UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE TED LIEU, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-2201 (EGS)
v.	)	**(Oral Hearing Requested)**
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO FEC'S MOTION TO DISMISS

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INTRODUCTION

The goal of this litigation under the Federal Election Campaign Act (FECA) is to present the U.S. Supreme Court with an opportunity to overturn a decision of the Court of Appeals for the D.C. Circuit, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), that the Supreme Court has not had an opportunity to review. Plaintiffs are a U.S. Senator, two Members of the U.S. House of Representatives, and House candidates of both major political parties who suffer "injury in fact" because the FEC no longer enforces limits on contributions to super PACs opposing their candidacies. They complained to the Federal Election Commission (FEC) about its failure to enforce the law. When the FEC failed for more than 120 days to rule on their complaint, plaintiffs filed a complaint in this Court alleging that the agency's delay was unlawful. When, nearly seven months later, the agency rejected plaintiffs' administrative complaint and reiterated its unwillingness to enforce the law, the plaintiffs sought leave to amend and supplement their complaint in this Court to challenge the FEC's ruling.[1]

The Court should not consider the FEC's motion to dismiss the unamended complaint before deciding the pending (and earlier-filed) motion for leave to amend. *See* Pls.' Mot. for Leave to Amend, ECF. No. 21 (June 22, 2017). The Court should not consider the FEC's motion because the motion to dismiss the original complaint is based on grounds that would not justify dismissal of the amended complaint. If the Court grants plaintiffs' motion to amend, then the motion to dismiss the original complaint will *itself* be moot. The Court has discretion to consider the motion for leave to amend before the motion to dismiss, and proceeding in that order would serve judicial efficiency and prejudice neither party. Consequently, the Court should decline the

[1] For brevity, this brief hereafter uses terms such as amend, amendment, and amended complaint to encompass both amendment under Fed. R. Civ. P. 15(a) and supplementation under Fed. R. Civ. P. 15(d).

FEC's invitation to consider the original complaint in isolation and then dismiss it. Instead, the Court should grant plaintiffs' motion, then permit the FEC to submit, if it wishes, a new motion to dismiss based on the complaint as amended.

Furthermore, this case is not moot because the FEC's delay is capable of repetition yet evading review. The delay is capable of repetition because plaintiffs expect to run for election again, and to face unregulated super PAC contributions used to oppose their candidacies; furthermore, they have demonstrated their commitment to pursuing FECA enforcement to challenge super PACs. The delay is capable of evading review both because of short election cycles and because the FEC's ability to control the pace of its own processes enables it to strategically avoid judicial resolution of delay.

BACKGROUND

The background to this proceeding is recited in plaintiffs' Reply in Support of Plaintiffs' Motion for Leave to File Amended Complaint, filed today.

ARGUMENT

I. The Court Should Not Consider the FEC's Motion to Dismiss the Unamended Complaint Before Deciding the Motion for Leave to Amend.

The Court should not consider the FEC's motion because it targets the wrong complaint. The motion to dismiss the original complaint is based on grounds that would not justify dismissal of the amended complaint. In this posture, the Court should defer consideration of the FEC's motion until plaintiffs' motion to amend the complaint has been resolved. If the Court allows plaintiffs' motion, then the FEC's motion to dismiss the *original* complaint will be moot.[2]

[2] This distinguishes this case from *Cureton v. U.S. Marshal Serv.*, 322 F. Supp. 2d 23, 25 n.6 (D.D.C. 2004), where the court applied a pending motion to dismiss to the amended complaint because the amended complaint had the same legal flaw as the original complaint.

Faced with a motion to dismiss and a pending motion for leave to amend the complaint, the better course is to consider the motion for leave to amend first. *See, e.g., Worth v. Jackson*, 483 F. Supp. 2d 1, 2 n.2 (D.D.C. 2004) (where court was presented with both an earlier-filed motion to dismiss and a later-filed motion to amend the complaint, it granted the motion to amend and deferred ruling on the motion to dismiss); *Matthew Bender & Co. v. W. Pub. Co.*, No. 94-CIV-0589 (JSM), 1995 WL 702389, at *3-4 (S.D.N.Y. Nov. 28, 1995) (where plaintiff sought to file supplemental complaint over defendant's objection that "a party cannot revive a moot action by filing a supplemental complaint," noting that "[t]his Court has yet to decide defendant's motion to dismiss based on the alleged nonjusticiability and mootness of the plaintiff's claims" and permitting supplementation to "promote the economic and speedy disposition of the controversy between the parties" notwithstanding suggestion that original claims may have become moot).

