

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

AMERICA FIRST LEGAL FOUNDATION,

*Plaintiff,*

v.

FEDERAL ELECTION COMMISSION,

*Defendant.*

Civil Action No.: 24-517 (JDB)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

**Introduction**

More than 260 days ago, the Plaintiff, America First Legal Foundation (“AFL”), filed its administrative complaint with the Federal Election Commission (“FEC” or “Commission”). AFL’s administrative complaint demonstrates that Biden for President, Biden Victory Fund, DNC Services Corp/Democratic National Committee, and Biden Action Fund (“Respondents” or “Biden Campaign”) violated federal law by failing to report the direct contributions, indirect contributions, and coordinated communications that resulted from the Biden Campaign’s development of a letter by 51 former intelligence officials (“Letter of 51”) and related media strategy—just two weeks before election day—to falsely discredit reports alleging a laptop containing illegal, embarrassing and scandalous information belonged to the President’s son, Hunter Biden. The Biden Campaign’s actions here sought to influence the outcome of the 2020 presidential election.

There are four stages of enforcement under the Federal Election Campaign Act (“FECA”) for such administrative complaints. In the first stage, after the respondents are notified and given an opportunity to present written arguments, the FEC Commissioners vote on whether the administrative complaint provides reason to believe that the law has been violated. 52 U.S.C. § 30109(a)(1)–(2). If at least four commissioners vote to find that there is reason to believe a violation has occurred, the matter proceeds to the second stage of enforcement. 52 U.S.C. § 30109(a)(2). Alternatively, the Commission may dismiss the case or determine there is no reason to believe a violation has occurred. *See* 52 U.S.C. § 30109(a)(1)–(2).

In the second stage, the FEC investigates the claims, including through subpoenaed documents and testimony. 52 U.S.C. §§ 30106(c), 30107(a)(1)–(5), 30109(a)(2), 11 C.F.R. § 111.10–14. Based on the evidence gathered and additional submissions from the respondents, the Commissioners vote to determine whether there is probable cause to believe a violation occurred. 52 U.S.C. § 30109(a)(3)–(4). If the Commission finds probable cause, it proceeds to the third stage of enforcement, which is an attempt to conciliate the matter with the respondents. 5 U.S.C. § 30109(a)(4)(A)(i). Finally, if the respondents are unwilling to conciliate, the Commission proceeds to the fourth stage of enforcement, which is to file a civil enforcement action in federal court 52 U.S.C. § 30109(a)(6).

To ensure the FEC moves enforcement matters through these stages in a timely manner, Congress has provided that a complainant like AFL may seek relief from this Court if the FEC fails to act on an administrative complaint within 120

days. 52 U.S.C. § 30109(a)(8)(A). Here, more than twice that amount of time has elapsed, and the Commission has not even completed the first stage. The Commission's failure to act is contrary to law. Worse, the FEC's unreasonable delay has the effect of obfuscating the resolution of a highly important matter of public concern directly relevant to the forthcoming Presidential election.

### Facts

On April 20, 2023, the House Judiciary Committee revealed that the letter from 51 former intelligence officials, including some who were on active contract with the Central Intelligence Agency ("CIA") alleging that "the arrival on the US political scene of emails purportedly belonging to Vice President Biden's son Hunter, much of it related to his time serving on the Board of the Ukrainian gas company Burisma, has all the classic earmarks of a Russian information operation," was coordinated by the Biden campaign to support its debate and media strategy. Statement of Facts ¶¶ 5–12. The United States government would later confirm the authenticity of the laptop in its prosecution of Hunter Biden over gun charges. *Id.* ¶ 16. According to one survey, nearly four out of five Americans believe that truthful coverage of the Hunter Biden laptop would have changed the outcome of the 2020 presidential election. *Id.* ¶ 15.

