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

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*, *Plaintiffs*,	)	Civ. No. 1:14-397 (AJT-IDD)
	)	Judge Anthony John Trenga
v.	)	Magistrate Judge Ivan D. Davis
FEDERAL ELECTION COMMISSION, *Defendant*.	)	

AMENDED REBUTTAL BRIEF OF PLAINTIFFS AND PUTATIVE INTERVENOR AMERICAN FUTURE PAC IN SUPPORT OF MOTION FOR JOINDER

INTRODUCTION

The FEC's Opposition demonstrates that, rather than seeking to protect its legitimate equities or prevent unfair prejudice, the FEC's true goal is simply to prevent adjudication of Plaintiffs' constitutional claim. The FEC contends, on the one hand, that Plaintiff Stop PAC's challenge to the six-month waiting period at issue will become moot once that period expires, while simultaneously arguing, on the other hand, that this Court should prohibit a newly formed group seeking to join in Stop PAC's challenge, American Future PAC, from entering the case.

The FEC's Opposition does not even attempt to defend the outlandish position it assumed during the parties' meet-and-confer session, that if American Future PAC does join this case, the FEC will require 128 days to take additional discovery from it, meaning that the discovery deadline and briefing schedule for dispositive motions would be pushed to early 2015.[1] Even the FEC's

[1] Indeed, the FEC itself appears embarrassed to admit its position to the Court, instead coyly and vaguely stating that, "[i]n the meet-and-confer discussion regarding the motion, the Commission . . . suggested that if joinder of a new plaintiff did occur, the case schedule should be extended to permit time for motions and discovery about the new plaintiff." FEC Opp. at 4; *see also id*. at 15 (again declining to expressly acknowledge the FEC's original position).

alternative request, for 60 days of additional discovery, *see* FEC Opp. at 15-16, is baseless and calculated to preventing adjudication of this case on the merits.

As an initial matter, the FEC relies solely on a vague, generalized demand for the chance to take discovery, without identifying any particular information it actually needs from American Future that it has not already received. American Future was formed barely a month ago, is operated by only two people, and has handled a total of less than $10,000. Because it is seeking to join in Plaintiff Stop PAC's pending constitutional challenge, American Future ***already has preemptively responded*** to ***all*** of the discovery requests that the FEC served on Stop PAC, including written interrogatory responses, admissions, and the production of documents, as those requests apply to American Future and provided initial disclosures under Rule 26(a). Copies of all of these documents were attached as exhibits to the motion for joinder.

This Court should be particularly skeptical of the FEC's claimed need for additional discovery from American Future, because any such discovery would involve requests that the FEC had not bothered to propound to Stop PAC. As discussed above, American Future is seeking only to join in Stop PAC's constitutional challenge, not to propound new claims, and already has responded to all of the discovery requests that the FEC served on Stop PAC. If there remain a few tangential issues for which the FEC did not see the need to take discovery from Stop PAC—which has been its main adversary to date—it cannot credibly contend it needs an extra two months or more to obtain such discovery from American Future.

The discovery American Future already provided includes detailed information and documents in response to the FEC's requests concerning:

- its personnel;
- its formation, operations and purpose;

- its contributors;
- the contributions it made and wishes to make;
- its independent expenditures (none);
- the basis for its constitutional claims;
- other methods American Future or its contributors may use to associate with candidates;
- its communications with federal candidates; and
- the timing of its creation.

The materials American Future provided confirm beyond dispute that it has standing to maintain Stop PAC's constitutional challenge; indeed, the FEC's opposition memorandum does not even bother attempting to challenge that standing. American Future:

- is registered with the FEC as a non-candidate, non-party, non-connected political committee with more than 50 contributors (registration form provided to FEC and filed with joinder motion);
- contributed to five or more candidates (five contribution checks provided to FEC and filed with joinder motion);
- contributed the maximum statutorily permitted amount of $2,600 to a candidate (contribution check provided to FEC and filed with joinder motion); and
- has additional funds which it wishes to immediately contribute to that candidate (declaration and copy of balance provided to FEC and filed with joinder motion).