If the Court grants plaintiffs' motion for leave to amend, then the FEC's pending motion to dismiss the original complaint will be moot because jurisdiction will be based on the amended complaint, not the original. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction"); *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) (amended complaint "'supersedes the original and renders it of no legal effect'") (quoting *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 162 (2d Cir. 2000)); Wright & Miller, 6 *Fed. Prac. & Proc. Civ.* § 1476 (3d ed. Apr. 2017 update) ("Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading."). The Court can then deny without prejudice all pending

motions pertaining to the original complaint. *See, e.g.*, *Adams v. Quattlebaum*, 219 F.R.D. 195, 197 (D.D.C. 2004) (when presented with motion to amend complaint and motion to dismiss original complaint, granting motion to amend and denying without prejudice motion to dismiss, while noting that this procedure "does not preclude the defendant from filing a motion to dismiss the amended complaint"); *Bancoult v. McNamara*, 214 F.R.D. 5, 13 (D.D.C. 2003) ("Because the original complaint now is superseded by the amended complaint, the court denies without prejudice all pending motions pertaining to the original complaint.").

The Court has the authority to defer the defendant's motion to dismiss in this manner. As explained in plaintiffs' reply in support of the motion to amend, even when cases are *definitely* moot, courts (including the Supreme Court) often allow plaintiffs to amend their complaints to cure that defect. *See* Pls.' Reply in Support of Pls.' Mot. for Leave to File Amended Compl. at 8-10 (filed today) (citing cases). Since a court can permit amendment when it *knows* that the original complaint is moot, it can also defer resolution of a contested mootness claim in favor of an amendment that would cure potential mootness. *See Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1015 (D.C. Cir. 1997) (where government action appeared to moot plaintiffs' claims on appeal, but plaintiffs argued that a mootness exception applied, holding that "[w]e need not decide . . . whether [plaintiffs'] claim would fall within one of these exceptions because we grant [its] alternative request that we allow it to amend its pleadings" to cure mootness). While *Dynalantic* involved a slightly different factual posture, it also involved a more dramatic amendment, significantly broadening the initial challenge. *See id.* Nonetheless, the D.C. Circuit explained, "Although we are normally hesitant to allow a plaintiff resisting a mootness claim later to assert broader claims of injury, here it is the government's own actions . . . that made

Dynalantic's claims regarding the [original] procurement arguably moot." *Id.* at 1015 (internal citation omitted).

Here, plaintiffs do not assert "broader" claims of injury in the amended complaint. They assert the same injury-in-fact, stemming from the same administrative complaint. It was the government's own action that raises the question of mootness. Thus, as in *Dynalantic*, the court "need not decide" whether the unamended complaint would fall into a mootness exception, since the FEC does not argue that the claims in the *amended* complaint are moot.

This approach of considering the previously filed Rule 15 motion before the later filed Rule 12 motion is sounder for three reasons. First, it is consistent with the general philosophy of the Federal Rules of Civil Procedure to "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *Matthew Bender & Co.*, 1995 WL 702389, at *3 (noting that "[i]t would be inefficient to force [plaintiff] to commence a separate suit" and that supplementation of existing complaint would not cause undue delay or prejucide defendant).

Second, it serves judicial efficiency by avoiding unnecessary adjudication. *See Johnson v. Panetta*, 953 F. Supp. 2d 244, 248 (D.D.C. 2013) (when presented with both a motion to dismiss a complaint for lack of subject matter jurisdiction and failure to state a claim, and a motion for leave to amend the complaint potentially curing both issues, concluding that "[f]rom the standpoint of judicial efficiency . . . the most pragmatic approach to resolving the instant motions, is to first address Plaintiff's Motion for Leave [to] Amend the Complaint"; ultimately granting leave to amend and denying motion to dismiss original complaint as moot); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 528 (D.N.J. 2004) (on grounds of efficiency, granting leave to amend over defendant's objection that court should decide Rule 12 motions before Rule 15

motion). If the Court grants leave to amend, there is no need for it to consider the questions posed in the FEC's motion to dismiss the original complaint. Furthermore, the Rule-15-motion-first approach avoids unnecessary *constitutional* adjudication, as the questions presented in the FEC's motion to dismiss on grounds of mootness require adjudication under Article III of the Constitution. As described *infra*, plaintiffs argue that this case is capable of repetition yet evading review, on grounds that potentially pertain to a broad category of FEC complaints. Addressing the motion to amend first would obviate the need to address this constitutional question.

