

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND :  
ETHICS IN WASHINGTON :  
and MELANIE SLOAN :  
1400 Eye Street, N.W., Suite 450 :  
Washington, D.C. 20005, :

Plaintiffs, :

v. :

Civil Action No. :

FEDERAL ELECTION COMMISSION, :  
999 E Street, N.W. :  
Washington, D.C. 20463 :

Defendant. :

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**COMPLAINT FOR DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF**

1. This is an action for declaratory and injunctive relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and 2 U.S.C. § 437g(a)(8), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission (“FEC” or “Commission”) of a complaint by Citizens for Responsibility and Ethics in Washington (“CREW”) and CREW Executive Director Melanie Sloan without providing a Statement of Reasons or explanation for the dismissal.

2. This is also an action for declaratory and injunctive relief under the APA, 5 U.S.C. § 706, and 2 U.S.C. § 437g(a), challenging as arbitrary, capricious, and contrary to law the pattern and practice of the FEC to effectively deprive complainants before it of their statutory right to review in the U.S. District Court for the District of Columbia of the FEC’s dismissals of their complaints by failing to provide Statements of Reasons or any other explanation for the

dismissals within the 60-day period for filing petitions for review.

### **JURISDICTION AND VENUE**

3. This action arises under the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* (“FECA” or the “Act”), as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155; the APA, 5 U.S.C. §§ 551-706, and the Declaratory Judgment Act, 2 U.S.C. § 2201. The Court has both subject matter and personal jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1336; 5 U.S.C. §§ 701, 702, and 706; and 2 U.S.C. § 437g(a)(8)(A). The APA, 5 U.S.C. § 702, gives private parties the right to seek injunctive relief when adversely affected or aggrieved by arbitrary or capricious agency action or inaction, as well as action or inaction that is contrary to law. The APA also empowers courts to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S. § 706.

4. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e), 5 U.S.C. § 703, and 2 U.S.C. § 437g(a)(8).

### **PARTIES**

5. Plaintiff CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to ensuring the integrity of government officials and to protecting the right of citizens to be informed about the activities of government officials. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission.

6. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. CREW does this in part by educating citizens regarding the

integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal office and publicizes those who violate federal campaign finance laws through its website, press releases, reports, and other methods of distribution. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing campaign finance violations and filing complaints with the FEC serve CREW's mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance laws.

7. CREW is hindered in its programmatic activity when an individual, candidate, political committee, or other regulated entity fails to disclose campaign finance information in reports of receipts and disbursements required by the FECA or fails to comply with other provisions of the FECA, including the requirement that principal campaign committees register with the FEC. 2 U.S.C. § 433(a).

8. CREW is also hindered in its programmatic activity when the FEC fails to properly administer the FECA's reporting requirements, which provide CREW with the only source of information in determining if a candidate, political committee, or other regulated entity is complying with the FECA.

9. Plaintiff Melanie Sloan is the executive director of CREW, a citizen of the United States, and a registered voter and resident of the District of Columbia. As a registered voter, Ms. Sloan is entitled to receive all the information the FECA requires candidates to report publicly and to the FEC's proper administration of the provisions of the FECA. Ms. Sloan is harmed when a candidate, political committee, or other regulated entity fails to report campaign finance activity or all other information required by the FECA

10. Ms. Sloan is also personally committed to ensuring the integrity of federal elections. Toward that end, Ms. Sloan reviews campaign finance filings and media reports to determine whether candidates and political committees comply with the FECA's requirements. When Ms. Sloan discovers a violation of the FECA, she submits complaints against violators pursuant to her rights under the law, 2 U.S.C. § 437g(a)(1).

11. Both CREW and Ms. Sloan are harmed when the FEC fails to properly administer the FECA, particularly its reporting requirements, thereby limiting their ability to review campaign finance information.

12. When CREW and Ms. Sloan file complaints against violators of the FECA, they rely on the FEC, as the exclusive civil enforcement authority, to comply strictly with the FECA when making its enforcement decisions. *See* 2 U.S.C. § 437d(e). CREW and Ms. Sloan are harmed and are "aggrieved" parties when the FEC dismisses their complaints contrary to the FECA or otherwise acts contrary to the requirements of the FECA. 2 U.S.C. § 437g(a)(8)(C).

