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' COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act
CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
RAD	Reports Analysis Division
RFAI	Request for Additional Information

INTRODUCTION & SUMMARY OF ARGUMENT

In December 2014, almost a decade ago, Congress passed the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) ("Appropriations Act"), which included approximately one page of text amending the Federal Election Campaign Act ("FECA" or "Act"). That small amount of legislative text has proven highly consequential, as it created three new kinds of "separate, segregated" accounts for the national party committees—an account for presidential nominating conventions, an account for party headquarters buildings, and an account for legal proceedings, 52 U.S.C. § 30116(a)(9)—that many millions of dollars flow into and out of each year. The massive influx of cash was by design: The Appropriations Act set the contribution limit for each account at 300% of the general limit, meaning an individual can currently contribute up to $123,900 per year to each account. *Id.* When each national political party has seven accounts, an individual can contribute up to $1.7 million to a single political party during every two-year election cycle.

Given the staggering amount of money in these accounts, and the lack of detail in the one-page amendment, there was an obvious need for the Federal Election Commission ("FEC" or "Commission") to provide further guidance via regulation. Basic issues like how the party committees should report their special-purpose account activities and exactly how they can spend their segregated funds required explanation. However, the FEC never promulgated a regulation on any of these topics and, to date, has not even decided to open a rulemaking, despite acknowledging that one is needed.[1]

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

After almost five years without FEC action, plaintiffs Campaign Legal Center ("CLC") and OpenSecrets submitted a rulemaking petition (the "Petition") on August 5, 2019, requesting that the Commission pursue a rulemaking on one discrete issue involving the Cromnibus accounts: reporting. Plaintiffs rely on FEC data to carry out their missions, and in the absence of binding guidance, the party committees have been reporting their special-purpose account receipts and disbursements in such inconsistent and haphazard ways that it is virtually impossible to track those funds, much less to understand how much money a party committee has in each of its accounts at any time—information that FECA mandates be disclosed so voters and the public can participate in the type of informed political discourse that drives our democracy. Two election cycles have now passed since plaintiffs filed their Petition, and a third is well underway. And still, the party committees' unregulated reporting practices obscure vital information from the public.

Meanwhile, the FEC has not made discernable progress toward reaching a decision on the Petition and bringing about the kind of transparency FECA requires. As plaintiffs explained in their motion for summary judgment, the Commission's failure to act on the Petition constitutes agency action unreasonably delayed in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551–559 ("APA"). Plaintiffs demonstrated that, under the delay factors enumerated in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("*TRAC*"), and related cases, the Commission's nearly five-year delay on the Petition (and the almost ten years that have elapsed since Congress passed the Appropriations Act), coupled with the important transparency interests at stake, warrant relief. *See* Pls.' Mem. Supp. Summ. J. at 25-33 ("Pls.' MSJ"), ECF No. 22. The FEC has now advanced a number of arguments attempting to justify the delay and downplay its impact, citing purported agency resource

constraints; the FEC's authority to prioritize other matters; a brief period nearly four years ago during which the Commission lost its quorum; a patently inadequate stopgap measure (in the form of a press release); and plans for website enhancements. But none of these arguments explain or justify the FEC's extreme, ongoing, and hugely consequential failure to act.

First, while the FEC claims that its delay is not unreasonable because no law imposes a strict deadline by which it must act on a rulemaking petition, the FEC ignores case law stating that the length of a delay must be viewed in the context of the statute enabling the agency's contemplated action. FECA is a statute that is organized around two-year election cycles, and it also protects core First Amendment interests, including electoral transparency. Thus, viewed through the lens of FECA, the almost three election cycles that have passed since plaintiffs filed their Petition—during which plaintiffs and the public lacked real access to statutorily required information about the national party committees' political campaign spending—is an intolerable amount of time to wait for a decision on whether the FEC will clarify the relevant reporting requirements. Courts have routinely held much shorter delays unreasonable.

Second, the Commission's temporary loss of a quorum in parts of 2019 and 2020 does not justify the delay. Even assuming that the Commission could not make progress on the Petition or any of its competing priorities during this timeframe—which does not appear to be entirely true—the Commission has had an uninterrupted quorum for nearly four years. Yet the Commission evidently made no progress on the Petition during that time, with the exception of soliciting another round of public comments in response to this lawsuit. The Commission cannot explain away these most recent four years of inaction with reference to historic events.

Third, while the FEC also attempts to point to a lack of resources and heavy workload, its claims are overblown. Many of the enforcement and policy matters that the agency cites as

taking up its time were routine matters that did not involve significant effort or resources. The FEC also admits that its staffing levels are increasing, and does not claim that it is more short-staffed than any other federal agency, so its purported lack of resources is not dispositive. And while the FEC is correct that there is an election around the corner, which may impact its workload, a pending election cannot be an excuse for an *elections agency* to indefinitely delay a rulemaking petition; there will always be another election on the horizon.

Fourth, the FEC claims that the Court must defer to the Commission's judgment about how to order its priorities. While agencies do have discretion to order their affairs, that discretion is not absolute. When an agency's delay is egregious, and when the matter that has been delayed is relatively simple, as is the case here, agencies are not entitled to deference. Moreover, the FEC has not established that it would need to reorder its priorities to provide a yes-or-no answer on the Petition. Indeed, the FEC has alluded to making the marginal progress that it has made on the Petition in tandem with other projects, and there is no reason to doubt that it can continue to do so.

Finally, the FEC's assertion that the current reporting regime is not frustrating FECA's purpose of promoting transparency is simply wrong. The FEC claims that the scant guidance it has provided to party committees on reporting their special-purpose accounts—a press release that the party committees regularly disregard and that addresses only two types of transactions—is functioning smoothly. The reality is to the contrary. Plaintiffs have provided numerous examples of the varied and confounding ways the parties report their Cromnibus account transactions, and have highlighted the Commission's inability to enforce the Act when the parties obscure their finances or misuse the accounts. Plaintiffs and the public lack access to basic

information about the accounts, and the Commission's allegedly forthcoming website improvements—while a positive step—are not a remedy.

The Appropriations Act amendments took effect almost a decade ago, and plaintiffs filed the Petition almost five years ago. It is far past time the FEC decides whether to issue Cromnibus account reporting rules and begin drafting those rules if it plans to move forward. There is no excuse for delaying another election cycle when vital public interests are on the line.