Finally, addressing the Rule 15 motion first results in prejudice to neither side. The FEC's approach seeks to dictate the outcome, with potential procedural consequences for plaintiffs' case, by insisting on sequencing the questions in a particular order which, the FEC argues, not only requires dismissal of the original complaint but also precludes amendment. *See* FEC Opp. to Pls.' Mot. to Amend, ECF No. 25 (July 17, 2017) ("FEC Opp."), at 6-10. By contrast, resolving the Rule 15 motion first would not preclude the FEC from later filing a motion to dismiss the amended complaint. *See Adams*, 219 F.R.D. at 197.

II. This Case is Not Moot.

A. Standard of Review

Plaintiffs agree with the FEC's recitation of the standard of review as stated in the Motion to Dismiss, *see* FEC Mot. to Dismiss, ECF No. 24 (July 17, 2017), at 5-6, except as to allocation of the burden. "The burden of establishing mootness rests on the party raising the issue, and it is a heavy burden." *Rumber v. D.C.*, 598 F. Supp. 2d 97, 112 (D.D.C. 2009), *aff'd*, 595 F.3d 1298 (D.C. Cir. 2010); *see also Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (same).

B. The FEC's Delay is Capable of Repetition Yet Evading Review.

This case qualifies for the "exception to the mootness doctrine for a controversy that is "'capable of repetition, yet evading review.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). This exception has two elements: a controversy is capable of repetition when "there is a reasonable expectation that the same complaining party will be subject to the same action again," and it is capable of evading review when "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Id.* (internal quotation marks and brackets omitted).

It is significant that the FECA complaint was filed by candidates actively campaigning for election and alleging injury in their election bids.[3] Election-related controversies are "'paradigmatic' examples of cases that cannot be fully litigated before the particular controversy expires." *La Botz v. FEC*, 889 F. Supp. 2d 51, 59 (D.D.C. 2012) (quoting *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009)); *see Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987) (finding a candidate's challenge was capable of repetition yet evading review); *Shays v. FEC*, 424 F. Supp. 2d 100, 111 (D.D.C. 2006) (same); *accord Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (Posner, J.) (same). Plaintiffs' injury stemmed from being forced to compete in illegally structured campaign environments in an upcoming election, *see LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011), and they have asserted that they expect to face similar injury from being forced to compete in similarly illegally structured campaign environments in future elections, *see Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). Moreover, as explained in detail

[3] Most cases under 52 U.S.C. § 30109(a)(8) are less time-sensitive. They are filed, not by candidates in an impending election, but by plaintiffs challenging the FEC's failure to enforce disclosure requirements. *See, e.g., All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 47-48 (D.D.C. 2004); *see also FEC v. Akins*, 524 U.S. 11, 21–22 (1998) (describing informational injury).

below, the specific circumstances of this controversy make it particularly capable of repetition yet evading review.

C. The Delay is Capable of Repetition Because There Is a Reasonable Expectation That the Same Complaining Parties Will Be Subject to the Same Action Again.

As noted in plaintiffs' reply in support of their motion to amend the complaint, this is not a one-off complaint stemming from particular idiosyncratic facts specific to the 2014-2016 time frame. The goal of this litigation is to present the U.S. Supreme Court with an opportunity to overturn a decision of the Court of Appeals for the D.C. Circuit, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), that the Supreme Court has not had an opportunity to review. While plaintiffs filed this action with particular super PAC contributions and spending from their 2016 (and in some cases 2014) election campaigns in mind, their larger goal is not simply to address specific excess contributions that happened to occur in the years leading up to the 2016 election, but rather to present the fundamental legal question to the U.S. Supreme Court.