On October 23, 2023, AFL filed an administrative complaint with the Commission showing that the Biden Campaign failed to report direct contributions, indirect contributions, and coordinated communications in violation of FECA. *Id.* ¶ 16. One of the Respondents had previously fabricated allegations of Russian collusion

to influence the 2016 presidential election in coordination with the intelligence community. *Id.* ¶ 20. The intelligence community appears to be doing the same in the current presidential election cycle. *Id.* ¶ 21. Barely three months from election day, the Commission has not yet acted on AFL’s administrative complaint. *Id.* ¶ 22.

## **Legal Standards**

### **I. Summary Judgment Standard**

Summary judgment is proper if “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 judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To establish a genuine issue of fact, the non-moving party cannot rely on “mere unsupported allegations or denials” but must support its opposition by “affidavits or other competent evidence setting forth specific facts showing there is a genuine issue for trial.” *Shays v. FEC*, 424 F. Supp. 2d 100, 109 (D.D.C. 2006) (citing *Celotex*, 477 U.S. at 324); *see also* FED. R. CIV. P. 56(c).

### **II. Contrary to Law Standard**

The Plaintiff is entitled to judgment as a matter of law where the undisputed facts show that the FEC has acted “contrary to law” by unreasonably delaying action on the underlying administrative complaint. 52 U.S.C. § 30109(a)(8)(c). While FECA “does not require that an investigation be completed within a specific time period,” *Democratic Senatorial Campaign Comm. v. FEC*, No. CIV.A. 95-0349 (JHG), 1996 WL 34301203, at \*1 (D.D.C. Apr. 17, 1996) (“*DSCC*”), it does impose “an obligation to

investigate complaints expeditiously.” *Id.* at \* 4; *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) (“Where the issue before the Court is whether the agency’s failure to act is contrary to law, the Court must determine whether the Commission has acted ‘expeditiously.’”).

In determining whether the Commission has acted “expeditiously,” the court considers the factors in *Common Cause* and the factors in *Telecommunications Rsch. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“*TRAC*”). The *Common Cause* factors are: “[1] the credibility of the allegation, [2] the nature of the threat posed, [3] the resources available to the agency, and the information available to it, [4] as well as the novelty of the issues involved.” *Common Cause*, 489 F. Supp. at 744. The *TRAC* factors are:

(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 (internal citations and quotations omitted).

This determination is far less deferential to the FEC than when determining whether the FEC’s dismissal of a complaint is contrary to law. *DSCC*, 1996 WL 34301203, at \*4 (D.D.C. Apr. 17, 1996) (“While the decision to investigate is entitled to considerable deference, the failure to act in making such a determination is not.”).

## Argument

The FEC's failure to act on the Plaintiff's administrative complaint is contrary to law. FECA provides: "[a]ny party aggrieved by ... a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A). The FEC's failure to act is contrary to law under the *Common Cause* factors and the *TRAC* factors. Accordingly, the Court should grant the Plaintiff's motion.

### **I. FEC's Inaction is Contrary to Law under the *Common Cause* Factors.**

The FEC's failure to act is contrary to law because the Commission has failed to act "expeditiously." *Common Cause*, 489 F. Supp. at 744. In *Common Cause*, the court "was disturbed about the inordinate length of time consumed by this investigation. The matter has moved at an exceedingly slow pace." *Id.*

Under *Common Cause*, the court first weighs the credibility of the allegation. *Id.* In *Campaign Legal Ctr. v. FEC*, No. CV 20-0809 (ABJ), 2021 WL 5178968, at \*5 (D.D.C. Nov. 8, 2021), the court found allegations of a violation of FECA's registration requirement for "political committees" credible because of substantial, publicly available filings. *Id.* at \*5. In *DSCC*, the court likewise found that allegations of a FECA violation regarding "soft money contributions" were credible because substantial evidence was provided, and the FEC never "contended that the allegations ... lacked credibility." 1996 WL 34301203, at \*5. Here, AFL's allegations

are highly **credible**, as they rely on the findings of the House Judiciary Committee. *See* Statement of Facts ¶ 5.

