IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and OPENSECRETS Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	Civil Action No. 1:23-cv-03163

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Campaign Legal Center ("CLC") and OpenSecrets, by their undersigned counsel, and pursuant to Fed. R. Civ. P. 56 and Local Civil Rule 7(h)(2), respectfully move this Court for a summary judgment declaring that the Federal Election Commission ("FEC") has unreasonably delayed taking final action on plaintiffs' August 2019 Petition to Promulgate Rules on Reporting of "Cromnibus" Accounts ("Petition"), dated August 5, 2019, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 706(1).

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment; the Declaration of Roger G. Wieand of CLC, attached hereto as Exhibit 1; the Declaration of Hilary Braseth of OpenSecrets, attached hereto as Exhibit 2; and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than July 3, 2024. Plaintiffs' requested relief is set forth in the attached Memorandum and accompanying Proposed Order.

Dated: April 4, 2024

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION & SUMMARY OF ARGUMENT

Nearly a decade ago, in December 2014, Congress amended the Federal Election Campaign Act ("FECA" or "Act") to create new special-purpose accounts for national political party committees. The legislation, also known as the "Cromnibus" because it was tucked into the $1.1 trillion Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) ("Appropriations Act"), allowed national party committees to establish three new kinds of "separate, segregated" accounts—one for presidential nominating conventions, one for party headquarters buildings, and one for legal proceedings—and tripled the generally applicable monetary limit for contributions to each account.

Staggering amounts of money have been raised and spent through these new supercharged party accounts since the amendments took effect. Each party currently operates up to seven special-purpose Cromnibus accounts—three for the parties' national committees and two for their congressional and senatorial committees, because only a party's national committee may establish a presidential nominating convention account—and *each* of those accounts is subject to a separate contribution limit 300% greater than the general limit. *See* 52 U.S.C. § 30116(a)(1)(B), (a)(2)(B), (a)(9). In the 2023-24 election cycle, therefore, each national party special-purpose account is subject to a limit of $123,900 per year (three times the party's base limit of $41,300 per year)—meaning an individual can now contribute up to $247,800 per two-year election cycle to each of a party's seven special purpose accounts, for a total of *more than $1.7 million* per election cycle to a single party.

The 2014 amendments thus dramatically relaxed FECA's party contribution limits and created an entirely new class of national committee accounts subject to the Act's disclosure requirements, demanding immediate rulemaking by the Federal Election Commission ("FEC" or

"Commission") to ensure proper implementation and prevent abuse. Instead, the FEC did nothing. Notwithstanding the clear need for its authoritative guidance, the Commission still has yet to promulgate a single rule, or even initiate a rulemaking, governing the permissible uses and reporting of Cromnibus funds—despite having received two petitions asking that it do so, including the 2019 Petition from plaintiffs Campaign Legal Center ("CLC") and OpenSecrets that is the subject of this suit.

Plaintiffs accordingly brought this action for declaratory and injunctive relief under the Administrative Procedure Act ("APA") to challenge the FEC's unreasonable delay in taking final action on plaintiffs' 2019 Petition to Promulgate Rules on Reporting of "Cromnibus" Accounts ("Petition"). Plaintiffs' Petition, which was filed on August 5, 2019, focused narrowly on the significant disclosure deficiencies that have arisen in the absence of FEC rules governing reporting for national party Cromnibus accounts. The Petition detailed how parties have adopted haphazard and inadequate reporting conventions for their special-purpose accounts, making it virtually impossible for the public to monitor the parties' use of these accounts or discern how Cromnibus funds are being raised and spent. AR 2-6. To address these problems, the Petition requested that the FEC promulgate rules and forms requiring national party committees to delineate within their reports the individual and aggregate transactions involving their Cromnibus accounts, and proposed several specific regulatory changes along those lines that would help achieve such transparency. AR 6.

As of the date of this filing, almost five years have elapsed since the Petition was filed and the FEC still has not given plaintiffs any answer. While the Commission published a second notice of availability on the Petition this year, and received five comments by the March 15, 2024, deadline, expanding the record is not a final agency action and does not suggest that one is

approaching. AR 71-96. The Commission solicited comments on the Petition in 2019 and then failed to progress toward a final action for more than four and a half years, *see* AR 13; there is no indication that this time will be different if the FEC is left to its own devices.

The FEC's continuing delay in this matter is inexcusable and patently unreasonable within the meaning of the APA. Indeed, the nearly five-year delay here already far exceeds the outer bounds of what this Circuit typically regards as "reasonable." Under the framework for determining if an agency's delay is unreasonable laid out in *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987), the FEC's nearly five-year delay "frustrat[es]" FECA's "statutory goal" of promoting transparency in campaign funding, thereby undermining the FEC's ability to "effectively regulate at all," *id*. at 897-98. This delay has had severe consequences, namely the public's and the Commission's complete inability to track the millions of dollars flowing through the national parties' special-purpose accounts, and the corresponding threat this poses to the integrity and transparency of the electoral system. *See id*. at 898. And the FEC has provided no "explanation" whatsoever for its delay—as indeed, no explanation *could* justify it. *See id.* Additional factors discussed in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("*TRAC*") also point to an unreasonable delay. In particular, the FEC's delay abandons any "rule of reason," *see id.* at 80, and contravenes Congress' expectations by threatening to render FECA "a dead letter," *Democratic Senatorial Campaign Comm. v. FEC*, No. 1:95-cv-349, 1996 WL 34301203, at *7 (D.D.C. Apr. 17, 1996) ("*DSCC*"), and impose "the very corruption and appearance of corruption . . . which the FECA was intended to remedy." *Common Cause v. FEC*, 692 F. Supp. 1397, 1401 (D.D.C. 1988) (internal quotation marks omitted).

Nearly five years ago, plaintiffs petitioned the FEC for simple rules to implement the core transparency requirements of FECA. The Commission still has yet to act on or conclusively

respond to that request. In the meantime, the FEC's continuing failure to promulgate disclosure rules for Cromnibus accounts has fostered irregular and woefully insufficient reporting practices that vitiate the public's statutory informational right to know who is contributing to these accounts, and in what amounts; how the money in each account is being spent; and how much money each account is carrying over from one reporting period to the next. The upshot is that due to the FEC's inertia, multiple election cycles have now come and gone without meaningful, statutorily mandated transparency with respect to the millions of dollars flowing through the national parties' special-purpose accounts. And clearly, that transparency will not materialize absent regulatory action by the FEC.

In short, there is no conceivable justification for the FEC's egregious delay in this matter. Nor has the agency attempted to offer one—perhaps because it recognizes that four and half years was more than enough time for the Commission to promulgate the simple but essential reporting rules sought in plaintiffs' Petition. The Commission's years-long failure to act is indefensible, unreasonable within the meaning of the APA, and warrants prompt intervention by this Court.