All six plaintiffs have asserted that they expect to run for federal office again, and they reasonably expect that unregulated super PAC contributions will again be used to oppose their candidacies. *See* Compl. ¶¶ 27, 29, 31, 32, 34, 36, ECF No. 1 (Nov. 4, 2016); *see also* First Amended Compl. ¶¶ 29, 31, 33, 34, 36, 38, ECF No. 21-2 (June 22, 2017) (same). All six plaintiffs have already demonstrated their commitment to pursuing FECA enforcement as a means to challenge super PACs. Consequently, this case is not like *Alliance for Democracy v. FEC*, where the court found the possibility "that these same plaintiffs will at some point in the future have a basis to believe that the Act has been violated, again file an administrative complaint, and again claim the FEC unreasonably delayed [was] far too attenuated." 335 F. Supp. 2d 39, 45 (D.D.C. 2004).

Furthermore, given the FEC's insistence that its 11 month timeframe in this purportedly simple case was *not* unreasonably delayed, *see* Answer ¶¶ 7, 81-86, ECF No. 12 (Jan. 13, 2017), it is entirely plausible that, absent a judicial declaration otherwise, the FEC will similarly delay its resolution of future complaints.[4] *See Honig v. Doe*, 484 U.S. 305, 321-22 (1988) (finding an increased likelihood that misconduct would be repeated because the defendant claimed full legal authority to do what it was no longer doing). Indeed, the FEC's systemic inability to diligently work through its enforcement docket has been thoroughly documented in the press and relevant commentary, and its own leadership has publicly acknowledged as much. *See* Compl. ¶ 3, ECF No. 1 (Nov. 4, 2016) (citing statements from three sitting Commissioners acknowledging that agency's enforcement process is often unreasonably slow).

Finally, this is not a scenario in which a case has allegedly become moot because of events outside either party's control or because of events that plaintiffs can control. Rather, *the FEC itself controls the length of the delay*.[5] Whenever a complainant sues under 52 U.S.C. § 30109(a)(8)(A), claiming that a delay is unlawful, the FEC can (unless an exception to the mootness doctrine applies) moot the complaint at any time by issuing a decision. It might, for example, wait until the court's ruling on the complaint seemed imminent before mooting a case, thereby taking advantage of whatever strategic advantage its unlawful delay might offer.

[4] That is more than enough commonality for the purposes of the exception. *See FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (finding that as-applied challenge to election regulation was capable of repetition yet evading review, but rejecting FEC's argument that potential future controversy must repeat "every 'legally relevant' characteristic," and noting that "[h]istory repeats itself, but not at the level of specificity demanded by the FEC"); *Majors*, 317 F.3d at 722-23 (similar conclusion as to candidate running for election in future cycles).

[5] In that sense, the FEC's voluntary cessation of illegal *inaction* is akin to the well-established mootness exception for voluntary cessation of illegal *action*. The Supreme Court has long held that "'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot,'" *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)), and the voluntary cessation of illegal delay is no different.

Moreover, it could repeat this conduct indefinitely with each new complaint—delaying action on the complaint until a judicial remedy for delay seemed imminent.[6] Its delays could become unlawful well before this time, but unless those delays were held capable of repetition yet evading review, the court would never be able to provide a remedy. *See Democratic Senatorial Campaign Comm. v. FEC*, No. CIV-A-95-0349 (JHG), 1996 WL 34301203, at *9 (D.D.C. Apr. 17, 1996) (rejecting FEC's argument that complaint was moot because it had belatedly started work, as this argument "would provide the FEC with *carte blanche* to avoid judicial review by implementing a start-stop administrative process based on whether a complaint was pending in district court").

D. The Delay Is Capable of Evading Review Because it iSays too Short in Duration to be Litigated Fully.

The FEC did not rule on the plaintiffs' administrative complaint until nearly 11 months after that complaint had been filed. While this is far from the longest delay in FEC administrative complaint processing, to hold here that the FEC's ruling rendered the plaintiffs' complaint moot would create a broad zone of potentially illegal but unreviewable delay.

The D.C. Circuit has recognized that federal litigation typically takes two years (or more), and has consistently employed a presumption that actions "'of less than two years' duration ordinarily evade review.'" *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quotation omitted); *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1329 (D.C. Cir. 1985); *see also First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months too short for judicial review). The original briefing schedule in this case

[6] It does not matter whether the FEC has in fact employed this strategy in this case; the issue is whether its delay is *capable* of repetition yet evading review.

shows that the FEC delay at issue in this case is likely to fit the pattern. This case was filed immediately after the 120-day period, and the Court's relatively expeditious initial litigation schedule provided that briefing on summary judgment would be completed on November 20, 2017. *See* Scheduling Order, ECF No. 16 (Mar. 22, 2017), at 5. Yet according to this schedule, even if the court ruled from the bench on the day after the completion of briefing, 18 months would have elapsed since the filing of the July 2016 administrative complaint.

