UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Patriots Foundation, Plaintiff, v. The Federal Election Commission, Defendant, and Correct the Record, *et al.*, Intervenor-Defendants.	Case No. 20-cv-02229-EGS **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS**

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Citizens for Responsibility & Ethics in Washington	**CREW**
Democratic Senatorial Campaign Committee	**DSCC**
Federal Election Commission	**FEC (or the "Commission")**
Matter Under Review	**MUR**
Political Action Committee	**PAC**
Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984)	**TRAC**
The Federal Election Campaign Act of 1971, as amended	**FECA**
The Patriots Foundation	**TPF**

PLAINTIFF'S OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff, The Patriots Foundation (hereinafter "Plaintiff" or "TPF"), brought a Complaint for declaratory and injunctive relief to enforce its statutory right to FEC action on its administrative complaint within the 120 days guaranteed by the Federal Election Campaign Act of 1971, as amended (the "FECA"). Plaintiff now moves this Court to deny Defendant-Intervenors' Motion for Judgment on the Pleadings because Plaintiff has sufficiently demonstrated standing upon the basis of informational injury and has pleaded facts that, when taken as true, state a claim for which this Court can grant the requested relief.

BACKGROUND

I. The Administrative Complaint

Plaintiff filed an administrative complaint with the FEC on April 8, 2020, alleging that Media Matters for America, American Bridge 21st Century Foundation, American Bridge 21st Century PAC, Correct the Record PAC, and David Brock (together, the "Administrative Respondents" or "Defendant-Intervenors") violated various FECA provisions establishing contribution limits, contribution source prohibitions, and public disclosure and reporting requirements by making or receiving excessive or prohibited and unreported in-kind contributions to one another by coordinating their activities with one another. Admin. Compl. at 11-15 (ECF No. 1-1). As fully explained in the Administrative Complaint, publicly available information established that there were multiple ongoing instances of uncompensated in-kind contributions being made from one Administrative Respondent to another—as well as to other political committees. *See id.* at 12.

Plaintiff's Administrative Complaint asked the FEC to find that the Administrative Respondents violated 52 U.S.C. § 30104 when: (1) American Bridge 21st Century PAC and

Correct the Record PAC failed to report uncompensated services each received from Media Matters For America; and (2) American Bridge 21st Century Foundation failed to report in-kind contributions to American Bridge 21st Century PAC. Plaintiff's Administrative Complaint further asked the FEC to find that the Administrative Respondents violated 52 U.S.C. § 30116 when Correct the Record PAC and American Bridge 21st Century PAC made prohibited contributions to Hillary Clinton's 2016 presidential campaign and when American Bridge 21st Century PAC made prohibited in-kind contributions to a variety of other Democratic campaigns. Finally, Plaintiff's complaint asked the FEC to conduct an investigation to determine whether a violation had occurred. Admin. Compl. at 12-16 (ECF No. 1-1).

Plaintiff's administrative complaint includes numerous facts demonstrating that the Administrative Respondents violated FECA. The FEC acknowledged receipt of Plaintiff's Administrative Complaint on April 8, 2020, and followed up by letter dated April 13, 2020, to inform Plaintiff that the FEC had "numbered this matter MUR 7726." April 13, 2020, Letter from FEC (ECF No. 1-2). TPF has not received any further communications from the FEC regarding MUR 7726. Torchinsky Dec. at ¶ 2 (ECF No. 20-1).

FECA provides administrative complainants with a cause of action against the FEC if the agency fails to act on an administrative complaint within 120 days of the date that it is filed. 52 U.S.C. § 30109(a)(8)(A). At the time the Complaint was filed in this Court, 127 days had elapsed since the filing of Plaintiff's Administrative Complaint. *See* (ECF No. 1-1, 1-2). Since more than 120 days had passed since Plaintiff filed its Administrative Complaint, and the FEC had taken no action on that complaint during the statutory period, Plaintiff filed the instant matter on August 13, 2020, seeking that the Court declare that the FEC's failure to act is contrary to law in violation of

52 U.S.C. § 30109(a)(8)(C) and direct the Commission to conform with such declaration within 30 days.

The FEC has lacked a quorum for a portion of the time Plaintiff's Administrative Complaint has been pending. However, the lack of a quorum does not toll the 120-day time period under 52 U.S.C. § 30109(a)(8)(A), and the FEC, with its quorum restored, has nonetheless had ample time to act in this matter during the intervening months.

