UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JORGE VILLANUEVA, *et al.*,
Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATIONS, *et al.*,

Defendants.

Civil Action No. 98-1704 (CKK)

MEMORANDUM OPINION

This case comes before the Court on a motion to dismiss Count II of Plaintiffs' complaint by Defendants Federal Bureau of Investigation ("FBI"), Department of Justice ("DOJ"), Attorney General Janet Reno, FBI Director Louis Freeh, President William J. Clinton, and the United States (collectively "Defendants"). Plaintiffs are former or current FBI employees who allege that, during their employment, they made protected disclosures against the FBI and have suffered reprisals as a result of those disclosures. In addition to challenging the allegedly adverse employment action, Plaintiffs allege that the administrative regulations enacted pursuant to 5 U.S.C. § 2303 are unlawful and should be set aside and that Defendants should be enjoined to enact lawful regulations pursuant to Section 2303. Defendants move to dismiss Count II on the grounds that this Court lacks jurisdiction over those claims because, inter alia, Plaintiffs have failed to exhaust their administrative remedies prior to seeking relief from this Court, Plaintiffs lack standing, and/or Plaintiffs' claims are unripe. Defendants' motion is granted in part and denied in part.

I. BACKGROUND

A. Statutory Background

This case concerns the protections afforded to FBI employees who disclose information to the Attorney General regarding the illegal conduct of their employers. Congress sought to protect such "whistleblower" employees by passing the Whistleblower Protection Act ("WPA") of 1989 as part of the amendments to the Civil Service Reform Act ("CSRA"). *See* Pl. Opp. at 2. As part of the WPA, 5 U.S.C. § 2303 requires the Attorney General to prescribe regulations that protect FBI whistleblowers and requires the President of the United States to enforce those regulations in a manner consistent with similar sections of the United States Code.[1] *See* 5 U.S.C. § 2303 (b) and (c).

In response to the Section 2303 mandate, the DOJ issued interim and proposed regulations concerning whistleblower rights for FBI employees on November 10, 1998. *See* Whistleblower Protection for Federal Bureau of Investigation Employees, 63 Fed. Reg. 62937 (1998). On November 1, 1999, the DOJ issued final regulations providing whistleblower protection for FBI employees and marked them for inclusion in Title 28 of the Code of Federal Regulations, Part 27.

B. Factual Background

This matter comes before the Court on the Third Amended and Supplemental Complaint ("TASC") of the four Plaintiffs. Plaintiff Dr. Jorge L. Villanueva is a former FBI chemist. *See*

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[1]Section 2303(c) provides that "the President shall provide for the enforcement of this section in a manner consistent with applicable provisions of section 1214 and 1221 of this title." 5 U.S.C. § 2303 (c).

TASC ¶ 2. Plaintiff Thomas M. Chamberlain is a former FBI Special Agent. *See id.* ¶ 3. Plaintiff Cheryl J. Whitehurst is a former FBI employee at the GS-13 level. *See id.* ¶ 4. Anonymous Plaintiff "John Doe" is currently an FBI special agent. *See id.* ¶ 5.

Each Plaintiff alleges that the Defendants engaged in personnel practices that are prohibited by 5 U.S.C. § 2303, and that each Plaintiff has made whistleblower disclosures that are protected by 5 U.S.C. § 2303.[2] *See* TASC ¶ 22. Specifically, Plaintiff Villanueva alleges that he was one of the only employees in his unit who declined to sign a petition circulated in support of a Supervisory Special Agent ("SSA") who was placed on administrative leave for misconduct. Villanueva alleges that the circulation and posting of the petition in February 1997 were "improper, illegal and created a hostile work environment for those FBI Laboratory employees who agreed with the . . . findings on FBI Laboratory practices and misconduct." *Id.* ¶¶ 24, 25. In September 1997, Villanueva disclosed to FBI officials that someone had forged the signature of the peer-reviewing official on the Report of Examination that Villanueva prepared for use in the FBI's Moot Court Training Program. *See id.* ¶ 26.

On September 25, 1990, Plaintiff Chamberlain disclosed to a federal judge information regarding alleged Title III wiretapping violations by FBI employees between 1987 and 1990.

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[2]Section 2303(a) provides:

> Any employee of the FBI . . . shall not . . . take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—
>
> (1) a violation of any law, rule, or regulation, or
>
> (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C.A. § 2303(a).

