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Pursuant to the Court's October 31, 2014 Order (Doc. No. 67), defendant Federal Election Commission ("FEC" or "Commission") provides this supplemental factual submission and briefing about plaintiff-intervenor American Future PAC ("AF PAC"). These supplemental facts support the constitutionality of the Federal Election Campaign Act's ("FECA") six-month period and the \$2,600 contribution limit that generally applies to persons, including new nonconnected political committees ("PAC") unless and until they become multicandidate PACs. *See* 52 U.S.C. § 30116(a)(1)(A), (a)(4). Plaintiffs claim that a new PAC with "more than 50 contributors, by definition, cannot be a façade through which a single individual is attempting to evade other contribution limits." (Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' SJ Br.") at 17-18 (Doc. No. 56-1).) But the evidence suggests that AF PAC has served as just such a façade.

AF PAC registered less than three months before the November 4, 2014 general election and was narrowly focused on assisting one Senate campaign — a campaign for which AF PAC's chairperson has worked. AF PAC's \$2,600 contribution to that candidate was made possible only because a single major donor had given AF PAC \$5,000, more than 90 percent of its funds, the day before. AF PAC wanted to give that Senate candidate more. So its chairperson obtained more than 50 contributors in just nine days by asking friends to give five dollars, telling one: "I need to get 51 donors." AF PAC then gave a mere \$100 to four more candidates, allowing it to satisfy the 51-contributor and five-contribution requirements in just 14 days — and nearly two months before AF PAC would have to file its first FEC report disclosing that it was bankrolled by that one donor, who later gave more than \$1,700 directly to that same Senate campaign.

The supplemental facts also show that AF PAC's claims should be dismissed for lack of jurisdiction. AF PAC intervened to assert the same claims as plaintiff Stop Reckless Economic Instability caused by Democrats ("Stop PAC") at a time when the Court had no jurisdiction over Stop PAC's claims, both because Stop PAC lacked standing and because its claims became moot on September 11 when it became a multicandidate PAC. In any event, AF PAC's claims now appear to be moot. The only campaign for which AF PAC wanted to give in excess of \$2,600

ended 10 days ago with the November 4, 2014 general election, in which AF PAC's preferred candidate won, and AF PAC has alleged no desire to give funds after that date.

For these reasons and those stated in the FEC's previous briefing, the FEC's motion for summary judgment should be granted and plaintiffs' motion denied.

### **BACKGROUND**

At an early point in this case, the Commission noted that plaintiff Stop PAC's claims in counts one and two of the Complaint would become moot on September 11, 2014, when Stop PAC would meet the requirements to become a multicandidate PAC and thus no longer be subject to the laws it claims are unconstitutional. (*See* Decl. of Counsel in Supp. of FEC's Mot. to Allow Time for Disc. Under Rule 56(d) at 9, ¶ 8(b) (Doc. No. 27-2).) In response, plaintiffs stated that they would attempt to join additional new PACs "as necessary" to extend the alleged "undisputed justiciability of this case for as much time as possible," including through any appeals until final judgment. (Joint Proposed Disc. Plan at 5 (Doc. No. 34).) On July 16, 2014, the Court issued a Scheduling Order pursuant to Federal Rule of Civil Procedure 16(b) requiring the parties to file any joinder motions "as soon as possible after counsel or the party becomes aware of the grounds for the motion." (Rule 16(b) Scheduling Order at 1, ¶ 5 (Doc. No. 40).)

Six weeks later, on August 27, plaintiffs moved to have AF PAC join or intervene in Stop PAC's claims. (*See* Doc. No. 50.) With that motion, AF PAC anticipatorily filed Rule 26(a)(1) initial disclosures and responses to some of the discovery requests that the FEC had previously served on Stop PAC. (*See* Decl. of Attorney Jerad Najvar ("Najvar Decl.") (Doc. No. 50-3); Exhs. 1-4 to Najvar Decl. (Doc. No. 50-4); AF PAC's Objections and Resps. to FEC's First Set of Disc. Reqs. to Stop PAC ("AF PAC's Resps. to Stop PAC Disc. Reqs.") (Doc. No. 50-5); AF PAC's Proffered Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1)(A) (Doc. No. 50-6).)