ARGUMENT

I. The FEC Has Unreasonably Delayed Action on Plaintiffs' Petition for Rulemaking.

As explained in plaintiffs' motion for summary judgment, the FEC's delay of almost five years (and counting) on plaintiffs' Petition is manifestly unreasonable under the *TRAC* factors and within the meaning of the APA. *See* Pls.' MSJ at 25-27. The FEC's arguments in response utterly fail to excuse its inaction. Accordingly, plaintiffs' motion for summary judgment should be granted, the FEC's cross-motion for summary judgment should be denied, and the Court should grant plaintiffs' requested relief, including by imposing a deadline for the FEC to reach a final decision, and, if the Commission chooses, to promulgate proposed and final rules.

A. The lack of a set deadline for the FEC to act on rulemaking petitions does not give the Commission carte blanche to delay final action indefinitely.

The FEC suggests that its years-long delay is reasonable because there is "no set deadline" for it to act on a petition for rulemaking. *See* FEC MSJ at 34-35. But even though "'[t]here is no *per se* rule as to how long is too long'" for an agency to act, *In re Public Emps. for Env't Responsibility*, 957 F.3d 267, 274 (D.C. Cir. 2020) (citing *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)), it does not follow that the FEC has boundless discretion to delay a final decision on plaintiffs' Petition.

First, as a general matter, "a 'reasonable time for agency action is typically counted in weeks or months, not years.'" *In re Public Emps.*, 957 F.3d at 274 (citation omitted). The FEC's nearly five-year delay already far exceeds those guideposts and "smacks of unreasonableness on it[s] face." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003). The delay has also already met or exceeded delays that this Circuit has previously found unreasonable. *See generally* Pls.' MSJ at 26-27. As of this filing, approximately four years and ten months have passed since plaintiffs filed their Petition on August 5, 2019. AR 1-7. According to the D.C. Circuit, "a reasonable time for an agency decision" could generally "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*, 372 F.3d at 419 (finding that the time of a delay is "typically counted in weeks or months" and holding that "FERC's six-year-plus delay is nothing short of egregious"); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (finding seven-year delay "anything but reasonable"); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 48 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (finding that "five years would be an unreasonable amount of time to delay"); *MCI Telecomms. Corp.*, 627 F.2d at 324-25 (finding a four-year delay to be unreasonable).

Under the first two *TRAC* factors, moreover, "the length of time that has elapsed since the agency came under a duty to act" must be reasonable "in the context of the statute which authorizes the agency's action." *Cutler v. Hayes*, 818 F.2d 879, 888-98 (D.C. Cir. 1987) (internal quotation marks omitted). So the pertinent question here is whether the Commission's nearly five-year delay on plaintiffs' Petition is reasonable in the context of FECA—a statute organized around two-year election cycles—and FECA's transparency provisions, which were crafted to

provide the electorate with information about the money raised and spent in federal elections so voters can make informed decisions at the polls. *See Citizens United v. FEC*, 558 U.S. 310, 370-71 (2010) (stressing the importance of "prompt disclosure," which provides "citizens with the information needed" to "make informed decisions").

Thus, contrary to the FEC's position that FECA does not supply "a rule of reason," *see* FEC MSJ at 34-35, case law makes clear that even in the "absence of a statutory timeline," *id.* at 36, the reasonableness inquiry is informed by the statute's context and purposes, *Cutler*, 818 F.2d at 897-98 ("[T]he reasonableness of the delay must be judged in the context of the statute which authorizes the agency's action," which "entails an examination of any legislative mandate in the statute" and the "extent to which delay may be . . . frustrating the statutory goal.") (internal quotation marks omitted). And considered in context, as *TRAC* instructs—accounting for the transitory nature of elections and the vital democratic interests FECA was designed to protect—the FEC's delay of nearly five years is plainly unreasonable. *Cf. Democratic Senatorial Campaign Comm. v. FEC*, No. 1:95-cv-349, 1996 WL 34301203, at *7 (D.D.C. Apr. 17, 1996) ("*DSCC*") ("Congress did not impose specific time constraints upon the Commission to complete final action" in enforcement matters, but Congress "did expect that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter").

Therefore, notwithstanding the FEC's assertions, the "circumstances surrounding the Petition" do not demonstrate that the FEC's inaction has been reasonable in this case, FEC MSJ at 35, but instead underscore exactly the opposite. Consideration of the relevant context here, including the multiple elections that have come and gone without adequate disclosure rules for special-purpose accounts in the near-decade that has passed since the accounts were first created, only confirms that there is no justification for the FEC's egregious delay. *Cf. Nader v. FCC*, 520

F.2d 182, 206 (D.C. Cir. 1975) ("[N]ine years should be enough time for any agency to decide almost any issue.").

In straining to justify its delay as reasonable in light of purported resource constraints and other practical concerns, the FEC elides this history, and thus ultimately fails to explain how its delay comports with FECA or serves its transparency purposes. The FEC's close to five-year delay on the Petition, on top of a further almost five years of inaction in implementing the Appropriations Act, confirms that the FEC has not approached its duty to respond to plaintiffs' Petition with "a rule of reason." *TRAC*, 750 F.2d at 80.

B. The Commission's temporary loss of a quorum in 2019-20 does not justify its continuing delay.

The FEC's attempt to justify its egregious delay by highlighting a period in 2019-20 in which the Commission operated without a quorum is unavailing. Indeed, even if the time period in which the FEC did not possess a quorum is wholly excluded in assessing the reasonableness of the FEC's delay, the end result of the *TRAC* analysis is the same: The delay is patently unreasonable. The FEC's lack of a quorum four years ago in no way excuses its protracted and ongoing delay.

The Commission lost its quorum on August 31, 2019, just under one month after plaintiffs filed their Petition and a few days after the Commission published a Notice of Availability in the Federal Register on August 28, 2019.[2] AR 13-14. After regaining its quorum on June 5, 2020,[3] the Commission lost it again from July 3, 2020 to December 18, 2020.[4] The

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[2] *See* Press Release, FEC, Matthew Petersen to Depart Federal Election Commission (Aug. 26, 2019), https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/.

[3] Press Release, FEC, James E. Trainor III Sworn in as Commissioner (June 5, 2020), https://www.fec.gov/updates/james-e-trainor-iii-sworn-commissioner/.

