UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-2201 (EGS)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF MOTION TO DISMISS
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION

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I. INTRODUCTION

As defendant Federal Election Commission ("FEC" or "Commission") showed in the opening brief in support of its motion to dismiss (Docket No. 24), plaintiffs' claims are moot and so the Court should dismiss them for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). This case sought relief under 52 U.S.C. § 30109(a)(8) for the FEC's alleged failure to act on plaintiffs' administrative complaint, but it became moot when the Commission completed its final action on that complaint. Because the FEC has already acted, there is no relief the Court could grant to redress plaintiffs' alleged injury. Plaintiffs now argue that the "capable of repetition, yet evading review" exception to the mootness doctrine applies, but plaintiffs completely abandoned their delay claims in their proposed amended complaint. Instead, plaintiffs appear to ask this Court to maintain jurisdiction so they can assert entirely new claims based on the FEC's dismissal of their administrative complaint. Plaintiffs have failed to show that the exception applies, as they rely on flawed arguments this Court has previously rejected in a similar case. *See All. for Democracy v. FEC*, 335 F. Supp. 2d 39 (D.D.C. 2004).

Because this lawsuit no longer presents a case or controversy that satisfies the requirements of Article III, the Court should dismiss plaintiffs' complaint. Plaintiffs argue that the Court has discretion to defer ruling on the motion to dismiss until after it decides plaintiffs' pending motion for leave to amend, but under the applicable case law, the Court lacks the power to allow an amendment when the entire case before it has become moot.

In any event, there is no cause to delay a ruling on the FEC's motion to dismiss, because plaintiffs' proposed amendment is futile. All parties agree that the D.C. Circuit's holding in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), requires this Court to rule in the Commission's favor on plaintiffs' dismissal claim. Thus, denying plaintiffs' motion to amend and granting the FEC's motion to dismiss would advance judicial economy by eliminating the

need for the parties to engage in redundant summary judgment briefing. There would be no prejudice to plaintiffs: If the Court has jurisdiction to rule on the request to amend, plaintiffs can pursue an appeal from denial of leave to amend seeking to overturn *SpeechNow*. And none of plaintiffs' arguments to this Court about judicial deference to Commission enforcement decisions or the validity of the underlying premises of *SpeechNow* present any reason to delay the inevitable. This case should be dismissed.

II. THE CASE IS MOOT AND NO EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES

Plaintiffs' judicial complaint asked the Court to declare that the Commission's failure to act on their administrative complaint within 120 days was contrary to law under 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 706(1) and "to order the FEC to conform with [such] declaration within 30 days." (Compl. ¶¶ 7, 84, 86 (Docket No. 1).) On May 25, 2017, the Commission dismissed plaintiffs' administrative complaint, concluding the administrative matter. As the FEC explained in its opening brief, because the agency has now completed final action on plaintiffs' administrative complaint, this lawsuit based on alleged delay no longer presents a live case or controversy that satisfies the requirements of Article III, and it should be dismissed as moot. (FEC's Mem. in Supp. of its Mot. to Dismiss Pls.' Compl. for Lack of Jurisdiction at 6-8 (Docket No. 24) ("Mot. to Dismiss").) The FEC further explained that under the applicable case law, including this Court's previous ruling in *Alliance for Democracy*, 335 F. Supp. 2d 39, the Court can no longer provide plaintiffs with any of the relief requested in their judicial complaint.

In arguing to the contrary, plaintiffs fail to address the nature of relief that can be obtained for failure to act under 52 U.S.C. § 30109(a)(8) and misstate the purported injury they seek to redress. Remarkably, in over six pages of argument about mootness, plaintiffs do not once articulate the relief they continue to seek for their delay claims. (Pls.' Opp'n to FEC's Mot.

to Dismiss at 6-13 (Docket No. 29).) And while plaintiffs once allude to "a judicial declaration," they do not state what they are asking this Court to declare. (*Id.* at 9.) In fact, plaintiffs propose to completely abandon their delay claims in their hoped-for amendments, explicitly seeking to "replac[e]" the delay claims with new dismissal claims. (*See* Mem. of P. & A. in Supp. of Pls.' Mot. for Leave to File Am. Compl. at 2 (Docket No. 21-1) ("Mot. to Amend"); Proposed Am. Compl. (Docket No. 21-2).) Yet plaintiffs now attempt to backpedal by suggesting in their brief that there is continuing jurisdiction over the delay claims. They do so in order to persuade the Court to grant their pending motion for leave to amend, but if the Court allows plaintiffs to amend the complaint as they request, no delay claims will be before the Court. The Court should thus disregard plaintiffs' hypothetical arguments regarding continuing claims they do not in fact intend to pursue.

A. Plaintiffs Are Not Entitled to Any Relief for Their Delay Claims

While plaintiffs did not receive their preferred outcome in the administrative matter, they did receive the outcome that a judgment from this Court in their favor would provide for a delay claim under 52 U.S.C. § 30109(a)(8)(A). Indeed, because the FEC has resolved the administrative matter, plaintiffs have received the only relief they could have obtained. Controlling law precludes any other injunctive or declaratory relief here.