While not required to do so, Plaintiff has on two separate occasions voluntarily requested that the Court hold the matter in abeyance, first for 120 days, (ECF No. 14), and then a second time for 90 days, (ECF No. 16), to allow time for the FEC to appear or otherwise act in this matter. The Court granted both requests. *See* Minute Orders, ECF Entries Nov. 30, 2020, and Mar. 30, 2020.[1] However, notwithstanding the additional five months that was granted, the FEC failed to appear or communicate with Plaintiff in any way. Torchinsky Decl. ¶¶ 8-10 (ECF No. 20-1). It has now been well over 450 days since TPF filed its Administrative Complaint.[2]

II. The FEC's Failure to Act.

"Obviously . . . all is not well at the FEC." Weintraub, E., *The State of the Federal Election Commission 2019 End of Year Report*, December 20, 2019, available at (ECF No. 20-2). While the FEC lacked a quorum from Sept. 1, 2019, to June 5, 2020, and then again from July 3, 2020, to December 18, 2020, the agency has had a quorum for approximately eight of the fifteen months

[1] Defendant-Intervenors, who are the subjects of the Administrative Complaint, contacted staff at the FEC on June 28, 2021, with Counsel for Plaintiff copied, asking "whether the FEC intends to make an appearance in the matter and defend the FEC against the complaint." Email from Stephanie Command to Lisa Stevenson (acting general counsel), Kevin Deeley (assistant general counsel), *et al.*) (ECF No. 20-7). To Plaintiff's knowledge, the FEC has not responded to that correspondence. Torchinsky Decl. at ¶ 9 *Id*. at 20-1.

[2] At the time the complaint was filed in this case, 127 days had elapsed since the filing of the administrative complaint. *See* (ECF No. 1).

since the Administrative Complaint was filed, and continuously since December 18, 2020. *See* Press Release, FEC, *FEC Remains Open for Business, Despite Lack of Quorum* (Sept. 11, 2019) (ECF No. 20-3); Press Release, FEC, *James E. Trainor III Sworn In as Commissioner* (June 5, 2020) (ECF No. 20-4); Press Release, FEC, *Caroline C. Hunter to Depart Federal Election Commission* (June 26, 2020) (ECF No. 20-5); Press Release, FEC, *Shana Broussard, Sean Cooksey, Allen Dickerson Sworn In as Commissioners* (Dec. 18, 2020) (ECF No. 20-6). According to the former chair of the commission, "[e]nforcement actions pending before the Commission languished for months or years . . . ." (ECF No. 20-2 at 2). Such is the case here.

The FEC has had more than sufficient time to act on MUR 7726. Even with a quorum, however, the FEC has failed to take any known action on Plaintiff's Administrative Complaint. Torchinsky Dec. at ¶ 11 (ECF No. 20-1). To date, the FEC has not appeared, filed an answer, or otherwise defended itself in this action. Torchinsky Dec. at ¶¶ 8, 11 (ECF No. 20-1); *see generally Patriots Foundation v. FEC*, No. 20-cv-2229 (D.D.C.) (the docket lists no appearance by the FEC and no filings by the FEC). If the FEC is unwilling to act in this matter, then it is relinquishing one of its "primary weapons" in the battle against improper political influence: The power to compel disclosure. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

STANDARD OF REVIEW

When a plaintiff's standing is challenged, the Court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Campaign Legal Ctr. Democracy 21 v. FEC*, 2021 U.S. Dist. LEXIS 31169, *10 (D.D.C. Feb. 19, 2021) (quoting *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quotation omitted). The "irreducible constitutional minimum" of standing requires that a plaintiff have "(1) suffered an injury in fact,

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Hence, accepting all of TPF's factual allegations as true, the relevant standard for assessing TPF's standing in this lawsuit is whether it has demonstrated "by a preponderance of the evidence that th[is] Court has subject matter jurisdiction to hear this case." *Biton v. Palestinian Interim Self-Government Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004). Plaintiff has alleged facts demonstrating that it has suffered an informational injury attributable to Defendant and redressable by this Court.

