

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

_____	)	
CAMPAIGN LEGAL CENTER ET AL.,	)	
	)	
Plaintiffs,	)	Civ. No. 1:23-cv-03163 (APM)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MOTION FOR SUMMARY
	)	JUDGMENT
Defendant.	)	
_____	)	

**FEDERAL ELECTION COMMISSION’S MOTION FOR SUMMARY JUDGMENT**

In accordance with the Court’s February 26, 2024, Scheduling Order, defendant Federal Election Commission (“FEC” or “Commission”) respectfully moves this Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h). In support of this motion, the Commission is filing the accompanying Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment; the Declaration of Neven Stipanovic of the FEC, attached hereto as Exhibit 1; and the Declaration of Paul Clark of the FEC, attached hereto as Exhibit 2. The Commission is also filing a Proposed Order.

Respectfully submitted,

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May 2, 2024

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FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
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_____	)	

**FEDERAL ELECTION COMMISSION’S MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT  
AND IN OPPOSITION TO PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The Federal Election Commission (“FEC” or “Commission”) is entitled to summary judgment on plaintiffs Campaign Legal Center (“CLC”) and OpenSecrets’ suit alleging that the Commission has violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (the “APA”) by unreasonably delaying action on a petition filed by the plaintiffs in which they seek the promulgation of rules governing reporting for segregated national party committee accounts.<sup>1</sup>

Because the facts show that the Commission has acted reasonably in its handling of plaintiffs’ petition, it should be permitted to proceed as it ordinarily would in processing any petition: with an eye toward thoroughness and consistent with the Commission’s priorities. Courts in this Circuit evaluate the reasonableness of an agency’s action by weighing a number of factors. The most important are whether: (1) the agency has acted according to a “rule of reason” when its actions are viewed holistically; and (2) expediting action would displace the agency’s own choice of priorities.

Applying these factors, plaintiffs have failed to demonstrate any unreasonable delay. The Commission has acted pursuant to a reasonable timeline in light of both resource constraints and numerous exigent priorities since plaintiffs’ petition was filed. First, shortly after the plaintiffs’ petition was filed, the Commission lost its quorum for more than a year as a consequence of Congress’s failure to confirm a full slate of Commissioners. During that time, the Commission was statutorily unable to act on the petition, and therefore this period should not be weighed against the agency. Second, following the restoration of the quorum the Commission faced a

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<sup>1</sup> The signatories to the petition were CLC and the Center for Responsive Politics. Plaintiffs state that the Center for Responsive Politics has since been merged into plaintiff OpenSecrets. Plaintiffs’ Mot. for Summary Judgment and Memorandum of Points and Authorities in Support (“Pls.’ Mem.”) at 11, Docket No. 20.)

historic workload, including a sizeable backlog with 446 pending enforcement matters and 275 staff reports awaiting Commission decision, including dozens of recommendations nearing the expiration of the relevant statute of limitations, while significantly understaffed. Nevertheless, the Commission has taken meaningful steps in considering plaintiffs' petition alongside many other important rulemakings. It has solicited two rounds of comments on plaintiffs' petition, including one round in the last few months. And, much of the information plaintiffs seek about contributions to and disbursements from segregated party accounts—though already available now—will become more easily accessible within the coming months.

In addition, the Commission has made reasonable decisions about how to prioritize its resources, including by providing statutorily mandated responses to requests from the regulated community and by devoting time and attention to completing high-priority rulemakings. Since 2021 the Commission has completed 23 rulemakings, including highly anticipated rulemakings addressing internet communication disclaimers that impact billions of dollars in spending per election cycle and updated rules on candidate salaries that make running for federal office more accessible to ordinary, working-class citizens. Prioritizing these impactful rulemakings ahead of plaintiffs' petition is all the more reasonable given that the Commission has not left those with a stake in segregated party account reporting in the dark and has in fact provided reporting guidance that addresses the precise issues plaintiffs seek to address with their petition. Comments provided to the Commission in the past two months indicate that this guidance has been effective in guiding the parties' segregated accounts reporting in the interim and that there is no urgency to adopt formal rules in the midst of a presidential election year.

Because the Commission has not unduly delayed in acting on plaintiffs' petition, the Commission's motion for summary judgment should be granted in its entirety, and plaintiffs' motion should be denied.

## **BACKGROUND**

### **I. STATUTORY AND REGULATORY BACKGROUND**

#### **A. The Commission**

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. § 30101-45 ("FECA"). Commissioners are appointed by the President and confirmed by the Senate. 52 U.S.C. § 30106(a)(1). Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC is required under FECA to make substantive decisions through majority votes of at least four Commissioners. *Id.* § 30106(c). In particular, four votes are required to engage in rulemaking and amend any forms. *Id.* §§ 30106(c), 30107(a)(8). Four votes are also required to issue advisory opinions, hold hearings, initiate litigation or defend the agency in new litigation brought pursuant to 52 U.S.C § 30109(a)(8) (concerning judicial review of enforcement dismissals), conduct investigations and make referrals to other enforcement agencies, or approve enforcement actions and audits. *Id.* §§ 30106(c), 30107(a)(6)-(9), 30109(a).

#### **B. The Commission's Rulemaking Process**

Pursuant to Commission regulations, "[a]ny interested person may file with the Commission a written petition for the issuance, amendment, or repeal of a rule" implementing

FECA. 11 C.F.R. § 200.2(a)(1). The regulations set forth detailed steps guiding how petitions for rulemaking are processed. Upon receipt of a petition, the Commission will “[p]ublish a Notice of Availability in the Federal Register, stating that the petition is available for public inspection in the Commission’s Public Records Office and that statements in support of or in opposition to the petition may be filed within a stated period after publication of the notice.” *Id.* § 200.3(a)(1). In addition, “[i]f the Commission decides that a Notice of Inquiry, Advance Notice of Proposed Rulemaking, or a public hearing on the petition would contribute to its determination whether to commence a rulemaking proceeding, it will publish an appropriate notice in the Federal Register, to advise interested persons and to invite their participation.” *Id.* § 200.3(c).

In any event, “[t]he Commission will not consider the merits of the petition before the expiration of the comment period on the Notice of Availability.” *Id.* § 200.3(d). In its deliberations, “[t]he Commission will consider all comments filed within the comment period prescribed in the relevant Federal Register notice” and may consider, at its discretion, comments received after the period closes. *Id.* § 200.3(e).

Once it has considered any comments on a Notice of Availability, Notice of Inquiry, Advance Notice of Proposed Rulemaking, or public hearing, as well as “any other information relevant to the subject matter of the petition, the Commission will decide whether to initiate a rulemaking.” *Id.* § 200.4(a). If the Commission decides not to proceed with a rulemaking, it “publish[es] a Notice of Disposition in the Federal Register and notif[ies] the petitioner.” *Id.* § 200.4(b). The Notice of Disposition includes a “brief statement of the grounds” for the Commission’s decision. *Id.* The regulations do not supply a timeline to decide to initiate a

rulemaking or issue a Notice of Disposition. *See generally id.* § 200.4. In deciding on a petition for rulemaking, the Commission may consider, *inter alia*:

- (a) The Commission's statutory authority;
- (b) Policy considerations;
- (c) The desirability of proceeding on a case-by-case-basis;
- (d) The necessity or desirability of statutory revision;
- (e) Available agency resources.

*Id.* § 200.5.

As noted, each of the various steps the Commission must or may take throughout this process, such as issuing a Notice of Availability, Notice of Inquiry, or Advance Notice of Proposed Rulemaking, or holding a public hearing, in addition to the decision to initiate a formal rulemaking, requires the affirmative votes of at least four FEC Commissioners. *See supra* Background Part I.A; 52 U.S.C. §§ 30106(b)(1), (c), 30107(a)(8)-(9), 30111(a)(8). In addition to these formal actions, the Commission organizes its priorities and directs agency resources for regulation matters via affirmative votes directing the drafting and preparation of notices and rules prior to a final vote by the Commissioners. (*See* Declaration of Neven Stipanovic (“Stipanovic Decl.”) ¶¶ 23-24, FEC Ex. 1.) When the Commission lacks a quorum of Commissioners, none of these actions are possible.

## **II. FACTUAL BACKGROUND**

### **A. The FEC Issues Reporting Guidance for National Party Accounts**

On December 16, 2014, the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) (“Appropriations Act”), also known as the “Cromnibus,” was signed into law. The Appropriations Act amended FECA by establishing separate limits on contributions to three types of segregated accounts for national party committees (collectively, the “segregated party accounts” or the “Cromnibus accounts”). These segregated party accounts are maintained separately by the party committees and may be used

specifically to defray expenses incurred with respect to: (1) presidential nominating conventions; (2) national party headquarters buildings; and (3) election recounts and contests and other legal proceedings. 52 U.S.C. § 30116(a)(9).