13. CREW and Ms. Sloan are dedicated to pursuing and protecting their interests and rights under the FECA to the fullest extent available under the law. When the FEC acts contrary to the FECA in dismissing a complaint brought by CREW or Ms. Sloan, both CREW and Ms. Sloan seek to vindicate their rights as aggrieved parties under the FECA by filing complaints before the U.S. District Court for the District of Columbia as authorized by 2 U.S.C. § 437g(a)(8).

14. CREW and Ms. Sloan are harmed when the FEC arbitrarily and capriciously dismisses their complaints without providing any reason for the dismissal prior to the 60-day period in which complainants must file a petition with the U.S. District Court for the District of

Columbia pursuant to 2 U.S.C. § 437g(a)(8), as such dismissals effectively deprive CREW and Ms. Sloan of their statutory rights to judicial review.

15. Defendant FEC is an agency within the meaning of 5 U.S.C. § 552(f) and was established by Congress to oversee the administration of the FECA. *See* 2 U.S.C. § 437c. The Commission has exclusive jurisdiction with respect to the civil enforcement of the FECA, 2 U.S.C. § 437c(b)(1), and is empowered to dismiss complaints brought before it for violations of the FECA, 2 U.S.C. § 437g(a). The FEC has dismissed at least several complaints brought by CREW and/or Ms. Sloan pursuant to that authority.

### **STATUTORY AND REGULATORY FRAMEWORK**

16. Under the FECA, any person who believes there has been a violation of the FECA can file a sworn complaint with the FEC. 2 U.S.C. § 437g(a)(1). Upon receipt of a complaint, the FEC has five days in which to notify the person or persons alleged in the complaint to have violated the Act. *Id.* The respondent then has 15 days to demonstrate to the FEC that no action should be taken based on the complaint. *Id.*

17. Based on the complaint, response, and any recommendation of the FEC Office of General Counsel, the FEC may then vote on whether there is “reason to believe” a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(2). If the FEC finds there is “reason to believe” a violation of the FECA has occurred, the FEC must notify the respondents of that finding and must “make an investigation of such alleged violation.” *Id.*

18. After the investigation, the FEC’s general counsel may recommend that the FEC vote on whether there is “probable cause” to believe the FECA has been violated. 2 U.S.C. § 437g(a)(3). The general counsel must notify the respondents of any such recommendation and

provide the respondents with a brief stating the position of the general counsel on the legal and factual issues presented. *Id.* Within 15 days of receiving the brief, respondents may submit their own brief on the legal and factual issues presented in the case and replying to the brief of the general counsel. *Id.*

19. Upon consideration of these briefs, the FEC may then determine whether there is “probable cause” to believe a violation of the FECA has occurred. 2 U.S.C. § 437g(a)(4)(A)(I). If the FEC finds probable cause to believe a violation of the FECA has occurred, the FEC must attempt for at least 30 days, but not more than 90 days, to resolve the matter “by informal methods of conference, conciliation and persuasion,” *id.*, a process that does not involve the complainant.

20. If the FEC is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in the appropriate United States district court. 2 U.S.C. § 434g(a)(6)(A). In any action instituted by the FEC, a district court may grant injunctive relief as well as impose monetary penalties. 2 U.S.C. §§ 437g(a)(6)(B)-(C).

21. If, at any stage of the proceedings, the FEC dismisses a complaint, any “party aggrieved” may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed “within 60 days after the date of the dismissal.” 2 U.S.C. § 437g(a)(8)(B). The FECA also allows a party filing an administrative complaint to seek judicial review of the FEC’s “failure . . . to act” after 120 days have elapsed. 2 U.S.C. § 437g(a)(8)(A).

22. The district court lacks jurisdiction over any petition for review filed more than 60 days after the date of dismissal, even when the complainant does not receive timely notice of the

dismissal. *Spannaus v. Fed. Election Comm'n*, 990 F.2d 643, 644 (D.C. Cir. 1993).

23. The FECA, by vesting in the FEC exclusive jurisdiction to civilly enforce the Act's provisions and setting forth a detailed time schedule within which the FEC must act on complaints, allows the development of a record before the matter reaches the U.S. District Court for the District of Columbia pursuant to 2 U.S.C. § 437g(a)(8)(A). *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 542-43 (D.C. Cir. 1980). It also avoids unnecessary judicial review, as "[i]nvestigations of complaints may result in a vindication of the alleged conduct to the complete satisfaction of all." *Id.* at 543.