Similarly, when assessing whether TPF has stated a sufficient claim, the Court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Just as with the standing analysis, this inquiry requires the reviewing court to "take all of the factual allegations in the complaint as true and [] construe the complaint liberally in the plaintiff's favor with the benefit of all reasonable inferences derived from the facts alleged." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019) (quotation omitted). Plaintiff has alleged facts demonstrating that Defendant violated FECA by taking no action on Plaintiff's administrative complaint before the expiration of the 120-day statutory deadline.

Based upon the foregoing and the analysis that follows, this Court should therefore deny Defendant-Intervenors' Motion for Judgment on the Pleadings.

ARGUMENT

I. Plaintiff Has Demonstrated an Informational Injury Sufficient to Establish Standing.

Asserting informational injury as a basis for standing is not a novel legal argument, but one whose validity has been repeatedly established in this and other courts. "The law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quotation omitted). Hence, there are two identifiable elements required to establish an informational injury: (1) the claimant has been denied access to information that a statute requires to be publicly disclosed, and (2) there is no reason to doubt the claimant's argument that the disclosure of the information would be beneficial to them.

First, the information that Plaintiff identifies is information that the FECA requires to be disclosed. The Supreme Court has recognized that FECA's disclosure provisions "constitute the Act's primary weapons against the reality or appearance of improper influence," and without adequate enforcement FECA is a dead letter. *Buckley*, 424 U.S. at 58. Moreover, FECA is a statute that expressly protects an informational right. "The Supreme Court has long recognized that FECA creates an informational right," and that right has been characterized as a "right to know who is spending money to influence elections, how much they are spending, and when they are spending it." *CREW*, 410 F. Supp. 3d at 12. Moreover, the pool of potential informational claimants under FECA has not been narrowly circumscribed by statute or by precedent; rather, the very language of the statute "demonstrates a congressional intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998); *see, e.g.*, 52 U.S.C. § 30109(a)(8)(A) ("*Any party aggrieved* . . . may file a petition with" this Court) (emphasis added). As a nonprofit, nonpartisan government watchdog

that regularly monitors FEC reports in order to broadcast significant findings to the public, Plaintiff fits squarely within the class of claimants whose right to information FECA protects.

Second, there is no reason to doubt Plaintiff's claim that the information it requested in its Administrative Complaint and that it continues to seek in this action would be helpful to its mission. Plaintiff "uses public disclosure reports that are required to be filed with the FEC to educate the public about campaign spending and the true sources and scope of candidates' financial support so that the public may fully evaluate candidates for public office." (ECF No. 1 ¶ 12). *See Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) ("The Supreme Court's ruling in *Akins* and our ruling in *Shays* establish that litigants who claim a right to information allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process."). There can be no question that the disclosures sought by Plaintiff are related to its informed participation in the political process and its efforts to inform others.

Defendant-Intervenors argue that Plaintiff lacks standing for several reasons, none of which withstand scrutiny. First, Defendant-Intervenors claim that TPF lacks standing because it seeks a "legal determination" from the Commission that they have violated FECA "rather than the disclosure of FECA-required information." (ECF No. 21-1 at 11). Courts have held that "a plaintiff's inability to procure from [an] agency a 'legal determination' or 'legal conclusion that carries certain law enforcement consequences' does not amount to informational injury." *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 83-84 (D.D.C. 2020). But while a plaintiff might not have a "legally cognizable interest in labeling spending 'coordinated' if that spending has already been disclosed in some format," a plaintiff *does* have a right to the disclosure of information that has never been disclosed in *any* format when that information was legally required

to be reported. *Campaign Legal Ctr. & Democracy 21*, 2021 U.S. Dist. LEXIS 31169 at *12 n.1 (citing *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001).

That is precisely the kind of information Plaintiff requests here. TPF's standing in this matter is based upon its right to specific information that Defendant-Intervenors have *never* disclosed to the FEC, or to any other agency or person, despite their legal obligation under FECA to do so. This information consists of two categories of unreported in-kind contributions first identified in TPF's Administrative Complaint: (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. *See* (ECF No. 1, ¶¶ 4, 7). TPF's claims are not limited to seeking a legal determination that the actions of Defendant-Intervenors during the 2016 campaign violated the FECA. Rather, TPF seeks additional facts. Plaintiff has identified information required to be disclosed by FECA and which has not been disclosed in previous filings. It seeks the disclosure of that information, concerning unreported in-kind contributions, that, as of the filing of this response, has *still* never seen the light of day. Plaintiff asserts standing based upon its statutory right to the disclosure of the information itself, without regard to any law enforcement consequences that might flow from that release.