Plaintiffs accordingly move for summary judgment, and ask that the Court declare the FEC's delay unreasonable and enter an order compelling the Commission to take final action on plaintiffs' Petition within 30 days.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

E. FECA disclosure and reporting requirements

Providing transparency about the money raised and spent in federal elections is a core objective of FECA. The Act's disclosure provisions were crafted to "expos[e] large contributions and expenditures to the light of publicity," *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam), and provide voters "with information 'as to where political campaign money comes from and how

it is spent,'" *id.* at 66 (quoting H.R. Rep. No. 92-564, at 4 (1971)), so as to "enable[] the electorate to make informed decisions" in elections, *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

To effectuate these purposes, the Act requires all federal political committees, including political party committees, to file periodic reports with the FEC accurately disclosing their receipts, disbursements, and debts and obligations. *See* 52 U.S.C. § 30104(a)(1)–(a)(4), (b). These reports must itemize, *inter alia*, each person to whom the committee has made operating expenditures or other disbursements of over $200, "together with the date[s], amount[s], and purpose[s]" of those expenditures or disbursements, *id.* § 30104(b)(5)(A), (6)(A), (B)(v), and must also include aggregate totals for all receipts, disbursements, and cash on hand for the reporting period and election cycle to-date, *see id.* § 30104(b)(1)-(2), (4), (7).

The Commission is charged to "administer, seek to obtain compliance with, and formulate policy with respect to [the] Act," *id.* § 30106(b)(1), and to prescribe such regulations as are necessary to carry out the statute's purposes, *id.* § 30107(a)(8).

F. **Administrative Procedure Act**

The APA sets forth general rules governing the issuance of proposed and final regulations by federal agencies. 5 U.S.C. §§ 551–559. As relevant here, the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). It also requires that, "within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id.* § 555(b). Finally, it obligates each agency to give "[p]rompt notice" of the "denial in whole or in part" of a written petition, together with a "brief statement of the grounds for denial." *Id.* § 555(e).

Consistent with these requirements, the FEC has adopted procedural rules governing the submission, consideration, and disposition of rulemaking petitions filed with the Commission. *See*

11 C.F.R. §§ 200.1–200.6. Under these rules, the Commission, upon receiving a valid rulemaking petition under 11 C.F.R. § 200.2, will publish a Notice of Availability in the Federal Register and establish a public comment period for statements in support of or opposition to the petition. *See id.* § 200.3(a)(1). At the close of the comment period(s) and following the Commission's consideration of the petition and available record, "the Commission *will decide* whether to initiate a rulemaking based on the filed petition." *Id.* § 200.4(a) (emphasis added). In the event the Commission declines to initiate a rulemaking, "it will give notice of this action by publishing a Notice of Disposition in the Federal Register and notifying the petitioner," and such notice "will include a brief statement of the grounds for the Commission's decision." *Id.* § 200.4(b).

As prescribed in the APA and under its own regulations, therefore, the Commission is obliged to decide, within a reasonable time, whether to initiate a rulemaking in response to a petition—failing which the APA's judicial review provisions empower a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1).

II. Statement of Facts

A. The Appropriations Act passes in December 2014.

In December 2014, as part of the Appropriations Act, Congress amended FECA by creating three new "separate, segregated" political party accounts—one for presidential nominating conventions, one for party headquarters buildings, and one for legal proceedings—and allowing national party committees to accept contributions into each of these accounts in amounts up to 300% of the otherwise applicable contribution limit, 52 U.S.C. § 30116(a)(1)(B), (2)(B), (9). National political parties were thus freed to raise millions of dollars into these accounts above the generally applicable contribution limits. Moreover, because each national party has three committees—the national committee, the congressional committee, and the senatorial committee, each of which operates two or three special-purpose accounts—each party now operates up to

seven special-purpose accounts, with *each* subject to a contribution limit 300% greater than the base contribution limit. 52 U.S.C. § 30116(a)(1)(B), (2)(B), (9). In the 2023-24 election cycle, therefore, each national party committee special-purpose account is subject to a limit of $123,900 per year (three times the base limit of $41,300 per year), meaning an individual can now contribute up to $247,800 per two-year election cycle to each of a party's seven special purpose accounts, for a total of more than $1.7 million per election cycle to a single party. AR 73.

The funds in these segregated party accounts must be raised and spent for specified purposes and cannot be used for campaign-related expenditures. According to the statutory language, the accounts are to be used "to defray expenses incurred with respect to a presidential nominating convention," 52 U.S.C. § 30116(a)(9)(A); "to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings," *id.* § 30116(a)(9)(C); and "to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party," or to repay loans or restore funds to defray such expenses, *id.* § 30116(a)(9)(B).

However, the Appropriations Act did not further define these purposes or contain disclosure requirements specific to funds spent out of the new restricted party accounts. It was therefore imperative for the FEC to undertake swift regulatory action to provide guidance to the parties, prevent abuse, and ensure that funds flowing through the new supercharged party accounts would be fully subject to the Act's disclosure provisions.

B. The FEC fails to promulgate any rules implementing the Appropriations Act from 2015 to 2019.

The so-called "Cromnibus" amendments took effect on January 1, 2015. The following month, the FEC issued a press release with "interim" reporting guidance for national party

committees operating Cromnibus accounts, which it directed parties to follow "[u]ntil the Commission adopts new regulations." Interim Reporting Guidance.[1] The FEC's issuance of "interim" guidance via press release was a clear acknowledgment that new regulations were necessary, and at least an implicit indication that new regulations would be forthcoming. Nevertheless, this "interim" guidance reflects essentially the sum total of the agency's interpretive efforts to date, and it did not even address some of the most commonly reported transactions. For example, the press release was silent on how to report the internal transfer of funds between accounts and how to report joint-fundraising transfers into the special-purpose accounts. *See* Interim Reporting Guidance. The press release has proven wholly inadequate and ineffective in carrying out FECA's disclosure provisions.

The FEC has also failed to provide sufficient guidance to its own analysts on how to review the national party committees' reports for disclosure failures involving the special-purpose accounts. The Commission's Reports Analysis Division Review and Referral Procedures—the guidelines Commission staff use to identify reporting problems, request that committees correct reporting errors for the benefit of the public record, and recommend corrective audits—do not even mention the special-purpose accounts.[2] Therefore, it is not clear that the FEC is even requiring the party committees to abide by the scant guidance it has issued, further frustrating FECA's transparency purpose.

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[1] Press Release, FEC, FEC Issues Interim Reporting Guidance for National Party Committee Accounts (Feb. 18, 2015), https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-accounts (cited and linked at AR 11) ("Interim Reporting Guidance").

[2] *See* FEC, Reports Analysis Division Review and Referral Procedures for the 2023-2024 Election Cycle, https://www.fec.gov/resources/cms-content/documents/Final-Redacted-2023-2024-RAD-Review-Referral-Procedures.pdf.

In the nearly nine years since the amendments were enacted, the Commission has failed to promulgate any rules delineating the limitations and disclosure requirements applicable to party special-purpose accounts. Indeed, the agency has not even opened a rulemaking to implement these significant changes to the Act, although it has repeatedly been asked to do so—by watchdog organizations and members of the regulated community alike, as well as by the agency's own lawyers.