On September 11, Stop PAC became a multicandidate PAC when its six-month registration period expired. (*See* FEC's Mem. in Supp. of Mot. for Summ. J. ("FEC SJ Br.") at 4, Statement of Undisputed Material Facts ("FEC Facts") ¶ 1 (Doc. No. 57-1).) Approximately a week later, the parties filed cross motions for summary judgment, including alleged undisputed

material facts. (*See id.*; *see also* Doc. Nos. 56, 56-1, 57.) Plaintiffs' alleged facts included facts asserted by AF PAC, which plaintiffs claimed would be material in the event the Court granted AF PAC's then-pending motion to join or intervene. (Pls.' SJ Br. at 7-8, ¶¶ 33-39 & n.2 (Doc. No. 56-1).) Given that AF PAC was not then a party, the FEC objected to the relevance of alleged material facts regarding AF PAC and did not respond to their substance.<sup>1</sup> (*See* FEC's Resp. in Opp'n to Pls.' Mot. for Summ. J. ("FEC Resp.") at 5, ¶¶ 33-39 (Doc. No. 60).)

On October 6, the Magistrate Judge issued an order denying AF PAC's motion to join, but granting its alternative motion to intervene. (Order at 1 (Doc. No. 62).) That order also gave the Commission until October 31 to pursue discovery from AF PAC. (*Id.* at 2.) AF PAC responded to the FEC's written discovery requests on October 27. (*See, e.g.*, FEC Exhs. 17-19 (Doc. Nos. 68-1 to 68-3).)

Four days later, on October 31, this Court held a hearing on the parties' cross-motions for summary judgment. (*See* Doc. No. 66.) Afterwards, the Court ordered that "the parties shall provide to the Court any supplemental factual submissions and briefing pertaining to Intervenor American Future PAC." (Order at 1 (Doc. No. 67).)

**RESPONSE TO PLAINTIFFS' ALLEGED UNDISPUTED FACTS  
REGARDING INTERVENOR AMERICAN FUTURE PAC**

33-37. Admit.

38. Admit that FECA prohibited AF PAC from contributing in excess of \$2,600 to Congressman Tom Cotton's campaign for Senate in the November 4, 2014 general election because AF PAC had yet to satisfy the six-month requirement of 52 U.S.C. § 30116(a)(4).

39. Admit that the November 4, 2014 general election occurred before AF PAC had been registered with the FEC for more than six months. Dispute that AF PAC was permanently deprived of the opportunity to fully exercise its First Amendment rights, since the contribution limit AF PAC challenges does not violate its First Amendment rights. (*See, e.g.*, FEC SJ Br. at

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<sup>1</sup> Because AF PAC has since been permitted to intervene, the FEC responds to the substance of AF PAC's alleged material facts below.

12-22 (Doc. No. 57-1).) Dispute that the threat of criminal prosecution inhibited AF PAC. *See* 52 U.S.C. § 30109(a)(5)(C) (criminal FECA violations require “knowing and willful” intent).

**STATEMENT OF SUPPLEMENTAL UNDISPUTED MATERIAL  
FACTS REGARDING INTERVENOR AMERICAN FUTURE PAC<sup>2</sup>**

**A. Plaintiff-Intervenor American Future PAC and Its Chairperson Matt Lenell**

34. AF PAC is a nonconnected political committee that registered with the FEC on August 11, 2014. (Exh. 1 to Najvar Decl. (Doc. No. 50-4).) FECA currently limits AF PAC’s contributions to any federal candidate to \$2,600 per election, as it does with all new non-connected PACs and persons generally. 52 U.S.C. § 30116(a)(1)(A); *Price Index Adjustments for Contribution Limitations*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

35. AF PAC’s chairperson is Matt Lenell. (AF PAC’s Resps. to Stop PAC Disc. Reqs. at 3, Interrog. 1 (Doc. No. 50-5).) As chairperson, Lenell “makes all decisions concerning strategic messaging, fundraising, contributions, and expenditures.” (*Id.* at 6, Interrog. 8.)