As a tiny, newly formed entity, American Future has very few documents, many of which it already has provided to the FEC. It has ***no*** evidence or additional information relevant to the constitutional claims at issue in this lawsuit: whether the six-month waiting period is reasonably tailored to preventing *quid pro quo* corruption, and whether it unreasonably burdens First Amendment rights. Indeed, none of the Plaintiffs had any evidence relevant to that issue, which turns primarily on legislative facts that the Supreme Court has ruled upon as matters of law.

And the FEC both fails to acknowledge—and has ***completely refused*** to take advantage of—the numerous concessions American Future offered, both during its meet-and-confer session as well as in its joinder motion, including:

- agreeing to immediately begin accepting discovery requests, as if it were a party;
- agreeing to service of such requests by e-mail on its attorney;
- agreeing to provide objections, written responses, and responsive documents to all discovery requests within six (6) days of receiving them, without the customary three-day extension for materials that are not personally served; and
- immediately providing Rule 26(a) disclosures.

Any purported prejudice the FEC claims to suffer at this point is entirely of its own making. This Court should see through the FEC's demand for 60 more days to seek additional discovery from American Future, *see* FEC Opp. at 15-16—discovery which it did not bother seeking from Stop PAC. Its request is a transparent attempt to delay this case further, "run the clock" on American Future's six-month waiting period, and moot this case before this Court has a chance to rule on the merits of Stop PAC's and American Future's constitutional challenge.

I. THE MOTION FOR JOINDER IS TIMELY

The FEC begins by arguing that the motion for joinder is untimely:

> [P]laintiffs' motion is untimely under this Court's July 16 Scheduling Order, which required that motions seeking joinder be made as soon as counsel or the party became aware of the grounds for them. In this case, plaintiffs were aware of the issue no later than the July scheduling filings and their counsel was aware no later than November 2012.

Opp. at 1; *see also id*. at 5 ("[P]laintiffs' counsel . . . . knew of the mootness problem they now confront at least as early as November 2012."). It appears the FEC is arguing that any motion for joinder had to be filed either concurrently with the Scheduling Order, or perhaps back in November 2012, before this case was even filed. The FEC fails to specify, however, exactly ***what*** Plaintiffs

should have filed at either of those times. *Cf.* Opp. at 3 ("Plaintiffs did not file a motion for joinder after the issuance of that [Scheduling] [O]rder."). There is no such thing as a "Motion for Joinder" in the abstract, which does not identify a particular entity to be joined.

And the instant motion seeking to join American Future certainly could not have been filed back in July (much less in November 2012). American Future was not created until early August, and did not receive its 51st contribution—a factor that is primarily outside of its control, but essential to its standing—until August 20. Plaintiffs and American Future finalized and filed the instant motion over the following week. While "Plaintiffs explained their plan for joining new plaintiffs at the beginning of July," Opp. at 5, American Future's constitutional rights were not being violated until mid-August, when it fulfilled all statutory requirements for contributing the increased $5,000/election amount to candidates, except for satisfying the six-month waiting period. Thus, American Future PAC could not have been joined back in July, before it either existed or had standing to raise this challenge.

Although the FEC maintains detailed records concerning every political committee in existence, it fails to identify any other entity that Plaintiffs could have sought to join in mid-July—that is, a: (i) non-party, non-candidate political committee, (ii) that was within its six-month waiting period, (iii) with at least 51 contributors, (iv) that had contributed to 5 or more candidates, (v) including a contribution of the legally maximum amount of $2,600 to a candidate, (vi) that had additional funds which it wished to immediately contribute to that candidate; ***and*** (vii) would have been willing to join this lawsuit.

Moreover, joining a new plaintiff in mid-July—particularly a plaintiff well into its six-month waiting period—would have defeated the very purpose of this joinder, which is to extend the period during which this case is indisputably justiciable. If a newly-formed plaintiff with

standing had been joined in early July (about halfway through Stop PAC's six-month waiting period), by the time Stop PAC's waiting period expired on September 11, only about three months would remain in that new plaintiff's waiting period, most of which would be consumed by the summary judgment briefing schedule. Joining a new plaintiff such as American Future now, at the end of Stop PAC's waiting period, removes any possible justiciability concerns until February 2015—likely in sufficient time to allow this case to be fully adjudicated.

Ironically, the FEC ends its argument that the motion for joinder is ***too late*** by arguing that it also is ***too early***:

> [I]nstead of trying to circumvent this Court's Scheduling Order, a more appropriate approach would be for plaintiffs to wait for the Commission to file a motion to dismiss Stop PAC for mootness, and at that time, fully brief their position that those claims are not moot because they are capable of repetition but evading review.