24. The district court reviewing either the FEC's dismissal or its failure to act may declare the FEC's actions (or inactions) "contrary to law." 2 U.S.C. § 437g(a)(8). The court may also order the FEC "to conform with such declaration within 30 days." *Id.* If the FEC fails to abide by the court's order, the FECA provides the complainant with a private right of action, brought in its own name, "to remedy the violation involved in the original complaint." *Id.*

25. FEC regulations require the FEC to place commissioner opinions in enforcement cases, general counsel's reports, and non-exempt investigatory materials on the public record within 30 days from the date on which respondents are notified the FEC has voted to close an enforcement file. 11 C.F.R. § 5.4(a)(4)

26. Following the dismissal of a complaint, the Secretary of the Commission also issues a certification attesting to the action taken by the Commission with respect to a particular complaint, including how each commissioner voted on each enumerated motion. The certification is placed on the public record.

#### **FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF**

27. On March 14, 2007, CREW and Melanie Sloan filed a complaint with the FEC against Peace Through Strength Political Action Committee (“PTS PAC”) and its treasurer, Meredith Kelley, for violations of the FECA. The complaint alleged: (1) PTS PAC, the political action committee of Rep. Duncan Hunter who was then a candidate for president of the United States, had knowingly received 11 contributions exceeding the FECA’s individual contribution limit for “testing the waters” activities in violation of 2 U.S.C. § 441a(f); (2) PTS PAC had failed to register as a candidate committee in violation of 2 U.S.C. § 433(a); (3) PTS PAC had made an excessive in-kind contribution in violation of 2 U.S.C. § 441a(a)(2)(A) and 11 C.F.R. § 110.2(b)(1); and (4) to the extent PTS PAC had failed to report disbursements for certain television advertisements it had violated 11 C.F.R. §§ 104.3(b) and 104.9(a).

28. Over three years later and long after the presidential election for which Rep. Hunter’s PAC was formed had concluded, FEC Assistant General Counsel Mark Shonkwiler advised CREW by letter dated July 23, 2010, and received by CREW on July 27, 2010, of the FEC’s actions with respect to CREW’s complaint, designated as MUR 5908. Mr. Shonkwiler’s letter was the first and only substantive communication CREW received from the FEC regarding its complaint in MUR 5908.

29. According to Mr. Shonkwiler, the FEC found reason to believe Peace Through Strength Political Action Committee, Treasurer Meredith G. Kelley, Duncan Hunter, Hunter for President, Inc. and Treasurer Bruce Young violated specified provisions of the FECA and FEC regulations. Mr. Shonkwiler further advised that on June 29, 2010, the FEC determined to take no further action and closed the file in this matter.

30. Mr. Shonkwiler stated that documents related to this case will be placed on the



public record within 30 days – which may be beyond the date by which a petition pursuant to 2 U.S.C. § 437g(a)(8) must be filed – and “A Statement of Reasons further explaining the basis for the Commission’s decision will follow” at some unidentified date.

31. To date, CREW has not seen either the documents related to this case or the FEC’s Statement of Reasons explaining its dismissal of CREW’s complaint. Nor has the FEC issued a certification of the action it took in MUR 5908, including an explanation of how each FEC commissioner voted with respect to the motion to find probable cause. Without these documents, CREW cannot ascertain the basis for the FEC’s dismissal of CREW’s complaint.

32. On September 24, 2004, CREW filed a complaint with the FEC against The November Fund, Bill Sittman as treasurer of The November Fund, the U.S. Chamber of Commerce, Tom Donohue as President of the U.S. Chamber of Commerce, Bush-Cheney ‘04, and Bush Cheney ‘04 Campaign Manager Ken Mehlman for violations of federal campaign finance laws.

33. On December 15, 2008, over four years after CREW filed its complaint and five calendar days before any request for judicial review pursuant to 2 U.S.C. § 437g(a)(8) was due, the FEC hand-delivered to CREW a letter from FEC Assistant General Counsel Mark Shonkwiler describing the FEC’s actions in relation to CREW’s complaint, designated as MUR 5541. Mr. Shonkwiler’s letter was the first and only substantive communication CREW received from the FEC regarding its complaint in MUR 5541.

34. According to Mr. Shonkwiler, on March 8, 2005, the FEC found reason to believe The November Fund and Bill Sittman had violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a), and that the U.S. Chamber of Commerce and Tom Donohue had violated 2 U.S.C. § 441b(a).

