the full opportunity to disseminate such information to its supporters and the public, and has not had the full opportunity to act on the matter." (Compl. ¶ 25.) FSFP fails to specify what "act" the FEC's alleged delay prevents, but in any event, FSFP's desire for the FEC to provide a legal "determination" within its preferred timeframe is insufficient to state an injury in fact, as explained further below.

FSFP has also entirely failed to allege any discrete injury that affects FSFP "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. FSFP alleges that it uses "research, litigation, and public advocacy to inform the public about the financing of political campaigns" and that it "uses information about campaign finance practices to advocate for legal reforms" (Compl. ¶ 6), but it fails to explain sufficiently how its objectives are in fact hindered by the FEC's alleged failure to act in this matter. Thus, FSFP cannot obtain any "tangible benefit from winning" this suit. *Herron for Cong. v. FEC*, 903 F. Supp. 2d 9, 16 (D.D.C. 2012); *see also Citizens for Responsibility and Ethics in Wash.* ("*CREW*") *v. FEC*, 267 F. Supp. 3d 50, 53 (D.D.C. 2017) ("*CREW/Murray Energy*") ("easily" dismissing claims because plaintiffs "have not alleged any injury in fact arising from [the alleged wrongdoing]").

What FSFP does seek is "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer v. FEC,* 268 F.3d 1070, 1075 (D.C. Cir. 2001). But "[w]hile 'Congress can create a legal right . . . the interference with which will create an Article III injury,' Congress cannot . . . create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Common Cause*, 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 573) (internal citation omitted). FSFP's desire to have the FEC pursue the administrative respondents is not enough to

establish standing. "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill*, 138 S. Ct. at 1933.

Moreover, as the D.C. Circuit has confirmed, a plaintiff cannot "establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of [FECA] has occurred." *Common Cause*, 108 F.3d at 418 (explaining that such a holding "would be tantamount to recognizing a justiciable interest in the enforcement of the law"). "[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." *Wertheimer*, 268 F.3d at 1074; *see also Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003) (stating that "an injury that occurs when a person is deprived of information that a law has been violated" is not legally cognizable). In sum, what a plaintiff in such cases really "desires is for the Commission to 'get the bad guys,' rather than disclose information. [Plaintiff] has no standing to sue for such relief." *Common Cause*, 108 F.3d at 418.

The fact that this case involves the Commission's alleged failure to act on an administrative complaint rather than the dismissal of an administrative complaint does not change the analysis of whether FSFP has standing. In *Judicial Watch*, 293 F. Supp. 2d 41, plaintiffs brought suit against the Commission pursuant to section 30109(a)(8) (which was then codified as 2 U.S.C. § 437g(a)(8)), alleging that the agency had failed to timely respond to or investigate an administrative complaint within 120 days. Addressing one plaintiff's "claim that the Commission's delay in responding to his claim is, in and of itself, an injury in fact . . . separate from informational injury," the court found "no basis in the law for this position." *Id.* at 48. Noting that the claim amounted to an assertion that the FEC's "delinquency in acting on [the administrative] complaint deprived [plaintiff] of the benefit of FECA's timetable for processing

complaints," *id*., the court evaluated the claim in light of the D.C. Circuit's guidance in *Common Cause*, 108 F.3d at 418-19, in which "a similar situation was presented," *Judicial Watch*, 293 F. Supp. 2d at 48. The *Common Cause* plaintiff had claimed that the FEC's failure to provide "a prompt and lawful resolution of the complaint" had deprived the plaintiff of "a statutorily promised benefit that is personal to the complainant," but the D.C. Circuit rejected that argument for standing. *Id*. (citation and internal quotation marks omitted). "The [D.C. Circuit] made clear that while the FEC's failure [to] act within the 120-day period of [section 30109(a)(8)(A)] conferred *a right to sue,* it did not also confer standing." *Judicial Watch*, 293 F. Supp. 2d at 48. Instead, the provision "'confers a right to sue upon parties *who otherwise already have standing*.'" *Id*. (quoting *Common Cause*, 108 F. 3d at 419). Applying *Common Cause,* the *Judicial Watch* court thus concluded that the plaintiff before it had presented only a "procedural injury" and that an administrative complainant could not "establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id*. (quoting *Common Cause*, 108 F.3d at 419).