36. Lenell is an employee of a political consulting firm called Campaign Solutions. (FEC Exh. 17, AF PAC’s Resps. to FEC’s First Set of Disc. Reqs. (“AF PAC’s Disc. Resps.”) at 5, Req. for Admis. (“RFA”) 1-2 (Doc. No. 68-1).) At some point between August 19 and October 27, 2014, Lenell provided services on behalf of Campaign Solutions to Congressman Tom Cotton’s Senate campaign in the November 4, 2014 general election. (*Id.* at 5, RFA 1; Exh. 2 to Najvar Decl. (Doc. No. 50-4).) Lenell’s services to Rep. Cotton included editing “fundraising communications that Campaign Solutions publicly distributed on behalf of the Cotton campaign.” (FEC Exh. 17, AF PAC’s Disc. Resps. at 11, Interrog. 1 (Doc. No. 68-1).) Lenell also “provided html and other technical ‘coding’ for online communications such as e-mails that Campaign Solutions posted or distributed on behalf of the Cotton campaign.” (*Id.*)

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<sup>2</sup> These undisputed material facts regarding AF PAC start with paragraph 34 because the FEC provided 33 paragraphs of undisputed material facts in its opening brief in support of its motion for summary judgment. (*See* FEC SJ Br. at 10 (Doc. No. 57-1).)

**B. American Future PAC's Agents, Vendors, and Alleged Purpose**

37. Only two people have been involved in AF PAC's creation and operation: Lenell and Jerad Najvar, its treasurer, custodian of records, and counsel, who represents AF PAC in this case. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 3-4, Interrog. 1 (Doc. No. 50-5); Exh. 1 to Najvar Decl. at 3 (Doc. No. 50-4).) Michael Morley, co-counsel for plaintiffs, is assisting Najvar in representing AF PAC. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 3-4, Interrog. 1 (Doc. No. 50-5).) Lenell retained Najvar to register AF PAC with the FEC and to act as its treasurer. (FEC Exh. 17, AF PAC's Disc. Resps. at 17-18, Interrog. 14 (Doc. No. 68-1).)

38. AF PAC has used two vendors, Conservative November and Anedot. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 3-4, Interrog. 1 (Doc. No. 50-5).) Conservative November is "the general consultant" to AF PAC and it "licenses [AF PAC's] data." (*Id.* at 3, Interrog. 1.) Conservative November registered as a limited liability company in Virginia on July 31, 2014, 11 days before AF PAC's registration with the FEC. *See* Commonwealth of Virginia, State Corporation Commission, Business Entity Details for Conservative November LLC, <https://sccfile.scc.virginia.gov/Business/S517543> (last visited Nov. 13, 2014). Conservative November's registered agent is Dan Backer (*id.*), co-counsel for plaintiffs in this lawsuit. AF PAC stated in discovery that "Dan Backer is not an officer, agent, independent contractor, or volunteer for American Future" and "has not provided any services to American Future." (FEC Exh. 17, AF PAC's Disc. Resps. at 16, Interrog. 10 (Doc. No. 68-1).)

39. AF PAC has used a vendor named Anedot to "provide[] an online fundraising platform for American Future." (AF PAC's Resps. to Stop PAC Disc. Reqs. at 4, Interrog. 1 (Doc. No. 50-5).) Anedot is a software application that allows users to "[e]asily fundraise from your website and using social media" including Facebook. Anedot, <http://www.anedot.com> (last visited Nov. 13, 2014).

40. AF PAC claims its purpose is to "stand for the veterans who have secured our freedom." (AF PAC's Resps. to Stop PAC Disc. Reqs. at 6, Interrog. 8 (Doc. No. 50-5).) AF PAC states that Lenell believed that AF PAC "would be an effective vehicle for highlighting

veterans' issues and sparking meaningful reform.” (FEC Exh. 17, AF PAC's Disc. Resps. at 17, Interrog. 13 (Doc. No. 68-1).)

**C. American Future PAC Obtained 51 Contributors in Nine Days**

41. AF PAC received contributions from 51 persons within nine days of its registration with the FEC on August 11, 2014. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 4, Interrog. 4 (Doc. No. 50-5); Exh. 3 to Najvar Decl. (Doc. No. 50-4).) To solicit those donations, AF PAC used “e-mail and other electronic communications, as well as personal requests by” Lenell and Najvar “directly to individual friends, colleagues, and business and personal acquaintances.” (FEC Exh. 17, AF PAC's Disc. Resps. at 13, Interrog. 4 (Doc. No. 68-1).)

