UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PATRIOTS FOUNDATION
4020 121st Street
Urbandale, Iowa 50323,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant,

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256,

CORRECT THE RECORD
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

MEDIA MATTERS FOR AMERICA
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

AMERICAN BRIDGE 21ST CENTURY FOUNDATION
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

AMERICAN BRIDGE 21ST CENTURY PAC
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

DAVID BROCK
800 Maine Avenue SW, Suite 400
Washington, DC 20024,

Defendant-Intervenors.

Civil Action No. 1:20-cv-02229

REPLY BRIEF IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

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American Bridge 21st Century Foundation	**AB Foundation**
American Bridge 21st Century PAC	**AB PAC**
Correct the Record	**CTR (or CTR PAC)**
Federal Election Commission	**FEC (or the Commission)**
Hillary for America	**HFA**
Matter Under Review	**MUR**
Media Matters for America	**MMFA**
Political Action Committee	**PAC**
Telecommunications Research & Action Center	**TRAC**
The Federal Election Campaign Act of 1971, as amended	**FECA (or the Act)**

INTRODUCTION

The Patriots Foundation cannot deny that it waited until April 2020—when the FEC lacked a quorum and could not act as a matter of law—to file an administrative complaint challenging allegedly unlawful conduct by Defendant-Intervenors that had taken place four years earlier during the 2016 presidential election. Plaintiff has provided no explanation for its delay nor has Plaintiff explained how the FEC's failure to take public action on its complaint thus far has caused Plaintiff any injury. This is fatal to Plaintiff's standing. Instead, Plaintiff's opposition to Defendant-Intervenors' Motion for Judgment on the Pleadings finally lays bare Plaintiff's real goal, which is for this Court to strip the FEC of its jurisdiction to adjudicate Plaintiff's administrative complaint, and allow Plaintiff to bring private litigation directly against Defendant-Intervenors: "[t]he only way to ensure the allegations found in TPF's Administrative Complaint will be investigated and adjudicated in a reasonable time frame is to allow Plaintiff to avail itself of FECA's private right of action." ECF No. 22 at 17 (citation omitted). But Plaintiff does not have the authority to tell the FEC how to manage its docket. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (cleaned up) (because the FEC is "primarily and substantially responsible for administering and enforcing FECA," it is "precisely the type of agency to which deference should presumptively be afforded").

On its path to trying to bring suit directly against Defendant-Intervenors, Plaintiff asks this Court to ignore the law—for example, by imposing a false requirement for the FEC to act on Plaintiff's complaint within 120 days, when in reality the 120-day timeline merely creates a cause of action; it does not provide a required timeline by which the FEC must act. *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). Even if that were not the case, as a practical matter, the FEC could not have resolved Plaintiff's administrative complaint within 120 days because it lacked

quorum for 92 of the first 120 days that the administrative complaint was pending.[1] When Plaintiff is not asking the Court to ignore the law, it merely rehashes arguments made in prior filings without meaningfully grappling with Defendant-Intervenors' arguments in favor of judgment on the pleadings.

As Defendant-Intervenors explained in their motion for judgment on the pleadings, Plaintiff has failed to plead facts sufficient "to state a claim [for] relief that is plausible on its face." *Qi v. F.D.I.C.*, 755 F. Supp. 2d 195, 199 (D.D.C. 2010); *see also Smallwood v. United States Dep't of Just.*, 266 F. Supp. 3d 217, 219 (D.D.C. 2017) ("The appropriate standard for reviewing a motion for judgment on the pleadings is that of a motion to dismiss under Rule 12(b)."). Plaintiff has failed to show that it possesses Article III standing and that the FEC's delay in acting on its administrative complaint is contrary to law. Plaintiff misunderstands the pleading requirements for asserting an "informational injury" and has not alleged facts to satisfy any of the elements sufficient to show the FEC's failure to act was "arbitrary and capricious." For these reasons, explained in more detail below and in Plaintiff's motion, Defendant-Intervenors respectfully request that the Court enter judgment on the pleadings in their favor.

[1] The FEC first lost quorum in late August 2019. FEC, "Matthew Petersen to depart Federal Election Commission," (Aug. 26, 2019). Plaintiff's complaint was filed in April 2020, when the FEC lacked quorum. Two months after TPF filed its administrative complaint, quorum was restored for a brief period when Trey Trainor III was sworn in as a Commissioner effective June 5, 2020. FEC, "James E. Trainor III sworn in as Commissioner," (June 5, 2020). But that quorum was short lived, as Commissioner Caroline Hunter resigned a month later, effective July 3, 2020. FEC, "Caroline C. Hunter to depart Federal Election Commission," (June 26, 2020). It was not until December 10, 2020, that the FEC again regained quorum and restored its activities to full strength. FEC, "Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength," available at https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf (Dec. 9, 2020).