Later cases from this District that address standing to bring delay suits pursuant to section 30109(a)(8) reflect agreement with the analysis in *Judicial Watch*. In *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39 (D.D.C. 2004), the court held, *inter alia*, that plaintiffs had failed to establish informational injury sufficient to support standing for claims that the FEC had failed to act on their administrative complaint. The court added that "under Article III, it is not enough for [a plaintiff] to allege that it was injured because the Commission unlawfully delayed the investigation; plaintiffs must show a 'discrete injury flowing from' such alleged delay." *Id*. at 48 (citing *Common Cause*, 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 572)). And in the later dismissal action related to the 2004 *Alliance for Democracy* decision, the court relied heavily on

the *Judicial Watch* analysis in finding that a lack of informational injury precluded standing to challenge the dismissal of an administrative complaint, showing that the injury analysis is in fact comparable in the delay and dismissal contexts. *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 147-49 (D.D.C. 2005).

In sum, even though delay suits are authorized by FECA, prior authority establishes that an allegation of a failure to act under section 30109(a)(8) does not alone give FSFP standing. FSFP must instead show how the Commission's alleged delay has caused it particularized injury. But FSFP has failed to do so.

C. FSFP Has Not Suffered Any Informational Injury

An Article III injury can arise when a statute has "'explicitly created a right to information,'" *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 97 (D.D.C. 2000) (quoting *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994)), but FSFP cannot establish standing on that basis. "For a plaintiff to successfully claim standing based on an informational injury, he must allege that he is directly deprived of information that must be disclosed under a statute." *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014); *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) ("For purposes of informational standing, a plaintiff 'is injured-in-fact . . . because he did not get what the statute entitled him to receive.'") (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)). However, "[n]othing in the FECA requires that information concerning a violation of the Act as such be disclosed to the public." *All. for Democracy*, 362 F. Supp. 2d at 148 (quoting *Common Cause*, 108 F.3d at 418). As explained above, courts in comparable FEC cases have repeatedly emphasized that plaintiffs seeking only determinations of illegality lack standing to maintain their claims. *See, e.g., Wertheimer*, 268 F.3d at 1075 (holding that plaintiffs lacked standing to seek a legal determination that certain transactions constitute coordinated expenditures); *CREW/Murray*

Energy, 267 F. Supp. 3d at 54 (holding that advocacy group lacked standing to challenge FEC dismissal of alleged violation of FECA's "prohibition on pass-through contributions" because "nothing in the statute or regulatory regime" would have required the alleged violator to disclose information); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178-79 (D.D.C. 2013) (holding that plaintiff lacked standing to seek a legal determination that certain political committees were affiliated). Such legal determinations are what FSFP seeks in this case.

Alleged violations of FECA's reporting requirements can in some cases provide an informational injury sufficient to support standing. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11 (1998). But the reporting violations that FSFP alleges in this case are insufficient because FSFP claims to already possess all of the information that would be revealed if FSFP is correct that FECA's reporting requirements were violated. According to the allegations contained in FSFP's judicial complaint, FSFP already knows that the alleged payment at issue was made to McDougal by AMI with the assistance of Cohen as an agent of the Trump Campaign for the purpose of influencing the 2016 presidential election. (Compl. ¶ 15.) Specifically, FSFP alleges that "AMI paid Ms. McDougal $150,000 to buy the rights to her life story," that "Mr. Cohen, as an agent for the Trump Campaign, facilitated negotiations between AMI and Ms. McDougal," and that "Mr. Trump, on behalf of the Trump Campaign, instructed Mr. Cohen to facilitate negotiations between AMI and Ms. McDougal." (*Id.*) All FSFP's lawsuit seeks, therefore, is to have the FEC issue a legal conclusion confirming what FSFP already claims to know. Even if FSFP were to succeed in obtaining that legal conclusion, it would gain no new information, since the Trump Campaign would be required to report a contribution and expenditure for which FSFP already claims to know the alleged source (AMI) and alleged recipient (the Trump Campaign). Thus, even assuming that the allegations in the complaint are true, FSFP has no cognizable injury at

this time due to the information it already possesses. *See All. for Democracy*, 362 F. Supp. 2d at 147.