42. AF PAC solicited those 51 contributions in part for the purpose of satisfying FECA's requirement that a political committee receive contributions “from more than 50 persons” to become a multicandidate political committee under 52 U.S.C. § 30116(a)(4). (FEC Exh. 17, AF PAC's Disc. Resps. at 6, RFA 4 (Doc. No. 68-1).) AF PAC asked for contributions explicitly so it could satisfy the “more than 50 persons” requirement. (*Id.* at 6, RFA 5.) For example, Lenell sent a solicitation via Facebook to a potential contributor that stated: “Hey. I need a favor. . . . I'm starting a Political Action Committee and I need to get to 51 donors to get standing and join a lawsuit. [W]ill you donate to help?” (FEC Exh. 18, Messages from Matt Lenell (Doc. No. 68-2).) Lenell also “made oral solicitations substantively identical to th[e]se written solicitations to other potential contributors.” (FEC Exh. 17, AF PAC's Disc. Resps. at 13-14, Interrog. 5 (Doc. No. 68-1).)

43. AF PAC solicited contributions of five dollars. (*See* FEC Exh. 19, Message from Matt Lenell (Doc. No. 68-3).) For example, Lenell solicited one potential contributor with an email that stated in its entirety: “Hey. Do me a favor — donate \$5. <https://anedot.com/campaigns/american-future-pac>.” (*Id.* at 2.) Out of the first 51 contributions that AF PAC received in the nine days after its registration, 41 were for five dollars. (Exh. 3 to Najvar Decl. (Doc. No. 50-4).) Three were for one dollar. (*Id.*)

44. By August 22, 2014, AF PAC had raised \$5,473 from 54 contributors. (Exh. 3 to Najvar Decl. (Doc. No. 50-4).) AF PAC received \$5,000 of that amount on August 18 from one contributor, Shaun McCutcheon. *Id.*; AF PAC Oct. Quarterly Report of Receipts and Disbursements at 17 (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf>. Before McCutcheon's \$5,000 contribution, AF PAC had received a total of \$321. (*See* Exh. 3 to Najvar Decl. (Doc. No. 50-4).) On August 19, the day after McCutcheon contributed \$5,000 to AF PAC, AF PAC contributed \$2,600 to Rep. Cotton's Senate campaign. *Id.*; Exh. 2 to Najvar Decl. (Doc. No. 50-4); AF PAC Oct. Quarterly Report of Receipts and Disbursements at 27 (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf>. A few weeks later, McCutcheon contributed \$1,776 directly to Rep. Cotton's Senate campaign. *See* Cotton for Senate Oct. Quarterly Report of Receipts and Disbursements at 1509 (Oct. 15, 2014), [http://docquery.fec.gov/cgi-bin/fecimg/?\\_14020822141+1509](http://docquery.fec.gov/cgi-bin/fecimg/?_14020822141+1509).

45. Since reaching 54 contributors, AF PAC has received no reported contributions. *See* AF PAC Oct. Quarterly Report of Receipts and Disbursements at 6-23 (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf> (reflecting that AF PAC received no contributions from August 22 through September 30, 2014;<sup>3</sup> AF PAC Pre-General Election Report of Receipts and Disbursements at 3 (Oct. 19, 2014), <http://docquery.fec.gov/pdf/670/14951682670/14951682670.pdf> (reflecting that AF PAC received no contributions from October 1 through October 10, 2014); *see also* FEC Exh. 17, AF PAC's Disc. Resps. at 19, Interrog. 17 (stating that AF PAC had "approximately 54 contributors" on October 27, 2014) (Doc. No. 68-1).

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<sup>3</sup> Lenell and Najvar lent money to AF PAC after August 22, which AF PAC later paid back. *See* AF PAC's Oct. Quarterly Report of Receipts and Disbursements at 24, 28 (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf>.

**D. American Future PAC Contributed \$2,600 to Rep. Cotton and \$100 to Four Other Candidates Within 14 Days of Its Registration**

46. AF PAC had contributed to five federal candidates as of August 25, 2014 — 14 days after it registered with the FEC. (Exh. 2 to Najvar Decl. (Doc. No. 50-4).) On August 19, AF PAC contributed \$2,600 to Rep. Cotton’s campaign for Senate in the November 4, 2014 general election. (*Id.*) AF PAC then contributed \$100 each to four other candidates. (*Id.*)

47. AF PAC contributed to the four other candidates in part to satisfy FECA’s requirement that a political committee make “contributions to 5 or more candidates for Federal office” to become a multicandidate political committee under 52 U.S.C. § 30116(a)(4). (FEC Exh. 17, AF PAC’s Disc. Resps. at 6, RFA 6 (Doc. No. 68-1).)