ARGUMENT

I. Plaintiff lacks Article III standing.

It is telling that Plaintiff's brief in opposition completely fails to respond to several crucial arguments made in Defendant-Intervenors' Motion. Thus, before rebutting Plaintiff's points on standing—which essentially boil down to two meritless arguments—it is worth noting that through its silence, Plaintiff's opposition essentially concedes that (1) the causation prong of the three-part standing inquiry has not been met, and (2) it has not pleaded facts sufficient to support a theory of organizational standing. On the first point, Plaintiff has never responded to Defendant-Intervenors' argument that Plaintiff has failed to show that its alleged injury is "fairly traceable to the challenged action of the defendant…" *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 180–81 (2000). Plaintiff inexplicably waited nearly four years (and until the FEC lacked a quorum) to file an administrative complaint with the FEC. Any injury Plaintiff claims to have suffered from lacking information was caused by its own delay, not the FEC's, which can be reasonably explained by the fact that the FEC lacked a quorum of four Commissioners for seven of the fifteen months Plaintiff's complaint has been pending with the agency. Plaintiff has never rebutted that argument.

On the second point, Plaintiff argues that it need not show that its programmatic activity will be adversely affected by the FEC's delay to allege informational injury; that level of specificity is only required for organizational injury. ECF No. 22 at 8. Accepting *arguendo*, that Plaintiff is correct—and it is not—Plaintiff's argument does nothing to save its claim to organizational standing. It is now clear, if it was not before, that Plaintiff proceeds only on a theory of informational standing, not organizational standing. *Id*. at 9 ("Nevertheless, it is not required that an organization demonstrate *both* informational and organizational injury in order to successfully plead one of the two."). Plaintiff does not even attempt to argue that it has alleged

harm to its specific programmatic activities, which even Plaintiff appears to agree would be required to show organizational standing. And for good reason. The subject of Plaintiff's complaint—the 2016 election—is long behind us; the candidate Plaintiff seeks information is about (Secretary Clinton) is not running for public office now or in the future; and at least two of the organizations about which Plaintiff complains (HFA and CTR PAC) are now dormant or defunct. It is thus hard to imagine how the information Plaintiff seeks could be useful in any of Plaintiff's alleged public education activities.

Plaintiff's claim to informational injury fails too. Plaintiff's opposition takes issue with only two of Defendant-Intervenors' challenges to Plaintiff's standing. *See* ECF No. 22 at 7-8. Plaintiff first incorrectly argues that it seeks access to information that has never been publicly disclosed. In so doing, Plaintiff ignores the record, including the exhibits submitted with its own administrative complaint, completely fails to respond to arguments made in Defendant-Intervenors' motion. Second, Plaintiff wrongly contends that it has adequately alleged informational injury because it has "identified the undisclosed additional information it seeks and the statute that mandates the disclosure of that information," and Defendant-Intervenors have mistakenly conflated the organizational and informational standing analyses in an effort to raise Plaintiff's burden. *Id*. This is also incorrect, as Plaintiff has still not met its burden of showing how the information it claims to seek would be useful. For the reasons discussed below, neither of these arguments have merit.

A. Plaintiff seeks a legal declaration regarding information that is already available to it.

Plaintiff seeks a legal declaration that publicly available information is misreported in violation of FECA. But that interest is not cognizable as an "informational injury" as a matter of law. A plaintiff fails to allege an informational injury by seeking the reporting of information

already publicly available because in doing so it "merely . . . alleg[es] that it has been deprived of the knowledge as to whether a violation of the law has occurred," rather than an interest in information to which it is entitled under FECA. *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

Plaintiff contends in its opposition that its standing is based upon "two categories of unreported in-kind contributions": "(1) the uncompensated services provided by Media Matters for America to American Bridge 21st Century PAC and Correct the Record PAC, which Plaintiff alleges constitute unreported in-kind contributions; and (2) the unreported in-kind contributions made by American Bridge 21st Century Foundation to American Bridge 21st Century PAC." *Id.* at 8 (citation omitted).[2] Plaintiff contends that this information has "*never* [been] disclosed to the FEC, or to any other agency or person, despite [Defendant-Intervenors'] legal obligation under FECA to do so." *Id.* (emphasis in original). But Plaintiff's own allegations and information available on the public record belie that argument.

With respect to the first set of alleged in-kind contributions—uncompensated services provided by Media Matters for America to American Bridge 21st Century PAC and Correct the Record PAC—Plaintiff's Complaint does not provide a single fact to support the assertion that MMFA provided services to the other Defendant-Intervenor organizations that would have actually been treated as in-kind contributions under FECA. *See* ECF No. 10-2. For example, there are no facts presented to rebut Defendant-Intervenors' assertion that any services provided by MMFA were for exempt online communications, and thus are not in-kind contributions under

[2] In limiting the scope of its informational injury to these two pieces of information, Plaintiff appears to concede that it has not suffered any informational injury related to alleged in-kind contributions made by CTR PAC to HFA, which are already publicly reported, or any of the other insufficient claims to informational injury asserted by Plaintiff in its Complaint. *See* ECF No. 22 at 8.