FEC Opp. 6. The FEC cannot seriously contend, on the one hand, that Plaintiffs' motion for joinder is untimely, while simultaneously arguing that Plaintiffs should have waited until ***after*** the FEC moved to dismiss Stop PAC's claims, that motion was fully briefed, and this Court ruled on it, before attempting to join a new plaintiff to address any remaining justiciability concerns. If moving to join a new plaintiff at that ***later*** point in the case would have been consistent with the Scheduling Order, the instant motion surely must be as well.

The Magistrate Judge certainly did not intend for his Scheduling Order to preclude future motions for joinder, and the FEC's intimation that he did is unworthy of credence.

II. AMERICAN FUTURE'S CLAIMS QUALIFY FOR PERMISSIVE JOINDER

American Future's claims satisfy the requirements for joinder, regardless of whether this Court considers the issue under Rule 20 or Rule 21.

A. This Court Should Permit Joinder Under Rule 21 to Preserve

the Justiciability of This Case

This Court should permit American Future to join in Stop PAC's claims under Rule 21 to remove any question about their continued justiciability. Rule 21 specifies that a "court may at any time, on just terms, add . . . a party." Fed. R. Civ. P. 21. A court may grant joinder under Rule 21 without separately analyzing whether Rule 20's requirements are satisfied. *Coach, Inc. v. 1941 Coachoutletstore.com*, 2012 U.S. Dist. LEXIS 1311, at *11-13 (E.D. Va. Jan. 5, 2012) (upholding joinder of 356 "Domain Name Defendants" under Rule 21, regardless of whether Rule 20's requirements were met).[2] Rule 21 permits courts to add parties to continue litigating constitutional claims already at issue in a case and alleviate potential justiciability problems.

At root, the FEC contends that the potential mootness of a plaintiff's claims "does not justify the joinder of a new plaintiff" who wishes to join in those claims by challenging the same exact laws, for the same exact reasons, using the same exact arguments. FEC Opp. at 1; *see also id*. at 11 (arguing that joinder rules should not be interpreted "to preserve the justiciability of a party's claims"). The binding cases and respected treatise Plaintiffs cited establish the exact opposite—it is entirely appropriate for courts to join new parties in a case, even when the opportunity for discovery has passed, to maintain its justiciability and allow adjudication of the

[2] The FEC contends that a court may rely on Rule 21 to join a party only if that party independently qualifies for joinder under some other rule, such as permissive joinder under Rule 20(a). FEC Opp. at 11. This Court already has held to the contrary. *Coach, Inc.*, 2012 U.S. Dist. LEXIS 1311, at *11-13. In any event, the FEC's interpretation would strip any independent meaning of Rule 21's grant of authority to courts to "add . . . a party" on "just terms," Fed. R. Civ. P. 21, rendering it a redundant dead letter. It is a "'cardinal rule of statutory interpretation,'" however, "'that no [statutory] provision should be construed to be entirely redundant.'" *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831, 843 (4th Cir. 2000) (quoting *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality op.)); *see, e.g.*, *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 327 (4th Cir. 2013) (rejecting interpretation of statute that "would render superfluous or redundant [a] phrase" in it). Thus, this Court should recognize and exercise its independent authority to permit American Future to join in Stop PAC's claims under Rule 21.

underlying constitutional claims. *E.g.*, *Mullaney v. Anderson*, 342 U.S. 415, 416 (1952); *Cal. Credit Union League v. City of Anaheim* ("*Anaheim III*"), 190 F.3d 997, 1001 (9th Cir. 1999); *Atkins v. State Board of Education*, 418 F.2d 874, 875 (4th Cir. 1969) (per curiam); *see also* 13B Wright & Miller, *Federal Practice & Procedure*, Civil § 3533.1 (3d ed.); 13C *id*. Civil § 3533.9.