Less than two months after the Appropriations Act was passed, on February 13, 2015, the Commission issued a press release announcing interim guidance for reporting contributions to and disbursements from segregated party accounts. Press Release, FEC, FEC Issues Interim Reporting Guidance for National Party Committee Accounts (Feb. 13, 2015), <https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-committee-accounts/>; *see also* Stipanovic Decl. ¶ 4. Pursuant to the press release, the FEC issued detailed reporting guidance on its website, which is available with the materials setting forth reporting requirements for candidates and committees (the “2015 Guidance”). FEC, National Party Accounts for Certain Expenses, <https://www.fec.gov/help-candidates-and-committees/registering-political-party/national-party-accounts-certain-expenses/>. According to the 2015 Guidance, party committees are directed to report both contributions to and disbursements from the committees’ segregated party accounts on existing FEC Form 3X, clearly labeling each contribution and disbursement with the segregated party account to which it pertains, and, in the case of disbursements, the purpose. *See id.*

With respect to contributions, the 2015 Guidance states that “[n]ational party committees report contributions received into their account(s) for the Presidential nominating convention, national party headquarters buildings, and ‘recount account’ on Form 3X, Line 17.” FEC, National Party Receipts for Presidential Nominating Conventions, Headquarters and Recount Accounts, <https://www.fec.gov/help-candidates-and-committees/filing-political-party-reports/additional-national-party-accounts-receipts/>. The contribution is itemized on Schedule A,

supporting Line 17, when it exceeds \$200 or aggregates over \$200 “when added to other contributions received from the same source during the calendar year.” *Id.* A list of the required information for Schedule A follows, including the name of the account: “for example, Convention Account, Headquarters Account, [or] Recount Account.” *Id.* Included for the party committees’ reference is a sample of a Schedule A itemized receipt filled out in accordance with the 2015 Guidance to show a \$50,000 contribution to “Convention Account.” *Id.*

Regarding disbursements made from presidential nominating convention or national party headquarters accounts, the 2015 Guidance states that “[n]ational party committees report disbursements . . . on Form 3X, Line 21(b).” FEC, National Party Disbursements for Presidential Nominating Convention, Headquarters and Recount Accounts, <https://www.fec.gov/help-candidates-and-committees/filing-political-party-reports/additional-national-party-accounts-disbursements/>. Disbursements are itemized on Schedule B, supporting Line 21(b), when they exceed \$200 or aggregate over \$200 “when added to other disbursements made to the same payee during the calendar year.” *Id.* A list of the required information for Schedule B follows, including the name of the account and purpose of the disbursements: “for example, ‘Convention Account – Bookkeeping and Compliance.’” *Id.* Also included is a sample of a Schedule B itemized disbursement filled out in accordance with the 2015 Guidance to show a \$1500 disbursement for the purpose of “Convention Account – Event Security.” *Id.*

Disbursements made from recount accounts are also subject to separate guidance. National committees report those disbursements on Form 3X, Line 29. *Id.* The disbursement is itemized on Schedule B, supporting Line 29, when it exceeds \$200 or aggregates to over \$200 “when added to other disbursements made to the same payee during the calendar year.” *Id.* Here, too, the Commission provides both a list of the information to be included when itemizing



the disbursements, as well as a sample Schedule B itemized disbursement filled out in accordance with the 2015 Guidance to show a \$5,000 disbursement for the purpose of “Recount Account – Legal Services.” *Id.*

After party committees file their disclosures pursuant to the 2015 Guidance, analysts in the Reports Analysis Division (“RAD”) of the FEC review them to determine whether party committees comply with the limits for contributions to segregated party accounts set forth in 52 U.S.C. § 30116, as directed by Standard 5 in RAD’s Review and Referral Procedures. *See* FEC, Reports Analysis Division Review and Referral Procedures for the 2023-2024 Election Cycle at 62-63 (“RAD Review and Referral Procedures”), <https://www.fec.gov/resources/cms-content/documents/Final-Redacted-2023-2024-RAD-Review-Referral-Procedures.pdf>.

When parties appear to have violated the limits set for party segregated accounts, RAD analysts send Requests for Additional Information (“RFAs”) seeking clarity. *See* Letter from FEC to Ronald C. Kaufman, Treasurer, Republican National Committee, Referencing Year-End Report (12/01/2019-12/31/2019) at 2, 4 (Apr. 29, 2020), <https://docquery.fec.gov/pdf/662/202004290300065662/202004290300065662.pdf> (requesting additional information from a party committee where it appeared that a contributor made an excessive contributions to a Headquarters Account); Letter from FEC to Anthony W. Parker, Treasurer, Republican National Committee, Referencing Year-End Report (11/29/2016-12/31/2016) at 2-3, Attachment at 3 (Nov. 3, 2017), <https://docquery.fec.gov/pdf/413/201711040300094413/201711040300094413.pdf> (“Nov. 2017 RFAI Letter re Headquarters and Legal Proceedings Accounts”) (requesting additional information from a party committee where it appeared that contributors made excessive contributions to Headquarters and Legal Proceedings Accounts); Letter from FEC to Ronald C.

Kaufman, Treasurer, Republican National Committee, Referencing Amended 30 Day Post-General Report (10/15/2020-11/23/2020), Received 3/17/2021 at 2-3, Attachment at 1 (Apr. 26, 2021), <https://docquery.fec.gov/pdf/279/202104260300116279/202104260300116279.pdf> (same); Letter from FEC to Anthony W. Parker, Treasurer, Republican National Committee, Referencing May Monthly Report (04/01/2017-04/30/2017) at 3, Attachment at 1 (Nov. 3, 2017), <https://docquery.fec.gov/pdf/422/201711040300094422/201711040300094422.pdf> (requesting additional information from a party committee where it appeared that a contributor made excessive contributions to the Convention Account).

**B. Plaintiffs File Their Petition to Promulgate Rules for Reporting of Segregated Party Accounts in 2019**

On August 5, 2019, plaintiffs submitted a Petition to Promulgate Rules on Reporting of “Cromnibus” Accounts (the “Petition”), which the agency designated as Commission Regulations Matter 2019-04 (“REG 2019-04”). *See* AR0001-07; Stipanovic Decl. ¶ 5. The plaintiffs’ chief allegation in the Petition is that it is difficult to track contributions to and disbursements from segregated party accounts due to a perceived lack of regulatory guidance, which purportedly frustrates the purpose of FECA. *See* AR0001. Specifically, plaintiffs allege that “each national party committee reports its receipts to and disbursements from the [segregated party] accounts in inconsistent and insufficient ways” and that it is “effectively impossible” to track the funds flowing into and out of the accounts as a result. AR0002. The Petition claims that it should be “easy” for the Commission to promulgate “simple and straightforward reporting regulations.” *Id.*

To collect information about total receipts, disbursements, and cash-on-hand for a segregated party account, plaintiffs allege that it is necessary to search a committee’s monthly reports and compile those transactions referring to the accounts. *Id.* This task is made difficult,

plaintiffs contend, “by the fact that there is no consistent location or terminology that committees use to denote transactions” involving the accounts. AR0002-03. Plaintiffs allege that parties use a “mix of the memo, purpose and ‘receipt for’/‘disbursement for’ sections of the FEC Schedule A and B forms to indicate such transactions.” AR0003. Then, plaintiffs outline specific alleged inconsistencies including, *inter alia*, that “some reports refer to the party headquarters account using the note ‘hq’ while other use ‘headquarters’” and that the National Republican Committee (“NRSC”) and National Republican Congressional Committee (“NRCC”) might write “hq account – subscriptions” or “headquarters acct – maintenance” in the purpose line for disbursements but included no memo text while writing memo text like “headquarters account” for receipts. *See* AR0003-05.

In order to remedy what plaintiffs view as an insufficient reporting scheme, they request “that the FEC promulgate rules and forms requiring national party committees to delineate within their reports the individual and aggregate transactions” involving their segregated party accounts. AR0006. Plaintiffs also provide suggestions for these rules, including that that the Commission “promulgate a new schedule to the national parties’ monthly reports under section 30111(a)(1), or an effective ‘cross-indexing system’ under section 30111(a)(3)” or “issue guidelines on uniform terminology for all committees to use under section 30111(a)(2).” *Id.*

In closing the Petition, plaintiffs explain that their specific requests are that: (1) the Commission promptly publish a Notice of Availability of this petition in the Federal Register; and (2) the Commission initiate a rulemaking to consider promulgating regulations on how committees should report their segregated party accounts. AR0007.

**C. The Commission Publishes a Notice of Availability on Plaintiffs' Petition and Receives Comments**

Two weeks after receiving the Petition, on August 19, 2019, the Commission's Office of General Counsel ("OGC") submitted to the Commissioners a draft Notice of Availability seeking comments on the Petition. *See* AR0008; Stipanovic Decl. ¶ 6. The Commission voted 4-0 to approve the Notice of Availability on August 22, 2019, at the first open meeting that occurred after plaintiffs submitted their Petition. *See* AR0015; Stipanovic Decl. ¶ 6. Thereafter, the Notice of Availability was published in the Federal Register on August 28, 2019. *See* AR0013-14; Stipanovic Decl. ¶ 6. In it, the Commission sought comments on the Petition on or before October 28, 2019. AR0013; Stipanovic Decl. ¶ 6. The Commission clarified that it would not consider the Petition's merits "until after the comment period closes" and that "[i]f the Commission decides that the Petition has merit, it may begin a rulemaking proceeding." AR0014.

The Commission received comments within the comment period from six individuals and entities, including one from plaintiffs. *See* AR0016-49; Stipanovic Decl. ¶ 6. Perkins Coie LLP Political Law Group ("Perkins Coie") submitted a comment advocating for a more comprehensive rulemaking on issues surrounding party segregated accounts, in line with a petition it submitted on January 8, 2016, and reattached to the comment (the "Perkins Coie Petition"). *See* AR0023-42. It generally opposed the Petition's bid to address reform to reporting requirements separately from any additional rulemaking on the Appropriations Act, calling it "nonsensical" to undertake a rulemaking on reporting divorced from a broader regulatory scheme and contending it would "create confusion to the regulated community and the public." *See* AR0024.

Democracy 21 also submitted a comment urging the Commission to undertake a broader rulemaking on issues surrounding the party segregated accounts but generally supporting the Petition. AR0018-22. Public Citizen, for its part, wrote in support of the rulemaking. AR0047-49. Two comments were submitted by private citizens, one of which described plaintiffs' proposal as imposing "an unnecessary burden from both a regulatory and administrative perspective," *see* AR0016, and one of which did not squarely address the Petition. *See* AR0017. Finally, plaintiffs submitted a comment supporting a rulemaking, which largely recapitulated the points detailed in the Petition. AR0043-46.

#### **D. The FEC Lacks a Commissioner Quorum for Over a Year, Stymying the Agency's Work**

During the pendency of the comment period for the Notice of Availability, on August 31, 2019, Commissioner Matthew S. Petersen departed the Commission, leaving only three Commissioners and thus eliminating the Commission's quorum. *See* Press Release, FEC, Matthew Petersen to Depart Federal Election Commission (Aug. 26, 2019), <https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/>; Press Release, FEC, FEC Remains Open for Business, Despite Lack of Quorum (Sept. 11, 2019), <https://www.fec.gov/updates/fec-remains-open-business-despite-lack-quorum/>; Stipanovic Decl. ¶ 7.