FEC argues that the combined 15-month period during which the Commission lacked a quorum should not be included when calculating whether it has unreasonably delayed a decision.

While most formal FEC actions, and all decisions requiring the affirmative votes of four commissioners, require a policymaking quorum, the temporary absence of a quorum does not mean that all agency activity grinds to a halt.[5] Commissioners and staff alike can research and discuss topics in preparation for making formal decisions when a quorum is restored. Thus, it would be inappropriate to fully discount the period in which the FEC lacked a quorum when evaluating if it unreasonably delayed responding to the Petition.

But even if one were to accept that the past loss of a quorum inhibited FEC operations for a time, the quorum was restored almost *four years* ago, and the Commission has apparently come no closer to a decision on plaintiffs' Petition. Therefore, even discounting those months where it lacked a quorum completely, the FEC has still had almost four years (and counting) to make a decision. As the meager record reflects, the FEC has made virtually no headway toward reaching a decision on the Petition, much less toward drafting a rule if it chooses to open a rulemaking. Aside from soliciting a second preliminary round of comments (apparently prompted by this lawsuit) in January 2024, there has been no indication of any progress on the Petition since the FEC regained its quorum in late 2020, despite continued urging from plaintiffs. AR 43-46, 56. Indeed, the FEC held just one Regulations Committee Meeting in 2021, with only an additional

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[4] Press Release, FEC, Caroline C. Hunter to Depart Federal Election Commission (June 26, 2020), https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/; Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson Sworn in as Commissioners (Dec. 18, 2020), https://www.fec.gov/updates/shana-broussard-sean-cooksey-allen-dickerson-sworn-commissioners/.

[5] *See* FEC, Commission Directive No. 10, Rules of Procedure of the FEC Pursuant to 2 U.S.C. § 437c(e), § L (amend. Dec. 20, 2007), https://www.fec.gov/resources/cms-content/documents/directive_10.pdf (detailing a list of 20 actions the Commission may take during times in which it does not have a quorum).

three meetings in 2022 and four in 2023. *See* Decl. of Neven Stipanovic ¶ 15, ECF No. 22-1; FEC, Responses to Questions from the Minority Members of the Committee on House Administration 13 (June 16, 2023), https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-response-2023.pdf ("June 2023 Responses to Congress"). There is no suggestion that the Petition was discussed at any of these meetings, nor that the Commission's consideration of the Petition was otherwise "progress[ing]" over this period. *See* FEC MSJ at 19, 36-37.[6]

Only *after* plaintiffs filed this lawsuit did the Commission apparently resume its consideration of the Petition—by repeating the same threshold ministerial step already completed when the Petition was originally filed in 2019. *See* AR 71-72. Given the unreasonable amount of time that has already elapsed, "it is now far too late for the Commission to be taking a 'first step,'" *In re Core Commc'ns, Inc.*, 531 F.3d at 859—especially when the FEC also conspicuously fails to specify when, or *if*, plaintiffs can expect an answer. The temporary absence of a quorum almost four years ago, followed by multiple years of normal FEC operations in which the Commission failed to make any progress on plaintiffs' Petition, does not excuse the agency's continuing delay or obviate its responsibility to provide a timely response.

[6] *See also* Stipanovic Decl. ¶¶ 8, 15; Press Release, FEC, FEC Approves Three Advisory Opinions, Discusses Rulemaking (June 18, 2020), https://www.fec.gov/updates/fec-approves-three-advisory-opinions-discusses-rulemaking-6-18-20; FEC, Attachment C, Regulation Committee Agendas, June 2023 Response to Congress at 2-3, https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/attachment-c-regulations-committee-agendas.pdf.

C. The FEC's invocation of purported resource constraints and a heavy workload cannot excuse its extreme delay here.

The FEC's argument that resource constraints and other agency responsibilities somehow excuse its delay in this case likewise fails. Even assuming the FEC's representations with respect to its workload and resources are accurate,[7] they still do not justify its egregious delay.

In particular, the FEC points to supposedly low funding and staffing levels, combined with the prioritization of other actions, as a justification for its nearly five-year-long refusal to rule on the Petition. *See* FEC MSJ at 15-23. But the mere existence of resource constraints cannot excuse the FEC's inertia. Most federal agencies rely on Congress to fund their operations, and most would undoubtedly also prefer to have more resources at their disposal.[8] But the fact that an agency's ambitions might outstrip its resources does not license it to postpone a mandatory action ad infinitum. And regardless of the FEC's claimed resource constraints, the delay here involves a simple, minimally labor-intensive action: deciding whether to initiate a rulemaking in response to plaintiffs' Petition. Expecting the agency to conclude such a straightforward action within a half-decade hardly imposes outsize demands on staff time or requires the Commission to divert its attention from higher-priority matters.

Nor is the FEC's delay excused by enumerating the various other activities that have apparently occupied its time since 2019. This list, which includes a handful of completed

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[7] The FEC's resource-based arguments extensively rely on material not contained in the administrative record—although in actions seeking review on an administrative record, "[a]gencies bear the burden of compiling the materials and documents they considered, either directly or indirectly." *Level the Playing Field v. FEC*, 381 F. Supp. 3d 78, 89 (D.D.C. 2019), *aff'd*, 961 F.3d 462 (D.C. Cir. 2020).

[8] *See, e.g.*, Department of Justice, Press Release, Justice Department Fiscal Year 2025 Funding Request Budget Proposal to Uphold the Rule of Law, Keep America Safe, and Protect Civil Rights, March 11, 2024, https://www.justice.gov/opa/pr/justice-department-fiscal-year-2025-funding-request-budget-proposal-uphold-rule-law-keep (requesting $37.8 billion for Fiscal Year 2025, an increase of $467 million from Fiscal Year 2024 Annualized Continuing Resolution).

rulemakings, is otherwise primarily composed of routine Commission responsibilities such as responding to advisory opinion requests, overseeing audits, and handling enforcement actions. *See* FEC MSJ at 17-23.[9] Of course, FECA's assignment of various obligations to the FEC does not change the fact that the FEC is also required, under both the APA and its own rules, to respond to petitions for rulemaking within a reasonable time. 5 U.S.C. §§ 553(e), 555(b) (providing that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" and "within a reasonable time, each agency shall proceed to conclude a matter presented to it"); 11 C.F.R. § 200.4(a), (b) (providing that the FEC "will decide whether to initiate a rulemaking based on the filed petition" and, if it declines to engage in rulemaking, to notify Petitioners of that decision in writing). The existence of other demands on the FEC's time does not excuse it from this responsibility, especially where the "competing matters" the Commission supposedly prioritized over plaintiffs' Petition were largely routine and/or not substantively significant.