The FEC unpersuasively attempts to dismiss Plaintiffs' authorities as "radically different" from the instant case, FEC Opp. at 2, and "wildly inapposite," *id*. at 11. The FEC begins by broadly pointing out that Plaintiffs' cases all involved joinder at the appellate level. *Id*. at 12. Rule 21, however, provides that a new party may be added "at ***any*** time." Fed. R. Civ. P. 21 (emphasis added). That language suggests that the standard for joinder is the same, whether at trial or on appeal. *See* In re *Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 542 (D.C. Cir. 2011) (holding that an appellate court "may exercise the ***same*** power" as a district court possesses under Rule 21) (emphasis added). There is no basis for suggesting that the standards would be stricter at the trial level.

Moreover, none of the rulings Plaintiffs cited suggests that joinder was appropriate ***because*** the case was on appeal; to the contrary, each of the courts explained why joinder was appropriate ***despite the fact*** that the cases already had reached the appellate level. If anything, one might assume that the standards would be stricter on the appellate level, after a final judgment already has been entered, it is impossible to take further discovery, and the trial-court record has been closed. Thus, far from undermining Plaintiffs' argument, the fact that new litigants were permitted to join in pending constitutional claims at the appellate level to preserve their justiciability simply underscores the propriety of American Future's joinder here.[3]

[3] It is difficult to believe that the FEC would be less opposed to American Future's joinder if Plaintiffs had waited to file the instant motion until this case is on appeal.

The FEC's attempts to distinguish Plaintiffs' cases on their individual facts is similarly unsuccessful. It points out that the parties seeking to be joined in *Mullaney*, 342 U.S. at 417, were union members attempting to alleviate possible justiciability problems with their union's claims. FEC Opp. at 12. The Court allowed their joinder because they sought to maintain the same claims as the union, based on the same arguments, and "their earlier joinder [wound not] have in any way affected the course of the litigation." *Mullaney*, 342 U.S. at 417. The Court went on to emphasize that, as here, requiring "the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id*. Although the Court certainly alluded to the fact that the union had been pursuing its claims on the members' behalf, the opinion does not turn on that fact; the main focus of the Court's reasoning was preventing wasteful duplication of judicial effort.

The FEC similarly attempts to distinguish *Anaheim III*, 190 F.3d at 998, on the grounds that, although the court permitted joinder to preserve the justiciability of a lawsuit despite the plaintiffs' lack of standing, the entity to be joined was the Government. FEC Opp. at 13. The Ninth Circuit's opinion demonstrates, however, that the court was simply applying the general standards of Rule 21 and treating the Government in the same way it would any other litigant; nothing in the opinion suggests that joinder was appropriate due to the Government's status as a sovereign entity. It held, "The United States can join this lawsuit because it is requesting the same remedy as the [current plaintiffs] and offers the same reasons for that remedy and because earlier joinder by the United States would not have affected the course of this litigation." *Anaheim III*, 190 F.3d at 999. All of these factors apply with equal force to the instant case.

The FEC's brief also alludes to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989) (cited in FEC Opp. at 12), which the Ninth Circuit quoted for the proposition that

a court's authority to "join a party to cure a jurisdictional defect must be 'exercised sparingly.'" *Anaheim III*, 190 F.3d at 1001. In *Newman-Green*, 490 U.S. at 838, the Supreme Court elaborated that it was "entirely appropriate" for a court to make changes to the parties to a case to avoid potential justiciability problems when "[n]othing but a waste of time and resources would be engendered by . . . forcing these parties to begin anew." That is the situation the parties face here. If this Court refuses to allow American Future to join this case, it will have to commence an independent lawsuit, wait 60 days for the FEC to file an answer, wait further for a scheduling order, likely undergo discovery and, by the time dispositive briefs are due, its six-month waiting period will be on the verge of elapsing and the FEC would once again claim mootness.

Finally, the FEC points out that the Federal Circuit refused to join a patentholder in a patent infringement suit in *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372 (Fed. Cir. 2000) (cited in FEC Op. at 13). The Federal Circuit denied joinder primarily because the defendants had "specifically challenged [plaintiffs'] standing in the district court," but plaintiffs did not seek to join a new party until "a post-appeal motion." *Id*. at 1381. Here, in contrast, Plaintiffs moved this Court to join American Future shortly after it was created and acquired standing, and mootness concerns had actualized due to the approaching end of Stop PAC's waiting period.