Second, Defendant-Intervenors allege that it is impossible to demonstrate an informational injury without first showing that an organization's "discrete programmatic activity will be imminently and adversely affected by the FEC's delay." (ECF No. 21-1 at 1-2). This argument conflates the requirements for two separate bases of standing. In *CLC v. FEC*, this Court discussed at length the standard for demonstrating standing based upon *informational* injury, while declining

to reach the *CLC* plaintiffs' arguments concerning *organizational* injury. 2021 U.S. Dist. LEXIS 31169, at *12 n.1. These two forms of injury are not mutually exclusive; an organization could conceivably suffer an informational injury based upon a statutory right to disclosure of information that has been unlawfully withheld and, also suffer an organizational injury based upon the impact such withholding has had on the specific programmatic activities of that organization. Nevertheless, it is not required that an organization demonstrate *both* informational and organizational injury in order to successfully plead one of the two.

Here, TPF has demonstrated an informational injury that supports its standing. That showing of informational injury does not also require the Plaintiff to identify specific programmatic activities that are adversely affected by Defendant-Intervenors' continued withholding of the requested information. Rather, it is sufficient that TPF has identified the undisclosed additional information it seeks and the statute that mandates the disclosure of that information. Furthermore, there is no reason to doubt that disclosure of the information sought would help Plaintiff, and that it directly relates to Plaintiff's informed participation in the political process. In *FEC v. Akins*, the Supreme Court defined the respondents' injury simply as the "inability to obtain information . . . that, on respondents' view of the law, the statute requires that [entity] make public." 524 U.S. at 20. The Court did not require the respondent to demonstrate specific ways in which that informational deprivation impacted their organizational activities. The Court instead held that a "failure to obtain relevant information"—*i.e.*, the very informational injury that Plaintiff asserts here—"is injury of a kind that FECA seeks to address." *Id.* This Court should not impose any additional pleading requirements beyond those required by the Supreme Court in this context.

Accepting all of the facts pleaded by Plaintiff as true, as is required at this point in the litigation, Plaintiff has credibly alleged that (1) FECA requires the public disclosure of the specific categories of unreported in-kind contributions identified by Plaintiff, and (2) "there is no reason to doubt [TPF's] claim that the information would help them" given the importance of such disclosure reports to TPF's mission as a nonpartisan, nonprofit government watchdog. 952 F.3d at 356; (ECF No. 1, ¶¶ 11-14). Therefore, Plaintiff has demonstrated standing upon the basis of informational injury.

II. Plaintiff Has Properly Stated a Claim and the Court Should Not Grant the Motion for Judgment on the Pleadings.

Accepting all of Plaintiff's factual allegations as true, TPF has plausibly alleged an informational injury under FECA that is attributable to the continuing inaction of the FEC and that is redressable by this Court using the remedies outlined in the same statute. FECA empowers this Court to "declare that the . . . [FEC's] failure to act is contrary to law, and [] direct the Commission to conform with such declaration within 30 days . . . ." 52 U.S.C. § 30109(a)(8)(C). When the relevant issue is the FEC's "failure to act," "the Court must determine whether the Commission has acted 'expeditiously.'" *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980). This analysis involves examination of "[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, as well as [4] the novelty of the issues involved." *Id.*

Courts also consider the factors outlined in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (hereinafter, "*TRAC*"), which include the [1] "rule of reason" regarding the time elapsed as informed by the [2] statutory timetable, [3] reasonableness of delay given the stakes, [4] effect expedition would have on agency priorities, and [5] interests prejudiced by delay. 750 F.2d at 80. While the *TRAC* Court stated that a court "need not find"

agency impropriety, should such impropriety exist, it would constitute a factor in favor of finding that the delay was contrary to law. *Id.*