1. FSFP's Administrative Complaint Seeks a Legal Determination, Not to Uncover New Factual Information

FSFP claims that an FEC investigation in this matter would provide it with factual information that "Mr. Cohen acted as an agent of the Trump Campaign and in consultation with Mr. Trump himself in facilitating the payment from AMI to Ms. McDougal" and information regarding the "nature of the involvement of the Trump Campaign and/or Mr. Trump in AMI's payment." (Compl. ¶¶ 23-24.) In FSFP's view, the payment should have been reported as a contribution to and expenditure of the Trump Campaign. (Compl. ¶ 1.) But FSFP states that its administrative complaint already identifies the source of the alleged transfer of money and the dollar amount. (*See* Compl. ¶ 1.) Thus, even if the FEC were to investigate plaintiff's allegations and agree with FSFP that the Trump Campaign should have reported this payment as an in-kind contribution from AMI, FSFP would not learn any new factual information that is required to be disclosed.

In circumstances like this, where any information claimants purport to seek is already available to them, those claimants lack standing to maintain their claims. *See, e.g.*, *Judicial Watch*, 293 F. Supp. 2d at 46-47 (holding that a plaintiff who had alleged reporting violations regarding his own contributions to a candidate lacked standing because he was "already aware of the facts underlying his own alleged contributions" and his lawsuit was unlikely to produce additional facts of which he was not already knowledgeable); *CREW v. FEC*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011) (holding that plaintiffs lacked a cognizable informational injury where they sought a legal determination that certain expenses were in-kind contributions but failed to "allege any specific *factual information* . . . that [wa]s not already publicly available"); *see also CREW*

v. FEC, 475 F.3d 337, 339-40 (D.C. Cir. 2007) ("*CREW/Americans for Tax Reform II*") (holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website, which contains the [sought after] list and a good deal more"). In contrast, informational injury may exist where new, previously unavailable information would be revealed to the plaintiff if the FEC agreed with the allegations of its administrative complaint. *See, e.g.*, *Akins*, 524 U.S. at 21 (finding informational injury in part because if plaintiff's allegation that a nonprofit group qualified as a FECA "political committee" was correct, the group would have had to reveal its previously unknown donors).

A recent case highlights the difference between seeking missing factual information and simply seeking to have the legality of undisputed, publicly available transactions considered. In *Campaign Legal Center v. FEC*, the court found no informational injury and thus no standing as to complaints that amounted to efforts to have the FEC reclassify known, publicly reported contributions as illegal; that is, to have the FEC make legal determinations. 245 F. Supp. 3d 119, 125-26 (D.D.C. 2017). By contrast, the court found that the plaintiff in that case *did* have standing to pursue other claims seeking the true sources of contributed funds who were required to be reported but whose identities were not available in any conclusive, public locations; the plaintiff had alleged that it simply did not know where the funds came from. *Id*. at 127. That is not the case here, where FSFP does not allege that it completely lacks any such key information about the alleged payment at issue, only that the information has not been timely identified and labeled by the FEC.

In this case, FSFP may have a generalized interest in learning whether there was anything unlawful surrounding the alleged transfer of money from AMI to Ms. McDougal, but FSFP lacks standing to seek that information because there is no general statutory requirement that a

violation of the Act be identified as such to the public. FSFP's desire "for the Commission to 'get the bad guys'" is not a legally cognizable interest, *Common Cause*, 108 F.3d at 418, and FSFP has thus failed to plead or show any particularized injury sufficient to give it standing.