Moreover, by the FEC's own admission, agency staffing levels *increased* in 2023, FEC MSJ at 17, 39 (citing FEC, Fiscal Year 2025 Congressional Budget Justification 13 (Mar. 11, 2024) as submitted to Congress and the Office of Management and Budget, https://www.fec.gov/resources/cms-content/documents/fy25-feccongressional-budget-justification.pdf), and completing "long-standing regulations matters" has "freed up Commission resources," FEC MSJ at 22. With higher staffing levels and those items off its plate, the FEC

[9] *See also* 52 U.S.C. § 30106(b)(1) (providing that "[t]he Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act" and "shall have exclusive jurisdiction with respect to the civil enforcement of such provisions"); *id.* § 30111(a)(8), (d) (providing that "the Commission shall . . . prescribe rules, regulations, and forms to carry out the provisions of this Act"); *id.* § 30108 (setting forth the process for issuing advisory opinions); *id.* § 30109 (enforcement); *id.* § 30111(b) (audits and field investigations).

should have no problem finally acting on plaintiffs' Petition, or at least committing to do so promptly. It has done neither.

The FEC also overstates the degree to which its other activities and obligations have reasonably impeded its ability to consider the Petition. For instance, the agency includes responding to advisory opinion requests in the 2021-22 election cycle as one reason it has been unable to address plaintiffs' request. FEC MSJ at 18. Yet we are now two years out from that cycle, so the FEC's focus on the "influx" of advisory opinion requests the Commission received before the 2022 elections—and its statutory obligation to answer such requests within 60 days—hardly explains why it could not act on plaintiffs' Petition at any point in the years before or after that busy period.

At the same time, the FEC emphasizes its generally heavier workload during presidential election cycles. FEC MSJ at 24. On this logic, however, any FEC delay would be reasonable: The Commission always operates in the wake of one election cycle and the run-up to another, and its available resources are always subject to the vicissitudes of the election calendar. Whatever demands each intervening election cycle has posed on Commission resources since the Petition was filed in 2019, after nearly five years, plaintiffs are entitled to a decision. That it is currently an election year only underscores the need for prompt action—without which voters will remain in the dark about the vast sums flowing through parties' special-purpose accounts, even as the money raised for and spent from these accounts has quite possibly reached its highest levels ever.

Likewise, the FEC's emphasis on its completion of other rulemakings as part of the "dramatically increased workload" supposedly impeding its consideration of plaintiffs' Petition, FEC MSJ at 39, does not withstand scrutiny. Of the 23 rulemakings the FEC touts, seven (or

almost a third) were purely technical, without a public comment period, four of which merely adjusted certain civil monetary penalties for inflation according to a statutory formula. *See, e.g.*, Civil Monetary Penalties Annual Inflation Adjustments, 89 Fed. Reg. 697 (Jan. 5, 2024); Civil Monetary Penalties Annual Inflation Adjustments, 87 Fed. Reg. 80020 (Dec. 29, 2022); Civil Monetary Penalties Annual Inflation Adjustments, 86 Fed. Reg. 73638 (Dec. 28, 2021); Civil Monetary Penalties Annual Inflation Adjustments, 86 Fed. Reg. 1737 (Jan. 11, 2021). *See also* ZIP Code Correction; Technical Amendment, 89 Fed. Reg. 19729 (Mar. 20, 2024) (updating the Commission's ZIP code); Reports by Political Committees and Other Persons (52 U.S.C. 30104), 87 Fed. Reg. 77979 (Dec. 21, 2022) (editorial and technical corrections to the C.F.R.); Technical Corrections, 86 Fed. Reg. 72783 (Dec. 23, 2021) (typographical and technical corrections). The purely technical character of these rules belies the FEC's inflated description of its completed rulemaking efforts as "complex" and "labor-intensive." FEC MSJ at 39.

Even with respect to its handful of substantive rulemakings over this period, the FEC overstates their significance and complexity. Four matters only have Interim Final Rules, some with comment periods still open. *See, e.g.*, FOIA Improvement Act, 89 Fed. Reg. 35685 (May 2, 2024) (comment period still open); Contributions in the Name of Another, 88 Fed. Reg. 33816 (May 25, 2023); Repayment of Candidate Loans, 87 Fed. Reg. 54862 (Sept. 8, 2022); Reporting Independent Expenditures, 87 Fed. Reg. 35863 (June 14, 2022). Additionally, specific rulemakings the FEC singles out as evidence of its lack of capacity for other responsibilities have also been pending for significant amounts of time; in at least two instances, for over a decade. For example, the FEC stresses its long-awaited completion of a rulemaking related to internet communication disclaimers, REG 2011-02. *See* FEC MSJ at 40. Yet it is also true that this rulemaking was initiated by a petition filed in 2011—thirteen years ago—and the bulk of the

agency's substantive work on it had long since concluded by the time plaintiffs' Petition was filed. *See* AR 105. As the FEC pointedly observes, plaintiff CLC indeed "urged the Commission to prioritize" the internet communication disclaimer rulemaking in January 2021, FEC MSJ at 19—because, as CLC's letter specifically highlighted, the matter had already languished for far too long without final agency action:

> [N]early a decade has passed since the Commission first published its notice of availability on REG 2011-02. 1,193 days have passed since the Commission voted to solicit a second round of public comments on these digital political ad disclaimer rules. 1,042 days have passed since the Commission published competing sets of draft rules in the Federal Register. 931 days have passed since the Commission held two days of hearings on the competing draft rules. 870 days have passed since CLC met with Commissioners to stress the urgency of finalizing this rulemaking. 573 days have passed since the Commission informally released for comment two proposed regulations.

AR 105.