The lack of a quorum significantly hamstrings the Commission because four affirmative votes are necessary to make substantive decisions in all key areas of the Commission's work, including in the realm of policy. *See supra* Background Part I.A-B. In particular, the Commission cannot engage in rulemaking without a quorum, nor can it amend any forms, such as those used in the disclosure process. 52 U.S.C. §§ 30106(c), 30107(a)(8). The Commission is also unable to undertake other critical tasks, such as issue advisory opinions, hold hearings,

initiate litigation or defend the agency in new litigation brought pursuant to 52 U.S.C. § 30109(a)(8), conduct investigations and make referrals to other enforcement agencies, or approve enforcement actions and audits. *Id.* §§ 30106(c), 30107(a)(6)-(9), 30109(a); *see* FEC, Commission Directive No. 10, Rules of Procedure of the FEC Pursuant to 2 U.S.C. § 437c(e), § L (amend. Dec. 20, 2007), [https://www.fec.gov/resources/cms-content/documents/directive\\_10.pdf](https://www.fec.gov/resources/cms-content/documents/directive_10.pdf) (setting forth special rules applying when the Commission lacks a quorum).

Throughout the rest of 2019 and the first half of 2020, Congress did not confirm another Commissioner. On June 5, 2020, a quorum was finally reconstituted when James E. Trainor III was sworn in as Commissioner. Press Release, FEC, James E. Trainor III Sworn in as Commissioner (June 5, 2020), <https://www.fec.gov/updates/james-e-trainor-iii-sworn-commissioner/>; *see* Stipanovic Decl. ¶ 8. Shortly thereafter, on June 18, 2020, the Commissioners were able to hold an open meeting, in which they dove back into their work by approving three advisory opinions and discussing a rulemaking for Commissions Matter 2020-02. Press Release, FEC, FEC Approves Three Advisory Opinions, Discusses Rulemaking (June 18, 2020), <https://www.fec.gov/updates/fec-approves-three-advisory-opinions-discusses-rulemaking-6-18-20/>; Stipanovic Decl. ¶ 8.

Also during June 2020, CLC submitted a comment to the Commission, pressing the Commission on a list of pending regulatory matters that it “strongly recommend the Commission prioritize.” AR0050-58; *see* Stipanovic Decl. ¶ 8. This list included seven regulatory matters that, in CLC’s view, “implicate[] the Commission’s statutory *mandate* to administer and interpret the Federal Election Campaign Act.” AR0050. Among these were Commission Regulations

Matter 2011-02 (“REG 2011-02”), which related to a rulemaking regarding internet communication disclaimers, as well as REG 2019-04. AR0051-52, AR0056; Stipanovic ¶ 8.

The June quorum lasted only twenty-eight days. On July 3, 2020, Commissioner Caroline C. Hunter resigned, and the Commission was again left without a quorum and unable to address pressing policy and enforcement priorities. Press Release, FEC, Caroline C. Hunter to Depart Federal Election Commission (June 26, 2020), <https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/>; see Stipanovic Decl. ¶ 9. The lack of quorum persisted throughout most of the rest of 2020. A quorum was only achieved again when Commissioners Shana M. Broussard, Sean J. Cooksey, and Allen Dickerson were sworn in on December 18, 2020, after their December 9, 2020, Senate confirmation. Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson Sworn in as Commissioners (Dec. 18, 2020), <https://www.fec.gov/updates/shana-broussard-sean-cooksey-allen-dickerson-sworn-commissioners/>; see Stipanovic Decl. ¶ 9. Shortly after the December 2020 restoration of quorum, CLC submitted another comment to the Commission, again strongly recommending that Commissioners prioritize seven rulemakings, including REG 2011-02 concerning internet communication disclaimers and REG 2019-04. See AR0097-109; Stipanovic Decl. ¶ 9.

All told, between September 2019 and the end of 2020, the Commission was unable to take any official action on rulemakings, advisory opinions, or other matters requiring an affirmative vote of at least four Commissioners for a total of 446 days—or nearly 15 months. (See Stipanovic Decl. ¶ 9.)

#### **E. The FEC Addresses Urgent Commission Priorities Under a Historically Heavy Workload with Reduced Resources**

When the Commission was reconstituted in late 2020, it faced a massive backlog of enforcement, audit, and other time-sensitive matters, including dozens of enforcement matters

within 18 months of falling outside the Commission’s five-year statute of limitations. *See* Commissioner Ellen L. Weintraub, Statement of Commissioner Ellen L. Weintraub on the Senate’s Votes to Restore the Federal Election Commission to Full Strength (Dec. 9, 2020), <https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf> (“Weintraub Statement”); Stipanovic Decl. ¶ 10. As of the date Commissioners Broussard, Cooksey, and Dickerson were confirmed, there were 446 pending enforcement matters and 275 staff reports awaiting Commission decision. *See* Weintraub Statement; *compare* FEC, Memorandum to Commission re Status of Enforcement – Fiscal Year 2021, First Quarter (10/10/20-12/31/20), [https://www.fec.gov/resources/cms-content/documents/1st\\_Quarter\\_Status\\_of\\_Enforcement\\_2021.pdf](https://www.fec.gov/resources/cms-content/documents/1st_Quarter_Status_of_Enforcement_2021.pdf) (explaining that 452 matters were pending), *with* FEC, Memorandum to Commission re Status of Enforcement – Fiscal Year 2019, Fourth Quarter (7/1/19-9/30/19), [https://www.fec.gov/resources/cms-content/documents/status\\_of\\_enforcement\\_fy2019\\_4thq\\_Final\\_redacted.pdf](https://www.fec.gov/resources/cms-content/documents/status_of_enforcement_fy2019_4thq_Final_redacted.pdf) (explaining that 260 matters were pending at the close of Fiscal Year 2019).

In addition, the FEC faced significant resource constraints in the period following the restoration of quorum. (*See* Stipanovic Decl. ¶ 11.) Despite these challenges, and as detailed *infra*, the FEC managed to address this historic backlog, while also completing 23 rulemakings since 2021, including several that were urgent priorities for multiple stakeholders, including the rulemaking on internet communication disclaimers, which plaintiffs here specifically admonished the FEC to address.

### **1.The FEC Operates with Reduced Resources After Quorum is Regained**

Due to Congress’s failure to respond adequately to the Commission’s budgetary requests, the FEC experienced “several years of essentially flat funding, which represents a decline in real



terms, for FEC operations between FY 2016 and FY 2021” while the workload of the Commission dramatically increased. FEC, Fiscal Year 2025 Congressional Budget Justification 2 (Mar. 11, 2024) (“FY 2025 Budget Justification”), as submitted to Congress and the Office of Management and Budget, <https://www.fec.gov/resources/cms-content/documents/fy25-fec-congressional-budget-justification.pdf>. This low level of funding continued throughout 2022, as the government operated under an extended continuing resolution. FEC, Fiscal Year 2023 Congressional Budget Justification 2 (Mar. 28, 2022) (“FY 2023 Budget Justification”), [https://www.fec.gov/resources/cms-content/documents/FEC\\_FY23\\_CBJ\\_March\\_28\\_2022.pdf](https://www.fec.gov/resources/cms-content/documents/FEC_FY23_CBJ_March_28_2022.pdf). The impact on staffing due to budgetary constraints in the face of an increased workload “created significant challenges for the agency . . . , as the agency needed to slow IT spending and hiring.” FEC, Fiscal Year 2022 Congressional Budget Justification 2 (May 28, 2021) (“FY 2022 Budget Justification”), [https://www.fec.gov/resources/cms-content/documents/FEC\\_FY22\\_CBJ\\_May\\_28\\_2021.pdf](https://www.fec.gov/resources/cms-content/documents/FEC_FY22_CBJ_May_28_2021.pdf).

Indeed, “these hiring constraints placed a considerable strain on many of the FEC’s line offices and impaired the agency’s ability to execute its mission.” *Id.* In fiscal year 2021, which ran from October 1, 2020, through September 30, 2021, though the volume of cases OGC was addressing for the Commission had increased significantly, its staffing resources had significantly decreased. *Id.* at 5. The increased caseload for the Enforcement Division alone “resulted in an approximate four-fold increase or more in the workload average per staff attorney.” *Id.* This immense burden was not limited to the Enforcement Division. As of fiscal year 2022, staffing in OGC had hit a 10-year low, with staffing down 24, 37, and 36 percent in the Policy, Enforcement, and Litigation Divisions, respectively. FEC, Responses to Questions from the Committee on House Administration at 11 (Sept. 12, 2022) (“FEC September 2022

Responses to CHA”), <https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-responses-2022.pdf>; *see* Stipanovic Decl. ¶ 11-12.

Though the Commission repeatedly requested that Congress provide adequate budget to accommodate staffing for the tremendous workload and other needs over the last several years, the Commission has only recently been granted resources to begin the process of replenishing personnel. *See* FY 2025 Budget Justification at 13 (showing slight staff increase in 2023) *see also* FY 2022 Budget Justification at 2, 4-6 (requesting increased budget to accommodate critical staffing needs); FY 2023 Budget Justification at 11 (same); FEC, Fiscal Year 2024 Congressional Budget Justification 47 (Mar. 13, 2023) (“FY 2024 Budget Justification”), <https://www.fec.gov/resources/cms-content/documents/fy24-fec-congressional-budget-justification.pdf> (same). Nevertheless, the Commission advanced significant policy, enforcement, and litigation priorities over the course of the years immediately following the restoration of its quorum.

## **2.The Commission’s Work During the 2021-2022 Election Cycle**

Working through the significant backlog under budgetary restraints during the 2021-22 election cycle required balancing of competing Commission priorities, including needing to focus on enforcement priorities imperiled by the statute of limitations. Stipanovic Decl. ¶ 11; *see* Weintraub Statement at 1 (explaining that dozens of enforcement reports were within 18 months of falling outside the statute of limitations to pursue matters).