The Judiciary Committee revealed that the letter from 51 former intelligence officials (“Letter of 51”), alleging that “the arrival on the US political scene of emails purportedly belonging to Vice President Biden’s son Hunter, much of it related to his time serving on the Board of the Ukrainian gas company Burisma, has all the classic earmarks of a Russian information operation,” was the product of the Biden campaign according to testimony from former CIA Deputy Director Michael Morell, who signed the Letter of 51. *See Id.* Contemporaneous emails show the organizers’ intent in drafting and releasing the statement: “[w]e think Trump will attack Biden on the issue at this week’s debate, and we want to offer perspectives on this from Russia watchers and other seasoned experts,” and “we want to give the [Vice President] a talking point to use in response.” *Id.* ¶ 8. Morell tasked Nick Shapiro, his former Deputy Chief of Staff and Senior Advisor at the CIA, with placing the statement in major publications. *Id.* ¶ 9. Specifically, Morell apprised Shapiro that “[b]etween us, the campaign would like” a specific reporter with the Washington Post to run the statement first. *Id.* ¶ 10.

As the FEC website explains, “An in-kind contribution is a non-monetary contribution. Goods or services offered free or at less than the usual charge result in an in-kind contribution . . . . An expenditure made by any person or entity in cooperation, consultation or concert with, or at the request or suggestion of, a candidate’s campaign is also considered an in-kind contribution to the candidate.”

FEC, *In-Kind Contributions*, <https://bit.ly/46QA6Wf> (last visited July 17, 2024). Utilizing political committee staff time, office space, or other resources in cooperation with a candidate counts as a contribution. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 784 (D.C. Cir. 2022) (citing 52 U.S.C. § 30101(8)(A)(i), (ii) and 11 C.F.R. § 109.20).

AFL's administrative complaint alleged that the Respondents received and failed to report direct contributions, indirect contributions, and coordinated communications in violation of FECA. *See id.* ¶¶ 13–14, 17. Instead, signatories and *Politico*, coordinated by the Campaign, send it to news sources, falsely presenting it as news. *Id.* Accordingly, AFL's allegations are credible.

The next factor is the **nature of the threat**, which, in this matter, poses serious political implications for a presidential campaign and the upcoming political campaigns if such misrepresentations can go undeterred. *Common Cause*, 489 F. Supp. at 744. The nature of the threat posed by the Respondent's FECA disclosure violations is "exactly the kind envisioned by the FECA provisions that authorize anyone to file such complaints with the FEC." *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*6. Furthermore, the Biden Campaign's receipt of an undisclosed contribution is, as was the respondent's in *DSCC*, "conduct that is contrary to one of the principal purposes of FECA: limiting the amount and sources of money to finance federal elections." 1996 WL 34301203, at \*5. On July 12, 2023, Missouri Secretary of State Jay Ashcroft joined several other Secretaries of State, expressing concern about the effect of the 51 intelligence officials' "public statement" on influencing the 2020 presidential election. Press Release, Secretary of State's Office, Secretary Gray, other



Election Officials Issue Statement Supporting Investigation into 2020 Election Interference (July 12, 2023) (available at <https://perma.cc/HF3N-A8KE>). In particular, these secretaries, including Secretary of State Ashcroft, stated:

As the chief election officers of our respective states responsible for running free and fair elections, we have great concern in the findings in the Report of the U.S. House of Representatives Committee on the Judiciary that former federal intelligence officials and the Biden Campaign coordinated efforts to intentionally influence the 2020 presidential election by spreading disinformation.

Letter from Secretaries of State of our Respective States, to Members of Congress, Statement by State Election Officials in Support of Congressional Investigation into Intentional Falsehoods Leading to Election Interference (July 12, 2023) (available at <https://perma.cc/E5G6-ASPN>). The threat of the FEC's delays strikes at the heart of the FEC's purpose in providing transparency concerning election-oriented activities. Failure to speedily adjudicate this case hampers the state chief election officers from ensuring free and fair elections.