2. To the Extent FSFP Does Seek Information, It Fails to Show that Such Information Would Be Useful in Its Voting

Even if FSFP's court complaint could be construed to have alleged violations of law that deprived it of information, FSFP cannot show that any such information would be useful in its voting, as required to demonstrate informational injury sufficient to support judicial review under 52 U.S.C. § 30109(a)(8).

To allege an injury that is concrete and particularized for informational standing under FECA, litigants must establish not only that they have failed to obtain information that must be publicly disclosed by statute, but also that "the disclosure they seek is related to their informed participation in the political process." *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013); *see also Common Cause*, 108 F.3d at 418 (administrative complainant suing must show that the information it seeks "is *both* useful in voting *and* required by Congress to be disclosed" (emphasis added)).

Section 501(c)(3) nonprofits like plaintiff that cannot vote, have no members who vote, and cannot engage in partisan political activity do not suffer a particular injury. *See CREW/Americans for Tax Reform II*, 475 F.3d at 339. FSFP merely seeks disclosure "to promote law enforcement," an injury that is neither sufficiently concrete nor particularized to confer standing. *Nader*, 725 F.3d at 229-30. Lacking a role in voting and disclaiming any intent to be involved in electoral campaigns, there is "reason to doubt" plaintiff's claim that the information sought would help it in any way related to voting. *See Akins*, 524 U.S. at 20-25.

There is an extensive line of lower court decisions implementing the D.C. Circuit's

requirement for personal voting or political participation for plaintiffs to possess informational injury under FECA. *Alliance for Democracy*, 335 F. Supp. 2d at 48 (finding that value of mailing list would have no concrete effect on plaintiffs' voting); *Alliance for Democracy*, 362 F. Supp. 2d at 138 (same); *Judicial Watch*, 293 F. Supp. 2d at 46 (same); *CREW v. FEC*, 401 F. Supp. 2d 115, 121 (D.D.C. 2005) ("*CREW/Americans for Tax Reform I*") (noting that information about the value of a list could not have been useful to the plaintiff in voting), *aff'd*, *CREW/Americans for Tax Reform II*, 475 F.3d 337; *CREW/Murray Energy*, 267 F. Supp. 3d at 54-55 (holding that information sought would not be used to evaluate candidates or causes and that publicizing violations constituted an insufficient interest in seeing the law obeyed). *But see Campaign Legal Center*, 245 F. Supp. 3d at 127 (finding informational injury despite no alleged effect on voting where FECA mandated the disclosure of the information sought).

In this case, FSFP cannot allege that knowing the precise details of the payment about which it complains would directly and concretely affect *its* voting, because FSFP is neither a voter nor does the complaint indicate that it has voting members. And even if FSFP had members who voted, the court complaint fails to explain how the information sought would be used to inform their voting choices. There is no allegation in the complaint that anyone associated with FSFP would vote differently depending on the FEC's determination that circumstances surrounding the alleged $150,000 payment from AMI to McDougal were unlawful. FSFP alleges that it "has not had the full opportunity to disseminate such information [about the role of President Trump and the Trump Campaign] to its supporters and the public, and has not had the full opportunity to act on the matter." (Compl. ¶ 25.) But nothing in this allegation indicates that such information would be useful in voting, as required to demonstrate informational injury sufficient to support judicial review under 52 U.S.C. § 30109(a)(8).

While there would undoubtedly be some general public interest in a determination that the respondents FSFP has identified may have violated the law, FSFP must make a particularized showing of personal injury from the alleged FECA violations and the purported missing information in order to have standing. In *FEC v. Akins*, for example, the plaintiffs challenged the FEC's dismissal of an administrative complaint that made numerous allegations about the failure of the American Israel Public Affairs Committee ("AIPAC") to register with the Commission as a "political committee" and "make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require." 524 U.S. at 13. The plaintiffs, who opposed AIPAC, argued that "the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id.* at 21. The Court agreed that this injury was "concrete and particular." *Id.* By contrast, in this case, details about the transfer between AMI and McDougal are already public or otherwise available to plaintiff. The court complaint fails to show how if these details were reiterated to FSFP at the conclusion of an FEC enforcement matter, it would be useful to FSFP in voting, even if the group had members who voted, which it has failed to allege in any event.