See id. ¶ 23. In addition, Chamberlain made additional disclosures between 1991 and 1994 to the FBI and DOJ regarding wiretap violations and whistleblower retaliation. *See id.*

Between March and September 1998,[3] Plaintiff Whitehurst claims that she made several protected disclosures to the FBI and DOJ. *See id.* ¶ 28. Whitehurst alleges that she sent a letter on June 2, 1998, to Attorney General Reno seeking relief from "continuing harassment and retaliation in violation of the Whistleblower Protection Act." *Id.* Furthermore, Whitehurst alleges that she witnessed additional violations of 5 U.S.C. § 2303(a)(1) and (2) between March and September 1998, and that she feared disclosing such violations because of the retaliation she had suffered in the past. *See id.* Finally, Whitehurst alleges that she was "chilled" from making disclosures and from pursuing administrative complaints because the statutory whistleblower protections of 5 U.S.C. § 2303 were not in place before November 1, 1999. *Id.* ¶ 30.

Plaintiff Doe makes a general allegation that he has made disclosures which fall within the protections of 5 U.S.C. §§ 2303(a)(1) and (2). *See id.* ¶ 31.

Plaintiffs seek monetary damages and injunctive relief for the alleged reprisals they claim to have suffered as a result of their whistleblower activities. *See* TASC ¶ 55. In addition, Plaintiffs challenge the validity of the DOJ's whistleblower protection regulations as being contrary to statutory and constitutional law. *See id.* ¶¶ 52, 53. Lastly, Plaintiffs seek injunctive and/or mandamus relief for the Attorney General's failure to report to the President regarding

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[3]Plaintiff Whitehurst also alleges to have made protected disclosures between 1991 and 1993, and between 1995 and 1997. *See* TASC ¶ 27. However, Whitehurst concedes that she signed a general release of these claims against defendants in March 1998. *Id.* ¶ 29. Accordingly, this Court will address only those complaints made after March 1998.

FBI whistleblower reprisals. *Id.* at ¶ 53. In response, Defendants seek dismissal of these claims for lack of subject matter jurisdiction and/or failure to state a claim. *See* Def. Reply at 1.

II. DISCUSSION

This Court will not grant a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Accordingly, at this nascent stage in the litigation, the Court assumes the veracity of all factual allegations forwarded by the Complaint. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Moreover, "[t]he complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

A. Reprisal Claims:

1. CSRA

Plaintiffs allege that they made constitutionally-protected disclosures of improper FBI conduct and that the resulting actions taken by the FBI violated Plaintiffs' constitutional rights. The CSRA governs the relationship between the federal government and its employees, providing "a comprehensive system for reviewing personnel action taken against federal employees." *USIA v. KRC*, 989 F.2d 1211, 1217 (D.C. Cir. 1993) (quoting *United States v. Fausto*, 484 U.S. 439, 455 (1988)). As a result, the CSRA generally "precludes district courts from taking jurisdiction over CSRA related claims." *Steadman v. Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990) (citing *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989)). However, "our circuit's law

affords employees . . . a right to federal court review of their *constitutional* claims at the end of the line." *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1433 (D.C. Cir. 1996) (emphasis added) (citing *Spagnola v. Mathis*, 859 F.2d 223, 229-30 (D.C.Cir. 1988); *Griffith v. FLRA*, 842 F.2d 487, 494-95 (D.C.Cir.1988). "But first the plaintiff must exhaust available administrative remedies." *Id.*

In general, exhaustion of administrative remedies, as a component of subject matter jurisdiction, is tested as of the time of the filing of the complaint. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987); *F.D.I.C. v. Lacentra Trucking, Inc.*, 157 F.3d 1292, 1301 (11th Cir.1998); *Whatley v. Resolution Trust Corp.*, 32 F.3d 905, 907 (5th Cir. 1994). Accordingly, the Court will evaluate whether Plaintiffs in this case exhausted their administrative remedies as those remedies existed at the time the complaint was filed. It is notable at the outset that this case is particularly unusual because the statutorily intended administrative remedy, complete administrative review, was not available to Plaintiffs at the time of their alleged injury. *See* Pl. Opp. at 6; Pl. Stmnt. of Material Facts Not in Dispute (filed with prior motion) at ¶¶ 6-7. Thus, while the Court is reluctant to enter into employment disputes between the federal government and its employees, it cannot order Plaintiffs to now submit to an administrative system which was not in place at the time their complaint was filed. Based on the allegations in the TASC, at this early stage in the litigation, it appears that Plaintiff exhausted whatever administrative remedies were available, limited though they were, at the time the Complaint in this case was filed.[4] *See* TASC ¶¶ 44-45. Given that Plaintiffs appear to have