Federal courts have no "power to render advisory opinions [or] . . . decide questions that cannot affect the rights of litigants in the case before them." *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (alteration in original) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Plaintiffs' judicial complaint was brought under the provision in section 30109(a)(8) for limited judicial review of whether the FEC's "failure to act" on an administrative complaint is "contrary to law." The Commission, by determining that there was no reason to believe that the Federal Election Campaign Act ("FECA") had been violated

and closing the administrative file, eliminated any possibility of a failure to act that could support judicial relief. The D.C. Circuit has explained that "[w]hen the FEC's failure to act is contrary to law, we have interpreted [52 U.S.C. § 30109(a)(8)(C)] to allow nothing more than an order requiring FEC action." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). But where the Commission has ended its administrative proceedings, "the order the Circuit court speaks of would be nothing more than an order directing the FEC to do what it has already done." *All. for Democracy*, 335 F. Supp. 2d at 43. Plaintiffs are thus foreclosed from any further substantive relief under the statute.

Plaintiffs are also precluded from seeking a declaratory judgment that the FEC acted unlawfully in delaying action on plaintiffs' administrative complaint. "The [Constitution's] requirement of a case or controversy is no less strict when a party is seeking a declaratory judgment than for any other relief." *Fed. Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 963 (D.C. Cir. 1995). And "the mooting of the specific claim moots any claim for declaratory judgment that the specific action was unlawful." *City of Hous. v. Dep't of HUD*, 24 F.3d 1421, 1429 (D.C. Cir. 1994). Here, as in *Alliance for Democracy*, plaintiffs' complaint attacks a specific instance of alleged FEC inaction and not a particular policy of delay by the FEC.[1] *See* 335 F. Supp. 2d at 46. And similarly, because the FEC has resolved the administrative matter, plaintiffs' request for declaratory relief is moot. *Id.* ("[A] declaratory judgment in this case would amount to nothing more than an advisory pronouncement that the FEC's past conduct was somehow contrary to law"). Because federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong," plaintiffs are

[1] While plaintiffs' make some broad allegations of delay by the FEC in resolving other administrative complaints (*see* Pls.'Opp'n to Mot. to Dismiss at 9; Compl. ¶ 3), they have not brought — and do not seek to bring — a claim that the Commission has unlawfully delayed in its handling of any other, still-pending matter.

not entitled to a declaration that the FEC took too long in acting on their administrative complaint. *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).)

B. Plaintiffs Have Failed to Establish That Their Delay Claims Qualify for an Exception to Mootness

Plaintiffs have failed to carry their burden of establishing that an exception to the mootness doctrine applies here. Although "'[t]he initial heavy burden of establishing mootness lies with the party asserting a case is moot,'" it is "'the opposing party [who] bears the burden of showing an exception applies.'" *SEC v. Bilzerian*, No. 11-5337, 2012 WL 1922465, at *1 (D.C. Cir. May 11, 2012) (alterations in original) (quoting *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010)). Plaintiffs now argue that this case is not moot because it involves a controversy that is "capable of repetition, yet evading review." *Id*. The parties agree on the two requirements that must be satisfied for this exception: (1) "the challenged action must be too short to be fully litigated prior to cessation or expiration"; and (2) there must be a "reasonable expectation that the same complaining party [will] be subject to the same action again." *Honeywell Int'l, Inc.*, 628 F.3d at 576 (alteration in original). However, plaintiffs misapply the standard for each requirement and misstate the injury their delay claims sought to redress.

1. The Action Challenged by a FECA Delay Lawsuit Is Not Too Short to Be Fully Litigated

While the D.C. Circuit employs a presumption that actions "of less than two years' duration ordinarily evade review," *Honeywell Int'l*, 628 F.3d at 576, the "Circuit also adds in an additional requirement . . . that 'the short duration is *typical* of the challenged action.'" *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish & Wildlife Serv.*, 59 F. Supp. 3d 91, 97 (D.D.C. 2014) (quoting *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (emphasis added)). Plaintiffs have failed to satisfy this requirement. Indeed, this Court has previously found that "[c]ases brought under [52 U.S.C. § 30109(a)(8)] . . . do not

challenge activity that, by its very nature, is short in duration." *All. for Democracy*, 335 F. Supp. 2d at 44. In doing so, the Court recognized that the FEC's administrative proceedings can reasonably take more than two years. *Id*. (citing *In re Nat. Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984)). And they do, as described for example in the very source upon which plaintiffs rely. (*See* Compl. ¶ 3 n.1 (linking to a statement of a Commissioner which describes how cases had been pending for more than three years from the time the General Counsel sent a recommendation to Commissioners).) Plaintiffs' contention that enforcement actions will inevitably be completed more rapidly than court cases is at odds with their earlier allegation that the Commission lacks the ability "to diligently work through its enforcement docket." (*Id.* ¶ 3.) In addition, some delay lawsuits under section 30109(a)(8) have been litigated to conclusion, undermining any claim that "such cases are inherently, or even likely, to evade review." *All. for Democracy*, 335 F. Supp. 2d at 44 (citing *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951 (D.C. Cir. 1998)).