The *Prima Tek II* Court also reasoned that joining the patentholder would be prejudicial, because it previously had been beyond the court's jurisdiction, preventing the defendants from taking discovery from it. *Id*. at 1381-82. Here, in contrast, American Future not only provided responses to all of the FEC's discovery requests to Stop PAC (as those requests would apply to American Future), but made a variety of concessions, discussed earlier, that would have permitted the FEC to take whatever further discovery it wished before the deadline. Thus, joinder here would not prejudice the FEC, and *Prima Tek II* is inapplicable. *See Mentor H/S, Inc. v. Med. Dev.*

Alliance, Inc., 244 F.3d 1365, 1373 (Fed. Cir. 2001) (distinguishing *Prima Tek II* and permitting joinder to eliminate justiciability concerns regarding the lawsuit).

For these reasons, this Court should add American Future as a party to this lawsuit under Rule 21 to eliminate any question as to the justiciability of Stop PAC's claims.

B. American Future's Claims Also Satisfy Rule 20

American Future also satisfies the requirements for permissive joinder under Rule 20 because its claim arises out of "the same . . . series of transactions or occurrences" as Stop PAC's claim, Fed. R. Civ. P. 20(a)(1)(A), and raises questions of law that are "common to all plaintiffs," *id*. R. 20(a)(1)(B). As the U.S. Supreme Court expressly declared, the "impulse" governing matters such as this must be "toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

1. American Future's claim satisfies the "same series of transactions or occurrences" test

The FEC contends that American Future's claim does not "arise out of the same transactions or occurrences" as Stop PAC's claim, FEC Opp. at 2, 7, because "[t]here is no indication that [it] seeks to make contributions to the same candidates as Stop PAC," *id*. at 8.

1. The FEC's argument fails because American Future wishes to join in Stop PAC's constitutional challenge to the six-month waiting period for certain committees to be able to contribute $5,000 per election to a candidate. Rather than seeking to bring an independent claim, American Future wishes to join in the very claim that Stop PAC has been pursuing, challenging the same statutory provisions, as applied to the same types of entities, under the same constitutional amendments, for the same reasons, based on the same arguments. The FEC's contention that this claim somehow falls outside of Rule 20's liberal standards for joinder, *Meth v. Natus Med., Inc.*,

2014 U.S. Dist. LEXIS 97355, at *9 (E.D. Va. July 17, 2014) (holding that Rule 20's "joinder provision is liberally construed by the courts"), is preposterous.

2. Rule 20 allows claims to be joined together if they "aris[e] out of the same transaction, occurrence, or series of occurrences." Fed. R. Civ. P 20(a)(1). Under this standard, "reasonably related claims may be tried together. . . . For purposes of Rule 20, claims are reasonably related if the plaintiff alleges more than distinct and unrelated acts by unrelated defendants." *Sanford v. Virginia*, 2009 U.S. Dist. LEXIS 52777, at *7-8 (E.D. Va. June 22, 2009). American Future's request easily overcomes this low bar.

Here, the challenged "series of occurrences" is the FEC's undisputed enforcement of the challenged six-month waiting period against non-party, non-candidate political committees that have 51 or more contributors and have contributed to 5 or more candidates. Such committees within that waiting period may contribute only $2,600 per election to a candidate, until they have been registered for six months, at which point they may contribute $5,000 per election to a candidate. The fact that Stop PAC and American Future wish to contribute amounts greater than $2,600 to different candidates, *see* FEC Opp. at 8, is irrelevant.

This case is similar to *Hinson v. Norwest Fin S.C., Inc.*, 239 F.3d 611, 613 (4th Cir. 2001) (quotation marks omitted), in which the plaintiffs sued the defendant mortgage company for failing to "inform them of their right to be represented by counsel of their choice at the closing." They later sought to join seven other plaintiffs who had received some information from the defendant about choosing their own counsel, but not enough to satisfy statutory requirements. *Id*. at 614. Although each of the putative plaintiffs had engaged in totally separate transactions with the defendant and received different disclosures, the Fourth Circuit affirmed the district court's decision to join them to the case. It explained:

> The joining plaintiffs alleged that they participated in the same kind of transaction in which the [original plaintiffs] had participated and that all the transactions involved similar loans from [the defendant mortgage company]. The joining plaintiffs also alleged the same or similar types of violations committed by [the defendant] in these transactions. Finally, it appears that similar principles of law would have been applicable to both the original plaintiffs and the joined plaintiffs.