[4]Although Defendants' dispute whether Plaintiffs have exhausted the limited administrative remedies available at the time this suit was filed, *see* Def. Mot. at 15, for purposes of a motion to

exhausted the remedies available at the time, this Court cannot state that, based on the pleadings, judicial intervention at this point would be improperly premature. *Cf. Steadman v. Governor, United States Soldiers' and Airmen's Home*, 918 F.2d 963, 966 (D.C. Cir. 1990). Accordingly, the Court will not dismiss Plaintiffs' reprisal claims.

2. Limitation on Damages

To the extent that any of Plaintiffs' reprisal claims seek monetary damages against the institutional defendants, the United States, the DOJ, and the FBI, this Court lacks jurisdiction to provide that remedy. *See United States v. Testan*, 424 U.S. 392, 400, (1976) ("In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity...."). As to the institutional defendants, none of the statutory or constitutional bases for Plaintiffs' claims provide an applicable waiver of sovereign immunity. Count II of Plaintiffs' complaint asserts jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution. Section 702 of the APA expressly limits the remedies available thereunder to "relief other than money damages." 5 U.S.C. § 702. In addition, other than the just compensation clause, the Constitution does not waive sovereign immunity. *See Arnsberg v. United States*, 757 F.2d 971, 980 n.7 (9th

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dismiss, this Court must construe the allegations in the Complaint as true. *See Doe*, 753 F.2d at 1102.

Cir. 1985).[5] Thus, inasmuch as Plaintiffs seek money damages against the institutional defendants, those claims for damages shall be dismissed.

3. Bivens Claims

Plaintiffs also seek money damages against the individual defendants, the President, the Attorney General, and the Director of the FBI, for the alleged deprivation of their First Amendment rights under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Plaintiffs argue that their *Bivens* action is viable under *Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1987). In *Spagnola*, a federal employee was permitted to bring a First Amendment *Bivens* action against two of his superiors in their individual capacities. *See Spagnola*, 809 F.2d at 19. In allowing Spagnola's claim, the court pointed out that there are two situations where *Bivens* actions are not available: (1) if Congress explicitly declares an equally effective remedy to be a substitute for recovery directly under the Constitution, and (2) when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* Finding the first situation inapplicable, the *Spagnola* court examined the suit for the presence of such "special factors" and found that the "special factors" relevant to Spagnola's claim were distinct from the factors which prohibited a *Bivens* action in *Bush v. Lucas*, 462 U.S. 367 (1983). *Id.* at 19-20. In *Bush*, the court denied a *Bivens* claim, holding that the elaborate remedies provided under the

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[5]None of the other jurisdictional statutes cited by Plaintiffs waive sovereign immunity either. The federal question jurisdiction statute, 28 U.S.C. § 1331, does not waive sovereign immunity. The Little Tucker Act, 28 U.S.C. § 1346(a)(2), has been read to bar federal employees from recovering back pay where the court relies on Tucker Act jurisdiction. *See United States v. Fausto*, 484 U.S. 439, 454 (1988). Likewise, neither the mandamus statute, 28 U.S.C. § 1361, nor the supplemental jurisdiction statute, 28 U.S.C. § 1367, nor the venue statute, 28 U.S.C. § 1391, purport to waive sovereign immunity.

CSRA were intended by Congress to be exclusive and were adequate to redress the constitutional claims of a demoted federal employee alleging retaliation for the exercise of his First Amendment rights. *See* 462 U.S. at 385. However, the court in *Spagnola* distinguished *Bush* on the finding that the remedial scheme with regard to the plaintiff in *Spagnola* was inadequate and not comprehensive. *See Spagnola*, 809 F.2d at 19-20. Specifically, the *Spagnola* court found the administrative remedy inadequate because, unlike in *Bush*, "other than the internal grievance process," the plaintiff had no other remedy than to "request to the Office of Special Counsel of the MSB to investigate and prosecute his claims." *Id.* at 20-21. As a result, the *Spagnola* court allowed the plaintiff to bring his *Bivens* claims against his superiors. *See id.* at 22-23.