The next factor considers the **resources available** to the FEC. *Common Cause*, 489 F. Supp. at 744. Courts have weighed this factor in favor of the complainant if “there is no indication that the FEC lacks the resources or capacity to conduct investigations or perform its statutory duties under FECA.” *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*6. In *Campaign Legal Ctr. v. FEC*, the court found that the FEC's temporary lack of quorum may have limited its resources for a time, but the FEC had sufficient resources to act upon the complaint once it regained a quorum. *Id.* The *DSCC* court held that, although “an agency is due [deference] in

resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period.” 1996 WL 34301203, at \*5. AFL filed its administrative complaint on October 23, 2023, and to date—during a time when the FEC has had a full quorum—the Commission has taken no action. Accordingly, the Court should find that the FEC has sufficient resources to take action.

The next factor includes the **information available** to the FEC. *Common Cause*, 489 F. Supp. at 744. Courts have found this factor in favor of the complainant if the evidence provided to the FEC is easily accessible. When the evidence supporting the allegations is publicly available, courts find that this factor weighs in the plaintiff’s favor. *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*5. Here, the Biden Campaign’s coordination of the Letter of 51 was first publicly disclosed by the Judiciary Committee on April 20, 2023, and the FEC had received AFL’s administrative complaint by October 23, 2023, all weighing in favor of the Plaintiff. *Accord DSCC*, 1996 WL 34301203, at \*6 (“there [was] no indication in the record and the FEC [had] not so claimed, that a lack of information contributed to the ... delay in forwarding [the administrative complaint] to the Commissioners for their ‘reason to believe’ determination.”).

The final *Common Cause* factor addresses the **novelty of the issues involved**. *Common Cause*, 489 F. Supp. at 744. Courts have also weighed this factor in favor of the complainant if the issue presented is routine. Here, as in *Campaign Legal Ctr. v. FEC*, the alleged reporting requirement is a fundamental section of

FECA and thus sufficiently routine. 2021 WL 5178968, at \*6. Even when the *DSCC* court found that a lengthy and detailed investigation would be required, it reasoned that an investigation into “soft money contributions” would not be novel or legally complex. 1996 WL 34301203, at \*6. Likewise, the failure to disclose allegations here should not be novel or legally complex, thus weighing this factor in the Plaintiff’s favor.

Federal enforcement is necessary when federal campaign finance and support turn from a private civic act to election interference and public corruption. *McCormick v. United States*, 500 U.S. 257 (1991); *Evans v. United States*, 504 U.S. 255 (1992). The FEC is highly qualified to address coordinated communications and undisclosed expenditures involving in-kind donations and undisclosed advertisements by campaigns, and the Commission’s failure to act is contrary to law.

## **II. FEC’s Inaction is Contrary to Law under the *TRAC* Factors.**

The *TRAC* factors are reviewed to determine whether a delay is unreasonable and, thus, whether mandamus relief is justified. Under the *TRAC* analysis, “[t]he central question in evaluating ‘a claim of unreasonable delay’ is ‘whether the agency’s delay is so egregious as to warrant mandamus.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *TRAC*, 750 F.2d at 79). In *TRAC*, the D.C. Circuit outlined the principles to consider when deciding whether a delay is unreasonable. The *TRAC* court found that “in light of the Commission’s failure to meet its self-declared prior deadlines for these proceedings, we believe these delays are serious

enough for us to retain jurisdiction over this case until final agency disposition.” 750 F.2d at 80.

First, as to the “**rule of reason**” factor, where Congress has provided a timetable or other indication of the speed with which it expects the FEC to proceed within FECA, it may supply this rule of reason. *See Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*6. Because the Commission has failed to act within FECA’s 120-day timetable, the first TRAC factor weighs in the Plaintiff’s favor.