In the same letter, CLC also requested prompt action on plaintiffs' Petition, AR 106-107, which poses no remotely equivalent demands in terms of complexity or the volume of public comments. That the FEC has allowed other priority rulemakings to sit dormant for years is no excuse for its inactivity here; "[a]lthough in some cases administrative delays may be unavoidable, extensive or repeated delays are unacceptable and will not justify the pace of action." *U.S. Women's Chamber of Com. v. U.S. Small Bus. Admin.*, No. 1:04-cv-1889, 2005 WL 3244182, at *16 (D.D.C. Nov. 30, 2005) (internal quotation marks omitted). The unreasonableness of the FEC's delay in this matter is not assuaged by its failure to complete supposedly higher-priority regulatory matters within a reasonable timeframe.

Finally, the FEC overemphasizes the significance of its backlog of enforcement matters when the Commission regained its quorum in late 2020. First, FEC staff is able to write recommendations on enforcement matters and draft factual and legal analyses when there is no quorum, so many matters in the backlog were awaiting nothing more than a vote. Second, as

noted above, nearly four years have now elapsed since the FEC's quorum was reconstituted, so this alleged accumulation of enforcement matters cannot continue to be relied upon as an excuse for the FEC's lack of action on plaintiffs' Petition. Third, between April 1, 2019 and May 1, 2023, 27% of closed enforcement matters were resolved exclusively on a tally vote,[10] and between 2018 and 2023, 22.9% of received cases were dismissed via the FEC's Enforcement Priority System.[11] Lastly, for all its hyperbole about the FEC's "tremendous" enforcement caseload, *see* FEC MSJ at 16-17, the Commission has elsewhere indicated that it is currently pursuing a whopping total of *three* enforcement investigations. Statement of Reasons of Vice Chair Ellen L. Weintraub at 3 n.17, Matter Under Review ("MUR") 8009 (Protect Ohio Values PAC *et al.*) (May 23, 2024), https://www.fec.gov/files/legal/murs/8009/8009_17.pdf.

D. Appeals to general principles of agency deference do not excuse the FEC's unreasonable delay.

The FEC overstates the extent of its discretion under the *TRAC* inquiry to delay responding to plaintiffs' Petition due to competing priorities. The fourth *TRAC* factor provides that "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. There is no dispute that the FEC's other duties and responsibilities are relevant to the evaluation of whether its delay has been

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[10] Between April 1, 2019 and May 1, 2023, the FEC closed 626 cases, 168 of which were resolved exclusively via a tally vote. *See* June 2023 Responses to Congress, *supra*, at 20.

[11] *See* FEC, Memorandum to Commission re Status of Enforcement–Second Quarter 2024 (01/01/24-03/31/24), https://www.fec.gov/resources/cms-content/documents/Status_of_Enforcement_2nd_Qtr_FY2024_Redacted.pdf (showing a total of 226 cases dismissed via EPS out of 986 total received cases from 2018 through 2023).

Under the FEC's Enforcement Priority System, incoming cases are "evaluat[ed]" "using objective criteria approved by the Commission," and "if the EPS rating indicates the matter does not warrant the further use of Commission resources," the FEC's Office of General Counsel "generally uses a streamlined EPS dismissal process to recommend the Commission dismiss the matter." June 2023 Responses to Congress, *supra*, at 14-15.

unreasonable in this case, particularly when resource constraints are also at play. However, under the law of this Circuit, the FEC's discretion to prioritize other activities is not unlimited. As the facts of this case make abundantly clear, the FEC has exceeded the bounds of that discretion.

Although "the FEC and all agencies" possess "discretion" in ordering their priorities and "allocating resources," courts have made clear that "such discretion is not a shield from judicial review of whether the agency has fulfilled its statutory obligations." *DSCC*, 1996 WL 34301203, at *6. "[T]hough [an] agency's decision of how to allocate its resources is entitled to deference, such deference yields when the statutory violation," such as "an excruciatingly long delay," is "egregious and ceases to be reasonable." *Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29, 40 (D.D.C. 2006) (internal citations omitted). This is true even when "the Commissioners have 'experienced a heavy workload and staffing pressures' during the time since" they were petitioned to take action. *Giffords v. FEC*, No. 19-cv-1192, 2021 WL 4805478, at *6 (D.D.C. Oct. 14, 2021); *see also In re Ctr. for Biological Diversity*, 53 F.4th 665, 672 (D.C. Cir. 2022) ("[H]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction.") (citing *Am. Hospital Ass'n v. Burwell*, 812 F.3d 183, 191 (D.C. Cir. 2016)); *Cutler*, 818 F.2d at 898 (noting that "justifications" such as "practical difficulty in carrying out a legislative mandate" or the "need to prioritize in the face of limited resources" "become less persuasive as delay progresses"). Here, where the FEC has delayed a simple yes-or-no decision on plaintiffs' Petition for nearly five years, the delay may be *per se* unreasonable, as plaintiffs previously explained. *See* Pls.' MSJ at 25-26. Thus, the FEC's "egregious" nearly half-decade-long cannot be excused by general invocations of agency deference, nor by citing the existence of other high priority matters. *See Sandoz*, 427 F. Supp. 2d at 40.

Furthermore, "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." *Giffords*, 2021 WL 4805478, at *7 (emphasis added) (citing *DSCC*, 1996 WL 34301203, at *5); *see also Sandoz, Inc.*, 427 F. Supp. 2d at 40 n.13 (observing that "the court will extend . . . leniency in [an agency's] *diligent attempts* to comply with the statute" (emphasis added)). After soliciting comments in 2019, there is no indication that the Commission discussed the Petition at its Regulation Committee Meetings when they resumed after the Commission regained a quorum in late 2020,[12] nor made any other progress in addressing plaintiffs' request until this lawsuit was filed.[13] This striking lack of progress undercuts the FEC's claims that it "has not been idle" and is entitled to deference. FEC MSJ at 40.

Moreover, the Commission's characterization of the relief sought here—that plaintiffs' want "to bring their petition to the front of the line"—is off base and should not be a deterrent to relief. *See* FEC MSJ at 42. The FEC has not contended that it must "drop everything" to engage in the requested action, such that line-cutting would be a relevant consideration. *See Filazapovich v. Department of State*, 560 F. Supp. 3d 203, 238 (D.D.C. 2021) (finding *TRAC* factor four to be "neutral" since "a finding that Defendants unreasonably delayed" processing a group of visa applications "[would] not require the State Department to drop everything" and

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[12] *See* Stipanovic Decl. ¶¶ 8, 15; Press Release, FEC, FEC Approves Three Advisory Opinions, Discusses Rulemaking (June 18, 2020), https://www.fec.gov/updates/fec-approves-three-advisory-opinions-discusses-rulemaking-6-18-20; FEC, Attachment C, Regulation Committee Agendas, June 2023 Response to Congress at 2-3, https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/attachment-c-regulations-committee-agendas.pdf.