Plaintiffs in the instant case argue that *Spagnola*, not *Bush*, controls, because the administrative remedies in this case are not comprehensive and are inadequate to remedy Plaintiffs' constitutional complaints. Assuming arguendo that Plaintiffs are correct that their case more closely resembles *Spagnola*, and as a result, they are entitled to pursue a *Bivens* action, the allegations in Plaintiffs' complaint are nonetheless insufficient to state a claim against the individuals named therein.

"Plaintiffs bringing suit against public officials generally must put forward, in their complaints or other supporting materials, greater factual specificity and 'particularity' than is usually required." *Martin v. Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987). Plaintiffs' TASC does not allege that the individual defendants engaged in any action or omission bearing a causal connection to Plaintiffs' alleged reprisals for their speech. In addition, the TASC does not name the individual defendants "in their individual capacities." As a result Plaintiffs' pleadings do not appear to meet the specificity requirement set forth in *Martin*.

Plaintiffs' only relevant allegation against the President and the Attorney General is that they have "failed to perform a clear and ministerial duty to provide Plaintiffs . . . with the right to seek remedies pursuant to 5 U.S.C. § 2303(c)." TASC ¶ 49. As an initial matter, Defendants correctly point out that the President is generally immune from liability for acts which fall beyond the "outer perimeter" of his official responsibilities, as his acts relevant to this case appear to fall. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Furthermore, the only actions or omissions alleged against the individual defendants in Plaintiffs' TASC impact Plaintiffs' rights under Section 2303; Plaintiffs fail to allege that the individual defendants engaged in any act or omission which directly violated their constitutional rights. *See* TASC ¶ 46 ("Defendants' denial of the right of plaintiffs . . . to seek relief and remedies pursuant to 5 U.S.C. § 2303(c) deprives plaintiffs of their rights to due process in violation of the Fifth Amendment to the U.S. Constitution and violates plaintiffs' rights under the First, Fourth, and Ninth Amendments."); ¶ 49 ("The Attorney General and the President have failed to perform a clear and ministerial duty to provide plaintiffs . . . with the right to seek remedies pursuant to 5 U.S.C. § 2303(c)"); ¶ 52 ("[D]efendants' failure to promulgate regulations pursuant to 5 U.S.C.§ 2303(c), or enforce the law pursuant to 5 U.S.C. § 2303(b) and (c), have constrained the exercise of . . . freedom of speech guaranteed by the First Amendment . . ."). So called "*Bivens* actions" are "federal cause[s] of action for violation of [] rights by federal officials." *Bivens*, 403 U.S. at 409. Thus, a *Bivens* action will not lie for violations of statutory rights. Plaintiffs' allegations against the President and the Attorney General concern statutory rights. They make no allegation that the President or the Attorney General's acts or omissions resulted in reprisals in violation of Plaintiffs' constitutional rights. To the contrary, Plaintiffs allege a denial of a proper remedy

under 5 U.S.C. § 2303. This lack of remedy is not, in itself, a violation of the First Amendment. In addition, Plaintiffs' TASC lacks any specific allegations against FBI director Louis Freeh. Thus, Plaintiffs have failed to allege constitutional violations against the individual defendants.

In their opposition, Plaintiffs failed to respond to Defendants' argument that their *Bivens* claims are not sufficiently pled, and they have not moved the Court to allow them to cure these defects by amending their complaint. Instead, Plaintiffs argue that it is "premature" for the Court to "determine that Plaintiffs lack [] a *Bivens* remedy." Pl. Opp. at 43. The Court disagrees. Accordingly, Plaintiffs' *Bivens* actions against the individual defendants shall be dismissed.[6]