For its part, plaintiff CLC first pressed for regulatory action in comments submitted on January 15, 2015—just weeks after the Cromnibus amendments were adopted—in response to an Advance Notice of Proposed Rulemaking regarding the Supreme Court's decision in *McCutcheon v. FEC*, 572 U.S. 185 (2014). While primarily focused on a range of other issues created in the wake of that ruling, CLC's January 2015 comments, which were joined by Democracy 21, also urged: "[T]o prevent abuse of these new restricted-use funds, the Commission should promulgate regulations specifying and limiting the permissible uses of these new funds, prohibiting transfer of these funds between party accounts, and requiring detailed disclosure of these funds."[3]

Ten months later, in October 2015, the Commission began nominally considering a rulemaking, after the FEC Office of General Counsel recommended that the Commission publish a Notice of Proposed Rulemaking ("NPRM") to implement the Appropriations Act and prepared an "Outline of Draft NPRM" that would begin the process to start a rulemaking.[4] Two months

[3] Comments of Campaign Legal Center and Democracy 21 re REG 2014-01: Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (*McCutcheon*), at 15 (Jan. 15, 2015), https://sers.fec.gov/fosers/showpdf.htm?docid=312983.

[4] *See* FEC Agenda Doc. 15-54-B (Oct. 23, 2015), https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-54-b.pdf.

later, in December 2015, the Commission discussed the draft outline at a meeting but took no action.[5] *See* AR 2.

In May 2016, following several more months of inaction, CLC and Democracy 21 renewed their concerns about the need for a rulemaking in a letter to the Commission. As the letter noted, seventeen months had by then already elapsed since the enactment of the Cromnibus provisions, but the Commission had "failed to adopt regulations to administer . . . [them]. There is no excuse for this failure."[6]

Meanwhile, even the regulated community was urging the FEC to act. On January 8, 2016, the Perkins Coie LLP Political Law Group[7] filed a petition requesting that the Commission open a rulemaking to address the Appropriations Act amendments, both by adopting new rules and revising relevant pre-existing rules. AR 26-42. Although the Perkins Coie petition was submitted in January 2016, the Commission waited almost ten months to take the mandatory ministerial step of publishing a Notice of Availability in the Federal Register and establishing a period for public comment, which it finally did in October 2016. *See* 11 C.F.R. § 200.3(a)(1); AR 64.

In response to the Notice of Availability, CLC and Democracy 21 submitted a joint comment urging the Commission to act. AR 64. CLC's January 2017 comments detailed, once again, why a rulemaking was sorely needed, and requested that the Commission "promulgate regulations specifying and limiting the permissible uses of these new funds, prohibiting transfer of

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[5] *See, e.g.*, FEC Agenda Doc. 16-04-A, at 11-12, 14 (Dec. 17, 2015), https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-04-a.pdf.

[6] Letter from Campaign Legal Center and Democracy 21 to Commissioners, at 1-2 (dated May 27, 2016), https://sers.fec.gov/fosers/showpdf.htm?docid=350856.

[7] The petition, though not submitted on behalf of any then-client of Perkins Coie, was characterized as reflecting the perspective of practitioners who represent parties regulated by the FEC.

these funds between party accounts, and requiring detailed disclosure of these funds."[8] In particular, the comments stressed that "it is vital to ensure there is effective and specific disclosure, by account, of all money spent from the three restricted accounts created by the Omnibus Act."[9]

The Commission also received public comments on the 2016 rulemaking petition from the Republican National Committee ("RNC"),[10] the National Republican Senatorial Committee ("NRSC") and National Republican Congressional Committee ("NRCC"), commenting jointly,[11] and the Center for Competitive Politics.[12] *See* AR 71-72. While the Republican congressional committees opined that a rulemaking was unnecessary, the other public commenters were broadly supportive of the petition or neutral.

The public comment period on the Perkins Coie petition closed in January 2017, but the Commission did not promulgate any rules, initiate a rulemaking, or otherwise take any action in response to the petition or supporting comments.

C. Plaintiffs' File Their Petition to Promulgate Rules for Reporting of "Cromnibus" Accounts in 2019.

By August 2019, it had been more than two years since the FEC had solicited public comments on the Perkins Coie petition, and still the Commission had not initiated a rulemaking related to Cromnibus accounts. Accordingly, on August 5, 2019, CLC and the Center for Responsive Politics (now OpenSecrets) submitted their rulemaking Petition with the FEC pursuant

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[8] Comments of Campaign Legal Center and Democracy 21 on Notice 2016-10, Rulemaking Petition re: REG 2014-10, at 4 (dated Jan. 30, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=354662.

[9] *Id*. at 7.

[10] *See* Comments of RNC on Rulemaking Petition re: REG 2014-10 (dated Jan. 30, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=354660.

[11] *See* Comments of NRSC and NRCC re: Notice 2016-10 (dated Jan. 30, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=354658.

[12] *See* Comments of Center for Competitive Politics re: Notice 2016-10 (dated Jan. 30, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=354562.

to 11 C.F.R. § 200.2 and 5 U.S.C. § 553(e). AR 1-7. While recognizing there was a continuing need for regulations to implement all aspects of the Cromnibus amendments, the Petition focused on just one serious problem created in the legislation's wake—namely, the disclosure and reporting issues associated with special-purpose accounts. *See* AR 1-7.

As noted in the Petition, the FEC's continuing failure to promulgate disclosure rules for Cromnibus accounts has fostered irregular and woefully insufficient reporting practices that vitiate the public's statutory informational right to know who is contributing to these accounts, and in what amounts; how the money in each account is being spent; and how much money each account is carrying over from one reporting period to the next. AR 2-6. In particular, FECA requires every political committee to file periodic reports that include the committee's total receipts, total disbursements, and cash on hand for the reporting period and election cycle to-date. *See* 52 U.S.C. § 30104(b)(1)-(2), (4), (7); AR 2. The national party committees, however, report none of these figures for their special-purpose accounts. AR 2. Therefore, if a member of the public wants to get information about total receipts, disbursements, and cash on hand for a national party committee's special-purpose account, they need to search the committee's monthly reports—which are typically thousands of pages long—and compile each transaction that refers to the account. AR 2.

But even this arduous task is made effectively impossible because there is no consistent location or terminology that committees use to denote transactions involving the special-purpose accounts. AR 2-3. In the absence of clear rules delineating their reporting obligations, committees instead use a mix of the memo, purpose, and "receipt for"/"disbursement for" sections of the applicable FEC Schedule A and B committee forms to indicate such transactions. AR 3. And their terminology also varies so significantly as to defeat efforts to automate the data-collection process.

AR 3. Compounding these problems, some committees even use internally inconsistent terminology within a single report. AR 4.

For example, some committees refer to the party headquarters account using the note "hq," while others use "headquarters," AR 3;[13] some alternate between different terms across and/or *within* reports, AR 4-5;[14] and some employ different terminologies and formats when reporting receipts versus disbursements—such as by using the disbursement purpose line to denote "hq account—subscriptions," with no accompanying memo text, but using a memo text entry to denote when contributions are deposited in the "legal proceedings account" or "headquarters account," AR 3.[15]

Plaintiffs noted numerous illustrative examples of such reporting inconsistencies, both in the Petition itself and in supporting comments that they filed in October 2019, *see* AR 43-46, including:

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[13] Citing RNC, 2019 June Monthly, FEC Form 3X, at 7,954, 7,965 (filed June 20, 2019), https://docquery.fec.gov/pdf/623/201906209150190623/201906209150190623.pdf; NRSC, Disbursements to Lexis-Nexis from "Headquarters Acct" (2017-18), FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00027466&recipient_name=lexis+nexis&two_year_transaction_period=2018&min_date=01%2F01%2F2017&max_date=12%2F31%2F2018 (last visited Apr. 4, 2024); NRCC, Disbursements to Lexis Nexis from "HQ Acct" (2017-18), FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00075820&recipient_name=lexis+nexis&two_year_transaction_period=2018&disbursement_description=HQ+ (last visited Apr. 4, 2024).