48. AF PAC filed its first report of receipts and disbursements with the FEC on October 15, 2014, nearly two months after August 25 when it had first obtained 51 contributors and contributed to five candidates. *See* AF PAC Oct. Quarterly Report of Receipts and Disbursements (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf>.

49. AF PAC’s FEC reports reflect no contributions to any candidate after August 25. *See* AF PAC Oct. Quarterly Report of Receipts and Disbursements at 25-28 (Oct. 15, 2014), <http://docquery.fec.gov/pdf/957/14978394957/14978394957.pdf>; AF PAC Pre-General Election Report of Receipts and Disbursements at 4 (Oct. 19, 2014), <http://docquery.fec.gov/pdf/670/14951682670/14951682670.pdf>.

50. The only campaign to which AF PAC has alleged that it wants to contribute in excess of \$2,600 is Rep. Cotton’s campaign for U.S. Senate, an election which occurred on November 4, 2014. (Pls.’ SJ Br. at 7-8, ¶¶ 33-39 (Doc. No. 56-1).) Rep. Cotton prevailed in that election. *See* Katie Glueck, *Tom Cotton Defeats Mark Pryor in Arkansas*, Politico.com (Nov. 4, 2014), <http://www.politico.com/story/2014/11/arkansas-senate-results-elections-2014-tom-cotton-mark-pryor-112515.html>.

**E. The Effects of FECA on American Future PAC**

51. Because American Future PAC has 51 contributors and has contributed to five candidates, and because it registered with the FEC on August 11, 2014, it will become a multicandidate PAC and gain the ability to contribute \$5,000 per election to federal candidates on February 11, 2015. *See* 52 U.S.C. § 30116(a)(2), (a)(4).

52. AF PAC admits that FECA does not limit the number of candidates to whom it may contribute. (FEC Exh. 17, AF PAC's Disc. Resps. at 6-7, RFA 8 (Doc. No. 68-1).)

53. AF PAC acknowledges that prior to February 11, 2015, FECA permits it to contribute more to political party committees than multicandidate political committees may contribute to political party committees. (FEC Exh. 17, AF PAC's Disc. Resps. at 8, RFA 11 (Doc. No. 68-1).) AF PAC also acknowledges that FECA permits it to contribute more to candidates and political party committees than corporations, unions, government contractors, and foreign nationals may contribute to candidates and political party committees. (*Id.* at 9, RFA 12.) AF PAC further admits that FECA gives it the opportunity to qualify to contribute up to \$5,000 per election to a candidate, while FECA offers no such opportunity to individuals, partnerships, and associations. (*Id.* at 9-10, RFA 13.) Finally, AF PAC acknowledges that under current law, it could register with the FEC as a "hybrid" political committee and accept contributions of unlimited amounts to fund independent political speech, while political parties and connected political committees may not do so. (*Id.* at 10, RFA 14.)

54. AF PAC is aware that it is legally permitted to spend unlimited funds on independent expenditures in support of or in opposition to federal candidates. (FEC Exh. 17, AF PAC's Disc. Resps. at 7-8, RFA 10 (Doc. No. 68-1).) AF PAC is "unaware of any circumstances that would prevent it from" making independent expenditures. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 5, Interrog. 6 (Doc. No. 50-5).) However, AF PAC "has not sought to make any independent expenditures for any candidate" and has no plans to do so. (*Id.*)

55. AF PAC acknowledges that it is legally permitted to encourage volunteer activities in support of federal campaigns. (AF PAC's Resps. to Stop PAC Disc. Reqs. at 12,

RFA 8 (Doc. No. 50-5). However, AF PAC has not organized any volunteer efforts for candidates. (FEC Exh. 17, AF PAC Disc. Reqs. at 19-20, Interrog. 19 (Doc. No. 68-1).)