[13] As explained in plaintiffs' summary judgment memorandum, 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. *See* Pls.' MSJ at 2-3.

engage in the requested action). It has also not indicated that it is addressing matters "in a queue" or on a "first-come, first-served basis." *Campaign Legal Center v. FEC*, No. 20-cv-0809, 2021 WL 5178968, at *8 (D.D.C. Nov. 8, 2021) (citing *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (D.C. Cir. 2003)) (stating that deference to an agency's agenda-setting discretion and choice of priorities is substantially less warranted when the agency is not proceeding on "a first-come, first-served basis"); *id.* (finding the fourth *TRAC* factor to be "neutral at best," in part because "the FEC ha[d] not indicated that the administrative complaint ha[d] been delayed because it [was] behind others in a queue or that addressing it would simply move all others back" without any "net gain" (internal quotation marks omitted)).

Indeed, given the relative simplicity of the task at hand—a yes or no decision to open a rulemaking—and the straightforward subject matter at issue—reporting receipts and disbursements in line with statutory language the FEC has interpreted for more than 50 years—it is difficult to see how the Commission cannot provide a response to the Petition while working on other priorities, or at least without any significant reshuffling of agenda items. *See Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 94 (D.D.C. 2020) (citing *Mashpee*, 336 F.3d at 1102) ("[W]hether a delay is reasonable . . . will depend in large part . . . upon the complexity of the task at hand."); *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (considering whether the subject matter at issue is "delicate" and "will take longer than might rulings on more routine items"). Indeed, the Commission states that it was able to request comments on the Petition "while simultaneously focusing on other rulemakings and priorities." FEC MSJ at 42. It has not alleged that addressing the Petition will require it to sideline any other matter, just that it will be busy in an election year. *See* FEC MSJ at 43; *U.S. Women's Chamber of Com.*, 2005 WL 3244182, at *18 (finding that the fourth *TRAC* factor pointed toward unreasonable delay because

"[t]he record [did] not reveal any higher priorities or competing interests that [would] be compromised if [the agency] [gave] expedited attention to completing the obligations imposed by [statute]").

The need for disclosure rules pertaining to national parties' special-purpose accounts is relatively uncontroversial, with the FEC itself acknowledging as much[14] and its Office of General Counsel recommending creating such rules as far back as 2015.[15] Moreover, plaintiffs have provided straightforward suggestions for implementing a basic disclosure scheme, including: (1) promulgating a new schedule to the national party committees' monthly reports under 52 U.S.C. § 30111(a)(1); (2) creating an effective "cross-indexing system" under 52 U.S.C. § 30111(a)(3); or (3) issuing guidelines on uniform terminology for all committees to use under 52 U.S.C. § 30111(a)(2). AR 6. Against this backdrop, making a determination on the Petition cannot reasonably be characterized as complicated or difficult. As such, there is "no evidence" that the FEC's "inaction indicates a careful determination of . . . priorities" such that its failure to decide should be accorded deference. *Campaign Legal Center v. Iowa Values*, 573 F. Supp. 3d 243, 254 (D.D.C. 2021).

That the FEC is due deference does not insulate its unreasonable delays from scrutiny. Applying the "hexagonal contours" of *TRAC*, 750 F.2d at 80, it is clear that no degree of deference can excuse the FEC's years-long delay here. The fourth *TRAC* factor instructs courts to consider whether expediting an unreasonably delayed action will adversely affect other agency priorities, 750 F.2d at 80; it does not countenance unlimited delay simply because an agency *has* other priorities. As the court in *Giffords v. FEC* acknowledged, although the FEC has "more than

[14] Interim Reporting Guidance, *supra* note 1.

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

one case on its docket," it "cannot ignore its statutory obligations by allowing a matter to languish," particularly one that is relatively simple and will not seriously affect other agency activities. 2021 WL 4805478, at *7. By allowing plaintiffs' Petition to "languish" for years without a final decision—or any hint it will ever reach one—the FEC has plainly exceeded the bounds of its discretion, necessitating court action.

E. The 2015 press release does not provide adequate reporting guidance or allow for meaningful enforcement of the law, frustrating FECA's purposes and plaintiffs' interests.

To justify its delay, the FEC also claims that its reporting guidance—a press release explicitly intended as a stopgap measure until the Commission promulgates a regulation[16]—is "functioning as intended to create transparency" and that the FEC is enforcing FECA and the Appropriations Act, FEC MSJ at 44. However, the Commission has failed to rebut several of plaintiffs' central points about the press release, or to offer any satisfactory explanation of how the press release secures meaningful transparency for plaintiffs or the public.

First, as plaintiffs highlighted previously, the press release fails to provide any instruction on multiple types of transactions national party committees regularly undertake. *See* Pls.' MSJ at 8. The press release does not instruct the party committees on how to report transfers into special-purpose accounts from joint fundraising committees, nor does it address how to report internal transfers between special-purpose accounts and the general account. *See* Interim Reporting Guidance. The result has been that each committee makes up its own way of reporting these transactions and there is no consistency across reports. For example, the DNC appears to label transfers simply as "transfers," whereas the NRCC appears to call them "allocable

[16] Interim Reporting Guidance, *supra* note 1 ("Until the Commission adopts new regulations, national party committees that establish such accounts should report the activities of those accounts as described below.").

expenses"—a term that does not even clearly indicate to the public that money is being moved between accounts.[17] The Commission has offered no justification for its silence concerning these transactions, instead claiming that the press release is adequate because it addresses two types of straightforward transactions, *i.e.*, direct donations and disbursements. *See* FEC MSJ at 45.