It is true that that the 120-day period in 52 U.S.C. § 30109(a)(8)(A) merely marks the earliest date on which a complainant is allowed to seek judicial review of FEC delay and that "*some* investigations can reasonably take more than two years." *All. for Democracy*, 335 F. Supp. 2d at 44 (emphasis added).[7] However, it is also true that "some cases can be dealt with in the 120 day period." *Citizens for Percy '84 v. FEC*, No. CIV.A. 84-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984) (finding delay unlawful where FEC did not hold "reason to believe" vote until five months after complaint was filed). The required procedures under FECA are quite brief: five days to notify a respondent, *see* 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.5(a), and a 15-day safe haven during which the FEC may not take any action *against* the respondent, so as to allow the respondent an opportunity to demonstrate that no action should be taken, *see* 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.6.

Some cases should be resolved within 120 days, but the FEC's argument would effectively create a 24-month "safe" zone in which unlawful delay in these cases could not be remedied. The agency's delay would have begun as much as four months before the district court complaint could be filed, and then could continue for two more years until the court would be likely to provide a remedy. In other words, a district court is unlikely to provide an effective

[7] *Alliance for Democracy* involved an administrative complaint that proceeded through multiple stages of investigation and ultimately to conciliation. *Id.* at 42.

remedy for any FEC delay shorter than 28 months. Within this zone, unlawful delay would generally evade review. This would greatly extend Congress's 120-day safe haven for FEC inaction. *See* 52 U.S.C. § 30109(a)(8)(A).

Whether *this* case is one that the FEC should have resolved within 120 days (or in any event within 11 months) is of course the question of whether the plaintiffs' delay claim is meritorious. Although the court need not resolve this question to determine whether the plaintiffs' complaint is moot, this case does illustrate how unlawful delay can easily evade review. The FEC itself maintains that this case is one of staggering simplicity. The plaintiffs and the FEC agree that the case turns on a narrow question of law and that complex factual investigations are not required. According to the FEC, the plaintiffs' administrative complaint was doomed from the start, and its impossibility of success was apparent from its four corners. *See* FEC Opp., at 13-18; FEC, MUR 7101, Factual and Legal Analysis 11-14 (June 1, 2017), http://eqs.fec.gov/eqsdocsMUR/17044421102.pdf.

But if the administrative complaint was as hopeless as the FEC claims—if its outcome was dictated from the start by the *SpeechNow* decision—the FEC could have dismissed the administrative complaint much more expeditiously. Still, even here, the FEC took almost eleven months.[8]

If ever there were a case for unreasonable delay within the 28-month zone, this administrative complaint would appear to present it. Yet the FEC now claims that its delay cannot be reviewed. If the FEC succeeds in blocking a ruling on the merits of the administrative

[8] Plaintiffs note that two months of the delay were apparently caused by initially failing to notify two of the named respondents (Congressional Leadership Fund and ESAFund) of the complaint until September 2016. *See* FEC Enforcement Query System, Case Search Result Page, http://eqs.fec.gov/eqs/searcheqs (search Case # "7101").

action that it says mooted the plaintiffs' delay claim and if the plaintiffs must again seek relief during the 2018 election cycle, this pattern is likely to be repeated. *See Groundhog Day* (Columbia Pictures 1993).

III. Conclusion

This Court should defer consideration of the FEC's motion to dismiss the original complaint until after resolution of plaintiffs' pending motion to amend their complaint. If the Court grants that motion to amend, then the FEC's motion to dismiss should be denied as moot, without prejudice to file a new motion to dismiss the amended complaint. If the Court does reach the merits of the FEC's motion to dismiss the unamended complaint, the Court should deny the motion because the controversy is capable of repetition yet evading review.

REQUEST FOR ORAL HEARING

Pursuant to Local Civil Rule 7(f), plaintiffs request an oral hearing on this motion.

Dated: August 16, 2017

Respectfully submitted,

/s/ Stephen A. Weisbrod

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 16, 2017, the foregoing was caused to be served on counsel of record for Defendant by the Court's electronic filing system.

Dated: August 16, 2017

/s/ Stephen A. Weisbrod__
Stephen A. Weisbrod