FECA as a matter of law. *See generally* ECF No. 1. Indeed, as "proof" that MMFA coordinated its activities with HFA, Plaintiff's administrative complaint cites to a *blog post published on MMFA's own website* the day after the email was sent. ECF No. 1-1 at 4; *see also* Alex Pfeiffer, *Clinton Campaign Planned to Work With Media Matters, Leaks Reveal*, DAILY CALLER (Nov. 4, 2016), https://dailycaller.com/2016/11/04/clinton-campaign-worked-with-media-matters-leaks-reveal/. Of course, unpaid online communications like that blog post are exempt from the definition of "public communication" and thus do not meet the three-part coordination test to be treated as a coordinated expenditure or in-kind contribution. *See* ECF No. 21 at 4-5. Plaintiff's opposition does not meaningfully rebut, or at the very least respond to, any of these arguments.

The second set of alleged in-kind contributions relate to payments made by American Bridge 21st Century Foundation to American Bridge 21st Century PAC. As background, American Bridge 21st Century Foundation and American Bridge 21st Century PAC are affiliated organizations that engage in a common arrangement among non-profit organizations called "cost-sharing," whereby one organization pays for costs that are borne by the two affiliated organizations, and the second organization reimburses the paying organization for its share of the costs incurred. *See* ECF No. 21 at 19-20. In this case, American Bridge 21st Century PAC paid the shared costs up front, and American Bridge 21st Century Foundation reimbursed the PAC for its share of the costs. This is undisputed. It is also undisputed that the amounts paid by American Bridge 21st Century Foundation to the PAC have been publicly reported. As Plaintiff itself acknowledges, at the end of each fiscal year, AB Foundation reported the payments it made to AB PAC as well as the outstanding funds that were owed to AB PAC. That information is listed on AB Foundation's Form 990 tax returns, which are publicly available on the IRS website. Plaintiff

has access to this information. Indeed, on page 9 of exhibits 8 through 11 of Plaintiff's Administrative Complaint, AB Foundation identifies the amounts it paid to AB PAC.

At bottom, none of Plaintiff's alleged requests "would . . . actually entail the disclosure of . . . information"—as Plaintiff's detailed descriptions of the very information it seeks makes clear—"other than legal determinations of coordination as to some subset of already-disclosed" information. *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 87-88 (D.D.C. 2020). Plaintiff reveals this intention throughout its complaint. It explains that it seeks information to confirm that "expenditures in support of Hillary Clinton's election were misreported," (though reported nonetheless), "as independent expenditures and should have been reported by Hillary for America as in-kind contributions." ECF No. 1, ¶ 26. And "the relief requested by [Plaintiff] consist[s] entirely of the investigation and imposition of monetary penalties against" Defendants. *Common Cause*, 108 F.3d at 418; *see also* ECF No. 1-1 at 16.[3]

Plaintiff's theory of standing has already been tried and rejected: "[T]he D.C. Circuit [has] squarely held that there is no statutory right to determining whether an expenditure," or any other political activity, was coordinated under FECA. *Campaign Legal Ctr. v. FEC*, 2021 WL 663204, at *7 (D.D.C. Feb. 19, 2021) (rejecting an informational injury premised on the idea that an expenditure "should be deemed a 'coordinated' (and thus an in-kind) contribution under FECA"). And in a near mirror of this action, this Court rejected a plaintiff's theory that informational standing could be satisfied by a desire to learn "which disbursements made by [Correct the Record] . . . were made in coordination with [Hillary for America] and are thus by definition in-kind

[3] "Complainant requests that the Commission make appropriate findings in connection with these violations, elicit admissions of the violations from each of the respondents, conduct a robust investigation to determine the scope of the alleged violations, bar respondents from continuing the violative activities, and collect civil penalties in amounts commensurate with the gravity of these serious ongoing violations." ECF No. 1-1 at 16.

contributions." *Campaign Legal Ctr*., 507 F. Supp. 3d at 84 (cleaned up). The Court explained that this theory fails because it does "not actually entail the disclosure of any information other than legal determinations of coordination as to some subset of already-disclosed expenditures." *Id.* at 88.