Likewise, the Commission's claim that the press release has allowed for meaningful enforcement of FECA falls flat. *See id.* The Commission explains that it occasionally issues "Requests for Additional Information" ("RFAIs") to national party committees when it appears that a special-purpose account has accepted an excessive donation. *Id.* at 8-9, 45. While the FEC certainly has a duty to enforce contribution limits, and that is one of the purposes of reporting, that is only half the story. One of the Commission's primary directives under FECA is to ensure transparency for the benefit of the public. As the Supreme Court has stated since the first time it reviewed FECA, in *Buckley v. Valeo*, disclosure is vitally important because it "provides the electorate with information 'as to where political campaign money comes from and how it is spent.'" *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (quoting H.R. Rep. No. 92-564, at 4 (1971)); *see also Citizens United*, 558 U.S. at 369 (stating that "the informational interest alone is sufficient to justify" a challenged disclosure law). The Commission has offered no evidence that it is enforcing the scant guidance in the press release in any way that clarifies the public record, such as by issuing RFAIs when a party committee does not use the terminology specified in the press release or use the "Purpose of Disbursement field" to indicate the applicable account.

[17] *Compare* DNC, 2024 May Monthly, FEC Form 3X, at 5,617-18 (May 20, 2024), https://docquery.fec.gov/pdf/378/202405209648584378/202405209648584378.pdf, *with* NRCC, 2024 May Monthly, FEC Form 3X, at 11,435 (May 20, 2024), https://docquery.fec.gov/pdf/314/202405209646214314/202405209646214314.pdf.

Indeed, the FEC cannot point to any passage in the Reports Analysis Division ("RAD") Manual instructing or authorizing analysts to even check for these types of reporting errors.[18]

Furthermore, it does not appear that the FEC is using party committee reports to identify improper uses of the special-purpose accounts and enforce the text of the Appropriations Act, which places limitations on how the special-purpose accounts may be used. *See* 52 U.S.C. § 30116(a)(9). The FEC points to no instances in which it has used a report to identify a substantive violation involving a disbursement and, more concerningly, it has used the very lack of regulations governing the special-purpose accounts to justify dismissing outside complaints identifying misuses of Cromnibus funds.[19] When the FEC's existing reporting regime does not allow the public to readily identify receipts and disbursements from party-committee special-purpose accounts, and the FEC is not even enforcing its minimal reporting guidance or significant aspects of the Appropriations Act, it is abundantly clear that the absence of a formal regulation is frustrating FECA's purpose. *See Cutler*, 818 F.2d at 898.

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[18] The RAD Manual contains a catch-all provision allowing an analyst to send an RFAI, with the Assistant Staff Director's approval, "where there may be serious violations of the Federal Election Campaign Act or the Commission's Regulations." FEC, Reports Analysis Division Review and Referral Procedures for the 2023-2024 Election Cycle at 184, https://www.fec.gov/resources/cms-content/documents/Final-Redacted-2023-2024-RAD-Review-Referral-Procedures.pdf. Because the press release obviously is not a law or regulation, it does not appear that RAD even has the authority to issue RFAIs to enforce it.

[19] *See* Factual and Legal Analysis at 2, MUR 7538 (Rosen for Nevada) (Sept. 15, 2021), https://www.fec.gov/files/legal/murs/7358/7358_20.pdf (dismissing a complaint concerning party committees' payments for a campaign's legal defense because "the Commission has yet to provide guidance to the regulated community regarding the scope of 'legal proceedings' that may be paid for from such a segregated account"); Factual and Legal Analysis at 2, MUR 7390 (RNC) (Sept. 13, 2021), https://www.fec.gov/files/legal/murs/7390/7390_14.pdf (dismissing a complaint concerning the RNC's use of its legal fund because the issue involved "relatively-new statutory text for which the Commission has yet to provide guidance"); *see also* Statement of Reasons of Chairman Cooksey at 5, MUR 8071 (NRSC) (Apr. 11, 2024), https://www.fec.gov/files/legal/murs/8071/8071_20.pdf (explaining a vote to dismiss a complaint concerning the NRSC's use of its legal fund, citing "the lack of clarity and the Commission's failure to issues guidance and regulations").

The Commission's attempts to justify the inadequacies Plaintiffs have cited are unavailing. The Commission claims that Plaintiffs "make much of too little" in citing inconsistencies in the way the parties report their special-purpose account receipts and disbursements, which often flout the instructions in the press release. *See* FEC MSJ at 45. The Commission characterizes the examples plaintiffs gathered as isolated instances unlikely to generate confusion. *See id.* at 45-46. However, the examples plaintiffs cited were merely emblematic of the reporting practices and inconsistencies that permeate every party committee report. The issues have continued during the pendency of this litigation, with each party continuing to report in its own unique fashion. The party committees' 2024 May Monthly reports, their most recent filings, illustrate the depth of this issue:

a. When reporting receipts, the DNC used the field reserved for specifying the election type (ex. primary or general) and year to indicate which special purpose account received the receipt.[20] In doing so, the DNC failed to comply with the press release, which instructs committees to use the "description field" to state the relevant account receiving a receipt. Interim Reporting Guidance.

b. The RNC labeled receipts into its account reserved for "election recounts and contests and other legal proceedings" as "legal proceedings account" contributions rather than "recount account" contributions, as the press release requires.[21] *Id.* It also used the memo field to indicate the account type for disbursements, rather than "the Purpose of Disbursement field."[22] *Id.*

c. The DSCC flipped the order of the account label and disbursement description in the "Purpose of Disbursement field," stating "Legal Services Legal Fund" rather than "Recount Account – Legal Services," as the press release instructs.

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[20] DNC 2024 May Monthly, *supra* note 17, at 5,588-5,619.

[21] RNC, 2024 May Monthly, FEC Form 3X, at 11,420 (May 20, 2024), https://docquery.fec.gov/pdf/860/202405209646225860/202405209646225860.pdf.

[22] *Id.* at 11,886-945.

Id. (Not to mention that it used the term "Legal Fund" instead of "Recount Account."[23])

d. The NRSC used the abbreviations "Legal Proc" and "HQ Account" to designate disbursements from what, according to the press release, should be called the "recount account" and "headquarters account."[24] *Id.*

e. Similarly, the DCCC labeled receipts with the designations "Headquarters/Building Fund Contribution" or "Recount/Legal Fund Contribution," rather than using the approved terms "recount account" and "headquarters account."[25] *Id.*

f. The NRCC is internally inconsistent, using "legal proceedings account" when describing receipts and "recount" when describing disbursements from the same account—neither of which is the "recount account" term provided in the press release.[26] *Id.*

Accordingly, every committee reports differently, using different terms and reporting fields to designate special-purpose account transactions, with no committee fully adhering to the press release. When there is effectively no standard way to report receipts and disbursements, it is impossible for plaintiffs to confidently compile data about party committees' special-purpose accounts—even after spending excessive amounts of time pouring over committees' reports. Moreover, given that the Supreme Court has opined on the importance of disclosure reports in "provid[ing] the electorate with information," *Buckley*, 424 U.S. at 66, reports should be accessible to everyone, not just "careful readers"—a lowered bar that the FEC appears willing to accept, *see* FEC MSJ at 46.