Second, “where Congress has provided a timetable ... that statutory scheme may supply content for this rule of reason.” *TRAC*, 750 F.2d at 80. “Congress did not intend to create a presumption that delay in excess of 120 days was unreasonable, per se.” *Citizens for Percy ’84 v. FEC*, No. CIV.A. 84-2653, 1984 WL 6601, at \*4 (D.D.C. Nov. 19, 1984) (but also finding, albeit before *TRAC*, that a lack of action only five months after the complaint was filed was an unreasonable delay). Here, the Commission’s failure to take any action exemplifies that they did not comport with the rule of reason. *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*7 (“the problem is not that the FEC failed to take final action on a complaint within the statutorily provided deadline; it has failed to take *any* action beyond the ministerial issuance of a notice of receipt.”). Here, the delay is even more unreasonable because this allegation involves misconduct by the same Respondents in the upcoming presidential election mere months away, and the Commission must deter the Respondents from repeating the same type of misconduct.

Next, the courts consider “**what is at stake.**” *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*6. While human health and safety take priority, the *DSCC* court held that “threats to the health of our electoral processes also require timely attention.” 1996 WL 34301203, at \*8. At stake in this case is the likelihood that the 2024 Biden Campaign will again mislead the American public, as did the 2020 Biden Campaign, through undisclosed coordination with the intelligence community to influence the outcome of the election. As previously alleged, nearly four out of five Americans, or 79 percent, believe that had there been “truthful” coverage of the Hunter Biden laptop, it would have changed the outcome of the 2020 presidential election. Statement of Facts ¶ 15.

Next, courts consider the “**effect of expediting delayed action**” on agency activities of a higher or competing priority. *TRAC*, 750 F.2d at 80. “A presidential election [is] a pressing priority for an agency tasked with monitoring electoral laws.” *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*8. Unless the FEC provides the court with sufficient “information to justify deference to unspecified agency priorities,” *id.*, this factor should weigh in the Plaintiff’s favor. In *FEC v. Rose*, 806 F.2d 1081, 1091 n.17 (D.C. Cir. 1986), the D.C. Circuit considered a presidential election as an activity of a “higher or competing priority.” See also *Citizens for Percy* ‘84, 1984 WL 6601, at \*4 (holding that the FEC, while having the discretion to marshal its limited assets, does not have the discretion to “disregard the importance of this particular election and give it routine ‘run of the mill’ treatment.”).

Next, courts consider the **nature and extent of the interests prejudiced by delay**. *TRAC*, 750 F.2d at 80. For this factor, protecting public confidence in elections is significant enough to weigh in favor of the complainant. *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*9. Additionally, “the length and timing of the delay bear on the nature of the interests prejudiced,” as delaying a matter past a presidential election could allow issues within the election to go unresolved. *Id.* Unless the Commission acts immediately to complete the first stage of its enforcement process, the Respondents’ behavior seems unlikely to change. If the “problems alleged in connection with one Presidential election [are] not looked into before the next,” *id.*, the Respondents will be emboldened to coordinate its hidden intelligence community election influence campaign again.

As the *DSCC* court stated:

Public confidence in our democratic electoral system, which [FECA] seeks to protect, turns on investigations that are conducted within a reasonable time and on effective enforcement. The deterrent value of [FECA]’s enforcement provisions is substantially undermined, if not completely eviscerated, by the FEC’s failure to process administrative complaints in a meaningful time frame.” Regarding the timing of the FEC’s actions, the court held that “[e]lection cycles, while not dispositive, are not irrelevant.

*DSCC*, 1996 WL 34301203, at \*8. Thus, to instill confidence in the upcoming election and to right the wrongs of the 2020 election, the Biden Campaign must be deterred from again coordinating in-kind contributions that are campaign advertisements misrepresented to appear as independent journalism. Accordingly, this “fifth factor weighs in favor of mandamus relief.” *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at \*9.

Finally, the court **needs not to find any impropriety** behind the FEC's delay in holding that agency action is unreasonably delayed.

### **Conclusion**

Due to this matter's significant political and legal implications, America First Legal respectfully submits that the Court grant the Plaintiff's motion for summary judgment and order the relief requested.

Dated: July 17, 2024

Respectfully submitted,

/s/ Michael Ding

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