Plaintiffs ignore this pertinent case law and mischaracterize the present lawsuit as an election-related controversy, which courts have held to be paradigmatic examples of lawsuits that are too short to be fully litigated. (Pls.' Opp'n to Mot. to Dismiss at 7.) Plaintiffs note that this lawsuit was filed by "candidates actively campaigning for election and alleging injury in their election bids." (*Id.*) But unlike election-related cases brought by candidates that survived the occurrence of an election, the present case became moot due to the FEC's resolution of plaintiffs' administrative matter. In fact, the case became moot because plaintiffs obtained the precise outcome they sought to achieve from this lawsuit. Moreover, none of the election-related cases plaintiffs cite involved a claim of unlawful delay of agency action. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (challenging an application of the "electioneering

communications" provisions of the Bipartisan Campaign Reform Act); *La Botz v. FEC*, 889 F. Supp. 2d 51, 56 (D.D.C. 2012) (challenging dismissal of an administrative complaint alleging exclusion from candidate debates); *Moore v. Hosemann*, 591 F.3d 741, 743 (5th Cir. 2009) (challenging a deadline for ballot qualification of presidential candidates); *Johnson v. FCC*, 829 F.2d 157, 159 (D.C. Cir. 1987) (challenging agency's denial of an administrative complaint seeking an order that would prohibit the televising of any debate excluding third-party candidate plaintiffs); *Shays v. FEC*, 424 F. Supp. 2d 100, 108 (D.D.C. 2006) (challenging the FEC's decision not to regulate certain groups as political committees).[2]

Equally unpersuasive is plaintiffs' claim that the *potential* for FEC enforcement actions to take less than two years to resolve allows the FEC to create a supposed safe zone in which to unlawfully delay acting on administrative complaints unless the mootness exception is applied. (Pls.' Opp'n to Mot. to Dismiss at 10-13.) As an initial matter, these arguments fail because the action challenged by a FECA delay claim is not, by its nature, too short to evade review, as explained in *Alliance for Democracy*. Plaintiffs attempt to distinguish that case by noting that it "involved an administrative complaint that proceeded through multiple stages of investigation and ultimately to conciliation." (*Id*. at 11 n.7.) However, nothing in *Alliance for Democracy* limits the Court's reasoning to the facts of that case. Moreover, plaintiffs offer no support for their claim that because the FEC could conceivably abuse the prevailing legal standard for an exception to mootness, the Court should find that this specific lawsuit is not moot. In any event,

[2] Plaintiffs also cite cases holding that candidates have standing because courts have recognized injury from being forced to compete in illegally structured campaign environments. (Pls.' Opp'n to Mot. to Dismiss at 7.) However, these cases have no bearing on whether a delay action is too short to be fully litigated. *See LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011); *Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). Nor do these cases show why a delay action that would otherwise be moot survives under the exception simply because it was brought by a candidate in a federal election.

if Congress had intended the FEC to resolve enforcement cases within a particular timeframe, it could have mandated that, but instead Congress left the FEC with considerable discretion to manage its own docket. *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("The FEC has broad discretionary power in determining whether to investigate a claim, and how, and . . . the prosecutorial discretion given to the Commission is entitled to great deference as to the manner in which it conducts investigations . . . ."). This Court should thus decline plaintiffs' invitation to second-guess the FEC's allocation of its resources in a now-closed matter.[3] *See FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies.").

2. There Is No Reasonable Expectation That the Same Plaintiffs Would Again Be Subjected to the Same Action

Because the FEC has decided the merits of plaintiffs' administrative complaint, there is no realistic expectation that they will again face the same alleged action. In other words, unless plaintiffs intend to file another administrative complaint with the FEC seeking the same or materially similar relief — and plaintiffs have failed to allege in their judicial complaint that they will do that — there is no basis to assume they would be subject to "the same action again."

[3] Plaintiffs make several unfounded allegations about the FEC's purported delay in resolving their administrative complaint. (*See, e.g.*, Pls.' Opp'n to Mot. to Dismiss at 9, 12.) These allegations need not be addressed in detail because, as plaintiffs concede, the merits of the delay claims are not at issue in the mootness inquiry. However, the FEC notes that it was reasonable to take 11 months to fully resolve the broad allegations in plaintiffs' administrative complaint, which led to the identification of 47 administrative respondents, each of which was entitled to FECA's procedural protections regardless of the complexity of the underlying legal issues. (*See* Admin. Compl., *House Majority PAC*, Matter Under Review 7101 (July 7, 2016), https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/murs/current/119429.pdf.) Plaintiffs' suggestion that the FEC could have dismissed their administrative complaint "much more expeditiously" ignores the statutory requirements governing the enforcement process under FECA. (*Id.*)

Moreover, contrary to plaintiffs' argument, because the administrative matter is closed, it cannot be compared to a case where the court found the FEC's delay to be unlawful because the agency could "implement a start-stop approach" on a pending administrative matter. *See Democratic Senatorial Campaign Comm. v. FEC*, Civ. No. 95-0349, slip op. at 2 (D.D.C. April 17, 1996). This Court recognized the distinction between pending and closed administrative matters in *Alliance for Democracy*. *See* 335 F. Supp. 2d at 47. Plaintiffs claim that in the absence of a judicial declaration, the FEC will delay resolving unspecified future complaints. (Pls.' Opp'n to Mot. to Dismiss at 9 (citing *Honig v. Doe*, 484 U.S. 305, 321-22 (1988)).) But even an "argument that these same plaintiffs will at some point in the future have a basis to believe that [FECA] has been violated, again file an administrative complaint, and again claim the FEC unreasonably delayed is far too attenuated." *All. for Democracy*, 335 F. Supp. 2d at 44.[4]

Declaratory relief is also not warranted based on plaintiffs' unfounded assertions that the FEC "controls the length of the delay" and can "moot [an administrative] complaint at any time by issuing a decision." (Pls.' Opp'n to Mot. to Dismiss at 9.) Such arguments ignore the limits on the FEC's authority under FECA and the realities of administrative proceedings in general. There is simply no basis to suggest that the FEC would intentionally delay action on an administrative complaint or seek to improperly moot delay lawsuits. Mooting of such suits is merely a natural byproduct where the FEC completes final action on the administrative complaint.