In sum, FSFP is not a political committee, it cannot vote, and the complaint lacks any claim that FSFP has members who vote. FSFP does not and cannot show that any information it might gain from the relief it seeks here would be useful to voting in any way particularized to it. Thus, it cannot show injury.

D. FSFP Lacks Standing for the Additional Reason that Its Programmatic Activities Are Not Directly and Adversely Affected by the Alleged Agency Delay

In addition to lacking any legally cognizable informational injury, FSFP cannot demonstrate standing in any representative or associational capacity. FSFP claims no members and is not a trade association; it is suing on its own behalf. Therefore, it is required to allege a direct and adverse effect on specific programmatic concerns from the FEC's alleged delay to meet Article III's injury requirement. FSFP has failed to do so. The complaint nowhere alleges anything that could fairly be read to suggest that FSFP's resources have been depleted. Nor does FSFP allege concrete and direct harm to its programmatic activities.[1]

"The injury in fact component of the standing inquiry is often difficult for organizational plaintiffs . . . to satisfy." *CREW/Americans for Tax Reform I*, 401 F. Supp. 2d at 120. If an organization has members or is a trade association, it may qualify for representative or associational standing on behalf of those members or constituents. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-44 (1977). But as the D.C. Circuit has explained, where an organizational plaintiff brings suit on its own behalf, "it must establish 'concrete and demonstrable injury to the organization's activities — with [a] consequent drain on the organization's resources — constitut[ing] . . . more than simply a setback to the organization's abstract social interests.'" *Common Cause*, 108 F.3d at 417 (quoting *Nat'l Taxpayers Union,*

[1] FSFP does not claim that it has standing due to any resources spent on this litigation, but even if it had, it is well established that resources expended on litigation cannot be deemed injury for Article III purposes. "'An organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.'" *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434 (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)). This position "would enable every litigant automatically to create injury in fact by filing a lawsuit," and it "has been expressly rejected by the Supreme Court." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (citing *Diamond v. Charles*, 476 U.S. 54, 65 (1986)).

Inc. v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995)); *see also id.* ("[T]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action."); *Akins v. FEC*, 101 F.3d 731, 735 (D.C. Cir. 1996) (en banc) ("[T]his type of injury is narrowly defined; the failure must impinge on the plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact."), *vacated on other grounds*, 524 U.S. 11 (1998).

This case is similar to *CREW/Americans for Tax Reform I*, 401 F. Supp. 2d 115, and for the very same reasons identified by the court in that case, plaintiff here has not suffered any injury to its programmatic activities. In *CREW*, the district court found that the plaintiff non-profit organization had not sufficiently identified any programmatic activities adversely affected by the Commission's dismissal of its administrative complaint. *Id.* at 121. Here, as in *CREW*, FSFP has not "specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions," nor has FSFP identified any "particular plan" for using any information it could obtain if it was to prevail in this action. *Id*. at 122-23. Moreover, while the court in *CREW* acknowledged "that it may be difficult to detail how information will be used when a plaintiff does not yet possess that information," here, as in *CREW*, "such hardship is not implicated [because FSFP is] already privy to the information" about the payment that it alleges was unlawful. *Id.*; *see supra* pp. 14-15. FSFP thus lacks any injury in fact that is "concrete," "distinct and palpable," and "actual or imminent." *McConnell v. FEC*, 540 U.S. 93, 225 (2003) (citation and internal quotation marks omitted), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

In sum, FSFP has failed to provide evidence of a concrete and particularized injury to any "discrete programmatic concerns" of FSFP's, let alone demonstrate that the organization is being

directly and adversely affected by its purported lack of information regarding the activity that is the subject of its administrative complaint. This failure is an independent reason FSFP cannot demonstrate Article III standing.