B. Plaintiffs' Non-Reprisal Claims

Plaintiffs allege that Defendants' failure to implement whistleblower protection regulations as required by 5 U.S.C. § 2303 denied Plaintiffs their right to obtain an independent investigation or adjudication of their allegations of whistleblower reprisal and their right to obtain corrective action under Section 2303(c). Pursuant to those allegations, Plaintiffs insist that they have the right to bring an APA challenge to the whistleblower regulations promulgated under Section 2303. In a similar vein, Plaintiffs argue that the whistleblower regulations, as currently enacted, violate Plaintiffs' rights under the First, Fourth, and Ninth Amendment rights, as well as their right to due process under the Fifth Amendment. *See* TASC ¶¶ 44, 46. As grounds for dismissal, Defendants argue that Plaintiffs lack standing to bring an APA challenge,

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[6]It is also noteworthy that Defendants contention that Defendants were not properly served with the Second and Third Amended Complaints remains unanswered by Plaintiffs' Opposition. *See* Def. Mem. at 11 n.4.

that Plaintiffs' constitutional challenges are improper attempts to circumvent the CSRA, and that the constitutional challenge is not ripe. *See* Def. Mem. at 12.

1. APA Claims

Plaintiffs seek a declaratory judgment that the regulations promulgated by the Defendants violate the APA because they do not comply with the requirements of 5 U.S.C. § 2303. Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The agency action relevant to Plaintiffs' APA claim is the issuance of the allegedly improper whistleblower regulations pursuant to 5 U.S.C. § 2303. As a remedy, under 5 U.S.C. § 706, Plaintiffs seek injunctive relief, requiring the Attorney General to promulgate new or additional regulations which comply with the requirements of Section 2303. Assuming without analysis that the FBI's whistleblower regulations are reviewable as "final agency actions," it still does not appear that Plaintiffs can bring a challenge to the regulations under the APA.

The relevant question in this case, as in any APA case, is whether Plaintiffs were "adversely affected" by the challenged agency action, here the alleged inadequacy of the whistleblower regulations. *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333 (D.C. Cir. 1999) (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990). "To be so situated [Plaintiffs] must satisfy all constitutional standing requirements and must demonstrate that their injury is 'to interests of the sort protected' by the statute." *Id.* (citing *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C.Cir.1996) (*en banc*)). "To have constitutional standing, a party must establish that it has 'personally ... suffered some actual or threatened injury,' which may be 'fairly ... traced to the challenged action' and is 'likely to be redressed by a favorable decision' of

the court." *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Plaintiffs fail to meet the first standing requirement– injury in fact.

When Plaintiffs originally filed suit, their APA claim challenged the complete failure of the DOJ to issue regulations pursuant to 5 U.S.C. § 2303. At that time, Plaintiffs were harmed by the absence of regulations because they appear to have been denied their § 2303 rights to full administrative process. The remedy, at that time, would have been for this Court to order the DOJ to promulgate appropriate regulations so that Plaintiffs could obtain more thorough administrative review. *See* 5 U.S.C. § 706.[7] However, since the time Plaintiffs filed their original Complaint, whistleblower regulations have been promulgated pursuant to Section 2303. *See* 28 C.F.R. § 27. Accordingly, Plaintiffs' initial injury, lack of administrative process, has been cured without this Court's intervention.

Plaintiffs then amended their complaint to challenge the new regulations promulgated by the DOJ, arguing that these regulations violate the APA on the ground that they are not in accordance with the statutory mandate of Section 2303. *See* TASC. However, Plaintiffs lack standing to bring this new claim because they have not subjected themselves to the new regulations. Having not brought themselves under the new regulations, Plaintiffs cannot have suffered any new injury which results from the alleged inadequacy of the regulations. Similarly, with the exception of John Doe,[8] Plaintiffs are no longer employed by the FBI, so they no longer

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[7]Lacking that remedy, Plaintiffs exhausted the limited administrative procedures available, and now seek relief from their reprisals in this Court. *See supra*, Section II. A.

[8]John Doe does not impact this analysis because the facts alleged in the TASC relevant to Plaintiff Doe fail to state a claim for which relief can be granted. *See infra* Section II.D.

fall within the scope of persons protected by the regulations. It would be overly speculative at this point for the Court to presume that Plaintiffs will once again be employed by the FBI and that they will then suffer some harm due to the allegedly inadequate regulations. Plaintiffs have suffered no injury under the new regulations, and this Court cannot speculate as to potential injury which is not yet concrete. By the same token, if this Court were to find that Plaintiffs had suffered some injury, the appropriate APA remedy under 5 U.S.C. § 706– a Court order that the DOJ amend the regulations so that they comply with Section 2303– would not affect Plaintiffs, as they no longer possess interests which are protected by Section 2303. Therefore, Plaintiffs lack standing to bring an APA challenge to the current whistleblower regulations and the relevant portions of their TASC shall be dismissed.