## ARGUMENT

### I. THE COURT LACKS JURISDICTION OVER AMERICAN FUTURE PAC'S CLAIMS

#### A. American Future PAC Should Be Dismissed Because the Court Has Lacked Jurisdiction over Stop PAC's Claims

In support of its motion for summary judgment, the Commission has shown that Stop PAC lacks standing and that its claims became moot on September 11, 2014. (FEC SJ Br. at 10-11 (Doc. No. 57-1); FEC Resp. at 6-8 (Doc. No. 60); FEC's Rebuttal in Supp. of Its Mot. for Summ. J. ("FEC Rebuttal") at 2-5 (Doc. No. 63).) AF PAC sought to join this suit to keep those claims alive, but it did not intervene until October 6 — *after* the Court clearly lacked jurisdiction over Stop PAC's claims — and that lack of jurisdiction is fatal to AF PAC's claims. *See Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) ("[I]t is well-settled law that intervention presupposes pendency of an action in a court of competent jurisdiction." (internal quotation marks omitted)); 7C C. Wright, A. Miller, M. Kane, R. Marcus, A. Steinman, *Federal Practice and Procedure* § 1917, at 458 (3d ed. 2005) ("Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action."). In particular, AF PAC's intervention could not cure the Court's lack of jurisdiction over counts one and two, whether jurisdiction was deemed to be lacking on standing or mootness grounds. *See, e.g., Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) ("We have long recognized that if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." (internal quotation marks omitted; alterations in original)); *Becton v. Greene Cnty. Bd. of Educ.*, 32 F.R.D. 220, 222-23 (E.D.N.C. 1963) (rejecting motion "for leave to intervene as plaintiffs in an action that has admittedly become moot" since "intervention may not be allowed to give life to a lawsuit which does not actually exist").

**B. American Future PAC's Claims Appear to Have Become Moot After the November 4 General Election**

Even if AF PAC's intervention was proper, the Court should dismiss AF PAC's claims because they now appear to be moot. AF PAC sought to contribute in excess of \$2,600 to one candidate: "[Rep. Tom] Cotton in connection with the 2014 general election." (Pls.' SJ Br. at 7, ¶¶ 37-38 (Doc. No. 56-1).) That election is over, however, and although it may still be possible to contribute to the Cotton campaign to retire any campaign debt the campaign may have, AF PAC has not alleged any desire to do so. Thus, FECA is no longer causing AF PAC any purported injury. Since "the relief sought can no longer be given or is no longer needed," *Incumaa v. Ozmint*, 507 F.3d 281, 287 (4th Cir. 2007) (internal quotation marks omitted), AF PAC's claims are moot.

**II. AMERICAN FUTURE PAC ILLUSTRATES HOW THE SIX-MONTH PERIOD HELPS PREVENT A DUMMY-LIKE PAC FROM CIRCUMVENTING THE \$2,600 LIMIT TO HELP A CANDIDATE JUST PRIOR TO AN ELECTION**

In its previous briefing, the Commission explained that Congress sought to reserve the special \$5,000 contribution limit for broad-based groups, such as political parties and multicandidate PACs, that are legitimately supported by many people and interested in supporting multiple candidates. The six-month period helps prevent one candidate's supporters from circumventing the \$2,600 contribution limit for individuals just before an election by labeling themselves a committee. (*See* FEC SJ Br. at 13-16 (Doc. No. 57-1); FEC Resp. at 15-17 (Doc. No. 60); FEC Rebuttal at 7-8 (Doc. No. 63).)

The FEC also presented evidence showing that plaintiff Stop PAC illustrated this circumvention risk, since it was created and operated by two workers for the then-ongoing congressional campaign of Niger Innis, to whom Stop PAC sought to contribute in excess of \$2,600. After registering, Stop PAC was able to easily satisfy the other two multicandidate PAC requirements — obtaining 51 contributors and contributing to five candidates — in only 24 days. Plaintiffs argue that at that point Stop PAC should have qualified for the \$5,000 limit. Yet Stop PAC was then still just two individuals with close ties to one candidate and had yet to even file

an FEC disclosure report, let alone become a broad-based group like its co-plaintiff Tea Party Leadership Fund. (*See* FEC SJ Br. at 13-16 (Doc. No. 57-1); FEC Resp. at 15-17 (Doc. No. 60); FEC Rebuttal at 7-8 (Doc. No. 63).)

The evidence regarding AF PAC similarly illustrates that without the six-month period, there would be a much greater risk that a dummy-like PAC could circumvent the \$2,600 limit and evade disclosure to aid one candidacy right before an election.