II. FSFP'S ATTEMPTED RELIANCE ON THE APA IS PRECLUDED BECAUSE FECA PROVIDES THE EXCLUSIVE VEHICLE FOR JUDICIAL REVIEW OF THE FEC'S HANDLING OF ADMINISTRATIVE ENFORCEMENT MATTERS

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 *Iqbal*, 556 U.S. at 678). 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. U.S. 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)).

FSFP purports to rely on the APA as an independent basis for challenging the Commission's alleged failure to act on their administrative complaint. (Compl. ¶¶ 4-5 (citing 5 U.S.C. §§ 702-03).) However, reliance on the APA is not permissible here because FECA

provides an adequate and exclusive judicial review mechanism.[2] Plaintiff should be confined to 52 U.S.C. § 30109(a)(8), the primary basis for jurisdiction on which it relies.[3]

Judicial review of final agency action is available under the APA only where such action is "made reviewable by statute" and there is "no other adequate remedy." 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 [] Congress has provided special and adequate review procedures." *Id*. (internal quotation marks omitted); *see Citizens for Responsibility & Ethics in Wash. v. U.S. 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 plaintiff's claim for judicial review pursuant to the APA).

FECA provides the exclusive mechanism for judicial review of any claimed failure by the Commission to act on an administrative complaint. In 52 U.S.C. § 30109(a)(8), Congress delineated the scope of judicial review available in an action challenging alleged FEC

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[2] FSFP's 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).

[3] Though its claim lacks merit, plaintiff has asked the Court, consistent with 52 U.S.C. § 30109(a)(8)(C), to declare that the FEC's alleged failure to act on the administrative complaint was "contrary to law" and order the FEC to act within 30 days. (Compl., Requested Relief p. 8.)

impropriety in handling an administrative complaint. The statute specifies that (1) the statutory cause of action is available only to a complainant; (2) the FEC must have allegedly failed to act upon the administrative complaint; (3) any petition for judicial review must be filed in the United States District Court for the District of Columbia; (4) 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 (5) 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).

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 statute. 52 U.S.C. § 30106(b)(1). As the D.C. Circuit has explained, section 30109(a)(8) is "as specific a mandate as one can imagine." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). 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 v.*

FEC, 164 F. Supp. 3d 113, 119 (D.D.C. 2015) ("*CREW/American Action Network*") (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 v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998) (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)).

Courts evaluating potential APA review of the Commission's administrative enforcement have accordingly found the judicial-review procedures in 52 U.S.C. § 30109(a)(8) to be exclusive. *See CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) ("Undertaking judicial review under the APA would enable administrative complainants to make an end run around the scheme established by Congress . . . ."); *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) ("*CREW/Crossroads GPS*") (holding that FECA provides an adequate remedy so there is no parallel claim for relief under the APA); *CREW/American Action Network*, 164 F. Supp. 3d at 120 ("This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA."). The Fifth Circuit found "substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]" in section 30109(a)(8). *Stockman*, 138 F.3d at 156.

Section 30109(a)(8) thus provides the exclusive mechanism for challenging any alleged delay by the Commission in handling administrative complaints and limits the scope of relief available to plaintiff in this action. The portion of plaintiff's claim that purports to rely on the APA is thus precluded as a matter of law and should be dismissed. *See CREW/Crossroads GPS*, 243 F. Supp. 3d at 104-05 (dismissing "the portions" of two counts "seeking relief under the APA"). A dismissal with regard to the APA claims ensures that, even if FSFP prevails, it will

not be entitled to any relief other than a declaration and order as authorized under 52 U.S.C. § 30109(a)(8)(C).

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiff's complaint for lack of subject matter jurisdiction and, in the alternative, in part for failure to state a claim.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Kevin P. Hancock
Acting Assistant General Counsel
khancock@fec.gov

/s/ Tanya Senanayake
Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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