Two years later, on November 27, 2007, the FEC authorized the Office of the General Counsel to enter into negotiations to attempt to reach a settlement of this matter prior to a finding of probable cause to believe. A year later, on October 21, 2008, the FEC was equally divided on whether to accept a revised conciliation agreement and whether to take further action in this matter and, as a result, closed the matter. The FEC's letter stated further: "A Statement of Reasons further explaining the basis for the Commission's decision will follow."

35. The FEC originally attempted to send its letter, which was dated November 26, 2008, by certified mail, return receipt requested and addressed to CREW at 11 DuPont Circle, N.W., 2<sup>nd</sup> Floor, Washington, D.C. 20036. CREW has not occupied that address since April 2006, and the letter was returned to the FEC as undeliverable.

36. The FEC did not provide CREW with its Statement of Reasons at the time it advised CREW on December 15, 2008, of the dismissal of CREW's complaint, nor did the FEC provide CREW with its Statement of Reasons prior to the expiration of the 60-day period for filing any petition of the dismissal pursuant to 2 U.S.C. § 437g(a)(8).

37. In the absence of the FEC's statement of reasons explaining why it dismissed CREW's complaint in MUR 5541, CREW was unable to ascertain whether there was a basis to file a petition pursuant to 2 U.S.C. § 437g(a)(8) challenging the FEC's dismissal of CREW's complaint. As a result of the FEC's arbitrary and capricious failure to provide an explanation of the basis for its dismissal, CREW did not file a petition for judicial review of the FEC's dismissal of MUR 5541.

38. On information and belief, the FEC has a pattern and practice of arbitrarily and capriciously failing to provide the basis for its dismissal of complaints before the expiration of

the 60-day period in which a petition for review in the U.S. District Court for the District of Columbia must be filed pursuant to 2 U.S.C. § 437g(a)(8), particularly in cases where the FEC commissioners are deadlocked in their votes.

39. Not only did the FEC fail to provide information concerning the bases for its dismissals of CREW's complaints, but it has done so in other matters as well. As part of its pattern and practice, the FEC dismissed MUR 5712 and MUR 5799 on March 18, 2009. These complaints were brought against Senator and then-presidential candidate John McCain in March 2006 (MUR 5712) and August 2006 (MUR 5799), alleging solicitation of so-called "soft money" in violation of the Bipartisan Campaign Reform Act of 2002. The dismissals occurred well after the presidential campaign had concluded. The FEC did not provide a Statement of Reasons explaining either dismissal until nearly one year later, on March 5, 2010.

40. Similarly, as part of that pattern and practice, the FEC dismissed MUR 5724 on October 7, 2008, after the FEC commissioners deadlocked. The dismissed complaint was filed on March 22, 2006, against then congressional candidate Jim Feldkamp and his campaign for allegedly accepting excessive campaign contributions in violation of the FECA. The FEC did not issue its first Statement of Reasons explaining the basis for the dismissal until over 60 days later on December 11, 2009, and a second Statement of Reasons until December 15, 2009.

41. As part of that pattern and practice, on May 19, 2009, the FEC also dismissed the complaint in MUR 5575 against the Alaska Democratic Party and the Tony Knowles for U.S. Senate Committee for alleged violations of the FECA. The complaint was filed nearly three years earlier on October 19, 2004. After dismissing the complaint, the FEC waited over 60 days until July 27, 2009, to issue a Statement of Reasons explaining the basis for its dismissal.

42. As part of that pattern and practice, the FEC dismissed the complaint in MUR 5835 against the Democratic Congressional Campaign Committee and Treasurer Brian L. Wolff for alleged violations of the Bipartisan Campaign Reform Act on February 10, 2009, but did not issue a Statement of Reasons until nearly five months later on July 1, 2009.

43. As part of that pattern and practice, on November 18, 2008, the FEC dismissed the January 15, 2005 complaint in MUR 5642 against George Soros for allegedly failing to report an independent expenditure. The FEC waited until January 22, 2009, to issue its first Statement of Reasons, following that up with a second Statement of Reasons on March 10, 2009.

44. In each instance where the FEC arbitrarily and capriciously failed to provide a Statement of Reasons or other explanation for the basis of its dismissal of a complaint, the complainant lacked a basis for filing a petition for review within 60 days of the dismissal.