Plaintiff's theory is of a piece. Plaintiff seeks a legal determination, to which it has no right, finding that already reported information is inaccurate or should have been reported a different way. In other words, what Plaintiff "desires is for the Commission to 'get the bad guys.'" *Common Cause*, 108 F.3d at 418. Plaintiff improperly seeks to "establish [an] injury in fact merely by alleging that [it] has been deprived of the knowledge as to whether a violation of the law has occurred." *Id*. But "[n]othing in FECA requires that information concerning a violation of the Act as such be disclosed to the public." *Id.*

B. Plaintiff has not alleged a concrete interest in voting.

Plaintiff mistakenly claims that because "FECA creates an informational right," *Citizens for Resp. & Ethics in Wash. v. Am. Action Network*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019), it has satisfied its Article III burden by merely "identif[ying] the undisclosed additional information it seeks and the statute that mandates the disclosure of that information," ECF No. 21 at 9. Plaintiff further claims that a "showing of informational injury does not also require the Plaintiff to identify specific programmatic activities that are adversely affected by" the information it purportedly seeks. *Id*. Rather, Plaintiff explains, "it is sufficient that [it] has identified the undisclosed additional information it seeks and the statute that mandates the disclosure of that information." *Id.*

Plaintiff misunderstands the law. The very case Plaintiff relies on for the proposition that harm to programmatic interests is not required for informational injury sharply belies Plaintiff's

argument. *Campaign Legal Ctr.*, 2021 WL 663204, at *8 (considering alleged "programmatic interests" in evaluating informational standing claim). Moreover, invoking the informational entitlement created by FECA—which is where Plaintiff's analysis fatally starts and ends—is only the beginning of the informational standing analysis. That is because "the nature of the information allegedly withheld is critical." *Common Cause*, 108 F.3d at 417. To sufficiently allege a concrete and particularized injury from "the denial of . . . information," a plaintiff must "seek[] information to facilitate his informed participation in the political process." *Campaign Legal Ctr.*, 507 F. Supp. 3d 79, 83 (D.D.C. 2020) (cleaned up).

This is no idle requirement. Courts have emphasized that the "information denied" must be "useful in voting," *Common Cause*, 108 F.3d at 418, and to make that determination courts have reviewed organizational plaintiff's complaints for signs that the organization uses information required to be disclosed by FECA for political or campaign-finance related activities. *See Campaign Legal Ctr.*, 2021 WL 663204, at *8; *see also Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017) (concluding plaintiffs pleaded a sufficient interest in the political process based on a "number of campaign-finance related activities—including public education, litigation, administrative proceedings, and legislative reform efforts—where the sought-after information would likely prove useful."); *see also Citizens for Resp. & Ethics in Wash. v. Am. Action Network*, 410 F. Supp. 3d 1, 9, 13 (D.D.C. 2019) (concluding that CREW adequately alleged an informational injury after finding that CREW "pled that it regularly reviews disclosure reports required by FECA and uses the information they contain regarding campaign expenditures for a host of programmatic activities such as "look[ing] for correlations between . . . spending on independent campaign activity that . . . benefits a candidate, and that member's subsequent congressional activities").

Plaintiff therefore misstates the law. This court requires that a plaintiff do more than simply identify information to which it is allegedly entitled to state an informational injury. Rather, a plaintiff must tie its interest in the information to its participation in the political process. *See FEC v. Akins*, 524 U.S. 11, 21 (1998). And where a plaintiff fails to do so, it fails to adequately allege Article III standing. *See*, *e.g.*, *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013) (concluding that Nader failed to state an informational injury because his "complaint merely asked the FEC to compel information from participants in the ballot contests in the hope of showing that they violated the prohibitions on undisclosed contributions and expenditures," and failed to allege that he sought "information to facilitate his informed participation in the political process").

The Supreme Court's decision in *FEC v. Akins* does not save Plaintiff's Complaint. This case is not the same as *FEC v. Akins*, where the Court found there was no reason to doubt that the information sought would be helpful to the plaintiff. By contrast, as Defendant-Intervenors argued in their Motion, there *is* reason to doubt that the information Plaintiff seeks will be useful. ECF No. 21 at 20-22. Indeed, unlike *CREW*, and of a kind with *Nader*, Plaintiff in this case has failed to tie the information it purportedly seeks to an interest in the political process. Given the arguments Defendant-Intervenors have raised, Plaintiff must do more than merely assert a speculative interest in "information concerning a violation of FECA" and re-state the law. This is all Plaintiff has done. But just because Plaintiff says there is no reason to doubt that the information it claims to seek will be helpful to it does not make it so. Plaintiff has never once explained how information related to a five-year-old campaign, involving a candidate with no intention of running for future office, is relevant to its "informed participation in the political process," *Campaign Legal Ctr.*, 507 F. Supp. 3d 79, 83 (D.D.C. 2020). Nor does Plaintiff once tie the information it purportedly seeks to its "programmatic interests" in political activity. *Campaign Legal Ctr.*, 2021

WL 663204, at *8. Instead, and as explained above, Plaintiff merely seeks a determination that Defendant-Intervenors violated the law. This is fatal to Plaintiff's standing.