[14] Citing NRSC, 2019 June Monthly, FEC Form 3X, at 2,963, 3,004 (filed June 20, 2019), https://docquery.fec.gov/pdf/587/201906209150150587/201906209150150587.pdf; NRCC, 2019 June Monthly, FEC Form 3X, at 3,105, 3,182 (filed June 20, 2019), https://docquery.fec.gov/pdf/020/201906209150165020/201906209150165020.pdf; Democratic National Committee ("DNC"), 2019 May Monthly, FEC Form 3X, at 2,532 (filed May 20, 2019), https://docquery.fec.gov/cgi-bin/fecimg/?201906209150231905.

[15] Citing NRSC, Disbursements to Lexis-Nexis from "Headquarters Acct" (2017-18), *supra* note 13; NRCC, Disbursements to Lexis Nexis from "HQ Acct," 2017-18, *supra* note 13; NRSC, 2019 June Monthly, *supra* note 14, at 3,004; NRCC, 2019 June Monthly, *supra* note 14, at 3,274. See also NRSC, 2019 June Monthly, *supra* note 14, at 2,967-68; NRCC, 2019 June Monthly, *supra* note 14, at 3, 112.

a. In its May 2019 monthly filing, the DNC used "hq account" and "headquarters accoung" on the same page. AR 5.[16]

b. The NRSC described disbursements from the legal proceedings account by noting "Legal Proc" in the purpose line (for example, "Legal Proc – Attorneys Fees"), whereas the NRCC described disbursements from both a "LEGAL ACCT" and a "RECOUNT" account, despite both apparently referencing the same account. AR 45.[17] The Democratic Senatorial Campaign Committee ("DSCC") also reported disbursements from both a "legal services" and a "legal services recount" account. AR 45.[18]

c. The NRSC reported *contributions* to the headquarters account with a memo item that said "HEADQUARTERS ACCOUNT," but then reported *disbursements* from that same account in an entirely different format, by writing "HQ ACCT" in the "Purpose of Disbursement" line and leaving the memo item blank. AR 45.[19]

d. The DNC's conventions for reporting disbursements appear to have changed over time. In its more recent reports, the DNC reported disbursements in the format of "headquarters account" in the purpose line, with no accompanying memo text, where it had previously reported such disbursements by writing "legal account" in the memo text and providing descriptions (*e.g.*, "GOTV canvassing") in the purpose line. AR 4.[20]

e. In their June 2019 monthly filings, the NRSC and NRCC used the term "headquarters account" in one part of the report, but "hq account –

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[16] Citing DNC, 2019 May Monthly, *supra* note 14, at 2,532.

[17] Citing NRSC, 2019 September Monthly, FEC Form 3X, at 4,310 (filed Sept. 20, 2019), https://docquery.fec.gov/cgi-bin/fecimg/?201909209163462488; NRCC, 2019 September Monthly, FEC Form 3X, at 5,383-84 (filed Sept. 20, 2019), https://docquery.fec.gov/pdf/287/201909209163468287/201909209163468287.pdf.

[18] Citing DSCC, Disbursements for "Legal," 08/01/2019–09/30/2019, FEC, https://www.fec.gov/data/disbursements/?t+wo_year_transaction_period=2020&disbursement_description+=legal&data_type=processed&committee_id=C00042366&min_date=08%2F01%2F2019&max_date=09%2F30%2F2019&disbursement_description=legal (last visited Oct. 20, 2023).

[19] Citing NRSC, 2019 October Monthly, FEC Form 3X, at 5,144, 5,185 (filed Oct. 20, 2019), https://docquery.fec.gov/pdf/666/201910209165195666/201910209165195666.pdf.

[20] Citing DNC, 2019 June Monthly, FEC Form 3X, at 3,670 (filed June 21, 2019), https://docquery.fec.gov/pdf/674/201906219150234674/201906219150234674.pdf; DNC, 2017 March Monthly, FEC Form 3X, at 2,037 (filed Mar. 20, 2017), https://docquery.fec.gov/pdf/247/201703209050964247/201703209050964247.pdf.

> maintenance" and "hq acct – computer support," respectively, in another. AR 4-5.[21]

To remedy these transparency problems, the Petition requested that the FEC promulgate rules and forms requiring national party committees to delineate within their reports the individual and aggregate transactions involving their Cromnibus accounts. AR 6. Petitioners also provided several specific possible solutions, noting that the Commission could: promulgate a new schedule to the national party committees' monthly reports under 52 U.S.C. § 30111(a)(1); create an effective "cross-indexing system" under 52 U.S.C. § 30111(a)(3); or issue guidelines on uniform terminology for all committees to use under 52 U.S.C. § 30111(a)(2). AR 6.

On August 28, 2019, the Commission published a Notice of Availability requesting comments on the Petition. AR 13. The comment period closed on October 28, 2019—*over four years ago*. AR 13. As noted above, on October 28, 2019, plaintiffs submitted comments with the FEC in support of the Petition, providing additional examples of the disclosure concerns they had described in their rulemaking request. AR 43-46. CLC thereafter followed up again by letter to reiterate the importance of the pending Petition. AR 56.

During the public comment period, five individuals and entities besides CLC and the Center for Responsive Politics submitted comments, including Public Citizen, Democracy 21, and Perkins Coie LLP Political Law Group. AR 18-42, 47-49. Only one commenter, an individual, appeared to oppose the initiation of a rulemaking. AR 16-17. Perkins Coie, however, opined that the Commission should engage in a comprehensive rulemaking (consistent with its own 2016 petition) rather than the narrower disclosure rulemaking urged in plaintiffs' Petition, stressing the

[21] Citing NRSC, 2019 June Monthly, *supra* note 14, at 2,963, 3,004; NRCC, 2019 June Monthly, *supra* note 14, at 3,105, 3,182.

need "for the FEC to issue full guidance on all areas of the law on the national party committees' segregated accounts." AR 23.

In the more than four years since the close of the comment period on October 28, 2019, the Commission has not initiated a rulemaking, conclusively responded to, or otherwise taken any action on the Petition. Meanwhile, millions of dollars are flowing through the parties' Cromnibus accounts, and the public has a statutory right to the corresponding financial information. *See* 52 U.S.C. § 30104(b); AR 75. However, thanks to the Commission's failure to promulgate any disclosure rules governing these accounts, national party committees are continuing to disclose their receipts and disbursements in non-uniform and manifestly deficient ways, effectively concealing information from the general public. *See* AR 74-76.