Id. at 618; *cf. Federico v. Lincoln Military Hous.*, 2012 U.S. Dist. LEXIS 144013, at *7 (E.D. Va. Oct. 3, 2012) (holding that consolidation of separate lawsuits was proper, even though they "involve separate incidents in separate locations with varying facts and circumstances," because both plaintiffs' claims arose from "the same harm—damp indoor space and mold exposures at their rental military housing located in Norfolk, Virginia").

Likewise, here, American Future is being prevented from performing the very same act as Stop PAC, pursuant to the same statute that the FEC is enforcing against both entities. The fact that they wish to contribute to different candidates is irrelevant. *Cf. Advamtel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 514 (E.D. Va. 2000) (allowing multiple plaintiffs to join together in claims against AT&T based on its routing of their long-distance calls, "because each call is routed in the same manner, regardless of which plaintiff . . . is originating the call").

The very case upon which the FEC exclusively relies, *Davidson v. District of Columbia*, 736 F. Supp. 2d 115 (D.D.C. 2010) (cited in FEC Opp. at 8), further confirms the propriety of joinder. In *Davidson*, parents of "85 disabled students who allegedly prevailed in 158 separate administrative proceedings" sued under the Individuals with Disabilities Education and Improvement Act, 20 U.S.C. § 1400 *et seq*., "seek[ing] to recover attorney's fees and costs incurred during those administrative proceedings. 736 F. Supp. 2d 115. The court severed each of their claims, on the grounds that the plaintiffs did not contend that they had been denied attorneys' fees based on "a written policy" or some other factor in common "similarly affecting each plaintiffs' case." *Id*. at 120 (*citing Battle v. District of Columbia*, No. 08-1449 (JR), 2009 U.S. Dist. LEXIS

127375, at *1-2 (D.D.C. Apr. 29, 2009)). Here, both Stop PAC's and American Future's inability to contribute more than $2,600 per election to a candidate stems from the FEC's undisputed enforcement of the same unconstitutionally overbroad statute, which affected their intended contributions in the precise same way.

Moreover, even the FEC acknowledges that the purpose of Rule 20 is to "expedite the final determination of disputes, thereby preventing multiple lawsuits." FEC Opp. at 7 (quoting *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 218 n.5 (4th Cir. 2007) (citation and internal quotation omitted)). Refusing to allow American Future to join in Stop PAC's claims would directly frustrate this purpose by requiring it to commence an entirely new lawsuit from scratch, potentially delaying—if not completely preventing—adjudication of the underlying constitutional issues in this case.

3. Litigants seeking to bring the same constitutional challenge to the same statute almost always are permitted to join together in the same lawsuit, even if the particular circumstances of their individual cases happen to differ. To take but one example, the Supreme Court's recent ruling in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), traces in large part back to a complaint filed by numerous students and groups against three different public universities (University of Michigan, Michigan State University, and Wayne State University), based on innumerable distinct admissions decisions and policies. *See Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 472-73 (6th Cir. 2012), *rev'd sub nom. Schuette*, 134 S. Ct. 1623. Because all of the plaintiffs were challenging the same provision of the state constitution (concerning affirmative action) on the same grounds, and contending that it affected them in comparable ways, it was customary and appropriate for their claims to be joined together. That is the typical structure of public law and constitutional litigation,

and this case is no different. *Cf.* FEC Op. at 11. Had American Future existed and been a plaintiff at the outset of this lawsuit, a motion to dismiss on the grounds that its claims arose from distinct occurrences from Stop PAC's would have been frivolous. The analysis is no different now.[4]

2. American Future's claim involves questions of law common to all plaintiffs.

The FEC further contends that joinder is inappropriate because American Future has not presented a "'question of law . . . common to all plaintiffs.'" FEC Opp. at 8 (quoting Fed. R. Civ. P. 20(a)(1)(B)). Yet again, the FEC is incorrect. The claims of Stop PAC, the other current plaintiffs, and American Future each involve the following common questions of law:

- whether restrictions on the amount a political committee may contribute to a recipient of its choice restrict First Amendment rights of speech and association;
- whether heightened constitutional scrutiny applies to disparate limits on political contributions from materially identical political committees, based on the length of time those committees have been registered with the FEC;
- whether the risk of *quid pro quo* corruption that a political committee poses changes after it has been registered with the FEC for six or more months;
- whether the risk of circumvention of contribution limits that a political committee poses changes after it has been registered with the FEC for six or more months;
- whether the FEC can achieve its goals of combatting corruption and circumvention of contribution limits through more narrowly tailored means than discriminating among materially identical political committees based solely on whether or not they have been registered for six months.