**A. American Future PAC Was Narrowly Focused on Helping One Candidate's Campaign, for Which American Future PAC's Chairperson Has Worked**

The evidence shows that AF PAC is exactly the type of "narrow-based political committee" that Senator Kennedy feared would attempt to "take on new sources of contributions" and "new candidate beneficiaries in order to qualify for the \$5,000 gifts allowed to be made by broad-based committees." 120 Cong. Rec. S18527 (daily ed. Oct. 8, 1974). AF PAC was formed and run by just two individuals, and it was apparently interested in assisting only Rep. Cotton's campaign for Senate in the November 4 general election.

AF PAC has no officers, employees, or agents other than Matt Lenell, its chairperson, and Jerad Najvar, its treasurer, custodian of records, and counsel. (FEC's Statement of Supplemental Undisputed Material Facts Regarding Intervenor American Future PAC ("FEC Supp. Facts") ¶ 37.)<sup>4</sup> Lenell has worked for Cotton's 2014 Senate campaign as an employee of the political consulting firm Campaign Solutions. (*Id.* ¶ 36.) Lenell's work for Cotton included editing "fundraising communications that Campaign Solutions publicly distributed on behalf of the Cotton campaign" and providing "html and other technical 'coding' for online communications such as e-mails that Campaign Solutions posted or distributed on behalf of the Cotton campaign." (*Id.*) Lenell retained Najvar to register AF PAC with the FEC. (*Id.* ¶ 37.) That registration occurred on August 11, less than three months before Cotton's November 4

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<sup>4</sup> AF PAC has hired two vendors; one was created just before AF PAC's FEC registration, and plaintiffs' counsel Dan Backer is that vendor's registered agent. (FEC Supp. Facts ¶¶ 38-39.)

election. (*Id.* ¶¶ 34, 36.) As chairperson, Lenell makes all decisions concerning AF PAC's contributions. (*Id.* ¶ 35.)

On August 19, AF PAC contributed the maximum allowed by FECA only to Cotton and then just \$100 to four other candidates. (FEC Supp. Facts ¶ 46.) Lenell wanted AF PAC to contribute even more to Cotton (*id.* ¶ 50), but the PAC has expressed no interest in contributing more than \$100 to any other candidate in pursuit of its broad stated purpose of "stand[ing] for the veterans who have secured our freedom" (*id.* ¶ 40). In fact, AF PAC made no reported contributions to any candidate after August 25. (*Id.* ¶ 49.)

**B. American Future PAC Easily Satisfied the 51-Contributor and Five-Contribution Requirements in Just 14 Days**

As the Commission has demonstrated, the six-month period is an essential aspect of the three multicandidate PAC criteria, in part because the other two criteria can be satisfied quickly. (FEC SJ Br. at 13-16 (Doc. No. 57-1); FEC Resp. at 15-17 (Doc. No. 60); FEC Rebuttal at 7-8 (Doc. No. 63).) This is even more true today than it was in 1976 when the multicandidate criteria were enacted, since it is now easier to quickly solicit donors using the Internet and social media. Using such techniques, AF PAC satisfied the 51-contributor and five-contribution requirements in only 14 days.

First, Lenell and Najvar successfully solicited contributions for AF PAC from more than 50 persons in just nine days. (FEC Supp. Facts ¶ 41.) They did so using online fundraising software and by sending emails, texts, and Facebook messages to friends, colleagues, and acquaintances asking for five dollars. (*Id.* ¶¶ 39, 41, 43.) Forty-one of AF PAC's first 51 contributions after registration were for five dollars, while three were for just one dollar. (*Id.* ¶ 43.) AF PAC admits that it solicited contributors in part for the purpose of satisfying FECA's 51-contributor requirement; indeed, some solicitations explicitly asked potential contributors to give to AF PAC for that purpose, not to help veterans. (*Id.* ¶ 42.) In one solicitation, Lenell said to a potential contributor: "Hey. I need a favor. . . . I'm starting a Political Action Committee and I need to get 51 donors to get standing and join a lawsuit. [W]ill you donate to help?" (*Id.*)

Lenell made similar oral solicitations. (*Id.*) Lenell and Najvar’s concerted effort to satisfy the 51-contributor requirement resulted in AF PAC obtaining 54 contributors by August 22. (*Id.* ¶ 44.) AF PAC has since received no further reported contributions. (*Id.* ¶ 45.)