In addition to addressing the backlog of enforcement priorities, which required that attorneys from throughout OGC focus their time on enforcement matters, the Commission, once it regained quorum, had to address still-pending audit matters from the 2016 and 2018 election cycles (including a post-audit final repayment determination of a 2016-cycle publicly-financed

committee) that it was unable to address without a quorum. Because the Policy Division provides legal advice over the lifecycle of Commission audits and applications for public financing of presidential campaigns (including legal review of audit findings and the drafting of initial and final determinations concerning post-audit repayments of public funds to the U.S. Treasury for publicly-financed committees), Policy Division staff had to handle, simultaneously, legal issues pertaining to the 2016, 2018, and 2020 election cycle audits and public financing once the FEC regained quorum. (*See* Stipanovic Decl. ¶ 12.)

The Commission also faced an influx of advisory opinion requests in the lead up to the 2022 election. (*Id.* ¶ 13.) Advisory opinion requests are highly fact-specific questions, which the Commission must promptly answer to ensure that candidates, party committees, and others comply with the law. *See id.*; 52 U.S.C. § 30108(a)(1)-(2) (setting a general 60-day deadline for advisory opinions and 20-day deadline for requests made within 20 days of an election); 74 Fed. Reg. 32,162 (July 7, 2009) (explaining that the Commission has an informal policy of expediting highly significant time-sensitive requests). In fiscal year 2022, the Commission completed 32 advisory opinion requests, though it processed a greater number (a request must include a complete description of all relevant facts and must meet certain qualifying factors before it may be deemed a complete advisory opinion request). (Stipanovic Decl. ¶ 13.) To accommodate this increase, and due to the overall workload of the Policy Division, including rulemakings completed close to the 2022 election, the Commission sought an unusual number of extensions beyond the statutory timeline. *Id.*; FY 2024 Budget Justification at 41n.33.

The Regulations Committee, comprising two Commissioners, with no more than one from the same party, is a working group that focuses on Commission rulemakings, the meetings of which are typically attended by staff members of other Commissioners and relevant agency

staff. Stipanovic Decl. ¶ 14; FEC, Responses to Questions from the Minority Members of the Committee on House Administration 11 (June 16, 2023) (“June 2023 Responses to Congress”), <https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-response-2023.pdf>. As a result of the loss of quorum, the Regulations Committee met only once in 2019 and not at all in 2020. Stipanovic Decl. ¶ 15; June 2023 Responses to Congress at 13. When the Committee does not meet, it is unable to direct the Policy Division to prepare drafts or perform other rulemaking work. (Stipanovic Decl. ¶ 15.)

Given the enormous demands on the Commission’s time, the first Regulations Committee meeting held after quorum was regained occurred on August 12, 2021. Stipanovic Decl. ¶ 15; Attachment C, Regulation Committee Agendas, June 2023 Response to Congress at 2 (“Regulation Committee Agendas”), <https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/attachment-c-regulations-committee-agendas.pdf>. Three additional Regulations Committee meetings occurred throughout 2022. Stipanovic Decl. ¶ 15; June 2023 Response to Congress at 13.

In its rulemaking work in 2021 and 2022, the Commission prioritized several rulemakings. (Stipanovic Decl. ¶ 16.) One major project was REG 2011-02, which addressed internet communication disclaimers and which the CLC had urged the Commission to prioritize in its 2020 and 2021 letters to the Commission. *Id.*; AR0051-58, AR0097-109. That rulemaking was complex and time intensive, *see* Stipanovic Decl. ¶ 16, involving the consideration of comments from over 315,000 individuals and entities. *See* 87 Fed. Reg. 77,467, 77,469-70 (Dec. 19, 2022). Final rules were published in December 2022. Stipanovic Decl. ¶ 16; *see* 11 C.F.R. § 100.26, 110.11; Press Release, FEC, FEC Approves Final Rule on Internet Communication Disclaimers, Two Notices of Proposed Rulemaking, and Advisory Opinion (Dec. 1, 2022),

<https://www.fec.gov/updates/fec-approves-final-rule-on-internet-communication-disclaimers-two-notice-of-proposed-rulemaking-and-advisory-opinion/>. The “new regulations [were] intended to give the American public improved access to information about the persons paying for and candidates authorizing certain internet communications” pursuant to FECA. 87 Fed. Reg. 77,467.

This “improved access” will include a considerable amount of information not previously available to the public. *Id.*; see also Stipanovic Decl. ¶ 16. In 2022, advertising expenditures across media types hit \$8.9 billion. Taylor Giorno, “Midterm Spending Spree”: Cost of 2022 Federal Elections Tops \$8.9 Billion, a New Midterm Record, OpenSecrets (Feb. 7, 2023), <https://www.opensecrets.org/news/2023/02/midterms-spending-spree-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record/>. Because online ad spending numbers in the billions of dollars, see Online Political Ad Spending, OpenSecrets, <https://www.opensecrets.org/online-ads> (last visited May 2, 2024); 2020 Political Digital Advertising Report, Tech for Campaigns, <https://www.techforcampaigns.org/impact/2020-political-digital-advertising-report> (last visited May 2, 2024), the public receiving these advertisements is expected to have significantly increased access to information on who is funding campaigns. (See Stipanovic Decl. ¶ 16.)

Another major priority for the Commission in 2021 and 2022 included Commission Regulations Matter 2021-01 (“REG 2021-01”), which concentrated on candidate salaries. (*Id.* ¶ 17). These regulations mitigate the personal financial cost of running for office by permitting federal candidates to draw compensation from their campaign committees as of the date of their Statement of Candidacy and by not tying candidate salaries to a single year of pre-candidacy compensation, thereby “help[ing] ordinary, working-class Americans to participate in [the]

political process and to represent their communities by running for federal office.”

Commissioners Shana M. Broussard and Ellen L. Weintraub and Chair Dara Lindenbaum, Statement Regarding the Commission’s Adoption of Final Rules in REG 2021-01 (Candidate Salaries) 2 (“Broussard, Weintraub, and Lindenbaum Statement”) (Dec. 14, 2023),

<https://www.fec.gov/resources/cms-content/documents/Statement-re-Candidate-Salaries-Final-Rule-12-14-23-Dem-Caucus-Final.pdf>; *see also* Commissioner Allen L. Dickerson, Statement

Regarding the Commission’s Adoption of Final Rules in REG 2021-01 (Candidate Salaries) 1 (Dec. 14, 2023), <https://www.fec.gov/resources/cms-content/documents/Statement-re-Candidate-Salaries-Final-Rule-12-14-23.pdf> (explaining that the stated goal of the regulation is “allowing individuals of modest means to campaign for office”); Stipanovic Decl. ¶ 17.

The Commission also worked on Commission Regulations Matter 2013-01 (“REG 2013-01”) during the 2021-2022 cycle, which focused on needed technological modernization for the agency’s regulations. Stipanovic Decl. ¶ 18; Regulations Committee Agendas at 2-3. In particular, the Commission drafted these rules to “address electronic communications and transactions, such as contributions made using credit cards, by text messages, or through internet-based payments processors” as well as to “facilitate electronic accounting, recordkeeping, reporting, and redesignation by political committees. 89 Fed. Reg. 196 (Jan. 2, 2024). This rulemaking, which spans 26 pages in the Federal Register, would revise numerous Commission regulations to address technological advances in electronic communications, recordkeeping, and financial transactions. *Id.* at 196-221; Stipanovic Decl. ¶ 18. By adopting or revising broadly applicable definitions under FECA, such as the meaning of “record,” “signature,” “filing,” and “cash,” the revised rules would touch nearly every aspect of campaign finance law. (*Id.*) In addition, this rulemaking would further expand the definition of “public

communication” to cover online communications that are placed or promoted for a fee on another person’s website, digital device, application, or advertising platform. (*Id.*) As a result, the rules would clarify that such communications require disclaimers, which would further increase access to information on who is funding campaign advertising. (*Id.*)

In addition, the Commission closed out several long-standing regulations matters contributing to the Commission’s backlog. Doing so freed up Commission resources, allowing staff to focus on other, higher priorities. Stipanovic Decl. ¶ 19; *see* Regulations Committee Agendas at 3.

### **3.The Commission’s Work in 2023**

The Commission’s workload continued to be significant throughout 2023. (Stipanovic Decl. ¶ 20.) In addition to continuing to address the backlog, OGC devoted considerable time to the Commission’s policy priorities. *See id.*; FY 2024 Budget Justification at 12 n.6 (describing the achievements of the Policy division during the first half of 2023). For example, in February 2023, the Commission held a public hearing, facilitated by the Policy division, on revisions to the audit process for committees that do not receive public funds—for many years a “long, inefficient, and often opaque process.” FEC Agenda Document No. 23-10-A for May 4, 2023, Meeting (Apr. 27, 2023) 1, <https://www.fec.gov/resources/cms-content/documents/mtgdoc-23-10-A.pdf>; *see* Stipanovic Decl. ¶ 21. The “goal of the new audit process” was “to balance efficiency, procedural protections for audited committees, orderly development of the law, transparency, and encouraging voluntary compliance” with FECA. Press Release, FEC, FEC Approves Revised Audit Procedures, Advisory Opinion and Audit Division Recommendation Memorandum (May 4, 2023), <https://www.fec.gov/updates/fec-approves-revised-audit-procedures-advisory-opinion-and-audit-division-recommendation-memorandum/>. And, in May

2023, the Commission approved those new, comprehensive procedures. *Id.*; Stipanovic Decl. ¶ 21.