D. In 2024, seemingly prompted by plaintiffs' lawsuit, the FEC issues a Notice of Inquiry for Segregated Party Accounts.

Following years of radio silence from the FEC, and with millions of dollars of effectively unreported money still traversing the parties' Cromnibus accounts, plaintiffs initiated this delay suit in October 2023. After allowing plaintiffs' Petition to lie dormant for more than four years, the Commission, seemingly prompted by the complaint, published a notice of inquiry in the Federal Register on February 14, 2024. AR 71-72. The notice of inquiry invited a second round of comments on both Plaintiff's Petition and the Perkins Coie petition, notwithstanding that the Commission had already undertaken this preliminary step—years ago—as to both Petitions. *See* AR 71-72.

CLC took the opportunity to submit comments explaining that the reporting situation has not improved since 2019. *See* AR 74-76. CLC's comment provided examples of the ways the national party committees have continued to report their special-purpose account receipts and disbursements in varied and haphazard ways:

a. Contrary to the FEC's 2015 interim guidelines, which indicated that the committees should identify recount account disbursements "by entering 'Recount Account' in the Purpose of Disbursement field along with the required purpose of the disbursement (*e.g.*, 'Recount Account – Legal Services')," the NRSC routinely designates such disbursements by adding the term "Legal Proc" to the itemized entry. AR 74.[22]

b. To designate contributions to its special-purpose accounts, the DCCC uses the terms "headquarters/building fund contribution" and "recount/legal fund contribution," whereas the NRCC uses the phrases "contribution headquarters account" and "contribution legal proceedings account." AR 75.[23]

c. The RNC reports a special-purpose account transaction by adding a memo item to the entry, whereas the DSCC reports the same kind of transaction by designating it as such in the space reserved for indicating the election to which the contribution will be applied. AR 75.[24] The DCCC has done both. AR 75.[25]

d. When reporting disbursements from its special purpose accounts, the NRSC prefaces its "purpose of disbursement" entries with "legal proc" or "HQ account," while the DCCC prefaces its purpose descriptions with "recount," "legal proceedings," or "headquarters." AR 75.[26]

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[22] Citing NRSC, Disbursements with "Legal Proc" in Description, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00027466&two_year_transaction_period=2024&disbursement_description=legal+proc (viewed Apr. 4, 2024).

[23] Citing DCCC, 2023 September Monthly, FEC Form 3X, at 13,167–13,168 (filed Sep. 20, 2023), https://docquery.fec.gov/pdf/373/202309209597210373/202309209597210373.pdf; NRCC, 2023 September Monthly, FEC Form 3X, at 7,672–7,673 (filed Sep. 20, 2023), https://docquery.fec.gov/pdf/744/202309209597201744/202309209597201744.pdf.

[24] Citing RNC, September 2023 Monthly Report at 13,432–13,433 (Sep. 20, 2023), https://docquery.fec.gov/pdf/234/202309209597228234/202309209597228234.pdf; DSCC, September 2023 Monthly Report at 16,373–16,374 (Sep. 20, 2023), https://docquery.fec.gov/pdf/854/202309209597136854/202309209597136854.pdf.

[25] Citing DCCC, September 2023 Monthly, *supra* note 23, at 13,167–13,168.

[26] Citing NRSC, Amend. 2022 Pre-General Election Report at 15,441, 16,015 (Apr. 11, 2023), https://docquery.fec.gov/pdf/086/202304119579818086/202304119579818086.pdf; DCCC, Amend. 2022 May Monthly, FEC Form 3X, at 12,816, 14,000 (Mar. 16, 2023), https://docquery.fec.gov/pdf/713/202303169579265713/202303169579265713.pdf.

The parties also have different terms for reporting transfers between their general accounts and special-purpose accounts. The NRSC calls these "internal transfers,"[27] the DNC calls them "transfers,"[28] and the NRCC calls them "allocable expenses."[29] The DCCC includes a lengthy description that references the Cromnibus bill; for example, "recount expenses reimbursement" followed by "transfer – recount expenses to Line 29 per 2014 Cromnibus bill."[30]

Finally, the parties have continued to be internally inconsistent in their reporting. For example, when describing contributions, the NRSC spells out the account names in full ("legal proceedings account" and "headquarters account"), while it uses abbreviations when it describes disbursements ("legal proc" and "HQ account").[31] Similarly, the NRCC uses "legal proceedings account" when describing contributions and "recount" when describing disbursements from the same account.[32] And, as noted above, the DCCC uses both "recount" and "legal proceedings" when describing its disbursements, with both terms even appearing on the same page of its amended May 2022 report.[33]

As CLC explained in the comment, due to these inconsistent reporting practices, and the fact that there is no separate accounting of the amount of money in any committee's special-purpose account, "no voter, regulator, reporter, political scientist, or watchdog organization can

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[27] NRSC 2022 Amended Pre-General, *supra* note 26, at 16,017 (describing disbursements as an "internal legal proceedings expenditures transfer" and an "internal hq allocable expenditures transfer").
[28] DNC, 2023 September Monthly, Form 3X, at 9,946 (filed Sept. 20, 2023), https://docquery.fec.gov/pdf/287/202309209597280287/202309209597280287.pdf (describing a disbursement as "Recount Account – Transfer for Recount and Other Legal Proceeding Expenses").
[29] NRCC 2023 September Monthly, *supra* note 23, at 7,965 (describing a disbursement as "allocable expenses to legal acct").
[30] DCCC 2023 September Monthly, *supra* note 23, at 13,202.
[31] NRSC 2022 Amended Pre-General, *supra* note 26, at 15,306-07, 15,441, 16,016.
[32] NRCC 2023 September Monthly, *supra* note 23, at 7,672, 7,965.
[33] DCCC 2022 Amended May Monthly, *supra* note 26, at 14,000.

reliably ascertain—even after poring through thousands of pages of disclosure reports to parse individual transactions—the answer to basic oversight and accountability questions." AR 76. That the agency tasked with ensuring election transparency has allowed plainly inadequate reporting to persist for nearly a decade is unacceptable. *See* AR 73, 76.

By the close of the comment period, all of the national party committees had weighed in on the FEC's notice, in addition to CLC. The DNC filed a comment, the DSCC and DCCC filed a joint comment, and the RNC, NRSC, and NRCC filed a joint comment. AR 77-83. While the party committees' feelings on a Cromnibus account rulemaking and what topics to prioritize varied, no party objected to the promulgation of uniform reporting rules. *See* AR 77 (DNC), 81 (Republican committees), 83 (DSCC and DCCC). One interest group, the Coolidge-Reagan Foundation, also filed a comment, but it did not address reporting. *See* AR 84-96.

The most recent comment period closed on March 15, 2024. But the Commission has at no point—before, during, or after the 2024 comment period—given an indication that it will hasten toward conclusive action on the Petition.

* * *

Nearly a decade has passed since Congress created the national party committee special-purpose accounts, and in that time, the Commission has not been able to decide if it plans to regulate the accounts, much less write even a single rule implementing the three paragraphs of statutory text that govern millions of dollars of political parties' money. The Commission's interim reporting guidance, announced in a press release, reflects essentially the sum total of the agency's interpretative efforts to date. *See* Interim Reporting Guidance. That guidance—which was never intended to replace a rulemaking—was insufficient from the start and has been ignored by the

committees, which have each developed their own reporting practices. It is past time the FEC vindicates the core transparency requirements of FECA and acts on plaintiffs' Petition.