In general, the *TRAC* factors are not ordinarily used until discovery is complete. Although this Circuit has in the past evaluated FEC conduct using the *TRAC* factors[3], *see FEC v. Rose*, 806 F.2d 1081, 1091 n.17 (D.C. Cir. 1986), the application of these factors is "premature at this stage of the proceedings" given that "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Hamandi v. Certoff*, 550 F. Supp. 2d 46, 54 (D.D.C. 2008); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 100 (D.C. Cir. 2003). In other words, the *TRAC* factors are properly addressed at the merits stage, which this litigation has not yet reached despite Plaintiff's best efforts. This Court recently modeled this principle in a recent opinion holding that FECA plaintiffs had successfully stated a claim under Section 30109(a)(8)(A) without mentioning the TRAC factors, presumably because it understood that such an inquiry would be "premature." *See* 2021 U.S. Dist. LEXIS 31169, at *11-28.

Furthermore, it is unclear whether the *TRAC* factors should even be relevant in a context in which a statute contains an express deadline for the initiation of agency action. The congressional intent in this instance is obvious: a FEC delay of more than 120 days in acting upon an administrative complaint is by definition not "expeditious" because Congress expressly conferred a right of action on claimants whose complaints remained unaddressed after that

[3] Unlike in *TRAC*—and in several other administrative contexts—the question posed by FECA is not whether the FEC "unreasonably delayed" but instead whether it acted within the statutorily prescribed 120 days. The FEC has not, and that should end the inquiry. *CREW v. FEC*, 363 F. Supp. 3d 33, 41 (D.D.C. 2018) (observing that FECA authorizes judicial review when the FEC "fails to act within 120 days of the filing of a complaint," and explaining further that "[W]hen Congress includes one possibility in a statute, it excludes another by implication" (quotation omitted)). *But see FEC v. Rose*, 806 F.2d 1081, 1091 n.17 (D.C. Cir. 1986).

timeframe. *See* 52 U.S.C. § 30109(a)(8)(A). Here, where the FEC has seemingly ignored that unambiguous statutory deadline, the agency should not be entitled to any additional time. There is no need to layer additional factors upon an inquiry that Congress has expressly limited to a single question; if there were, then "we fail to understand why Congress created jurisdiction in this court upon the passage of 120 days from filing of the administrative complaint." *Citizens for Percy '84 v. FEC*, 1984 U.S. Dist. LEXIS 21881, *12 (D.D.C. Nov. 19, 1984). Nevertheless, Plaintiff will proceed with an analysis of the *Common Cause* and *TRAC* factors because Defendant's inaction was unreasonable even under those tests.

Although the Commission's decision whether to investigate a complaint "is entitled to considerable deference, the failure to act in making such a determination is not." *Democratic Senatorial Campaign Comm. v. FEC*, 1996 U.S. Dist. LEXIS 22849, at *13 (D.D.C. Apr. 17, 1996) (hereinafter, "*DSCC*"). Here, an application of either the *Common Cause* factors or the *TRAC* factors demonstrates that the FEC has failed to act expeditiously, thereby rendering its failure to act contrary to law.

A. Plaintiff's Administrative Complaint States Credible, Well-Supported Allegations.

First, Plaintiff's Administrative Complaint states credible and amply supported allegations. *See Common Cause*, 489 F. Supp. at 744. In *Citizens for Percy '84 v. FEC*, the court found the allegations credible where the plaintiff waited to file the complaint until after it had "amassed a considerable amount of evidence" and the complaint contained documentation of the amounts spent and the purposes of the spending. 1984 U.S. Dist. LEXIS 21881, *8 (D.D.C. November 19, 1984). Given this, the *Percy* Court found that the "evidence provided by the plaintiffs in the complaint was more than sufficient to guide the FEC's investigations as well as underscore the credibility of the allegations." *Id.*

Likewise, here, TPF's administrative complaint provided extensive, reliable evidence to guide the FEC's investigation and establish the credibility of its allegations. TPF's Administrative Complaint cited extensively from various credible sources and included over 450 pages of supporting exhibits.[4] By submitting a detailed and specific compilation of relevant evidence in its administrative complaint, TPF both provided the FEC with guidance to conduct its investigation and left no doubt that its claims deserve to be regarded as credible. Moreover, the FEC has not even appeared in this action to dispute the credibility of TPF's claims.