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[23] DSCC, 2024 May Monthly, FEC Form 3X, at 16,278-83 (May 20, 2024), https://docquery.fec.gov/pdf/433/202405209646166433/202405209646166433.pdf.

[24] NRSC, 2024 May Monthly, FEC Form 3X, at 33,968, 35,160 (May 20, 2024), https://docquery.fec.gov/pdf/524/202405209646123524/202405209646123524.pdf.

[25] DCCC, 2024 May Monthly, FEC Form 3X, at 6,461-6,512 (May 20, 2024), https://docquery.fec.gov/pdf/496/202405209646190496/202405209646190496.pdf.

[26] NRCC 2024 May Monthly, *supra* note 17, at 10,916, 11,431-35.

Along the same lines, the FEC claims that its inaction on plaintiffs' petition is justified by the "regulated community's" recent comments that the press release "provides adequate clarity" and is "administratively workable." *Id.* at 45. The "regulated community's" positive view of the current reporting regime is hardly surprising, given that the committees are reporting virtually however they please with little oversight from RAD and full knowledge that the Commission will not impose a penalty concerning the special-purpose accounts until there is a regulation providing additional guidance. *See supra* at 22-25. While Plaintiffs have no quarrel with considering the clarity and relative burden of reporting requirements on the regulated community, the regulated community is only one of the Commission's constituencies. The FEC also owes a duty to the public, which includes organizations like Plaintiffs, voters, the press, academics, and anyone else who strives to understand the candidates and interests vying for public support. The Commission does not even claim that the status quo satisfies the public's interest in understanding how the party committees are raising and spending money, and it would be hard-pressed to explain how haphazard and standardless reporting, with no enforcement mechanism, is enough to vindicate the public's informational interest.

Finally, the Commission tries to explain away some of these concerns by promising to unveil new features on its website by August 2024 that will help "sort and view data on contributions to and disbursements from segregated party accounts." FEC MSJ at 46. According to the Commission's Disclosure Business Architect, the FEC is in the process of creating "data tables" showing itemized donations and disbursements to the special-purpose accounts. Decl. of Paul C. Clark II ¶¶ 5-6, ECF No. 22-2. Users will purportedly be able to sort, sum, and export data from the tables, and the data will also appear on the "party committees' financial summary

pages." *Id.* ¶¶ 5-7. This effort is certainly a welcome step, but it is no replacement for a regulation.

To begin with, FEC employees will have to make judgment calls about which transactions to place in these tables. As discussed previously, the party committees do not follow the press release and do not report consistently, so individuals (or an automated process programmed by individuals) will have to determine which transactions pertain to which accounts. Consequently, there will always be questions about the accuracy of these tables. The solution required by the Act is that the party committees self-report their fundraising and spending from each account; FEC employees making their best guess at what money is flowing into and out of the special-purpose accounts is not a substitute.

Furthermore, while the tables will allow users to total the *itemized* receipts and disbursements in a committee's special-purpose account, there is still no way to know the total amount contained in each account. Receipts and disbursements below the $200 itemization threshold are not included in the tables and will not be summed with the data in the tables. Therefore, it is still not possible to ascertain how much money is in a committee's individual special-purpose accounts, because non-itemized receipts and disbursements are still only reported as a lump sum on Line 17/21b/29 of the summary page of a committee's report, *i.e.*, one lump sum with nothing to distinguish what fraction of that amount is a receipt or disbursement related to the general account, the legal account, the headquarters account, or the convention account.

On top of these flaws, there is no guarantee that the Commission will release these new website features or stick to its "anticipate[d]" timetable. *See* Clark Decl. ¶ 8. In light of the Commission's years-long delay in deciding whether to craft regulations implementing the

Appropriations Act, the Commission's "plans" cannot be a substitute for court intervention and a formal regulation. Only a regulation mandating uniform reporting with full disclosure for each special-purpose account will fulfill the Act's transparency goals and provide the Commission with the comfort it apparently needs to enforce its guidance. Court intervention is required to end the very real frustration of plaintiffs' interests and FECA's purpose. *See* Pls.' MSJ at 44.

II. The Court Should Declare the FEC's Delay Unreasonable and Compel the Commission to Act.

On balance, the *TRAC* factors favor a finding that the FEC's nearly five-year delay on plaintiffs' Petition is unreasonable. Further, the FEC has made no representation that a final decision on the Petition or a rule is imminent. To address the Commission's delay and ensure the electoral transparency that FECA requires, the Court should:

(a) declare the FEC's failure to take final action on the Petition an unreasonable delay under the APA;

(b) enter an order requiring the FEC to issue a final decision on the Petition within 30 days; and

(c) Retain jurisdiction to supervise the FEC's compliance with its obligations under FECA and the APA, including through the pendency of any rulemaking.

If the FEC denies the Petition, the Court should also require the FEC to provide a "brief statement of the grounds for denial," 5 U.S.C. § 555(e), within 30 days of the Court's Order.

If the Commission grants the Petition, the Court should require the Commission to 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. It is not unusual for courts to set a timetable for unreasonably delayed rulemakings, particularly where important issues are at stake, and the Court should exercise its authority to do so here. *See Pub. Citizen Health Rsch. Grp. v. Auchter*,

702 F.2d 1150, 1158-59 (D.C. Cir. 1983) (ordering the issuance of a notice of proposed rulemaking within 30 days); *see also, e.g.*, *In re Am. Rivers*, 372 F.3d at 414, 420; *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1035-37 (D.C. Cir.), supplemented, 705 F.2d 1343 (D.C. Cir. 1983); *MCI Telecomms. Corp.*, 627 F.2d at 345-46; *Nader*, 520 F.2d at 207.

CONCLUSION

The Court should grant plaintiffs' motion for summary judgment, deny the FEC's cross-motion for summary judgment, and enter an order granting plaintiffs' requested relief.

Dated: May 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 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.

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