ARGUMENT

I. Plaintiffs Have Standing.

Plaintiffs CLC and OpenSecrets have shown informational and organizational standing because they "suffered an injury in fact" that is "fairly traceable" to the FEC's failure to act on their petition for rulemaking and is "likely to be redressed by a favorable judicial decision." *Spokeo*, *Inc. v. Robins*, 578 U.S. 330, 338 (2016). *See also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, both plaintiffs have suffered "a quintessential informational injury." *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 784 (D.C. Cir. 2022) ("*CLC*").

It is well 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). Under FECA, all federal political committees—including national parties' separate, segregated accounts—must file periodic reports accurately disclosing their receipts, disbursements, and debts and obligations, *see* 52 U.S.C. § 30104(a)(1)-(4), (b). These reports must itemize each person to whom the committee has made operating expenditures or other disbursements of over $200, "together with the date[s], amount[s], and purpose[s]" of those expenditures or disbursements, *id.* § 30104(b)(5)(A), (6)(A), (B)(v), and must also include aggregate totals for all receipts, disbursements, and cash on hand for the reporting period and election cycle to-date, *see id.* § 30104(b).

However, because the FEC has failed to implement the Cromnibus amendments to ensure proper disclosure with respect to national parties' special-purpose accounts, plaintiffs have been deprived of this statutorily required information. In the absence of any specific reporting rules or authoritative guidance from the FEC, each national party committee reports receipts to and disbursements from its special-purpose accounts in an inconsistent and piecemeal fashion, making it effectively impossible for plaintiffs or the public to accurately determine the amount of money flowing into and out of the accounts. *See, e.g.*, Exhibit 1, Decl. of Roger Wieand ¶ 6; Exhibit 2, Decl. of Hilary Braseth ¶ 14. The inability to access this FECA-required disclosure information has concretely injured both plaintiffs. Wieand Decl. ¶ 7-8; Braseth Decl. ¶ 15.

And it is beyond doubt that this information would be "helpful" to plaintiffs CLC and OpenSecrets. *FEC v. Akins*, 524 U.S. 11, 31 (1998). Obtaining complete and accurate campaign finance information is essential to each organization's ability to carry out its programmatic work and mission.

A central way that plaintiff CLC works to advance its mission involves researching the money used to influence elections, including funds transmitted through party committees, and communicating its research to voters. Wieand Decl. ¶¶ 10-11. CLC relies on information reported under FECA to develop a wide variety of public education materials, *id.* ¶ 13; prepare comments, letters, and complaints submitted to the FEC and state campaign finance agencies, *id.* ¶¶ 25, 27; draft briefs and other filings for state and federal campaign finance litigation, *id.* ¶¶ 31-32; and provide testimony and educational materials to legislators, partner organizations, and other policymakers. *Id.* ¶¶ 22-23.

Similarly, information reported to the FEC about the funds raised and spent in federal elections is essential to OpenSecrets' organizational mission and activities. OpenSecrets tracks and

analyzes campaign finance information, which it shares with the public through its own publications and those of other news media. Braseth Decl. ¶¶ 5-9. In addition, OpenSecrets advocates in support of campaign finance reform, contributes to litigation about campaign finance laws, and participates in rulemakings and other administrative matters at the FEC. *Id.* ¶¶ 3, 10-12. OpenSecrets' data is also used by other entities, including individuals testifying before Congress, courts, and parties in litigation. *Id.* ¶¶ 10, 12. The success of these activities depends on OpenSecrets' ability to receive timely, accurate, and useable disclosure information under FECA about the money raised and spent in federal political campaigns, including through the national parties' special-purpose accounts. *Id.* ¶¶ 4, 15.

Second, CLC has also suffered a distinct organizational injury by virtue of the FEC's failure to detail and standardize the reporting requirements applicable to national parties' special-purpose accounts, which has fostered haphazard reporting practices and obliged CLC to divert organizational resources in its efforts to piece together missing or inaccurate disclosure data. Wieand Decl. ¶ 14; *see People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). Because the FEC's inaction has allowed parties to conceal the flow of money into and out of their special-purpose accounts, CLC has been forced to "spend staff time researching relevant law, poring over the details of disclosure reports, and explaining to [inquiring] reporters what information is missing or concealed and how they might attempt to find it," all of which reduce the resources available for CLC's regular programs and activities. Wieand Decl. ¶ 15.

Finally, plaintiffs meet the causation and redressability elements of standing. The FEC caused plaintiffs' injuries by failing to take action on the Petition, and those injuries are likely to be redressed if plaintiffs succeed on the merits of their claim. *See Akins*, 524 U.S. at 25. Moreover,

where "Congress has accorded [a plaintiff] a procedural right to protect his concrete interests"—including by challenging an agency action unlawfully withheld or unreasonably delayed under the APA—the plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517-18 (2007) (internal quotation marks and citation omitted). So too here. "When a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518 (emphasis added). Under either standard, plaintiffs "easily satisfy the causation and redressability requirements of Article III standing." *CLC II*, 31 F.4th at 784 (citing *Akins*, 524 U.S. at 25).

II. Standard of Review

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To meet its burden on summary judgment, the moving party must "inform[] the district court of the basis for its motion, and identify[] those parts of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The APA requires an agency to "proceed to conclude a matter presented to it" and to do so "within a reasonable time." 5 U.S.C. § 555(b). The APA also states that a court "shall compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1); *see also TRAC*, 750 F.2d at 77 ("[S]ection 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that court[s] designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed."). Thus, there are occasions when an "agency's delay is so egregious as to warrant mandamus" relief. *TRAC*, 750 F.2d at 79.

"According to the law of the Circuit, a court must assess several factors in order to determine whether an agency's delay is 'unreasonable'" under the APA and warrants judicial intervention. *In re Int'l Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). *Cutler v. Hayes* lays out the following four-step inquiry to guide courts undertaking a delay analysis:

1) "[A]scertain the length of time that has elapsed since the agency came under a duty to act."
2) Judge the "reasonableness of the delay . . . in the context of the statute which authorizes the agency's action." This includes an examination of "the extent to which delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all."
3) "[E]xamine the consequences of the agency's delay."
4) "[C]onsider the agency's explanation" for the delay, such as bad faith (which is always unreasonable), "administrative necessity, insufficient resources, or the complexity of the task confronting the agency."

818 F.2d at 888-98 (internal quotation marks omitted); *see Int'l Chemical Workers Union*, 958 F.2d at 1149 (citing *Cutler* and applying these factors); *see also Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting *International Chemical Workers Union*'s articulation of the *Cutler* factors).

Courts in this Circuit also apply the six factors articulated in *Telecommunications and Research Action Center v. FCC* ("*TRAC*"), known as the *TRAC* factors:

> (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 quotation marks omitted); *see Common Cause*, 692 F. Supp. at 1399-1401 (analyzing the *TRAC* factors in a case alleging that the FEC unreasonably delayed reconsidering its refusal to promulgate detailed soft-money allocation rules).