2. Constitutional Claims

a. Exhaustion

Citing to *Steadman*, Defendants insist that Plaintiffs cannot "circumvent" the CSRA by bringing constitutional claims and asserting that they are distinct from their reprisal claims. *See* Def. Mem. at 12-13. While *Steadman* does stand for the general principle that litigants must seek relief first under a statutory scheme before seeking relief under a constitutional scheme, *Weaver* provides an exception to that rule. *See Weaver*, 87 F.3d at 425. The *Weaver* court ruled that where the constitutional challenges to the regulations, or lack thereof, stand independently of challenges to a reprisal, a plaintiff is "entitled to pursue her non-CSRA claim for declaratory and injunctive relief without having exhausted her administrative remedies." *Id.* The *Weaver* court allowed these claims on the grounds that the district court would always have jurisdiction, regardless of exhaustion, over a "simple pre-enforcement attack on a regulation." *See id.* Thus,

to the extent that Plaintiffs seek injunctive relief for the alleged denial of their constitutional rights, those challenges to the whistleblower regulations are not dismissible on the ground that Plaintiffs have failed to exhaust their administrative remedies.[9] However, these claims are dismissible on ripeness grounds.

b. Ripeness

Plaintiffs contend that the regulations promulgated under Section 2303 violate their rights under the Constitution. Defendants argue that Plaintiffs' challenges to the Section 2303 regulations are not ripe for review because, according to Defendants, the regulations have not had some concrete effect upon Plaintiffs. The "basic rationale" behind the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). In this case, it is clear that the DOJ whistleblower regulations have been formally promulgated. *See* 28 C.F.R. § 27. The more difficult question is whether Plaintiffs have felt the effects of those policies in any concrete way; this Court finds that they have not.

The Part 27 regulations do not require Plaintiffs to take any affirmative action, nor do they prevent Plaintiffs from engaging in any particular action or speech. As a result, Plaintiffs' rights have not been impacted by the alleged unconstitutionality of the regulations. Thus,

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[9]Moreover, for the same reasons discussed *supra*, Section II.A., the facts alleged in the TASC give rise to a presumption, for purposes of evaluating Defendants' motion, that Plaintiffs have exhausted the administrative remedies available prior to filing their initial Complaint.

Plaintiffs' reliance on *Burlington Northern Railroad Co. v. Surface Transportation Bd.*, 75 F.3d 685 (D.C. Cir.1996), is misplaced because the regulations in *Burlington* were "compulsory" and "had immediate effects on legal rights relating directly to the parties' primary conduct." *Id.* at 690. By the same token, this case is unlike *Weaver*, where the Court stated, without specifically referring to ripeness, that it "would have jurisdiction over a pre-enforcement attack on a regulation." 87 F.3d at 1434. The pre-enforcement challenge Plaintiffs propose is distinct from the specific one addressed in *Weaver*, because the plaintiff in that case sought to challenge a regulation which worked a prior restraint on her speech. *See id.* The regulations in this case involve no such prior restraint and cannot be subject to "facial challenge" as Plaintiffs insist.

To the contrary, the regulations Plaintiffs seek to challenge, for the most part, interpret 5 U.S.C. § 2303. *See* 28 C.F.R. § 27. Thus, in order to feel their effects, Plaintiffs would have to submit themselves to the regulations by seeking a remedy under those regulations. At this stage in the litigation, the Court has already determined that because of the unusual timing of the enactment of the administrative remedies in this case, Plaintiffs are not required to exhaust the remedies enacted after their claims arose, in order to bring their reprisal claims. However, because Plaintiffs have not sought any relief under these same newly enacted administrative procedures, any attack that those procedures violate their First Amendment rights is, at this point, not yet ripe, as these procedures have not impacted Plaintiffs in any concrete way. Accordingly, the Court will not consider the future impact of the whistleblower regulations on Plaintiffs' constitutional rights, because any such impact remains speculative. Thus, Plaintiffs' constitutional challenges to the regulations promulgated in 28 C.F.R. § 27 must be dismissed.