II. Plaintiff has not pleaded facts sufficient to allege that the FEC's delay is arbitrary and capricious.

Plaintiff's complaint fails to satisfy the standard for pleading that the FEC's delay is arbitrary and capricious. In determining whether a plaintiff has sufficiently plead that agency inaction is arbitrary and capricious, courts consider several factors, including: (1) the resources and information available to the agency; (2) the credibility of the allegations made in the administrative complaint, (3) the nature of the threat posed, (4) the effect of expediting delayed action on agency activities of a higher or competing priority the novelty of the issues involved, (5) the novelty and complexity of the issues involved, (6) whether the FEC's failure to take public action violates a "rule of reason," and (7) the nature and extent of the interests prejudiced by delay. *See* ECF No. 22 at 11; *see also In re Nat. Cong. Club*, No. 84-5701, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984); *Telecommunications Research & Action Center* ("*TRAC*") v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

This Court should not lose sight of the fact that Plaintiff's Complaint does not allege facts to support any of these factors. Instead, Plaintiff suggests that the factors do not play a role at the pleading stage, *see* ECF No. 22 at 11, which is plainly incorrect. Courts in this circuit frequently apply the *TRAC* to the factual allegations of a complaint asserting a claim of unreasonable delay. *See, e.g.*, *Palakuru v. Renaud*, No. 20-cv-02065, 2021 WL 674162, at *3-6 (D.D.C. Feb. 22, 2021) (noting that it is "appropriate" to consider whether a complaint "meets Rule 12(b)(6) pleading standards" by applying *TRAC* factors); *Sarlak v. Pompeo*, No. 20-cv-35, 2020 WL 3082018, at *5 (D.D.C. June 10, 2020) (rejecting the plaintiffs' argument that applying the *TRAC* factors at the motion-to-dismiss stage was premature because "*TRAC* factors have been generally employed at

the motion to dismiss stage to determine whether a plaintiff's complaint has alleged facts sufficient to state a plausible claim for unreasonable administrative delay"); *see also Ghadami v. DHS*, No. 19-cv-00397, 2020 WL 1308376, at *7 n.6 (D.D.C. Mar. 19, 2020) ("[I]t is appropriate for the Court to apply the factors at th[e] [motion-to-dismiss] stage"); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 175-77 (D.D.C. 2020) (applying *TRAC* factors to resolve the government's motion to dismiss); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 93–96 (D.D.C. 2020) (same); *Mirbaha v. Pompeo*, No. 20-cv-299, 2021 WL 184393, at *4 (D.D.C. Jan. 19, 2021) (same); *Thakker v. Renaud*, No. CV 20-1133, 2021 WL 1092269, at *5 (D.D.C. Mar. 22, 2021), *appeal dismissed*, No. 21-5079, 2021 WL 3083431 (D.C. Cir. July 14, 2021) (same).

Plaintiff claims that this Court's recently holding denying a motion to dismiss a complaint raising a Section 30109(a)(8)(A) claim without mentioning the *TRAC* factors indicates that the Court understood that such an inquiry would be "premature." ECF No.22 at 11 (citing *Campaign Legal Ctr. & Democracy 21 v. FEC*, 2021 US Dist LEXIS 31169, at *11-28). But in that case, the intervening defendant moved to dismiss the FECA claim only on standing grounds. Although the Court characterized the intervening defendant's argument that the plaintiff lacked standing because FECA did not require certain disclosures as "premature," the Court did not suggest that it is "premature" to review the *TRAC* factors when considering whether a plaintiff has stated a claim for relief under FECA. The Court simply did not review the *TRAC* factors because whether the plaintiff plead facts sufficient to allege that the FEC's delay is arbitrary and capricious was not an issue before the Court.

Plaintiff's suggestion that it is "unclear" whether the *TRAC* factors should even be relevant in the context of a FECA claim is similarly baseless. *See* ECF No. 22 at 11. Courts regularly apply the *TRAC* factors to unreasonable delay claims under FECA. *See, e.g. Stockman v. FEC*, 944 F.

Supp. 518, 524 (E.D. Tex. 1996), *aff'd as modified*, 138 F.3d 144 (5th Cir. 1998); *see also Democratic Senatorial Campaign Comm. v. Fed. Election Comm'n*, No. CIV.A. 95-0349 (JHG), 1996 WL 34301203, at *9 (D.D.C. Apr. 17, 1996). Plaintiff is wrong to assert that "the question posed by FECA is not whether the FEC 'unreasonably delayed' but instead whether it acted within the statutorily prescribed 120 days." ECF No. 22 at 11. To reiterate, the 120-day period is not a timetable within which the Commission must resolve an administrative complaint; it is merely a jurisdictional threshold before which the complainant may not file suit. *E.g.*, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986) ("unequivocally" rejecting the contention "that [FECA] required the Commission to act within 120 days or within an election cycle."). The question the Court must resolve is whether the FEC has acted "contrary to law" in delaying public action on Plaintiff's administrative complaint; if merely missing the 120-day deadline were sufficient to end the inquiry, then there would be no need for "contrary to law" suits under 52 U.S.C. § 30109(a)(8)(A) in the first place.