[4] Plaintiffs attempt to distinguish *Alliance for Democracy* by broadly casting the goal of the current litigation as "present[ing] the U.S. Supreme Court with an opportunity to overturn" *SpeechNow*. (Pls.' Opp'n to Mot. to Dismiss at 8.) However, that goal does not mean that plaintiffs would again face the same action by the FEC, particularly since the FEC has already decided the merits of their administrative complaint.

Plaintiffs' abandonment of their original delay claims, the lack of available relief, and plaintiffs' failure to meet their burden of establishing an exception to the mootness doctrine require the Court to grant the FEC's motion to dismiss for lack of jurisdiction.

III. MOOTNESS IS A THRESHOLD JURISDICTIONAL QUESTION THAT SHOULD BE DECIDED FIRST

The Commission has explained that the claims in plaintiffs' original complaint are moot and should be dismissed because the agency has completed final action on plaintiffs' administrative complaint. (*See* Mot. to Dismiss at 6-8.) The Commission also showed in its opposition to plaintiffs' Motion to Amend that the Court may not grant leave to amend where its jurisdiction over the case has ceased to exist. (*See* FEC's Opp'n to Pls.' Mot. to Amend at 8-10.)

Plaintiffs argue that because they have moved to amend the original complaint, the Court should not decide the FEC's motion to dismiss until it decides plaintiffs' pending motion. However, plaintiffs' argument contravenes the fundamental principle that the Court lacks jurisdiction and is thus without power to act when an action no longer presents a "live" controversy. *See Am. Wild Horse Pres. Campaign v. Salazar*, 800 F. Supp. 2d 270, 273 (D.D.C. 2011); *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 148 F.R.D. 474, 487 n.30 (S.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994). Indeed, Article III of the United States Constitution authorizes this Court to adjudicate only actual cases and controversies. *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (quoting *Honig*, 484 U.S. at 317). Thus, the Court may not simply defer a motion to dismiss a moot complaint and allow plaintiffs to substitute new claims and an entirely new basis for jurisdiction.[5]

[5] Plaintiffs suggest, without citing any authority, that the doctrine of constitutional avoidance supports first deciding their motion to amend. (Pls.' Opp'n to Mot. to Dismiss at 6.) However, it is well-established that questions of justiciability must be decided before the Court determines the merits of the case. *See, e.g., ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir. 2013) ("We begin and end our analysis on the issue of

Article III and the applicable case law foreclose plaintiffs' efforts to reframe the jurisdictional issue as a matter of discretion that may be deferred until after the Court considers plaintiffs' motion for leave to amend. Notably, in a case plaintiffs cite, a court in this district explained:

> If a court lacks jurisdiction over the subject matter, it is disabled from taking any action. It is therefore perfectly understandable why *a court which lacks jurisdiction over the subject matter cannot grant a motion to amend a complaint*, any more than it could enter a judgment.

Ulico Cas. Co. v. E.W. Blanch Co., 200 F.R.D. 3, 5 (D.D.C. 2001) (emphases added). In *Ulico*, the court allowed an amended complaint to supersede an original complaint that was allegedly deficient in jurisdiction because plaintiff amended the complaint as of right under the Federal Rule of Civil Procedure 15(a). But that is inapplicable here because plaintiffs now require court approval for an amendment.[6] And at this stage of litigation, courts may not grant leave to amend a moot complaint. *See Am. Wild Horse*, 800 F. Supp. 2d at 273 n.1 (dismissing plaintiffs' original challenge to an agency action as moot and rejecting its arguments for amendment because "if there is no federal jurisdiction in a case, it may not be created by amendment"). Plaintiffs attempt to distinguish *American Wild Horse* by claiming that the amended complaint here does not involve an "unrelated administrative decision[]" (Pls.' Reply in Supp. of Mot. to Amend at 11) and that their original complaint and proposed amended complaint assert the

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mootness. Mootness is a ground which should ordinarily be decided in advance of any determination on the merits.") (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). Determining whether plaintiffs' proposed amendment is futile necessarily involves assessing the merits, and the Court should thus first decide the FEC's motion to dismiss for lack of jurisdiction.

[6] Plaintiffs also argue that once a proposed amended complaint becomes operative, jurisdiction should be based on the amended complaint. (Pls.' Opp'n to Mot. to Dismiss at 3-4.) However, that principle does not help plaintiffs here because the Court lacks jurisdiction to grant an amendment in the first place.

"same injury-in-fact" (Pls.' Opp'n to Mot. to Dismiss at 5). But plaintiffs are incorrect. FECA's plain language creates a distinct cause of action for challenging the Commission's dismissal of an administrative complaint, which does not depend on or evolve from an action challenging an unlawful delay. *See* 52 U.S.C. § 30109(a)(8). Furthermore, plaintiffs' attempt to conflate the two types of injuries is unavailing in light of this Court's previous recognition that delay and dismissal claims are not related. (*See* FEC's Opp'n to Mot. to Amend at 21-22 (citing Notice of Designation of Related Civil Cases, *All. for Democracy v. FEC*, No. 04-cv-00127-RBW, Docket No. 2 (D.D.C. Jan. 26, 2004).) Tellingly, plaintiffs have failed to address these arguments.