C. Plaintiffs' Reporting Requirement Claims

Paragraph 53 of Plaintiffs' TASC seeks a "writ of mandamus and/or an injunction . . . to direct and compel the Attorney General and/or the President of the United States to perform their duties . . . pursuant to 5 U.S.C. § 2303(c)." Section 2303(c) provides that "[t]he President shall provide for the enforcement of this section . . ." Plaintiffs allege that in April of 1997, the President issued a written memorandum to the Attorney General directing her "to establish appropriate processes within the Department of Justice to carryout" the "functions" mandated by 5 U.S.C. § 2303(c). TASC ¶ 47. Plaintiffs further allege that the President also required the Attorney General to provide him with a report on March 1 of each year stating the status of all whistleblower reprisal allegations received during the preceding calendar year, but that the Attorney General has failed to do so. *Id.* As a result of this alleged failure, "Plaintiffs seek mandamus relief pursuant to the mandamus statute and injunctive relief pursuant to the APA to compel defendants to comply with this mandatory reporting requirement." Pl. Opp. at 37.

1. Mandamus

Defendants argue that this Court lacks jurisdiction over Plaintiffs' mandamus request. The mandamus statute, 28 U.S.C. § 1361, provides jurisdiction over mandamus requests "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Based on the facts alleged by Plaintiffs, argue Defendants, the only duty created by the President's directive is owed to the President, not to Plaintiffs. Plaintiffs insist, however, that there is a duty owed to them in that "the President will not have the information necessary to enforce the whistleblower rights for FBI employees." Pl. Opp. at 38. This Court disagrees.

Despite Plaintiffs' contentions to the contrary, the President's potential need for information provided by the Attorney General does not afford Plaintiffs a legal right to demand that the Attorney General act. The Attorney General owes a duty to the President, and only the President may demand action pursuant to that duty. Accordingly, a writ of mandamus is not available to Plaintiffs under 28 U.S.C. § 1361.

2. Injunction

Defendants also argue that injunctive relief is not available for Plaintiffs' claims under the APA. Under 5 U.S.C. § 704, judicial review is only available for "final agency action." Pursuant to that limitation, Defendants argue that the annual reports concerning FBI whistleblowers are not final agency action because they are merely advisory and do not affect the rights of FBI employees. *See* Def. Mem. at 28. In *Bennett v. Spear*, 520 U.S. 154, (1997), the Supreme Court explained that two conditions must be satisfied for agency action to be 'final': "First, the action must mark the 'consummation' of the agency's decisionmaking process- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78 (citations omitted). Neither requirement is met in the present case.

As an initial matter, Defendants' alleged failure to file a non-binding report to the President does not appear to represent "consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78. The Supreme Court has held that the issuance of a report to the President, even if required by statute, is not "final agency action." *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Specifically, the *Franklin* Court stated that the "Secretary's report to the President is an unusual candidate for 'agency action' within the

meaning of the APA" because no rights were vested by the report. *Id.* That is, after the President received the report, he had to take additional steps before the plaintiffs in that case secured any rights. *See id.* Accordingly, the *Franklin* Court held that "the final action complained of is that of the President," but that because "the President is not an agency within the meaning of the [APA] . . . there is no final agency action that may be reviewed under the APA standards." *Id.* Like the report to the President discussed in *Franklin*, the report to the President at issue in this case will not impact Plaintiffs' rights until the President takes some action. Thus, the issuance of that report, or failure to issue it, is not "final agency action" for the purposes of APA review.

Furthermore, even if the Court construes Defendants' failure to act as a "final decision" not to act, there are no "rights and obligations" determined by that failure to act, nor legal consequences which flow from it. *Bennett,* 520 U.S. at 179 (explaining that presentation of a report to the President does not constitute "final agency action," because there are no "direct consequences" of filing the report) (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). The situation alleged in Plaintiffs' complaint is analogous to that described in *Bennett.* The failure of the Attorney General to report to the President, as directed, "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939). Therefore, APA review of the Attorney General's failure to act is not available, and the portions of Plaintiffs' TASC which seek an injunction against the Attorney General for her failure to act must be dismissed.