To state a claim for unreasonable delay that is contrary to law under FECA, Plaintiff must plead facts that, if supported by evidence, would tip the *TRAC* factors in favor of finding that the FEC's failure to take public action on its administrative complaint is arbitrary and capricious. *Ghadami*, 2020 WL 1308376, at *8. A facially plausible claim pleads facts that are not "merely consistent with a defendant's liability" but that "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Although courts must accept all well-plead factual allegations as true, courts do not "assume the truth of legal conclusions, nor do [they] accept inferences that are unsupported by the facts set out in the complaint." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (quoting *Islamic Am. Relief Agency v. Gonzales*, 477

F.3d 728, 732 (D.C. Cir. 2007)). The threadbare recitals of the law in Plaintiff's nine-page complaint are not sufficient to meet the pleading standard.

A. Plaintiff's allegations are speculative and unsupported, and Plaintiff's opposition to Defendant-Intervenors' motion for judgment on the pleadings does nothing to cure their deficiencies.

The allegations underlying Plaintiff's administrative complaint do not even meet the standard required for the FEC to take action, much less for a court to credit them. When analyzing an administrative complaint, the FEC considers whether there is "reason to believe" a violation of the Act has occurred. 52 U.S.C. § 30109(a)(2). In interpreting this provision, the Commission has held that it "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."[4] Moreover, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true." *Id*. If at least four of the FEC's Commissioners vote to find such reason to believe,[5] the FEC may investigate the alleged violation or engage in pre-probable cause conciliation; otherwise, the FEC dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

As stated in Defendant-Intervenors' response to the administrative complaint, Plaintiff's allegations fall woefully short of the standard necessary to prompt investigation by the FEC. *See* ECF No. 10-2. For example, as discussed above, Plaintiff complains that publicly-reported reimbursement payments made by AB Foundation to AB PAC for shared costs may be inaccurate without any reason to believe that is the case. ECF No. 1-1 at 5. The fact that the payments were

[4] MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

[5] Prior to the Commission's vote, the FEC's Office of General Counsel recommends to the Commission in a report whether there is "reason to believe" a violation has occurred. 52 U.S.C. § 30109(a)(2).

made based on estimates of costs is consistent with industry practice and is not reason to believe they were false. Similarly, the administrative complaint alleges that AB PAC made prohibited in-kind contributions to unnamed Democratic campaigns. But the complaint never so much as names which campaigns were the supposed recipients. *Id.* at 4.

Plaintiff's opposition to Defendant-Intervenors' Motion does not even attempt to bolster its speculative claims with factual evidence. *See* ECF No. 20. Plaintiff cites *Citizens for Percy '84 v. FEC*, 1984 WL 6601 (D.D.C. 1984), to suggest that its allegations are credible because it has provided evidence sufficient to guide the FEC's investigation and underscore the credibility of its allegations. *See* ECF No. 22 at 12-13. However, in *Citizens for Percy*, there was no argument that the allegations were speculative or unbelievable and, in any event, the evidence presented to the FEC was also presented to the court. *Citizens for Percy '84*, 1984 WL 6601, *3. Not only have Defendant-Intervenors repeatedly pointed to the speculative and unbelievable nature of Plaintiff's allegations, but Plaintiff has also failed to present to this Court its "over 450 pages of supporting exhibits." ECF No. 22 at 13 n.4. Even if Plaintiff had presented those exhibits to the Court, they would not bolster the credibility of Plaintiff's allegations. The vast majority of those exhibits merely detail undisputed financial information that has already been publicly reported, and do not provide any factual evidence that would permit the FEC to find a "reason to believe" a violation has occurred. For instance, approximately one-third of those 450 pages are pages of FEC reports that merely display Defendant-Intervenors' expenditures and disbursements, many of which are unrelated to Plaintiff's allegations. Thus, Plaintiff's repeated boasts that they submitted 450 pages of "evidence" of their claims is overblown. In reality, Plaintiff's have not provided any evidence to this Court that would permit it to determine whether Plaintiff's claims are credible. *See Citizens for Percy '84*, 1984 WL 6601, *3.

B. Plaintiff alleges no ongoing or significant threat posed by Defendant-Intervenors, which are mostly defunct organizations, and the FEC's failure to take public action on Plaintiff's administrative complaint has no effect on the FEC's ability to enforce the law.

Plaintiff has not alleged any facts suggesting that Defendant-Intervenors, whose conduct is at the center of Plaintiff's administrative complaint, pose any ongoing or urgent threat to the electoral system. *See* ECF No. 1. Nor could they. Several of the Defendant-Intervenor organizations, including HFA, which was supposedly was the impetus for the alleged in-kind contributions in the first place, are no longer active. Similarly, CTR PAC is defunct. In fact, TPF concedes in its administrative complaint that "[i]t appears that CTR has been essentially dormant since the 2016 election, and it filed a report requesting termination on December 4, 2019." ECF No. 1-1 at 2. Thus, there is no threat that they will continue the conduct Plaintiff challenges.