B. The Threat to the Electoral System Posed by the FEC's Delay in Investigating the Scheme is Significant and Ongoing.

Second, the nature of the threat posed by the FEC's failure to act on TPF's claims is significant. *Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. In analyzing this factor, courts look at both the significance of the threat and the likelihood that illegal activity will continue. *See Percy*, 1984 U.S. Dist. LEXIS 21881, at *9; *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *15-16 ("The threat to the electoral system is highlighted not only by the amounts of money involved and the impact upon close elections, but by the serious threat of recurrence.").

TPF's allegations that the Administrative Respondents engaged in a deliberate scheme to circumvent various campaign finance and coordination rules presents an ongoing threat to the integrity of the electoral process. Deliberately concealing the true source of campaign funds is conduct contrary "to the principal purpose of FECA," *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *15, to ensure voters know "who is speaking about a candidate . . . before an election," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). Disclosure is crucial to allow "citizens [to] see whether

[4] Due to the extensive size and number of exhibits, the Complaint included as an attachment only the Administrative Complaint without the corresponding exhibits. *See* (ECF No. 1-1). The exhibits will be included in the normal course in the event this Court order the FEC to act but the FEC subsequently fails to act.

elected officials are 'in the pocket' of so-called moneyed interests," *id.* at 370, and to prevent "corruption and avoid the appearance of corruption," *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). The Commission's continuing failure to take action against the clear violations outlined in Plaintiff's Administrative Complaint "not only makes it eminently possible" that Administrative Respondents and other similar entities will continue to violate campaign finance and coordination rules to elude FECA's requirements, "but also provides a clear roadmap for doing so." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citing *McConnell v. FEC*, 540 U.S. 93, 177 n.69 (2003)).

The purpose of the FEC disclosure regime is not simply to punish bad actors, but also to serve the interests of the voters through ensuring disclosure. As explained in Section I *supra*, this is the basis of TPF's standing in this case. Here, the FEC's failure to take timely action in this case will likely embolden others to engage in similarly illegal and deceptive activity. Absent FEC action, there is no reason to believe the Administrative Respondents and others will be deterred from continuing to violate the various campaign finance and coordination rules at issue in the Administrative Complaint. Allowing Administrative Respondents' violations to continue uncorrected creates "an immense loophole that would facilitate the circumvention of the Act's" framework and lead to "the potential for gross abuse." *See Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). Therefore, allowing such an obvious evasion of FECA's requirements is clearly "inconsistent with the statutory mandate," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981), and the FEC's ongoing delay in acting on TPF's Administrative Complaint poses a substantial and ongoing threat to the electoral system.

C. The FEC's Failure to Act Cannot Be Excused by Lack of Information, Resource Constraints, or Competing Priorities.

There is no evidence to suggest that the FEC lacks the resources or information to complete its investigation of Administrative Respondents in a timely manner or has competing priorities that would be harmed by moving forward with this matter. *See Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. As an initial matter, the FEC has not appeared in this case, so it has not identified resource constraints or competing priorities that could serve as a potential excuse for its ongoing failure. *Cf. id.* The FEC has thus failed to justify delay based on lack of resources, a burden which lies with the agency because "[k]nowledge as to the limits of [agency] resources is exclusively within the control of the Commission." *Citizens for Percy '84*, 1984 U.S. Dist. LEXIS 21881, at *11. But, even if the FEC pleaded poverty, "whatever deference an agency is due in resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period." *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *18.

Further, the FEC has more than enough information available to move forward expeditiously on Plaintiff's Administrative Complaint. The Administrative Complaint sets forth TPF's allegations in exhaustive detail and provides extensive citation to evidence to support those factual allegations. *See* (ECF No. 1-1). Even if the FEC required additional information, it has now had over 15 months to investigate. Given that the FECA contemplates that "some cases can be dealt with in the 120 day period," a delay of 15 months to gather information is unreasonable. *See Citizens for Percy '84*, 1984 U.S. Dist. LEXIS 21881, at *12 ("If not, we fail to understand why Congress created jurisdiction in this court upon the passage of 120 days from filing of the administrative complaint."). By comparison, this Court recently entered a default judgment against the FEC in a matter involving an eight-month delay—holding that the one-month stretch in Summer 2020, during which the Commission had a quorum, indicated it "was statutorily capable

of acting on the complaint during that period." *See* Order at 1 n.1, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020) (ECF No. 14); see also Order at 1, *CREW v. FEC*, (D.D.C. Apr. 4, 2020) (ECF No. 9) (entered a default judgement in a matter involving an approximately fourteen-month delay).