Instead, plaintiffs compare this case to *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1015 (D.C. Cir. 1997), where the court allowed a plaintiff to amend the complaint to assert a broader claim of injury arising from the same government program plaintiff had originally challenged. *Id.* ("The government apparently intends to continue . . . the [challenged] program, and [plaintiff's] challenge to the program is not mooted merely because the challenge to one particular application of it may be."). Plaintiffs' reliance on *Dynalantic* is misplaced because this case involves two dissimilar and unrelated agency actions, challenges to each of which encompass different legal rights and remedies. Plaintiffs also suggest that this case is similar to *Dynalantic* and other cases where the government's own action causes the original complaint to become moot. (Pls.' Opp'n to Mot. to Dismiss at 5). The FEC's action on the underlying administrative complaint did render the judicial complaint moot, but that action provided plaintiffs with the outcome they sought and cannot be construed as an attempt to circumvent judicial review, in contrast to the cases on which plaintiffs rely.

Plaintiffs also argue that courts "often allow plaintiffs to amend their complaints to cure [the] defect" when cases are "*definitely*" moot (Pls.' Opp'n to Mot. to Dismiss at 4), but the cases

plaintiffs cite do not actually meet that description. *See Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972) (per curiam) (remanding with leave to amend in part so appellants could demonstrate that the repealed statute, which was the basis of the original claim, retained some continuing force); *Bryan v. Austin*, 354 U.S. 933 (per curiam) (1957) (remanding with leave to amend in part so appellants could "safeguard any rights that may have accrued to them by virtue of the operation of the repealed [a]ct"); *Worth v. Jackson*, 483 F. Supp. 2d 1, 2 & n.2 (D.D.C. 2004) (granting leave to amend only after determining that defendant had "failed to establish mootness"). These cases actually support the FEC's position that the Court must first determine whether the original complaint is moot before evaluating plaintiffs' motion to amend.[7] Indeed, presented with the issue of mootness, the Fourth Circuit has declined to allow amendment under *Diffenderfer* and instead remanded with instructions to dismiss the complaint where "the entire action below is [] moot." *Phillips v. McLaughlin*, 854 F.2d 673, 678 n.11 (4th Cir. 1988) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). Here, as in *Phillips*, plaintiffs have not established the ongoing viability of any claim in the original complaint. In fact, plaintiffs abandoned *all* claims from the original complaint in their proposed amended complaint. (*See* Proposed Am. Compl.) There is thus no reason to delay deciding the FEC's motion to dismiss.

[7] Plaintiffs also cite cases in which it is unclear whether the parties fully litigated the jurisdictional issue, *see Schmidt v. United States*, 749 F.3d 1064, 1070 n.4 (D.C. Cir. 2014) (expressing frustration with the parties for their lack of briefing on the interplay between Rule 15 and mootness), or the court did proceed to find all the original claims moot, *see Sierra Club v. Watkins*, 808 F. Supp. 852, 857 (D.D.C. 1991) (finding only that plaintiff's challenge to an environmental assessment became moot after the filing of a subsequent environmental assessment, but assessing the merits of plaintiffs' alternative argument about the applicability of a different environmental procedure). These cases thus do not support plaintiffs' contentions regarding how this Court should adjudicate the present motion to dismiss.

The judicial task here is not to exercise discretion to determine which motion should be decided first but rather to conduct a narrower inquiry into whether the claims in the original complaint are moot and should be dismissed for lack of jurisdiction. None of the cases plaintiffs cite supports plaintiffs' request that the Court exercise such discretion. In fact, most of the cited cases merely stand for the proposition the FEC itself acknowledged in its opening brief: Courts may allow a plaintiff to cure a jurisdictional defect through amendment or supplementation. *See* 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.14[3] (3d ed. 1999) ("Essentially a plaintiff may correct the complaint to show that jurisdiction does in fact exist; however, if there is no federal jurisdiction, it may not be created by amendment."); *Purtill v. Harris*, 658 F.2d 134, 138-39 (3d Cir. 1981) (remanding with permission to allow plaintiff to amend complaint to allege exhaustion of his administrative remedies); *Shows v. Harber*, 575 F.2d 1253, 1255 (8th Cir. 1978) (per curiam) ("remand[ing] to the district court with directions to permit the plaintiff to amend her complaint to allege the essentials of diversity of citizenship"); *Judicial Watch, Inc. v. DOE*, 191 F. Supp. 2d 138, 139 (D.D.C. 2002) (allowing plaintiff in a Freedom of Information Act case to file a supplemental pleading alleging the additional fact that it had exhausted its administrative remedies). But these cases do not support allowing amendment or supplementation to substitute a *new* cause of action and a *new* basis for jurisdiction after the original claims have become moot in their entirety.[8]

[8] Plaintiffs also cite district court cases allowing supplemental complaints to add claims involving issues identical or similar to the issues in the operative complaint. *See Aftergood v. CIA*, 225 F. Supp. 2d 27, 31 (D.D.C. 2002) (supplemental complaint alleged a "substantially identical" issue); *Matthew Bender & Co. v. W. Publ'g Co.*, No. 94 CIV. 0589 (JSM), 1995 WL 702389, at *4 (S.D.N.Y. Nov. 28, 1995) (supplemental complaint did not "inject an entirely new issue into the case" and "the basic issues . . . [had] not changed at all"). But as explained *supra*, here plaintiffs seek to substitute dismissal claims this Court has previously refused to recognize as related to delay claims.