III. The FEC Has Unreasonably Delayed Action on Plaintiffs' Petition.

Under the *Cutler* and *TRAC* factors, the FEC has unreasonably delayed action on plaintiffs' Petition. Plaintiffs are thus entitled to relief, including a judgment against the FEC declaring that it has unreasonably delayed a final decision on plaintiffs' Petition in violation of the APA; an order imposing a deadline for the FEC to reach a final decision, and, if the Commission chooses, to promulgate proposed and final rules; and continuing judicial supervision of the agency to ensure its compliance with the timetable imposed. *See infra* Part IV (discussing remedy).

A. The FEC's four-and-a-half-year delay far exceeds other agency delays held unreasonable, and should be found *per se* unreasonable.

The first step in assessing whether an agency has unlawfully delayed final action on a rulemaking petition is determining the length of the delay. *See Cutler*, 818 F.2d at 888. Here, plaintiffs filed the Petition on August 5, 2019. Four years and eight months have elapsed since that date. At this point, the FEC's egregious and unexplained delay in reaching a decision on whether to proceed with a rulemaking on Cromnibus account reporting verges on being *per se* unreasonable.

As Judge Sullivan stated in a 2003 decision, "[w]hile the APA does not set clear temporal boundaries defining 'unreasonable delay,' a *five year* delay smacks of unreasonableness on it[s]

face." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003). Likewise, the D.C. Circuit has opined that, generally, "a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (quoting *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)). *See also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) ("FERC's six-year-plus delay is nothing less than egregious."). The FEC's delay in this matter, which is rapidly approaching the five-year mark, has exceeded the outer bounds of what this circuit typically regards as "reasonable."

The nearly five-year delay has also far surpassed the time allotted to the Commission to reach a rulemaking decision in *Common Cause*. 692 F. Supp. at 1,400-01. In that case, Common Cause had petitioned the FEC to create rules more closely regulating how political committees use "soft money." *Id.* at 1398. The FEC denied the petition, and Common Cause sued the FEC, alleging that the Commission's decision was contrary to law. *Id.* A federal court agreed and ordered the FEC to reconsider Common Cause's petition. *Id.* Seven months after the court's decision, the FEC solicited comments on the petition. *Id.* Four months after the close of the comment period, when the FEC had still not decided whether to undertake a rulemaking, Common Cause returned to court, arguing that the agency's delay warranted the court imposing a "timetable for the promulgation of new rules." *Id.* at 1398, 1400. While the court ultimately decided against creating a strict schedule, it concluded that "supervision appears to be appropriate," and retained jurisdiction, requiring the FEC to file status reports every 90 days. *Id.* at 1401. If an eleven-month delay in considering whether to promulgate rules effectuating FECA warrants supervision, then certainly a four-year-and-eight-month delay warrants supervision *and* a requirement of immediate action.

The FEC's delay is even more egregious in context. Congress passed the Appropriations Act in December 2014, nine years and four months ago. In February 2015—nine years and two months ago—the Commission issued its interim reporting guidance, which acknowledged the need for new reporting regulations. In January 2016—eight years and three months ago—Perkins Coie filed its rulemaking petition, requesting, among other things, that the Commission amend its disclosure rules to address the Appropriations Act. In the interim, the FEC's own Office of General Counsel recommended that the Commission start a rulemaking to address the Cromnibus accounts. Meanwhile, election after election—including two presidential elections and two midterm elections—came and went without regulations in place requiring the national party committees to report statutorily required information about their special-purpose accounts. It has been almost a decade since it became clear to the Commission, the regulated community, and the public that reporting regulations were needed, yet the Commission has failed to take any final action.

While the Commission has solicited two rounds of comments on plaintiffs' Petition, including a recent round of comments apparently prompted by this lawsuit, comments are not a final agency action or indicative that a decision will follow promptly (or ever). *See TRAC*, 750 F.2d at 79 ("It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action."); *see also Int'l Chemical Workers Union*, 958 F.2d at 1146-48, 1150 (finding an unreasonable delay when an agency stated that it planned to open a rulemaking, issued unenforceable guidelines "intended to serve only as an interim measure," and solicited multiple rounds of comments on a proposed rule, but failed to progress appropriately toward a final, binding rule). The FEC's nearly five-year delay on plaintiffs' Petition, set against the backdrop of an additional almost five years of inaction, makes plain that court intervention is required to guarantee a resolution of this matter.

B. The FEC's delay in promulgating a Cromnibus reporting rule unquestionably frustrates the core informational purposes of FECA.

The second step of analyzing a delay claim is looking to the agency's enabling act and determining to what degree the delay is undermining the statute. *Cutler*, 818 F.2d at 888. Here, where one of FECA's core purposes is transparency, there is no question that the Commission's failure to promulgate regulations defining how national party committees must report the millions of dollars flowing into and out of their Cromnibus accounts "frustrat[es] the statutory goal." *Id.* at 898.

FECA includes a detailed scheme for how political committees must report their receipts and disbursements, *see* 52 U.S.C. § 30104, and the Supreme Court has remarked that the Act's reporting requirements serve at least three important interests: (1) reporting "provides the electorate with information" about how committees raise and spend their money; (2) "disclosure requirements deter actual corruption and avoid the appearance of corruption;" and (3) publicly filed reports "are an essential means of gathering the data necessary to detect violations," *Buckley*, 424 U.S. at 66-68. According to the Supreme Court, Congress's intent in passing FECA was "to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 76 (quoting S. Rep. No. 92-229 at 57 (1971)); *see also id.* at 78 ("[Congress] wished to promote full disclosure of [ ] spending to insure both the reality and the appearance of purity and openness of the federal election process." (citing S. Rep. No. 92-96 at 33 (1971); S. Rep. No. 93-689 at 1-2 (1974))).

The FEC's delay in promulgating any regulations to implement the Appropriations Act has hindered FECA's transparency goal and all of the interests served by that goal. It is nearly impossible for the public and the Commission itself to track national party committees' special-

purpose account receipts and disbursements. The national party committees do not report the total amount of money raised or spent by their special purpose accounts (either collectively or on a per-account basis), and they itemize individual transactions on reporting lines that reflect several purposes. Locating a relevant entry is like finding a needle in a haystack, particularly when each committee uses its own terminology and places the account label in a different area of the entry.

When people cannot find information about how the national party committees are using their special-interest accounts and who is funding those accounts, they are left without knowledge of how the party committees are operating. They cannot engage in the type of watchdogging activities that would deter misuse of the accounts or effectively spot violations. The opaque nature of the party committees' current reporting practices—which leaves an informational vacuum—undermines "[p]ublic confidence in our democratic electoral system, which the Act seeks to protect." *DSCC*, 1996 WL 34301203, at *8. The lack of meaningful and standardized reporting thus cuts at the heart of FECA and undermines its raison d'être, and represents a regulatory breakdown, as the FEC is failing its statutory duty to "administer, seek to obtain compliance with, and formulate policy with respect to [the] Act." 52 U.S.C. § 30106(b)(l); *Cutler*, 818 F.2d at 897 n.156 (explaining that "inordinate agency delay would frustrate congressional intent by forcing a breakdown of regulatory processes").