Additionally, the FEC's inaction is likely not just a matter of competing priorities or scarce resources. The Commission can only appear in federal court to defend against a lawsuit when four Commissioners affirmatively vote to do so. See 52 U.S.C. §§ 30106(c); 30107(a)(6). Therefore, the FEC's failure to appear in this action likely indicates that the required four Commissioners have never authorized a defense providing a rationale for their inaction.

D. The Issues Raised Are Not Novel.

The FEC regularly investigates the very types of violations that Plaintiff identifies here, rendering the issues far from novel. *See Common Cause*, 489 F. Supp. at 744. Plaintiff's Administrative Complaint raises credible allegations of violations of the statute and regulations by alleging that Administrative Respondents (1) failed to report uncompensated services and other in-kind contributions, 2 U.S.C. § 30104; and (2) made prohibited contributions, in-kind and otherwise, to various Democratic campaigns, 2 U.S.C. § 30116. None of these are novel provisions and each have been the subject of prior FEC action. The FEC already understands the relevant law and it cannot be said that the current case is so novel as to justify the ongoing delay. The underlying violations at issue here are not novel. The FEC is accustomed to applying relevant law to Section 30104 and 30116 violations like those at issue in TPF's Administrative Complaint.

E. Continued, Unexplained Delay Violates the "Rule of Reason" and Is Out-of-Sync with the FECA's Statutory Timetable.

Continued delay runs contrary to the "rule of reason" and Congress's intent as evidenced through the express statutory timetable in Section 30109(a)(8)(A). *TRAC*, 750 F.2d at 80. The "rule

of reason" assumes that an agency matter "will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade." *Rose v. FEC*, 608 F. Supp. 1, 10 (D.D.C. 1984) (quotation omitted). Here, we are fast approaching the 16-month mark with no evidence from the Commission that it has taken, or plans on taking, any substantive action to advance the investigation requested by Plaintiff.

While Congress "did not impose specific constraints upon the Commission to complete final action, . . . it did expect that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter." *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *23. To this end, the language of the FECA, which contains many "short deadlines governing the speed with which such complaints must be handled," *Rose*, 608 F. Supp. at 11, evidences an expectation of movement within a reasonable time. In fact, "some cases can be dealt with in the 120-day period" defined by the FECA, *Citizens for Percy '84*, 1984 U.S. Dist. LEXIS 21881 at *12, and there is no reason to believe that this should not have been such a case. "The deterrent value of the Act's enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame." *DSCC*, 1996 U.S. Dist. LEXIS 22849, at *25. The FEC's failure to appear in this case deprives this Court and Plaintiff of any further insight into the FEC's process. As such, there is no evidence to suggest that the FEC has taken, or will take, any meaningful action on the administrative complaint. The 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. *See* 52 U.S.C. § 30109(a)(8)(C).

Accordingly, this factor mediates in favor of a finding that the FEC's delay is unreasonable and confirms that the delay is likely to continue.

F. The FEC's Delay Prejudices Plaintiff and Gives Rise to the Appearance of Impropriety.

Plaintiff and voters will be and have been severely prejudiced by the FEC's inability to proceed with its investigation of Administrative Respondents, and this delay—a fair amount of which occurred after the FEC regained a quorum—gives rise to the appearance of agency impropriety. *See TRAC*, 750 F.2d at 80. The fact that the election at issue has passed "does not make the 'nature' or 'extent' of the threat any less significant." *Rose*, 608 F. Supp. at 12. Rather, absent enforcement, there is no reason to believe that the same parties who violated various campaign finance and coordination laws in this instance will not be empowered to do so again, despite the attendant illegality of such action, in future elections.

The lack of enforcement and lack of any consequences for the unlawful behavior detailed in the Administrative Complaint will encourage these bad actors to continue to violate campaign finance law.