At best, Plaintiff again asserts that the FEC's failure to take public action on the administrative complaint "provides a clear roadmap" for other entities to elude FECA regulations. ECF No. 22 at 14. Plaintiff is again wrong. The rules prohibiting coordination and setting contribution limits are still on the books and being enforced by the FEC. *See, e.g.*, 52 U.S.C. §§ 30101(17), 30116(a), (d); 11 C.F.R. 110.1. Indeed, the FEC recently resolved a complaint against Hall for Congress and treasurer David Gould after finding reason to believe they violated 52 U.S.C. § 30116(f) (prohibiting candidates and political committees from accepting any contributions or making any expenditures in violation of the section's provisions) and 11 C.F.R. § 102.9 (requiring accounting for contributions and expenditures). MUR 7767, available at https://www.fec.gov/data/legal/matter-under-review/7767/.

Plaintiff cites *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008), to suggest that the FEC's failure to take public action in response to its administrative complaint will "provide a clear roadmap" for entities to elude FECA's requirements. ECF No. 22 at 14. But in *Shays*, the complaint

challenged an FEC regulation, not the agency's failure to take public action in response to an administrative complaint. *See Shays*, 528 F.3d at 925. There was no doubt that striking down the regulation would change the regulatory landscape, which the challengers argued would mean candidates could evade certain restrictions on the use of soft money. *Id.* Here, in stark contrast, it is not action but *inaction* that is at issue. Unlike in *Shays*, the regulatory landscape is not changed by the FEC's inaction. Plaintiff's argument that this case will open the door for political actors in a way that poses an urgent and ongoing threat to the entire electoral system is overblown and entirely speculative.

Furthermore, to the extent Plaintiff believes that Defendant-Intervenors' alleged conduct poses an urgent threat, its actions before filing this lawsuit and during the course of this litigation indicate otherwise. Plaintiff waited nearly four years after Defendant-Intervenors' alleged conduct took place—from the 2016 election until spring of 2020—to even file an FEC complaint regarding the conduct challenged in this case. Then, after Plaintiff ironically sued the FEC for not taking public action quickly enough, Plaintiff moved to stay this case for another seven months. ECF Nos. 14, 15. If Plaintiff was concerned that Defendant-Intervenors and other political actors would engage in repeated and similar prohibited conduct that would threaten the electoral system, then it would have filed an administrative complaint earlier, and it would have litigated this case on a more swift timeline. Plaintiff's delay is inexcusable and further demonstrates that the FEC's delay is not contrary to law.

C. All publicly available evidence demonstrates that the FEC's lack of resources is the cause of the FEC's inaction in this case.

It is simply absurd that Plaintiff argues that the FEC's inaction in this case cannot be excused by resource constraints. The FEC has lacked a quorum for the majority of the time the administrative complaint has been pending, and since regaining quorum, it has been working

through a significant backlog of cases. *See* ECF No. 21 at 31 n.6. When determining whether a plaintiff has sufficiently pleaded that an agency's failure to act is arbitrary and capricious, courts recognize that agencies are entitled to deference when prioritizing their docket, and thus consider whether the factual allegations demonstrate a reason to undermine that deference. *TRAC*, 750 F.2d at 80. Plaintiff attempts to claim that an agency's failure to take public action on an administrative complaint is not entitled to deference. ECF No. 22 at 12. But Plaintiff misses the mark. When an agency *unreasonably* fails to take public action, such a failure is not entitled to deference. *Democratic Senatorial Campaign Comm. v. FEC*, 1996 U.S. Dist. LEXIS 22849, at *13 (D.D.C. 1996). However, "[i]n making decisions regarding whether it will accept administrative complaints for investigation, there is little doubt that the FEC is entitled to considerable judicial deference." *Id.*at *4. That is because "[r]esource allocation in general and prosecutorial decisions in particular are areas in which courts are reluctant to intervene in agency operations without substantial justification." *Id.* Further, "it is to be expected that the agency will be busy during an election year" and that the Commission's resources will be diverted to issues arising from the current 2020 election cycle. *Citizens for Percy '84*, 1984 WL 6601, at *4.

Plaintiff's claim that "[t]here is no evidence to suggest that the FEC lacks the resources or information to complete its investigation" is meritless. For one thing, there is no dispute that, for a significant part of the time Plaintiff's complaint has been pending, the FEC has lacked the resources necessary to adjudicate it. *See* ECF No. 21 at 29-32. While extensive knowledge of the limits of the FEC's resources is information that is most readily within the control of the Commission, *see id.* at 15, Plaintiff's *own exhibits* demonstrate that the FEC's hands were tied while it lacked a quorum, and that it was unable to investigate cases, *see* ECF No. 20-2 at 4 n.1 (noting that, as of September 1, 2019, the FEC had only three commissioners, and thus "has been

unable to launch any new investigations, issue any advisory opinions, promulgate any rules, grant any matching funds request, or render any decisions on pending enforcement actions") (cleaned up). Simply put, Plaintiff provides no basis to conclude that the FEC's delay in resolving TPF's administrative complaint is "a product of anything other than excessive demands on a strapped federal agency." *Stockman*, 944 F. Supp. at 524.