Plaintiffs' reliance-based arguments also fail to show that the Court should first decide their motion to amend. Plaintiffs claim that it would be unjust to deny their motion for leave to amend because they did not file a new complaint challenging the Commission's dismissal of their administrative complaint before the expiration of the 60-day limitations statutory period in reliance upon the Court's Scheduling Order. Pls.' Reply in Supp. of Mot. to Amend at 8; *see* 52 U.S.C. § 30109(a)(8)(B) (petitions challenging an order of the Commission dismissing an administrative complaint must be filed within 60 days after the date of dismissal). Plaintiffs argue that the Scheduling Order was an "actual or apparent rejection of the FEC's position" that the Court lacks jurisdiction to grant leave to amend because the original complaint is moot. However, that argument ignores the plain language of the Scheduling Order, which allows plaintiffs only to "*file a motion* to amend or supplement their complaint" within the specified time period. (Scheduling Order at 2 (Docket No. 16) (emphasis added).) The FEC is not arguing that plaintiffs had no right to file their motion; only that it should be denied. Further, nothing prevented plaintiffs from simultaneously filing a new complaint to preserve the timeliness of their dismissal claims.

Plaintiffs claim that deciding their motion for leave to amend before the FEC's motion to dismiss would serve judicial economy, but that is irrelevant because if the Court determines it lacks jurisdiction over the case, it should not grant leave to amend. And in any event, plaintiffs have failed to show that judicial economy or other interests of justice would be served by granting them leave to amend.

IV. EVEN IF THE COURT IS NOT REQUIRED TO CONSIDER THE COMMISSION'S JURISDICTIONAL ARGUMENTS BEFORE PLAINTIFFS' MOTION TO AMEND, THE FUTILITY OF AMENDMENT HERE MEANS THAT THE COURT MUST STILL RULE ON THE MOTION TO DISMISS

Assuming that this Court has the authority to decide plaintiffs' motion to amend prior to ruling on the Commission's jurisdictional arguments, the Court should still rule on the motion to dismiss because the motion to amend should be denied based on futility of amendment. Plaintiffs have offered no valid reason why the Court should refrain from ruling on the futility of amendment at this stage. Doing so would be the most efficient course, as it would obviate the need for successive rounds of briefing on whether the Commission permissibly conformed to settled precedent that both parties agree is binding on this Court. Because plaintiffs' motion to amend should be denied, this Court need not delay consideration of the motion to dismiss.

A. Plaintiffs Offer No Valid Reason Why the Futility Inquiry Should Not Be Decided at This Stage

Plaintiffs' primary argument is that a ruling on the Commission's motion to dismiss should wait for the Court's ruling on their motion to file an amended complaint. (Pls.' Opp'n to Mot. to Dismiss at 2-6.) Plaintiffs suggest that the Court should not decide whether amendment is futile until after the amendment is accepted. That argument assumes the result it seeks. There is no good reason to delay the result in this case when all of these issues are ripe for review now.

As plaintiffs implicitly concede, there is no barrier to the Court's consideration of the merits of the proposed amended complaint at this stage. (*See* Pls.' Reply in Supp. of Mot. to Amend at 12-13.) Even so, plaintiffs argue that the Court should simply allow amendment without deciding "whether the amended pleading is defective." (*Id.* at 12.) But plaintiffs admit that binding circuit precedent compels this Court to reject their claims. (*See id.* at 1.) That same precedent unquestionably establishes the futility of amendment. *See Banner Health v. Burwell*,

55 F. Supp. 3d 1, 9 (D.D.C. 2014) (holding that amendment to assert certain proposed claims was "futile" because the claims were "contrary to D.C. Circuit precedent").

None of plaintiffs' cases supports their request for the Court to delay ruling on the futility of the claims in the proposed amended complaint. In *Deya v. Hiawatha Hospital Ass'n*, the court permitted amendment to assert a negligence claim without deciding a legal issue on which there was "no Kansas state or federal case directly on point." No. 10-cv-2263, 2011 WL 1698774, at *3 (D. Kan. May 4, 2011) (internal quotation marks omitted). Another case did address futility, in the context of a proposed amendment sought by a *pro se* plaintiff. *Adams v. FedEx Ground Package Sys., Inc.*, No. 11-cv-2333, 2013 WL 61448, at *1 (D. Colo. Jan. 4, 2013). And another case considered a proposed amendment that the defendant claimed suffered from the same legal defect that was the subject of a still-pending motion to dismiss. *Matthew Bender & Co. v. W. Publ'g Co.*, No. 94 Civ. 0589 (JSM), 1995 WL 702389, at *4 (S.D.N.Y. Nov. 28, 1995). None of those cases involved judicial review of an agency's enforcement decisions, which presents a "purely legal question." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). And none of those cases considered a proposed amended pleading that conflicted with clear and binding circuit precedent.

Further delay here would serve no useful purpose. Should the Court deny amendment based on futility and grant the Commission's motion to dismiss, plaintiffs would be free to argue to the Court of Appeals or the Supreme Court that their claims are viable. *See In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010) (on appeal from a denial of leave to amend for futility, "the standard of review is *de novo*"). Resolving the entire case now would, therefore, actually benefit plaintiffs by speeding this case to its inevitable conclusion at this stage and on to a potential appeal.