C. The FEC's continuing failure to act poses an urgent threat to the integrity and transparency of the electoral system.

The delay inquiry next turns to "the consequences of the agency's delay," which are clear in this case. *See Cutler*, 818 F.2d at 898. The party committees have been operating special-purpose accounts for nearly a decade, and two federal elections have passed since plaintiffs filed the Petition, with a third quickly approaching. As just discussed, during the pendency of plaintiffs' Petition, and without substantive reporting guidance from the FEC, the national party committees

have adopted haphazard and inadequate reporting conventions that make it virtually impossible for the public to monitor the parties' use of these accounts or discern how Cromnibus funds are being raised and spent. The party committees are effectively concealing statutorily required information about their receipts and disbursements from the public and from the FEC, which is tasked with analyzing reports and spotting violations. Moreover, per these party committees' recent comments on plaintiffs' Petition, *see* AR 77-83, they are comfortable with their reporting habits and unlikely to change their practices unless required to do so.

Courts have considered such violations of FECA's statutory purpose to be grave "threat[s] to the integrity of" the country's elections. *See Citizens for Percy '84 v. FEC*, No. 84-2653, 1984 WL 6601, at *3-4 (D.D.C. Nov. 19, 1984) (describing an alleged coordinated expenditure that exceeded the Act's contribution limit as such a threat); *DSCC*, 1996 WL 34301203, at *5 (describing soft money as a threat). Furthermore, courts have opined that the threat to electoral integrity is particularly substantial where, as here, the conduct alleged is contrary to one of the principal purposes of the Act—ensuring comprehensive public disclosure of the money received and spent by all political committees. *See DSCC*, 1996 WL 34301203, at *5 (finding that the underlying matter involved a substantial threat when it "involve[d] allegations" concerning "one of the principal purposes of FECA"). The "amounts of money involved" and the risk "of recurrence" are also factors that heighten the risk and make the need for judicial intervention more urgent. *See id.* at *5; *Percy*, 1984 WL 6601, at *3. Here, where millions of dollars pass through each party's special-purpose accounts, and the committees will continue to report as they have been in the absence of applicable rules, there is little question that the FEC's delay has threatened electoral integrity and requires urgent redress.

D. There is no justification for failing to complete a discrete and straightforward rulemaking in under four years and eight months, nor has the FEC offered one.

The FEC has not provided any information in the administrative record explaining or attempting to justify its delay, which is the final criterion to be weighed in determining the reasonableness of its pace. *See Cutler*, 818 F.2d at 889. This may be because it is hard to imagine, even in the abstract, any reason for the nearly five-year delay. A lack of resources can hardly excuse the lag when the Petition asks for a rule that is small in scope and well within the agency's existing expertise. The Petition merely requests a straightforward application of FECA's existing reporting regime to the seven special-purpose accounts of a very small subset of political committees. Yet the Commission has not even decided whether to accept plaintiffs' invitation for a rulemaking, much less taken any steps to implement the modest regulatory changes plaintiffs' Petition seeks. And regardless, a rulemaking that simply clarifies that existing reporting regulations apply to the Cromnibus accounts and tweaks disclosure forms to explicitly include the accounts hardly poses outsize demands on agency resources. *See Common Cause*, 692 F. Supp. at 1401 ("[A]lthough deference ordinarily is accorded to an agency[ ] . . . the plaintiffs' petition does not involve complex scientific or factual issues.").

Nor is the upcoming election an excuse for further delay. A federal election is always, at most, two years away. The fact that an election is already underway, as many recent commenters point out, AR 77, 79, 82, is immaterial. The FEC has a duty to promulgate regulations to govern money in elections, so it cannot point to elections as a reason to shirk its duty. As stated pointedly in the *Common Cause* decision, "[T]he Commission could have addressed this problem long before the elections neared," and to "countenance further delay . . . would reward inaction with further immunity from judicial review." *Id.* at 1401.

E. The TRAC factors also establish that the FEC's delay has been unreasonable.

While the previous discussion subsumed several of the *TRAC* factors, those that remain also establish that the FEC's delay has been unreasonable. To begin, though "Congress did not impose specific time 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 WL 34301203, at *7. The FEC's delay here—which has resulted in a lack of transparency about the party committee's special-purpose accounts—risks just that. FECA has no teeth if political committees are not openly reporting their receipts and disbursements.

Moreover, "[a]lthough lives do not hang in the balance," the Commission's failure to act on plaintiffs' Petition "threatens [to impose] the very corruption and appearance of corruption by which the integrity of our system of representative democracy is undermined, and which the FECA was intended to remedy." *Common Cause*, 692 F. Supp. at 1401 (internal quotation marks omitted). By waiting almost five years and counting to determine whether to undertake a rulemaking on plaintiffs' Petition, the FEC has abandoned "any rule of reason," and this court must now require the agency to take action.

IV. The Court Should Declare the FEC's Delay Unreasonable and Compel the Agency to Act.

To remedy the FEC's unjustified, nearly five-year delay on plaintiffs' Petition, the Court should declare that the FEC's failure to take final action on the Petition constitutes agency action unreasonably delayed in violation of the APA; enter an order compelling the FEC to issue a final decision within 30 days; and retain jurisdiction to supervise the FEC's timely compliance with its obligations under FECA and the APA. Prompt declaratory and injunctive relief is especially warranted here given the magnitude of the FEC's delay and the manifest harm further delay would pose to electoral integrity and transparency.

The Court should also establish a deadline for the FEC to take final action on the Petition, in accordance with the APA's mandate that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id.* § 553(b). Courts routinely set timetables for action when confronted with an agency's unreasonable delay or obstinacy, particularly where important public interests are at stake. *See, e.g.*, *In re Am. Rivers*, 372 F.3d at 414, 420 (ordering action within 45 days); *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1158-59 (1983) (ordering the issuance of a notice of proposed rulemaking within 30 days); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1035-37 (D.C. Cir.), supplemented, 705 F.2d 1343 (D.C. Cir. 1983) (ordering action within 60 days and then staying the imposition of that timeline to allow the parties to "discuss their respective requirements"); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 345-46 (D.C. Cir. 1980) (ordering the FCC to submit a proposed schedule for court approval within 30 days, to which the parties would be "expected to adhere"); *Nader v. FCC*, 520 F.2d 182, 207 (D.C. Cir. 1975) (same).

Plaintiffs "are entitled to an end to [the FEC's] marathon round of administrative keep-away and soon." *Am. Rivers*, 372 F.3d at 420. Therefore, the Court should order the FEC to grant or deny the Petition within 30 days of the Court's Order, and further order that the FEC must:

(a) provide, if it intends to deny the Petition in whole or part, a "brief statement of the grounds for denial," 5 U.S.C. § 555(e), also within 30 days of the Court's Order; or

(b) issue a proposed rule within 30 days of the Court's Order and a final rule within 90 days of the proposed rule's publication in the Federal Register.

Finally, plaintiffs request that this Court retain jurisdiction until the FEC takes final action on the Petition, including throughout the pendency of any rulemaking.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' motion for summary judgment and enter an order granting plaintiffs' requested relief.

Dated: April 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2024, 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.

/s/ Megan P. McAllen

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