Moreover, pursuant to its work in 2021-2022, and after considering extensive comments and holding a public hearing in REG 2021-01, the Commission promulgated rules addressing candidate salaries. *See* Stipanovic Decl. ¶ 22; FEC Agenda Document No. 23-30-A for December 14, 2023, Meeting (Dec. 7, 2023), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-23-30-A.pdf>; Press Release, FEC, FEC Elects Officers for 2024, Discusses Advisory Opinion, Approves Final Rules on Candidate Salaries and Technological Modernization and Votes to Send Legislative Recommendations to Congress (Dec. 14, 2023) (“Dec. 2023 Press Release”), <https://www.fec.gov/updates/fec-elects-officers-for-2024-discusses-advisory-opinion-approves-final-rules-on-candidate-salaries-and-technological-modernization-and-votes-to-send-legislative-recommendations-to-congress/>; 11 C.F.R. § 113.1 (codifying candidate salaries regulation). The Commission also promulgated rules modernizing the Commission’s regulations in light of technological advances in REG 2013-01, the focus of the agency’s work during the 2021-2022 election cycle. *See* Stipanovic Decl. ¶ 22; FEC Agenda Document No. 23-29-A for Dec. 14, 2023, Meeting (Dec. 7, 2023), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-23-29-A.pdf>; Dec. 2023 Press Release; 11 C.F.R. pts. 1, 4, 5, 6, 100, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112, 114, 116, 200, 201, 300, 9003, 9004, 9007, 9032, 9033, 9034, 9035, 9036, 9038, and 9039.

In total, the Commission completed 23 rulemakings from fiscal year 2021 to the present. (Stipanovic Decl. ¶ 22.)



#### **4. The Commission's Workload During Presidential Election Cycles is Particularly Heavy**

As the 2024 election draws closer, the Commission, and in particular the Policy Division, will face increased demands on its time. (*See* Stipanovic Decl. ¶ 26.) Requests for Advisory Opinions, which become urgent as regulated parties ramp up fundraising efforts, and inquiries concerning and applications for public financing requests become more frequent. (*See id.*) Advisory Opinion requests must be answered in 60 days or fewer, *see* 52 U.S.C. § 30108(a)(1), a timeline that decreases to 20 days for requests made within 60 days of the election. *Id.* § 30108(a)(2). Moreover, the Commission endeavors to expedite significant requests where appropriate. 74 Fed. Reg. 32,162. These obligations affect how the Commission prioritizes other policy matters, such as rulemakings. (*See* Stipanovic Decl. ¶ 26.) In Quarter 2 of fiscal year 2024, the Commission had 27 open rulemaking matters. (*Id.* ¶ 27.)

The rest of the Commission must also be working at maximum capacity. During the 2020 election, political committees and other filers “reported more than 600 million financial transactions, which were reviewed by FEC staff and disclosed to the public on the FEC’s website.” FY 2022 Budget Justification at 2. This represented nearly *five times* the number of transactions reported during the 2016 election. *Id.* at 3.

#### **F. The Commission Publishes a Notice of Inquiry on Plaintiffs’ Petition and Receives Comments**

On January 9, 2024, the Commission voted 6-0 to direct the Office of General Counsel to draft for the Commission’s consideration in an open meeting “reopened notices of availability or any similarly captioned draft items for both Regulation 2019-04 and Regulation 2014-10, for a

comment period of 30 days,” subject to the Policy Division’s discretion on the precise form of the solicitation. AR0059; *see* Stipanovic Decl. ¶ 23.

On February 1, 2024, OGC submitted to the Commission a Draft Notice of Inquiry for Segregated Party Accounts for consideration at the Commission’s February 8, 2024, public meeting. AR0060-67; *see* Stipanovic Decl. ¶ 24. The Commission voted 5-0 to approve the Draft Notice on February 8, 2024, *see* AR0070, and the resultant Notice of Inquiry was published in the Federal Register on February 14, 2024. AR0071-72; *see* Stipanovic Decl. ¶ 24. In it, the Commission provided background on the Petition and the Commission’s work on it, including on the Notice of Availability and the comments received in response. AR0072.

The Notice of Inquiry also provided background on the Perkins Coie Petition, which, as set forth above, sought a comprehensive rulemaking with respect the Appropriation Act. AR0071-72; *see also* AR0026-42 (setting forth the Perkins Coie Petition). In that petition, Perkins Coie urged the Commission to adopt a “‘new regulatory framework’ for each type of party segregated account and to amend current regulations or adopt new regulations for all such accounts.” AR0071; *see also* AR0029, AR0031. The Commission explained that a Notice of Availability was issued for the Perkins Coie Petition on October 27, 2016, which garnered four comments, including one from plaintiff CLC. AR0072 n.12.

The Notice of Inquiry detailed the Commission’s decision to issue another solicitation for comments on the Petition, explaining that it was seeking more public input given “the relatively small number of comments received and the party committees’ and the public’s additional experience in administering and interpreting the information about party segregated accounts.” AR0072. In calling for additional comments, the Commission posed specific questions it deemed warranted further public input, soliciting feedback from stakeholders regarding their

“additional experiences with party segregated accounts” and whether these “resulted in further development of their positions?” *Id.* The Commission also queried whether “the national party committees or the public encountered any further challenges during election cycles that a rulemaking on party segregated accounts could help to resolve?” *Id.*

The comment period for the Notice of Inquiry closed on March 15, 2024. AR0071. Six commenters submitted comments on the Draft Notice of Inquiry and Notice of Inquiry. *See* AR0068-69, 73-96; Stipanovic Decl. ¶ 25. Of these, three were from party committees, one was from election law practitioners, and two were from non-profits or individuals, including one from plaintiffs. *See* AR0068-69, 73-96. The non-profit Coolidge-Reagan Foundation and its Chairman Shaun McCutcheon did not address plaintiffs’ petition or segregated party accounts reporting. *See* AR0084-96.

The Elias Law Group, which describes itself as the successor to the practice which drafted the Perkins Coie Petition, submitted a comment regarding the Draft Notice of Inquiry prior to its publication in the Federal Register. *See* AR0068-69. The Group noted that, *contra* plaintiffs’ representations, the Commission had “in fact issued public guidance on reporting from the additional accounts,” citing to the FEC’s 2015 Guidance. AR0069. In the practitioners’ “extensive experience, this guidance has proven more than sufficient to provide the regulated community with the information it needs to fully and consistently report activity from the segregated accounts.” *Id.* Any sudden changes in reporting requirement, the Group noted, would “likely only generate confusion.” *Id.* In any event, the Group urged the Commission to delay moving forward on any comprehensive rulemaking. AR0068-69.

The comment submitted by the DNC Services Corporation/Democratic National Committee (the “DNC”) spoke directly to reporting requirements, explaining its view that the

2015 Guidance on reporting receipts and disbursements “has proven to be understandable and workable” and that it would “welcome[] steps by the Commission to codify this guidance in its regulations or, at the very least, in its instructions for Form 3X.” AR0077. However, the DNC also requested that the Commission delay proceeding with rulemaking until after the 2024 presidential election, noting the FEC’s “past practice of avoiding unnecessary disruptions during the height of campaign season.” *Id.*

The Democratic Senatorial Campaign Committee (“DSCC”) and the Democratic Congressional Campaign Committee (“DCCC”) (collectively, the “Democratic Committees”) jointly submitted a comment along similar lines. AR0082-83. They explained that, in their view, any comprehensive rulemaking should not begin by addressing reporting. AR0083. Should the Commission include reporting, however, the DSCC and DCCC argued that “any final rule should codify the existing guidance from the Commission,” which is “clear and has been easy for the Committees to follow and implement since the Commission issued it.” *Id.* They emphasized that the Commission “should adopt this guidance, period.” *Id.* But any rulemaking before the election, according to the Democratic Committees, would be “disruptive” and “ill advised.” *Id.*

The Republican National Committee (“RNC”), National Republican Senatorial Committee (“NRSC”), and National Republican Congressional Committee (“NRCC”) (collectively, the “Republican Committees”) also submitted a comment which characterized the Commission’s 2015 Guidance as “clear and administratively workable.” AR0081. In their view, should the FEC embark on a rulemaking focusing on reporting, “one option would be to codify this guidance as a regulation.” *Id.* However, the Republican Committees opposed the creation of a “new reporting schedule and complex allocation reporting requirements,” which they

described as “unnecessary” and burdensome to party committees. *Id.* Alternatively, the Republican Committees expressed that they would not be opposed to further guidance instructing the national party committees “to use uniform terminology to identify transactions relating to segregated accounts (*e.g.*, ‘HQ,’ ‘Legal,’ ‘Conv.’).” *Id.* The Republican Committees advised that any new regulations should not be effective until 2025 because it would be “highly disruptive and administratively difficult for national party committees to implement changes required by any new regulations—particularly those that involve reporting and accounting procedures—in the middle of a calendar year.” AR0080.

CLC and CRP’s comment largely recapitulated plaintiffs’ Petition and earlier comments. *See* AR0073-76. Specifically, plaintiffs (1) highlighted wording inconsistencies between the party committees’ reporting, *see* AR0075; and (2) stated that it is difficult to aggregate data. AR0075-76.

#### **G. The Commission’s Website Will Soon Provide Improved Access to Information Regarding Segregated Party Accounts**

As explained *supra*, Background Part II.A, party committees report contributions to and disbursements from segregated party accounts according to the 2015 Guidance, and the public may examine public disclosure reports to ascertain who has contributed to the accounts and aggregate the total receipts and contributions. The Commission also plans to debut tools that will provide easier access to information including contributions to and distributions from the segregated convention, headquarters, and recount party accounts already available in public disclosure reports. (*See* Declaration of Paul Clark (“Clark Decl.”) ¶¶ 4-8, FEC Ex. 2.) The FEC

anticipates that these tools will become available for use by the general public by August 2024. (*Id.* ¶ 8.)

Specifically, the Commission will make available on its website data tables for contributions to and disbursements from segregated party accounts. (*Id.* ¶ 5-6.)<sup>2</sup> The data table for contributions will include information on all contributions exceeding \$200 individually or in the aggregate when added to other contributions received from the same source during the same calendar year. (*Id.* ¶ 5.) This table will be sortable by several categories, including, *inter alia*, the type of account (*e.g.*, Headquarters Account), the name of the committee (*e.g.*, the DSCC), the name of the contributor, and the amount of the contribution. (*Id.*) The data will be exportable and can be summed to show the total amount of all contributions exceeding or aggregating over \$200 when added to other contributions received from the same source during the calendar year from all contributors to each national party committee's segregated party account. (*Id.*)

The data table for disbursements will include information on all disbursements exceeding or aggregating to over \$200 when added to other disbursements made to the same payee during the same calendar year. (*Id.* ¶ 6.) The data will be sortable by several categories, including, *inter alia*, the type of account (*e.g.*, Headquarters Account), the name of the committee (*e.g.*, DSCC), the name of the payee, the amount of the disbursement, and the purpose of the disbursement. (*Id.* ¶ 6.) This data will also be exportable and can be summed to show the total amount of all disbursements exceeding or aggregating to over \$200 when added to other

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<sup>2</sup> Developer data for this ongoing project is available on a third-party website, including mockups of tables and financial summaries showing contributions to and disbursements from segregated party accounts. GitHub, Feature: National Party Accounts, <https://github.com/fecgov/fec-epics/issues/231> (last visited May 1, 2024).

disbursements made to the same payee during the same calendar year, to all payees, from each national party committees' segregated party account. (*Id.* ¶ 6.)