D. Plaintiff's attempt to generalize its allegations cannot mask the complexity of its administrative complaint.

This case is complex. Plaintiff attempts to cabin this case as just about run-of-the-mill coordination and contribution limits, ECF No. 22 at 16, but that is a drastic oversimplification. Plaintiff's administrative complaint alleges that "numerous excessive and prohibited in-kind contributions" took place between several different respondents. *See* ECF No. 1-1. Those respondents are categorically different entities—some are non-profit organizations while others are political committees—to which different rules apply. *See id.* Before it can take public action on the administrative complaint, the FEC must analyze numerous financial transactions that are called into question by the Plaintiff, as well as the relationships between the Defendant-Intervenors. Not only that, but this case is also closely related to other administrative complaints that were filed against HFA, CTR PAC, and other Defendant-Intervenors in the wake of the 2016 election. *See* MURs 6940, 7097, 7146, 7160, and 7193. And Plaintiff's theory of excessive in-kind contributions made by CTR PAC in support of HFA is closely related to a novel theory pushed by Campaign Legal Center in a complaint that has been *rejected* by the FEC. *See* Amended Certification, MURs 6940, 7097, 7146, 7160, and 7193, available at https://www.fec.gov/data/legal/matter-under-review/7146/ (signed June 13, 2019).

E. Plaintiff provides no basis to find the FEC's failure to take public action violates the rule of reason.

Plaintiff's fails to provide any reason why an FEC complaint that has been pending with the agency for just over 15 months following eight months of agency inaction due to lack of quorum is violative of reason. As an initial matter, there is no "statutory deadline" by when the FEC must respond to an administrative complaint, as Plaintiff contends, *see* ECF No. 22 at 11-12. Congress *did not* provide a timetable within which the FEC must act, *see Rose*, 806 F.2d at 1092. Elsewhere in Plaintiff's Opposition to Defendant-Intervenors' Motion for Judgment on the Pleadings, Plaintiff acknowledges the same. *See* ECF No. 22 at 17.

But more to the point, courts regularly find comparable—and longer—delays reasonable. *See, e.g.*, *Common Cause*, 489 F. Supp. at 745 (finding a two-year delay was not contrary to law); *Stockman*, 944 F. Supp. at 523 (noting that "an FEC investigation lasting approximately one year and ten months does not strike the Court as violative of rules of reason" and that resolution of similar matters "take[s] 3.3 to 4.6 years to complete"). In fact, it is not at all unusual for similar matters to take the FEC more than eight months to resolve. *See, e.g.*, MUR 7878 (resolving administrative complaint regarding contribution limits 24 months after the matter was opened); MUR 7875 (resolving administrative complaint regarding contributions 34 months after the matter was opened); MUR 7768 (resolving administrative complaint regarding contribution limits 16 months after the matter was opened); MUR 7767 (resolving administrative complaint regarding contribution limits s16 months after the matter was opened).

F. Plaintiff's allegations utterly fail to allege that it has been prejudiced by the FEC's failure to take public action on its administrative complaint, and Plaintiff's own—far greater—delay in filing its administrative complaint belies its attempt to do so now.

To survive a motion for judgment on the pleadings, Plaintiff *must* point to where it alleges that the FEC's delay has prejudiced its interests. *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food*

& Drug Admin., 740 F.2d 21, 35 (D.C. Cir. 1984); *Stockman*, 944 F. Supp. at 524 (considering whether the plaintiff provided "real evidence of any injury resulting from the delay"). However, because of its own delay in filing its administrative complaint, and its requests to delay the instant action, Plaintiff cannot plausibly claim that the FEC's delay has prejudiced its interests. *See* ECF No. 21 at 28-29.

CONCLUSION

For the reasons stated above and in Defendant-Intervenors' Motion, Defendant-Intervenors respectfully request that the Court grant their Motion for Judgment on the Pleadings.

Dated: August 10, 2021

Respectfully submitted,

PERKINS COIE LLP

By: */s/ Aria Branch*

Marc E. Elias
Aria C. Branch
PERKINS COIE
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
Email: MElias@perkinscoie.com
Email: ABranch@perkinscoie.com

Attorneys for Defendant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, that I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

By: */s/ Aria Branch*

Marc E. Elias
Aria C. Branch
PERKINS COIE
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
Email: MElias@perkinscoie.com
Email: ABranch@perkinscoie.com