III. The Equitable Doctrine of Laches Does Not Bar Plaintiff's Claims.

Plaintiff's claims are not barred by laches and Intervenors' attempt to argue otherwise borders on nonsensical. As Intervenors readily admit, Plaintiff did *not* delay in bringing the current action. Motion, (ECF No. 21-1 at 34) ("Plaintiff did not delay in filing the instant action . . . ."). Intervenors instead attempt a multi-part sleight of hand. First, Intervenors seek to apply laches to a claim *that is not before this Court*. *Id*. Second, Intervenors completely disregard that an applicable statute of limitations *exists* for the FEC to review violations of FECA, meaning laches is inapplicable. *Id.* at 34-35. Third, and finally, Intervenors do not, and indeed cannot, prove laches.

First, Intervenors ask the Court to focus on the wrong question. The case before the Court is not about the validity of the underlying Administrative Complaint or the timeliness of that complaint. The only question before the Court is whether the FEC acted within 120 days in

response to TPF's Administrative Complaint as required by FECA. And, as Intervenors readily concede, *this* action was timely. *Id.* at 34. That is, and should be, the end of this Court's analysis on this issue.

Second, even if the diligence pursued by Plaintiff in submitting the Administrative Complaint were an issue in *this proceeding*—which it is not—then laches *still* does not apply because there is an applicable statute of limitations for administrative complaints. "[I]n face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief. . . ." *Petrella v. MGM*, 572 U.S. 663, 679 (2014); *id* at 678 (collecting cases). Congress has set a statute of limitations for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" at five years. 28 U.S.C. § 2462. Section 2462 applies to administrative complaints under FECA. *FEC v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997) (noting that "FECA does not contain an internal statute of limitations. The applicable statute of limitations is provided under 28 U.S.C. § 2462."). Accordingly, laches has no applicability here.

Third, the FEC cannot prove laches, because (1) the FEC is not here to defend itself; (2) it could not do so even if it had appeared given the applicable statute of limitations; and (3) Intervenors contrived attempt to speak for the FEC is meaningless. "Laches is an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Manin v. NTSB*, 627 F.3d 1239, 1242 (D.C. Cir. 2011). Importantly, "the party asserting a laches defense must have relied on the plaintiff's inaction, and must have been harmed on account of that reliance." *Purepac Pharm. Co. v. Thompson,* 283 F. Supp. 191, 203 (D.D.C. 2002).

First, as was stated above, Plaintiff was *per se* diligent because it filed the Administrative Complaint within the applicable statute of limitations. Next, as to the prejudice question,

Intervenors do not discuss the prejudice to *themselves*, instead they attempt to argue that Plaintiffs alleged delay "prejudices the FEC." *See* Motion, (ECF No. 21-1 at 34). There are several problems with this. Initially, while an Intervenor can, in some instances, step into the shoes of a party litigant, it cannot put words in another party's mouth. Intervenors here are attempting to assert prejudice on behalf of the FEC. This is something it cannot possibly do. Intervenors cannot claim that the FEC will have to adjust its priorities to accommodate Plaintiff's *timely* administrative complaint because Intervenors know just as much about the FEC's "priorities" as do Plaintiffs: that is to say, nothing.

And finally, even *if* Intervenors could assert prejudice on behalf of the FEC—which it cannot—it has not met its burden under relevant case law. There are two kinds of prejudice that support a finding of laches. First, the defendant can show that "Plaintiff's delay in filing suit may have resulted in the loss of evidence or witnesses supporting defendant's position. . . ." *Gull Airborne Instruments, Inc.,* 694 F.2d at 844. The second type of prejudice requires that the defendant show that it "may have changed its position in a manner that would not have occurred but for plaintiff's delay." *Id*. Here, Intervenors make no attempt at showing the former or the latter. *See* Motion, (ECF No. 21-1 at 34-35). All Intervenors attempt to do is intone that an order from this Court—not Plaintiff's delay—will prejudice the FEC and its "administrative priorities." *Id* at 35. This is insufficient.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff requests that this Court deny Defendant-Intervenors' Motion for Judgment on the Pleadings.

Dated: Aug. 3rd, 2021

/s/ *Jason Torchinsky*
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CERTIFICATE OF SERVICE

I do hereby certify that, on this 3rd day of August 2021, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record. I further certify that a copy of this response was sent to the Federal Election Commission, who has yet to enter an appearance, by USPS Certified mail on August 4, 2021.

/s/ Jason Torchinsky
Jason Torchinsky