In addition, these same categories of information will also be available on the raising and spending tabs of individual party committees' financial summary pages, which will have new, separate categories for segregated party accounts. (*Id.* ¶ 7.)

### **III. PROCEDURAL HISTORY**

Plaintiffs filed this suit on October 10, 2023, alleging that the Commission has unreasonably delayed in responding to the Petition in violation of the APA. (*See generally* Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Compl."), Docket No. 1.) In their Complaint, plaintiffs seek: (1) a declaratory judgment that the FEC has unreasonably delayed; (2) injunctive relief "enjoining the FEC from further relay" and "compelling the FEC to issue a final decision within 30 days"; (3) retention of jurisdiction to supervise compliance with any Court order; (4) costs and attorney's fees; and (5) any further relief the Court deems appropriate. (*See id.* at 24.) The Commission filed its answer on December 22, 2023, in which it denied that the FEC has unreasonably delayed in responding to the Petition. (*See generally* FEC's Answer, Docket No. 10.)

The Commission filed the certified list of the administrative record on January 26, 2024. (*See* FEC's Certified List of Contents of the Administrative Record in Commission Regulations Matter 2019-04, Docket No. 14-1). It has since supplemented the list as necessary. (*See* FEC's Supplemented Certified List of Contents of the Administrative Record in Commission Regulations Matter 2019-04, Docket No. 16-1; FEC's Second Supplemented Certified List of Contents of the Administrative Record in Commission Regulations Matter 2019-04, Docket No.

19-1; FEC’s Third Supplemented Certified List of Contents of the Administrative Record in Commission Regulations Matter 2019-04, Docket No. 21-1.)

On April 4, 2024, plaintiffs filed their Motion for Summary Judgment. (*See* Plaintiffs’ Mot. for Summary Judgment and Memorandum of Points and Authorities in Support (“Pls.’ Mem.”), Docket No. 20.) In it, they argue that: (1) the FEC’s alleged delay in acting should be found *per se* unreasonable (*see id.* at 25-27); (2) the FEC’s alleged delay frustrates the core informational purposes of FECA (*see id.* at 28-29); (3) the FEC’s alleged failure to act “poses an urgent threat” to the electoral system (*see id.* at 29-30); (4) there is no justification for alleged lag (*see id.* at 31); (5) the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C.Cir.1984) (“*TRAC*”) weigh against the Commission (*see* Pls.’ Mem. at 32); and, finally, (6) the Court should enter declaratory and injunctive relief against the Commission. (*See* Pls.’ Mem. at 32-33.)

## ARGUMENT

### **I. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE UNDISPUTED MATERIAL FACTS SHOW THE COMMISSION HAS ACTED REASONABLY IN HANDLING PLAINTIFFS’ PETITION FOR RULEMAKING**

A review of the Commission’s actions in handling the Petition plainly shows that it has acted reasonably. Plaintiffs’ argument hinges on the premise that the length of time since their Petition was filed is, by definition, unreasonable. But APA delay cases are not decided by reference to the passage of time alone. Instead, the Court’s judgment is highly contextual, depending upon the actions the agency has taken, the constraints on the agency’s action, and competing priorities to determine whether the agency has been unreasonably delayed by applying the six *TRAC* factors set forth below.

The factors here conclusively weigh in the Commission’s favor. First, the length of time that the Commission has taken is reasonable when considering: (1) the time during which the



Commission lacked a quorum; and (2) the dearth of resources available to the agency when the quorum was reconstituted. Second, the Commission has reasonably set its priorities, and indeed achieved a great deal of the goals it has set, including completing 23 rulemakings since 2021. Third, neither the plaintiffs' interests nor the functioning of FECA has been frustrated, as the FEC's 2015 Guidance provides direction to party committee filers and ensures that segregated party account contributions and expenditures are reported in an identifiable manner. The facts underlying the Commission's actions are not in dispute, and the Commission should therefore be granted summary judgment.

#### **A. Standards for Evaluating Summary Judgment and Claims of Delay Under the APA**

##### **1. Summary Judgment Standard**

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The court must “view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact.” *Defs. of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d. 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)). “To determine which facts are ‘material,’ a court must look to the substantive law on which each claim rests.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986)). “A ‘genuine issue’ is one whose resolution could establish an element of a claim or

defense and, therefore, affect the outcome of the action.” *Id.* (citing *Celotex*, 477 U.S. at 322, and *Anderson*, 477 U.S. at 248).

## 2. Standard for Evaluating Claims of Agency Delay

The APA requires an agency to “proceed to conclude a matter presented to it” within “a reasonable time,” 5 U.S.C. § 555(b), and directs courts to “compel agency action . . . unreasonably delayed.” *Id.* § 706(1). Together, “[t]hese provisions give courts authority to review ongoing agency proceedings to ensure that they resolve the questions in issue within a reasonable time.” *Pub. Citizen Health Rsch. Grp. v. FDA*, 740 F.2d 21, 32 (D.C.Cir.1984). “‘In the context of a claim of unreasonable delay,’ the Court must consider whether the agency’s failure to respond is ‘so egregious’ as to warrant relief.” *Ctr. for Sci. in the Pub. Int. v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014) (quoting *TRAC*, 750 F.2d 7at 79). “As a result, courts rarely compel an agency to render an immediate decision on an issue.” *Orion Rsrvs. Ltd. P’ship v. Kempthorne*, 516 F. Supp. 2d 8, 11 (D.D.C. 2007).

Courts in this Circuit apply the “hexagonal contours of a standard” identified in *TRAC* to evaluate whether an agency has been unreasonably delayed. *See* 750 F.2d at 80. The *TRAC* court identified the following six considerations as relevant in that exercise:

- (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted); *see also Cutler v. Hayes*, 818 F.2d 879, 898-99 (D.C. Cir. 1987) (explaining that courts consider the length of time that has

elapsed, the reasonableness of the delay in the context of the statute authorizing agency action, the consequences of the delay, and the agency’s explanation for the delay, including “administrative necessity, insufficient resources, or the complexity of the task confronting the agency”); *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) (considering, when reviewing delays under FECA, “the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved”).

The most important *TRAC* factors are the first, which involves general considerations of reasonableness, and the fourth, which addresses an agency’s choice of priorities. *See Tate v. Pompeo*, 513 F. Supp. 3d 132, 148 (D.D.C. 2021), *dismissed sub nom. Tate v. Blinken*, No. 21-5068, 2021 WL 3713559 (D.C. Cir. July 22, 2021) (“The first factor is the most important.”); *see Milligan v. Pompeo*, 502 F. Supp. 3d 302, 319 (D.D.C. 2020), *dismissed sub nom. Miligan v. Blinken*, No. 21-5017, 2021 WL 4768119 (D.C. Cir. Sept. 21, 2021) (“Th[e fourth] factor carries the greatest weight in many cases, and it does so here.”); *Whitlock v. DHS*, Civ. No. 21-807, 2022 WL 424983, at \*5 (D.D.C. Feb. 11, 2022) (explaining that the fourth factor can carry weight “so substantial as to be dispositive, even if all other factors cut against it”).

## **B. The Commission Has Acted Reasonably in Handling Plaintiffs’ Petition**

### **1. There is No Set Deadline for the Commission to Act on Plaintiffs’ Petition**

A key aspect in considering whether the Commission’s handling of the rulemaking petition has been lawful is whether, pursuant to the first and second *TRAC* factor, there is a “timetable or other indication” governing how quickly the Commission must act. *See TRAC*, 750 F.2d at 80; *Tate*, 513 F. Supp. 3d at 148 (“The first and second *TRAC* factors are considered together.”). Here, neither FECA nor its legislative history supply any deadlines to the agency—even despite relatively rigorous deadlines imposed for other agency duties, *see, e.g.*, 52 U.S.C.

§ 30108(a)(1) (requiring the Commission to publish advisory opinions within 60 days of a request), and other specific timelines included in the statute. *See id.* § 30109(a)(8) (providing jurisdictional deadlines to challenge agency actions). Thus, the proper timing standard is the general one of reasonableness set forth by the first *TRAC* factor. *See TRAC*, 750 F.2d at 80 (explaining that the time agencies take to make decisions must be governed by a “rule of reason”).

Despite plaintiffs’ assertions, “[t]here is no per se rule as to how long is too long to wait for agency action.” *Dastagir v. Blinken*, 557 F. Supp. 3d 160, 164 (D.D.C. 2021) (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)). Indeed, the rule of reason “cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful.” *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Though the time of a delay is “typically counted in weeks or months,” *see In re Am. Rivers*, 372 F.3d at 419, “cases in this Circuit have made clear that measuring the delay by years alone cannot establish unreasonable delay.” *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 115 (D.D.C. 2005); *see Common Cause v. FEC*, 692 F. Supp. 1397, 1400 (D.D.C. 1988) (noting that some delays “have lasted upwards of five and ten years before courts have seen fit to impose deadlines on an agency”). A review of the Commission’s actions and the circumstances surrounding the Petition demonstrates that the Commission’s actions have been reasonable here.