The FEC argues that Stop PAC's and American Future's claims also raise a few distinct issues. Specifically, Stop PAC has established a separate "independent expenditure"-only account

[4] Even if this Court finds that the technical requirements of Rule 20 are not satisfied, American Future meets the standards for permissive intervention under Rule 24(b): "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). American Future's claim presents the same "question of law" as Stop PAC's claim in "the main action." *Id.*

that may accept unlimited contributions for the sole purpose of subsidizing independent expenditures, while American Future lacks such an account. FEC Opp. at 9. This distinction is legally irrelevant to any argument the FEC may attempt to mount, however, because American Future is free to create such an account at any time, if it wishes. The FEC also contends that none of Stop PAC's supporters live in the same state as any of the candidates to whom it contributed, while several of American Future's supporters live in the same state as a candidate to whom that entity contributed. *Id*. This is incorrect; the attached declaration demonstrates that Stop PAC has contributors from throughout the nation, and some of them live in the same states as candidates to whom it contributed. *See* Declaration of Dan Backer (attached as Exh. A).

In any event, any factual differences that may exist between Stop PAC's claim and American Future's claim are irrelevant under Rule 20(a)(1)(B). Once a putative plaintiff has established that its claims share "common questions of law" with the current plaintiffs, Rule 20(a)(1)(B) is satisfied; the presence of other factual or legal differences is irrelevant. *See Sanford*, 2009 U.S. Dist. LEXIS 52777, at *10 (E.D. Va.) (holding that, under rule 20(a)(1)(B), "there need not be an identity of issues of law or fact so long as any common issue exists between the claims"). Thus, American Future satisfies Rule 20's requirements for joinder.

III. THE FEC DOES NOT NEED ADDITIONAL TIME TO OBTAIN FURTHER DISCOVERY FROM AMERICAN FUTURE

The FEC also contends, on the one hand, that allowing American Future to join this case without giving the FEC time to take discovery would prejudice the FEC but, on the other hand, extending the deadline for discovery would unduly delay this case. Opp. at 2. To the contrary, allowing American Future to join this case without further discovery will not prejudice the FEC, alleviating any need for delay.

1. The Supreme Court and other courts have permitted new plaintiffs to join in constitutional challenges to alleviate potential justiciability concerns, despite the fact that those cases were already ***on appeal***, when it was impossible to take further discovery. *See, e.g.*, *Mullaney*, 342 U.S. at 416-17; *Mentor H/S*, 244 F.3d at 1373; *Anaheim III*, 190 F.3d at 999. Thus, precedent firmly supports permitting American Future to join in Stop PAC's claims here.

2. As discussed earlier, American Future already provided to the FEC all the discovery the FEC could reasonably seek under Rule 26. The FEC complains that it "is entitled to conduct its own discovery, rather than having to rely on what plaintiffs choose to supply." FEC Opp. at 15. Because American Future seeks to join in Stop PAC's claims, it answered ***all of the FEC's written discovery requests*** to Stop PAC—including interrogatories, requests for admission, and requests for production—as those requests would apply to American Future.

The discovery period is now closed. The evidence American Future has provided establishes beyond dispute its standing to join in Stop PAC's claims. The FEC's brief does not even bother attempting to challenge that standing. And the FEC has not seen a need to seek additional information from Stop PAC to defend against its constitutional challenge. Thus, American Future already has provided all of the discovery that ***the FEC itself*** decided it needs to both investigate an entity challenging the six-month waiting period (*i.e.*, Stop PAC), and defend against that constitutional challenge. The FEC cannot credibly claim to need more.

3. Additionally, American Future already provided to the FEC a substantial fraction of all the documents American Future ***has***. American Future is a tiny group operated by two people with extremely limited assets. There is hardly any other information left for the FEC to even attempt to obtain in discovery.