The only prejudice plaintiffs identify to support their request that the court withhold ruling on the motion to dismiss is that, under this procedural posture, plaintiffs "must address" futility "from the standpoint . . . of a reply brief." (*See* Pls.' Reply in Supp. of Mot. to Amend at 12.) It was plaintiffs' strategic choice, however, to address potential futility arguments only obliquely in their motion to amend. (*See* Mot. to Amend at 10.) And they did so despite acknowledging that "futility of amendment" was part of the standard for resolving their motion. (*Id.* at 5 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).) Plaintiffs' opening brief did not come close to the page limit and they sought no extension of that limit, nor did they seek one for their reply, although they did seek and receive a substantial extension of time to file the reply brief. (*See* Consent Mot. for Extension of Briefing Deadlines (Docket No. 27).) In any event, all parties agree that the claims plaintiffs seek to assert in their amended pleading are precluded by clear circuit precedent. There can be no prejudice to plaintiffs in confirming the obvious now.

In contrast, granting leave to amend and denying the FEC's motion to dismiss would require: (1) plaintiffs to file the amended complaint; (2) the Commission to answer or make a motion under Rule 12; and (3) the Court to resolve the matter on a Rule 12 motion or summary judgment proceedings after compiling of an administrative record and further briefing. The parties agree that the conclusion of those proceedings is set: *SpeechNow* requires this Court to rule in the Commission's favor. Deciding that question now preserves judicial resources.

B. Plaintiffs' Choice to Bring This Suit Pursuant to 52 U.S.C. § 30109(a)(8) Led to the Highly Deferential Standard of Review That Applies Here

In seeking to overturn *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), plaintiffs had a choice of procedural mechanisms. They elected to file an administrative complaint asking the FEC to pursue enforcement proceedings implicating ten identified super PACs and

contributors to those groups for allegedly violating FECA even though *SpeechNow* and other precedent foreclosed such enforcement.

One of the consequences of plaintiffs' choice is the standard for judicial review of Commission decisions dismissing an administrative complaint. Under 52 U.S.C. § 30109(a)(8), judicial review is limited to whether the Commission's "dismissal . . . is contrary to law." The D.C. Circuit and other courts have repeatedly described this standard as "[h]ighly deferential" to the Commission's enforcement decisions. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) (noting that the standard for reviewing Commission decisions "whether to initiate or proceed with charges of alleged FECA violations" is "extremely deferential"), *appeal docketed*, No. 17-5049 (D.C. Cir. Mar. 24, 2017).

Plaintiffs suggest that no deference should be given to the FEC's decision because it relies on a constitutional holding of the D.C. Circuit. But that argument conflates the deference the Commission receives when making enforcement decisions with the deference administrative agencies receive when exercising authority delegated by Congress to fill gaps in statutes they administer under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To be sure, in the latter instance courts are not bound to accept an agency construction when engaged in direct interpretation of judicial precedent. In the context of FEC enforcement decisions, however, the agency is generally "far better equipped than the courts" to analyze the relevant factors — including the state of the law as expressed in judicial opinions — and make reasonable conclusions about "whether the agency is likely to succeed if it acts." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Unlike the decision not to enforce at issue in *Heckler*, the FEC's dismissal decisions are subject to judicial review. *See FEC v. Akins*, 524 U.S. 11, 26

(1998). But such decisions are reviewed only to determine whether the Commission's action was "sufficiently reasonable." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).[9]

There is also no merit to plaintiffs' straw-man claim that the Commission's arguments here would have prevented *Brown v. Board of Education*, 347 U.S. 483 (1954). (*See* Pls.' Reply in Supp. of Mot. to Amend at 16-17.) *Brown* did not involve judicial review of an agency's decision not to bring an enforcement action under a deferential standard of review. Rather, that case presented a constitutional question directly. Had plaintiffs wanted to obtain judicial review of whether *SpeechNow* was correctly decided without implicating deference to Commission enforcement decisions, they could have chosen another mechanism to achieve that result. For example, plaintiffs might have directly challenged the Commission advisory opinion at issue. *See, e.g.*, *Unity08 v. FEC*, 596 F.3d 861, 864-65 (D.C. Cir. 2010). Instead, plaintiffs elected to ask the Commission to test their preferred legal theory by initiating enforcement proceedings against specified citizens and groups. Had the Commission accepted plaintiffs' suggestion to go forward, these administrative respondents would have had to defend their conduct in further administrative proceedings — and potential enforcement litigation — even though the D.C. Circuit and other jurisdictions have held that such conduct cannot be limited consistent with the First Amendment. Having chosen to request that the Commission consider these issues in the

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[9] The enforcement context of this case also distinguishes those few cases where courts have considered an agency's interpretative guidance adopted nationwide after a single foreign court of appeals ruled against the agency's prior interpretation. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808 (D.C. Cir. 2002). A different set of factors applies to an agency's decision not to bring an enforcement action. *See Heckler*, 470 U.S. at 831; *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014). Moreover, it is clearly reasonable for an administrative agency to follow a judicial holding declaring a statute unconstitutional within that jurisdiction. *See Grant Med. Ctr. v. Burwell*, 204 F. Supp. 3d 68, 79 (D.D.C. 2016), *appeal docketed sub nom. Grant Med. Ctr. v. Price*, No. 16-5314 (D.C. Cir. Oct. 31, 2016).

enforcement context against identified administrative respondents, plaintiffs must now live with that choice.