## **2. The FEC’s Progress Has Proceeded According to a Rule of Reason Considering the Loss of Quorum and Heavy Workload with Limited Resources**

The Commission’s consideration of plaintiffs’ Petition, from the time the Petition was filed through this year’s renewed solicitation of public comments, has proceeded in a manner consistent with a “rule of reason,” as envisioned by the first *TRAC* factor. *See TRAC*, 750 F.2d at

80. In the absence of a statutory timeline, courts in this Circuit take a holistic approach to evaluating whether agencies have abided by such a rule. *See Tate*, 513 F. Supp. 3d at 148 (listing considerations in deciding whether a rule of reason has guided agency action); *Ctr. for Sci. in the Pub. Int.*, 74 F. Supp. at 301 (same). Here, the yardstick by which the Commission's progress should be measured is shaped by (1) the FEC's inability to act when it lacked a quorum, (2) the severe lack of resources available to the Commission when the quorum was finally restored, and (3) the Commission's successful completion of 23 priority rulemakings along with its handling of a historic caseload of exigent and backlogged proceedings while the Petition was pending.

*a. The Period in Which No Quorum Existed Should Not Count Against the Commission When Determining a "Rule of Reason"*

As a preliminary matter, in reviewing whether the Commission's actions conform with a "rule of reason," the Court should not consider the period during which the Commission lacked a quorum. After plaintiffs filed their Petition on August 5, 2019, the Commission acted swiftly to draft a Notice of Availability within two weeks of when the Petition was filed, which was published in the Federal Register on August 28, 2019—a few days after being unanimously approved by the Commission at the first available open meeting. AR0008-15. Unfortunately, despite these early efforts, the Commission nearly immediately lost the necessary quorum to consider the Petition when Commissioner Petersen announced his departure only a few days after the Notice of Availability was approved and then left at the end of August 2019. *See supra* Background Part II.D.

The lack of quorum effectively paused all work on the Petition for *over 15 months* because the Commission could not address any rulemakings, advisory opinions, or other matters requiring an affirmative vote of at least four Commissioners, and instead action on each of these

priorities was put on hold for this period. 52 U.S.C. §§ 30106(c), 30107(a)(8); Stipanovic Decl. ¶ 9. Here was not a situation in which the FEC refused to act or comply with a judicial directive. On the contrary, the Commission was without legal authority to formally alter its regulations or take interim steps such as publishing a Notice of Availability, Notice of Inquiry, or Advance Notice of Proposed Rulemaking, or holding a public hearing with only three sitting Commissioners. *See supra* Background Part I.A-B.

During this period, the Commission simply lacked the legal authority to act on the Petition for reasons outside its control. The Senate and the President could have filled the open positions at the agency, some of which had been vacant for years, at any time, but they chose not to confirm a full panel of Commissioners until December 2020. *See* Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson Sworn in. Had the Senate and President been concerned with a lack of progress on agency priorities, presumably they would have remedied the loss of quorum more quickly by exercising their statutory power to fill the positions. *See* 52 U.S.C. § 30106(a)(1). Because this period imposed legal and practical barriers beyond the agency's control, the Court should take that into consideration in determining whether any delay is reasonable under the APA.

After the quorum was restored, the Commission resumed its work in a reasonable manner given the availability of its resources.

*b. Weighing the Commission's Lack of Resources in the Face of a Historically Heavy Workload Indicates the Commission's Progress Has Been Reasonable*

Circuit law requires that courts consider, among other things, “the resources available to the agency” when evaluating the first *TRAC* factor. *See Mashpee Wampanoag Tribal Council*, 336 F.3d at 1102; *Whitlock*, 2022 WL 424983, at \*5 (explaining that the first factor “requires an account of the resources available to the agency” (internal quotation marks omitted)). Relevant

resources include, *inter alia*, available staff for the task. *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100 (noting that there was limited staff available to evaluate petitions to the agency in concluding that delay was not unreasonable); *see also Liberty Fund, Inc.*, 394 F. Supp. 2d at 110 (surveying agency resources and noting that, though “the number of applications for permanent labor certification increased, Department of Labor staffing did not”); *Common Cause*, 489 F. Supp. at 744 (explaining that in FECA cases, courts should evaluate available agency resources).

When the FEC’s quorum was restored, the agency was faced with an enormous backlog, including 446 pending enforcement matters and 275 staff reports awaiting Commission decision around the time the quorum was regained. Weintraub Statement; *see Stipanovic Decl.* ¶ 10. Unfortunately, this backlog coincided with historically strained resources. (*See Stipanovic Decl.* ¶ 11.) Going into the 2021-22 election cycle, the Commission faced a budget that remained essentially unchanged since 2016. *See FY 2022 Budget Justification* at 2. As the FEC reported to Congress in its budget justification for fiscal year 2022, hiring restraints resulting from a tight budget and increased demand on agency staff “impaired the agency’s ability to execute its mission.” *Id.*

Between October 2020 and October 2021, the increased caseload for the Enforcement Division alone resulted in a four-fold increase in the workload average per staff attorney. *Id.* at 5. At the same time, staffing levels across OGC hit a 10-year low—down 24, 37, and 36 percent in the Policy, Enforcement, and Litigation Divisions, respectively. FEC September 2022 Responses to CHA at 11; *see Stipanovic Decl.* ¶ 11. Though the FEC has “turned repeatedly to the Congress to request additional resources,” *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100, it was not able to begin the process of rebuilding its staff reserves until recently.

See FY 2025 Budget Justification at 13 (showing slight increase in staff in 2023). As the Circuit Court made clear in *Mashpee Wampanoag Tribal Council, Inc.*, a shortage of agency staff in the face of a dramatically increased workload is a critical part of the context in which an agency's work should be evaluated. 336 F.3d at 1100 (explaining that very few Bureau of Indian Affairs staff were available to consider complex petitions).

Despite this pressure, the Commission's progress has been reasonable in the face of a "shortage of resources addressed" to the "extremely complex and labor-intensive task" of undertaking rulemakings in the niche space of campaign finance. See *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100. Since fiscal year 2021, the Commission has completed 23 rulemakings, which represents a considerable amount of time and work. (See Stipanovic Decl. ¶ 22.) Nevertheless, at the end of the second quarter of fiscal year 2024, there were 27 open rulemakings competing for Commission priority, including plaintiffs' Petition. (See *id.* ¶ 27.) With respect to plaintiffs' Petition, the Commission has now solicited two rounds of comments, including a round within the last month and half, which the Commission is now considering. (See Stipanovic Decl. ¶ 25.)

### **3. The FEC Is Entitled to Deference in How It Prioritizes Competing Matters**

In light of its choice to prioritize a backlog of statutorily mandated activities and its action on rulemakings that will have a substantial impact on both the regulated community and the general public, the Commission's actions are reasonable. Pursuant to the fourth *TRAC* factor, courts may not lightly disturb or second guess the way in which an agency orders its priorities. *TRAC*, 750 F.2d at 80. Indeed, the fourth factor can carry weight "so substantial as to be



dispositive.” *Whitlock*, 2022 WL 424983, at \*5; *see Milligan*, 502 F. Supp. 3d at 319 (D.D.C. 2020).

The FEC has “broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.” *Cutler*, 818 F.2d at 896; *see In re Barr Lab ’ys, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (“[R]espect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency’s choice of priorities.”). As the D.C. Circuit has explained in evaluating the Commission’s actions, “[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendence directing where limited agency resources will be devoted. [The courts] are not here to run the agencies.” *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

The FEC has not been idle. Following the restoration of the quorum, the Policy Division attended to still-pending audit matters from the 2016 and 2018 election cycles that it was unable to address in the preceding 15 months. (*See Stipanovic Decl.* ¶ 12.) From 2021 to 2023 the Commission prioritized several high priority rulemakings including a final set of rules governing internet communication disclaimers pursuant to REG 2011-02. *See supra* Background Part II.E. This rule will give the public access to information about who pays for these ads that is critical for the transparency goals motivating FECA, *see Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (*per curiam*); *Stipanovic Decl.* ¶ 16—precisely the goal plaintiffs seek to advance. The Commission also prioritized REG 2021-01, which resulted in a rulemaking on candidate salaries designed to “help ordinary, working-class Americans to participate in [the] political process and to represent their communities by running for federal office.” Broussard, Weintraub, and Lindenbaum Statement; *see supra* Background Part II.E. The Commission further prioritized REG 2013-01,

which made comprehensive revisions to Commission regulations to address technological advances in electronic communications, recordkeeping, and financial transactions. Stipanovic Decl. ¶ 18; *see supra* Background Part II.E. This rulemaking also further expanded the definition of “public communication,” which will increase the public’s access to information on who is funding campaigns. (Stipanovic Decl. ¶ 18.) The Policy Division also assisted the Commission in completing a major overhaul of audit procedures in 2023 in order to clarify what was a “long, inefficient, and often opaque process,” *see* FEC Agenda Document No. 23-10-A at 1, and “encourag[e] voluntary compliance” with FECA. *See* Press Release, FEC Approves Revised Audit Procedures.

The completion of each of the above projects, including the 23 rulemakings finalized since fiscal year 2021, is a result of the Commission’s decision to focus its limited staff and time on these matters. (*See* Stipanovic Decl. ¶ 22.) The Commission is in a “unique—and authoritative—position to view” these projects, including the various regulatory projects, “as a whole, estimate the prospects for each, and allocate its resources in the optimal way.” *In re Barr Lab’ys, Inc.*, 930 F.2d at 76. These represent important Commission priorities, which the Commission, not plaintiffs or the courts, is in the best position to evaluate. *See id.*; *Liberty Fund, Inc.*, 394 F. Supp. 2d at 118 (explaining that DHS’s decision to prioritize some types of labor certifications over others is “deserving of deference”). The Commission’s choices should not now be second-guessed: relief here would “reorder” the way in which petitions are reviewed by the Commission, which is the kind of interference into agency prioritization that courts have determined is impermissible absent extraordinary circumstances. *Tate*, 513 F. Supp. 3d at 149-50 (internal quotation marks and citations omitted).

As plaintiffs have made clear in letters to the Commission, there are, at any time, numerous important rulemakings vying for the Commission’s consideration. *See* AR50-58 (“Below is a list of pending regulatory matters that we strongly recommend the Commission prioritize. This is by no means an exhaustive list . . . .”); AR0097 (“We write to draw to your attention several long-pending regulatory matters that we strongly recommend the Commission prioritize. Although this list does not cover every regulatory matter . . . .”). Indeed, the Commission had 27 open rulemakings in Quarter 2 of fiscal year 2024. (*See* Stepanovic Decl. ¶ 27.)