4. Moreover, because the discovery deadline was only a few weeks away when American Future held its meet-and-confer call with the FEC, it provided the FEC with an extraordinary range of unprecedented concessions concerning discovery, and reiterated those concessions in its joinder motion. As mentioned earlier, American Future agreed to immediately provide its Rule 26(a) disclosures; start accepting discovery requests by e-mail to its counsel, as if it were a party; and provide ***all*** responses—including objections, written answers, and responsive documents—within six (6) days, without the additional three days customarily added for document served by e-mail.

The FEC, however, chose to ignore those concessions and declined to serve even a single discovery request on American Future. It cannot now ask this Court to either extend the discovery deadline, or punish both Plaintiffs and American Future by excluding it from this case. American Future did absolutely everything it could to give the FEC a more-than-fair opportunity to take additional discovery from it; the FEC should not now be rewarded for its own obstinance.

5. The FEC cannot credibly contend that it needs information from American Future to defend the constitutionality of a statutory scheme that Congress enacted decades ago, and the FEC has been enforcing ever since. This law's constitutionality cannot possibly hinge on anything about these particular litigants, which were not even created until long after this framework's enactment. To the contrary, the constitutional issues in this case turn on essentially legislative facts about corruption and circumvention which the Supreme Court repeatedly has treated as questions of law. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-56 (2014); *Citizens United v. FEC*, 558 U.S. 310, 357-61 (2010); *cf. Buckley v. Valeo*, 424 U.S. 1, 47 (1976) ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only

undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments.").

6. The FEC has failed to identify even a single piece of information it purportedly needs from American Future that American Future: (i) is likely to have, and (ii) has not already provided to the FEC. *Cf*. FEC Opp. at 14 ("[T]he Commission needs to build a record to defend the FEC challenge by the potential plaintiff . . . ."); *id*. at 15 ("[T]he Commission intends to serve written discovery requests, tailored to [American Future's] specific situation . . . ."). The FEC's vague and hackneyed assertions of prejudice—recall the FEC's impassioned, yet ultimately baseless, discovery-related opposition to Niger Innis' dismissal—are insufficient to preclude joinder or require changes to the discovery deadline and dispositive motion briefing schedule.

Thus, this Court should permit American Future to join this lawsuit, decline to extend the discovery deadline, and maintain the current briefing schedule.

IV. EXTENDING DISCOVERY BY EVEN A MONTH OR TWO WOULD DEFEAT THE POINT OF JOINING AMERICAN FUTURE

The FEC concludes its brief by asking this Court to extend the discovery deadline, as well as the briefing schedule for dispositive briefs, by 60 days as a condition for joining American Future to this lawsuit. For the reasons set forth above, this Court should deny those requests. More fundamentally, granting the FEC's request will largely defeat the benefit to judicial economy of joining American Future in the first place. Providing an additional two months of discovery at this point would push the discovery deadline back to mid- or late November, and dispositive briefing would not be complete until nearly the end of the year. By that time, American Future would be nearing the end of its six-month waiting period (just as Stop PAC was when this motion was filed), and Plaintiffs would have to attempt to identify and join yet another entity to avoid any potential justiciability concerns with this case and ensure an adjudication on the merits. And this cycle

would recur. This Court should let American Future join in Stop PAC's claims without delay and permit dispositive briefing to occur as scheduled.

CONCLUSION

For these reasons, this Court should permit American Future to join Stop PAC's claims in this case and preserve the existing discovery deadline and briefing schedule.

Respectfully submitted,

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/s/ Dan Backer
Dan Backer, Esq.,
Virginia State Bar # 78256
DB CAPITOL STRATEGIES PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
Phone: (202) 210-5431
Fax: (202) 478-0750
E-mail: DBacker@DBCapitolStrategies.com
Attorney for Plaintiffs

/s/ Michael T. Morley
Michael T. Morley, Esq.,
Virginia State Bar # 65762
COOLIDGE-REAGAN FOUNDATION
1629 K Street, Suite 300
Washington, DC 20006
Phone: (202) 603-5397
E-mail: Morley@coolidgereagan.org
Attorney for Plaintiffs and Putative Plaintiff-Intervenor American Future PAC

/s/ Jerad Najvar*
Jerad Najvar
NAJVAR LAW FIRM
4151 Southwest Freeway, Suite 625
Houston, TX 77027
Phone: (281) 404-4696
E-mail: jerad@najvarlaw.com
Attorney for Putative Plaintiff-Intervenor American Future PAC
*Motion for *pro hac vice* admission forthcoming