Second, AF PAC had contributed to five federal candidates by August 25. (FEC Supp. Facts ¶ 46.) It gave \$2,600 to Rep. Cotton and then a relatively nominal \$100 to four others — amounts that AF PAC admits were given in part simply to satisfy the five-contribution requirement for multicandidate PAC status. (*Id.* ¶ 47.) Since contributing to Cotton and the four other candidates, AF PAC has made no other reported contributions to any candidate. (*Id.* ¶¶ 48, 49.)

AF PAC’s efforts to satisfy the 51-contributor and five-contribution requirements, even if litigation-driven, illustrate how easy it would be for a dummy-like group motivated by narrow circumvention interests to quickly obtain the \$5,000 limit were it not for the six-month period.

**C. After 14 Days, American Future PAC Was Still a Circumvention Risk and Not Similarly Situated to a *Bona Fide* Multicandidate Group like the Tea Party Leadership Fund or a Political Party**

Plaintiffs have asserted that a new PAC “that has more than 50 contributors, by definition, cannot be a façade through which a single individual is attempting to evade other contribution limits.” (Pls.’ SJ Br. at 17-18 (Doc. No. 56-1).) But just like the evidence regarding Stop PAC, the evidence here regarding AF PAC undermines that assertion.

On August 25, 2014, when AF PAC had 51 contributors and had made five candidate contributions (FEC Supp. Facts ¶¶ 41, 46), it was *far* from being a broad-based citizen interest group akin to plaintiff Tea Party Leadership Fund or a political party. AF PAC was then only 14 days old and created and operated by just two people. (*Id.* ¶¶ 34, 37.) It had contributed the \$2,600 maximum allowed by FECA to a single candidate, Rep. Cotton, while showing little interest in other candidates. (*Id.* ¶¶ 46, 49-50.) AF PAC admits that it donated to four other candidates in part simply to satisfy the five-contribution requirement. (*Id.* ¶ 47.) AF PAC’s

chairperson either had worked or would soon work for the Cotton campaign, performing tasks that included editing Cotton campaign fundraising communications. (*Id.* ¶ 36.)

Furthermore, AF PAC's \$2,600 contribution to Rep. Cotton was made possible only because a single donor had given AF PAC \$5,000 the day before. (FEC Supp. Facts ¶ 44.) That single donor, Shaun McCutcheon, dominated AF PAC's receipts: More than 91 percent of the \$5,473 AF PAC had raised by August 22 came from McCutcheon's \$5,000. (*Id.*) McCutcheon would later donate \$1,776 directly to Rep. Cotton's campaign. (*Id.*) On August 25, however, the public had no way to know that AF PAC's receipts consisted largely of money from one donor who would later give directly to Rep. Cotton, since AF PAC had yet to file a disclosure report detailing the sources of its funding.<sup>5</sup> (*Id.* ¶ 48.) In fact, AF PAC would not be required to file a disclosure report for nearly another two months, on October 15. (*Id.*)

Finally, after August 25, once AF PAC had obtained 51 contributors and had made five contributions including to Rep. Cotton, it apparently ceased engaging in any activity. From that date on, including the critical time immediately preceding the general election, AF PAC neither received nor made any reported contributions (FEC Supp. Facts ¶¶ 45, 49) to further its stated mission of "stand[ing] for the veterans" (*id.* ¶ 40).

Nevertheless, plaintiffs claim that the Constitution requires that AF PAC be entitled to contribute as much to a candidate as national party committees may. The Constitution, however, requires no such thing. *See, e.g., Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (holding that FECA may, consistent with the Constitution, "reflect a judgment by Congress that . . . entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process").

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<sup>5</sup> AF PAC disclosed information regarding its contributors on August 27 in response to discovery in this litigation (Exh. 3 to Najvar Decl. (Doc. No. 50-4)), but of course, such disclosure would not normally occur.

**CONCLUSION**

For the foregoing reasons, and for the reasons stated in the FEC’s previous briefing, the FEC’s motion for summary judgment should be granted and plaintiffs’ motion for summary judgment should be denied.

Respectfully submitted,

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November 14, 2014

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

STOP RECKLESS ECONOMIC	)	
INSTABILITY CAUSED BY	)	
DEMOCRATS, <i>et al.</i> ,	)	Civ. No. 1:14-397 (AJT-IDD)
	)	
Plaintiffs,	)	
	)	
and	)	
	)	
AMERICAN FUTURE PAC,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel:

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