D. Plaintiff John Doe

Plaintiff "Doe" alleges that he has made protected disclosures which fall within the protections of 5 U.S.C. §§ 2303(a)(1) and (a)(2) and that he has suffered adverse or prohibited personnel actions as a result of these disclosures. *Id.* ¶¶31, 33. Based on the complaint, Mr. Doe has not alleged facts sufficient to state a claim pursuant to Fed. R. Civ. P. 8(a), which merely requires "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff claims and the grounds upon which the claim rests. *See M.K. v. Tenet*, 99 F.Supp. 2d 12, 18 (D.D.C. 2000) (quoting *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). The threshold to making a proper claim is admittedly a low one. Earlier this year, this Court reiterated the well established rule that "the averments in the complaint are taken as true, and the plaintiff is given the benefit of any doubts and of all reasonable inferences that can be drawn from the facts alleged." *See M.K.* at 16 (citations omitted). However, for purposes of determining whether a complaint states a cause of action for which relief can be granted, a court need not accept legal conclusions that are cast as factual allegations. *Id.* (citations omitted).

In comparison to the three named plaintiffs who point to specific prohibited personnel actions visited upon them by defendants,[10] John Doe merely regurgitates the language of 5 U.S.C. § 2303. Defendants correctly point out that "the allegations concerning John Doe do not

[10]Plaintiff Villanueva alleges that he was "subject to harassment, discrimination and retaliatory treatment by FBI employees and managers, and the FBI terminated his employment;" Plaintiff Whitehurst alleges that she was subject to "escalating harassment, retaliation and a hostile work environment" and that this retaliatory treatment resulted in her constructive discharge; Plaintiff Chamberlain alleges that he was "subjected to retaliatory investigations by the FBI ... between 1991 and 1994, and the FBI terminated [his] employment." *See TASC* ¶ 33. Plaintiff Doe makes no such concrete or factual allegations.

name him, his position, the type of disclosures made, the recipient of the disclosures, or the adverse action or prohibited personnel action suffered." *See* Def. Reply at 20. Plaintiffs' response to Defendants' assertion that John Doe has failed to allege facts sufficient to state a claim only insists that the allegations in the TASC are sufficient. *See* Pl. Opp. at 26-27. Plaintiffs have not sought to amend their complaint. Lacking at least some of the aforementioned information, the Court finds that the complaint fails to provide defendants with fair notice of what John Doe's claim is and upon what grounds it is based. Thus, because Plaintiff John Doe has failed to allege facts upon which relief may be granted, Defendant's motion, to the extent it seeks dismissal of John Does's claims, must be granted. *See* Fed. R. Civ. P. 12(b)(6).

V. CONCLUSION

Based on the allegations in the TASC, at this early stage, it appears that Plaintiffs' reprisal claims may stand because Plaintiffs allege that they have exhausted the then-available administrative remedies. This Court will not require Plaintiffs to exhaust newly enacted administrative remedies which were unavailable at the time Plaintiffs filed their initial Complaint. However, by the same token, Plaintiffs cannot now challenge the adequacy of administrative processes which do not affect them. Plaintiffs' APA challenge to the regulations must be dismissed for lack of standing because Plaintiffs possess no statutory rights which are currently impacted by the whistleblower regulations. Likewise, Plaintiffs cannot now challenge the constitutionality of regulations which have no immediate impact upon them. Therefore, Plaintiffs' constitutional challenges to 28 C.F.R. § 27 are not ripe for review and must also be dismissed.

In addition, Plaintiffs' claims for money damages against the institutional defendants must be dismissed because there has been no waiver of sovereign immunity. Likewise, Plaintiffs' *Bivens* claims shall also be dismissed, as Plaintiffs have failed to allege facts sufficient to state a claim for the violations of constitutional rights by the individual defendants. Furthermore, Plaintiffs have failed to state valid claims for mandamus and injunctive relief from the Attorney General's failure to report annually to the President on the status of all reprisal claims. Accordingly, Plaintiffs' request for mandamus relief, against the President and Attorney general, and injunctive relief, against the Attorney General, shall be dismissed. Finally, Plaintiff John Doe's claims must be dismissed as they do not allege any specific facts, and merely regurgitate the language in the relevant statutes.

An appropriate Order accompanies this Memorandum Opinion.

December 5, 2000

COLLEEN KOLLAR-KOTELLY
United States District Judge