In any event, no dispute regarding the level of deference courts should afford to Commission dismissal decisions should delay the resolution of this case because no deference is necessary to affirm the Commission's decision here. In *SpeechNow* the D.C. Circuit unambiguously ruled that contribution limits could not be constitutionally applied to contributions to groups that make only independent expenditures. 599 F.3d at 696. Separation of powers principles require the FEC to follow that decision in this circuit. *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983); *cf. Adams v. Suozzi*, 393 F. Supp. 2d 175, 178 (E.D.N.Y. 2005) (holding that it was not "contrary to law" for magistrate judge to refuse to stay discovery pending appeal "[g]iven the clear precedent from the Second Circuit directly on point on this issue" notwithstanding circuit split). And while the Commission might have elected to test the continued validity of *SpeechNow*, it "was not *required* to make [that] choice." *Grant Med. Ctr.*, 204 F. Supp. 3d at 80.

C. This Court Cannot Reconsider *SpeechNow*

All parties agree that this Court is bound by the D.C. Circuit's decision in *SpeechNow*. Plaintiffs nonetheless argue that decision was wrong because it is inconsistent with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) and because it applied cases considering limits on campaign expenditures to a limit on contributions. (Pls.' Reply in Supp. of Mot. to Amend at 17-22.) But the Court of Appeals already considered and rejected these arguments. In fact, the Commission specifically argued in *SpeechNow* that a more permissive standard of review applies to contribution limits than to limits on expenditures. *See* FEC Br. at 19-23, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009), http://www.fec.gov/law/litigation/speechnow_fec_brief_092309.pdf. The Commission also

warned of the possibility of "the proliferation of independent expenditure political committees devoted to supporting or opposing a single federal candidate or officeholder and funded entirely by very large contributions" which afford high-dollar donors "unprecedented influence over candidates and elected officials." *Id.* at 45. And the Commission similarly argued that independent groups gain "undue influence over officeholders" even "without directly coordinating with them" on campaign-related spending. *Id.* at 36-38. Plaintiffs' arguments therefore rehash arguments that the D.C. Circuit found unpersuasive in *SpeechNow* itself.

Nor do the recent cases plaintiffs cite suggest any change in the law that undermines the holding of *SpeechNow*. (*See* Pls.' Reply in Supp. of Mot. to Amend at 19-20 (citing *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016), *aff'd*, 137 S. Ct. 2178 (2017); *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015)).) The soft money restrictions at issue in *Republican Party of Louisiana* applied not to independent groups but to political parties, which the courts have treated differently in light of their close relationship with officeholders and candidates. 219 F. Supp. 3d at 97; *see also McConnell v. FEC*, 540 U.S. 93, 154-55 (2003). Similarly, *Menendez* involved allegations that the defendants had engaged "in a *quid pro quo* bribery scheme, not with exceeding limits set by a prophylactic campaign finance regulation" like the one struck down in *SpeechNow*. *Menendez*, 132 F. Supp. 3d at 638. Those cases do not justify revisiting *SpeechNow*.

D. Even If *SpeechNow* Were Wrongly Decided, the Commission Acted Reasonably in Following its Prior Advisory Opinion

In dismissing plaintiffs' administrative complaint, the Commission also reasonably relied on its prior advisory opinion that had expressly authorized committees that make only independent expenditures to accept unlimited contributions. *See* FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). This advisory opinion justifies the

Commission's dismissal because those who rely in good faith on an FEC advisory opinion "shall not . . . be subject to any sanction provided by" FECA. 52 U.S.C. § 30108(c)(2). The Commission interpreted this safe harbor as preventing the enforcement proceedings plaintiffs requested in their administrative complaint. That decision is entitled to *Chevron* deference.

Plaintiffs argue that the term "sanction" unambiguously prevents only the imposition of "penalties" and note that they seek "only prospective relief." (*See* Pls.' Reply in Supp. of Mot. to Amend at 22-23.) But courts interpreting statutory uses of the term "sanction" have not limited it to backward-looking relief. The Supreme Court has observed that as "a general matter" this definition "is spacious enough to cover" both "punitive fines" to punish past statutory violations as well as "coercive" fines designed to modify behavior prospectively. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 621 (1992) (construing the Clean Water Act). And the Eleventh Circuit has concluded that a "sanction is commonly understood" to include restrictive measures designed "'to prevent some future activity.'" *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) (quoting Webster's Third New International Dictionary 2009 (1976)).

Nor does the D.C. Circuit's opinion in *LaRouche v. FEC* preclude deference to the Commission's interpretation of "sanction." 28 F.3d 137 (D.C. Cir. 1994). That case held only that a Commission order to a presidential candidate to repay presidential matching funds erroneously disbursed to that candidate was not a "sanction." *Id.* at 142. It did not address whether declaratory or injunctive relief constitutes a sanction under FECA. Moreover, a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). *LaRouche* did not hold that "sanction" was unambiguous; indeed, the case does not appear to have considered that question at all. 28 F.3d at 142.[10] In the absence of such an indication, the Commission's reasonable construction of the ambiguous term controls.

V. CONCLUSION

Because this case is moot, it should be dismissed.

Respectfully submitted,

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[10] It is also not clear that *LaRouche* equated sanctions with penalties, as plaintiffs argue. The order to repay at issue in *LaRouche* is akin to an agency disgorgement order, which the Supreme Court has construed as a penalty in some contexts. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).