Here, the Commission has continued to consider plaintiffs’ Petition while simultaneously focusing on other rulemakings and priorities. (*See* Stepanovic Decl. ¶ 25.) The Commission just recently solicited more comments on the Petition to better understand the experiences of the regulated community and the public with the 2015 Guidance. AR0071-72. Because the Commission continues to make meaningful progress, the Court should decline plaintiffs’ invitation to bring their petition to the front of the line. *See Liberty Fund, Inc.*, 394 F. Supp. 2d at 117 (“[W]here resource allocation is the source of the delay, courts have declined to expedite action because of the impact on competing priorities.”); *Democratic Senatorial Campaign Comm. v. FEC*, Civ. No. 95-0349, 1996 WL 34301203, at \*5 (D.D.C. Apr. 17, 1996) (explaining that, in the context of delays under FECA, agencies are due less deference when they fail to take “meaningful action within a reasonable time period”).

The agency is due particular deference in this case, where a judicial order reordering its priorities could disrupt its essential operations within less than a few months of a presidential election. *See Rose*, 806 F.2d at 1091 n.17 (explaining that a court order could have “adversely affected the FEC’s ability to attend to ‘activities of a higher or competing priority,’ not the least

of which was the Presidential election of that year” (quoting *TRAC*, 750 F.2d at 80)). As the election draws closer, the Policy Division must devote increasing time to answering requests for Advisory Opinions and inquiries concerning and applications for public financing become more frequent—work that would be stymied were REG 2019-04 assigned precedence by the Court. (See Stepanovic Decl. ¶ 26.) And, immediate rulemaking would burden agency staff, who would be tasked with learning and enforcing new rules at the apogee of the campaign season. See FY 2022 Budget Justification at 2-3 (explaining that the number of financial transactions reviewed by Commission staff in 2020 was nearly five times that in the 2016 election).

In addition, the political parties with a direct stake in segregated account reporting requirements have decisively and unanimously weighed in against any rulemaking prior to the 2024 Presidential election: it would be “highly disruptive,” AR0080, be “ill advised” and “disruptive,” AR0083, occasion “unnecessary disruptions during the height of campaign season,” AR0077, and “generate confusion,” AR0069. Though commentary from party committees does not dictate Commission action, the Commission is obligated to “consider all comments filed within the comment period.” See 11 C.F.R. § 200.3(e).

At the very least, these considerations counsel that the Court should not set deadlines that require the Commission to decide whether to issue a rulemaking before the November election. Any such decision would seriously impair the Commission’s ability to set its own priorities with the resources available to it. See *In re Barr Lab ’ys, Inc.*, 930 F.2d at 76; Stepanovic Decl. ¶ 13 (discussing the competing priorities before the 2022 election), *id.* ¶ 26 (explaining the pressures on the Commission in the lead up to the 2024 presidential election). Nor does case law cited by plaintiffs suggest that such an extreme remedy is appropriate or usual. See Pls.’ Mem. at 31. In *Common Cause v. FEC*, the court ordered the Commission to provide updates every 90 days

regarding its progress toward issuing regulations during an election year—a remedy imposed only *after* the Commission had failed to comply with a court order to reconsider a petition for rulemaking issued a year earlier. 692 F. Supp. at 1401.

#### **4. Neither Plaintiffs’ Interests Nor FECA’s Purpose Is Frustrated**

The third and fifth *TRAC* factors, which gauge the impact of the delay on plaintiffs and the overall functioning of the law, also weigh in favor of the Commission. *See TRAC*, 750 F.2d at 80; *see also Cutler*, 818 F.2d at 898 (“[T]he court must examine the consequences of the agency’s delay.”); *Common Cause*, 489 F. Supp. at 744 (explaining the court may consider “the nature of the threat posed”). Plaintiffs’ concerns about the harms to them and the threat to the functioning of FECA are overstated.

First, this is not a case where interests are heightened because an agency’s delay threatens safety. *See TRAC*, 750 F.2d at 80 (explaining that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake”). Indeed, “notwithstanding the obvious importance of the political process,” allowing the Commission’s consideration of a regulation explicating a subsection of FECA to proceed in the ordinary fashion by which all rulemaking petitions proceed should be the default approach. *Cf. Rose*, 806 F.2d at 1091 n.17.

Second, as plaintiffs recognize but discount, the FEC *has* issued guidance to party committees on how to disclose contributions and disbursements from segregated party accounts. *See Pls.’ Mem.* at 7-8. The continued operation of the 2015 Guidance, which is set forth in detail on the FEC’s website and is functioning as intended to create transparency and enable the Commission to detect violations of the law, indicates that the “nature and extent of the interests prejudiced” by any alleged delay are necessarily circumscribed. *See TRAC*, 750 F.2d at 80;

*Cutler*, 818 F.2d at 898. The 2015 Guidance outlines the steps for reporting contributions to and disbursements from all three types of segregated party accounts and provides illustrative samples. *See* FEC, National Party Accounts for Certain Expenses. Moreover, contrary to plaintiffs' contentions, *see* Pls.' Mem. at 8, the Commission in fact evaluates the reports it receives for compliance with segregated account reporting requirements. The FEC's RAD analysts have issued several RFAs to a party committee that appeared to have run afoul of the 2015 Guidance, demonstrating that reporting discrepancies do not go unaddressed. *See, e.g.*, Nov. 2017 RFAI Letter re Headquarters and Legal Proceedings Accounts at 2-3 (requesting additional information from a party committee where it appeared that contributors made excessive contributions to Headquarters and Legal Proceedings Accounts); *see also* RAD Review and Referral Procedures at 62-63 (providing that RAD will assess authorized committee reports for compliance with contribution limitations).

The regulated community, including the practitioners who filed the Perkins Coie Petition, has indicated in clear terms that they have found the 2015 Guidance provides adequate clarity. *See* AR0069 (Elias Group comment explaining that the guidance has "proven more than sufficient to provide the regulated community with the information it needs to fully and consistently report activity"); AR0077 (DNC Comment that the 2015 Guidance is "understandable and workable"); AR0083 (DSCC and DCCC comment that "any final rule should codify the existing guidance"); AR0081 (RNC Comment that the 2015 Guidance is "clear and administratively workable").

Third, plaintiffs make much of too little in their allegations of reporting inconsistencies. *See* Pls.' Mem. at 12-15. Where parties deviate from the wording set forth in the FEC's guidance, such deviations are still understandable and, on the whole, the disclosure scheme

advances the purposes of FECA. *See Buckley*, 424 U.S. at 67 (“[D]isclosure requirements . . . expos[e] large contributions and expenditures to the light of publicity”). Moreover, where the information is available, plaintiffs are not entitled to disclosure in any particular form. *Cf. Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 125 (D.D.C. 2017) (concluding no injury exists where “plaintiffs already possess all the relevant information about [certain] contributions”).

Among the alleged inconsistencies plaintiffs note is that the NRSC reported contributions to the “HEADQUARTERS ACCOUNT” and disbursements from the “HQ ACCT” in the same monthly report. *See* Pls.’ Mem. at 14. They further highlight slightly different wording used by other committees when denoting the same account, *e.g.*, the DSCC’s report of disbursements from both a “legal services” and “legal services recount” account. *See id.* These phrasing differences are unlikely to confuse the kinds of careful readers, such as plaintiffs, who typically review campaign finance reports.

In any event, many of plaintiffs’ concerns about the ease of access to data will soon be ameliorated. Plaintiffs contend that it is time consuming and difficult to isolate transactions involving segregated party accounts and aggregate data about the receipts and disbursements currently available. (*See* Pls.’ Mem. at 12-19.) By August 2024, the Commission anticipates launching new tools to assist plaintiffs and others sort and view data on contributions to and disbursements from segregated party accounts. (*See* Clark Decl. ¶¶ 4-8.) Contribution and disbursement data will be organized into data tables on the FEC’s website and will show, for contributions and disbursements exceeding or aggregating above \$200, the name of the contributor or payee, the amount of the transaction, the type of account and relevant party committee, and, for disbursements, the purpose. (*See id.* ¶¶ 5-6.) In addition, these same

categories of data will also be available on the individual party committees' financial summary pages. (*See id.* ¶ 7.)

As such, plaintiffs' claims that agency inaction has frustrated FECA's purpose of promoting transparency are overwrought. The 2015 Guidance advances disclosure of campaign finances. Its detailed reporting scheme "provides the electorate with information as to where political campaign money comes from" because the contributions to the segregated purpose accounts are itemized and show who has given the money and in what amount. *Buckley*, 424 U.S. at 66. The itemized disbursements also show the electorate "how [the money] is spent" by the party accounts because the parties are required to include a clear purpose of the disbursement for each receipt. *Id.* The 2015 Guidance also deters corruption and its appearance by "exposing" the contributions to and disbursements from the segregated party accounts "to the light of publicity"—they are a part of publicly-filed reports. *Id.* at 67. Finally, as set forth above, a plain reading of the parties' disclosure reports, even those with the alleged inconsistencies identified by plaintiffs, permit the detection of contribution violations. *See id.* at 67-68; *see also, e.g.*, Nov. 2017 RFAI Letter re Headquarters and Legal Proceedings Accounts at 2-3.

The project to make campaign finance data more easily accessible on the FEC's website further advances FECA's purpose and the FEC's mission. By providing tools that will better enable analysis of contributions to and disbursements from the segregated party accounts by August 2024, *see Clark Decl.* ¶¶ 4, 8, the Commission will have addressed many, if not all of plaintiffs' concerns about interpreting and collating segregated party accounts data, further limiting any impact on plaintiffs. *See TRAC*, 750 F.2d at 80.



**CONCLUSION**

For the foregoing reasons, plaintiffs' Motion for Summary Judgment should be denied, and the Commission's Motion for Summary Judgment should be granted.

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May 2, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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