45. In each instance where the FEC arbitrarily and capriciously failed to provide a Statement of Reasons or other explanation for the basis of its dismissal of a complaint, there was no adequate record from which a reviewing court, consistent with its judicial role under the FECA, could rule on a petition challenging the dismissal.

46. On information and belief, the FEC refrains from issuing Statements of Reasons explaining the bases for its dismissal within the 60-day period for filing a petition for review under 2 U.S.C. § 437g(a)(8) with the intent and/or effect of depriving complainants of their statutory right to judicial review and preventing the U.S. District Court for the District of Columbia from ruling on an issue on which the FEC has not been able to reach consensus.

## **PLAINTIFFS' CLAIM FOR RELIEF**

### **CLAIM ONE**

**For an Order Declaring the FEC's Dismissal of MUR 5908  
Arbitrary, Capricious, and Contrary to Law**

47. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as if fully set forth herein.

48. The FEC's dismissal of the complaint in MUR 5908 without providing a Statement of Reasons or any other explanation whatsoever for the basis of its dismissal is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 2 U.S.C. § 437g(a)(8)(A).

49. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 2 U.S.C. § 437g(a)(8) and has acted arbitrarily and capriciously in failing to provide an explanation for its dismissal of MUR 5908.

**For an Order Compelling the FEC to Explain the Basis  
for Dismissing Complaints Within 60 Days of Any Dismissal**

50. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as if fully set forth herein.

51. Pursuant to 2 U.S.C. § 437g(a)(8), unless a petition for review of the FEC's dismissal of a complaint is filed within 60 days of the dismissal, the U.S. District Court for the District of Columbia lacks jurisdiction to hear the petition.

52. In the absence of a Statement of Reasons or other explanation for the FEC's dismissal of a complaint, a complainant is unable to ascertain whether there is a basis to file a petition for review with the U.S. District Court for the District of Columbia.

53. In the absence of a Statement of Reasons or other explanation for the FEC's dismissal of a complaint, the district court reviewing any petition from a dismissal of a complaint

by the FEC is unable to resolve the matter because to do so would stray beyond the judicial and administrative roles mandated for the court and the FEC respectively by the Supreme Court.

*Common Cause v. Fed. Election Comm'n*, 906 F.2d 705, 706-07 (D.C. Cir. 1990), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

54. Accordingly, in order to give meaningful effect to the statutory right to judicial review conferred on any “party aggrieved” by 2 U.S.C. § 437g(a)(8)(A), the FEC by law must provide an explanation for its dismissal of any complaint within the 60-day period in which a petition for review of the dismissal must be filed.

55. The FEC’s pattern and practice of knowingly failing to issue a statement of reasons or other explanation for its action within 60 days of dismissing a complaint, thereby effectively preventing complainants from seeking further judicial review, is arbitrary, capricious, an abuse of discretion, and contrary to law.

56. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 2 U.S.C. § 437g(a)(8) and has acted arbitrarily and capriciously in failing to provide an explanation for dismissals of complaints within 60 days of the dismissals. Plaintiffs are also entitled to an injunction compelling defendant FEC to provide a Statement of Reasons or other explanation for dismissing any complaint sufficiently within 60 days of the dismissal so as to permit a complainant to file a petition for review with the U.S. District Court for the District of Columbia.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court:

(1) Declare that the FEC’s dismissal of MUR 5908 without providing a Statement of

Reasons or other explanation for the dismissal is contrary to law;

(2) Remand the matter to the FEC with an order to conform to the declaration within 30 days;

(3) Declare the failure of the FEC to provide a Statement of Reasons or other explanation for dismissing complaints within 60 days of such dismissals arbitrary, capricious, and contrary to law;

(4) Order the FEC to issue a Statement of Reasons or other explanation for dismissing complaints sufficiently within 60 days of such dismissals so as to permit a complainant to file a petition for review with the U.S. District Court for the District of Columbia;

(5) Award plaintiff its costs, expenses, and reasonable attorneys' fees in this action; and

(6) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Anne L. Weismann  
D.C. Bar No. 298190  
Melanie Sloan  
D.C. Bar No. 434584  
Citizens for Responsibility and Ethics  
in Washington  
1400 Eye Street, N.W., Suite 450  
Washington, D.C. 20005  
Telephone: (202) 408-5565  
Fax: (202) 588-5020  
[Aweismann@citizensforethics.org](mailto:Aweismann@citizensforethics.org)

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