UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER ET AL.,	)	
Plaintiffs,	)	Civ. No. 1:23-cv-03163 (APM)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Christopher H. Bell (D.C. Bar No. 1643526)
Acting Assistant General Counsel
chbell@fec.gov

Sophia H. Golvach (D.C. Bar No. 1656365)
Attorney
sgolvach@fec.gov

Blake L. Weiman (D.C. Bar No. 1725165)
Attorney
bweiman@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

June 28, 2024

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 4

I. THE COURT SHOULD GRANT THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT BECAUSE UNDISPUTED MATERIAL FACTS SHOW THE COMMISSION HAS ACTED REASONABLY IN HANDLING PLAINTIFFS' PETITION FOR RULEMAKING 4

A. Summary Judgment Standard and Claims of Delay Under the APA 4

B. There is No Per Se Rule for Unreasonableness 6

C. The FEC's Progress Has Been Reasonable 10

i. The Period in Which No Quorum Existed Should Not Count Against the Commission 10

ii. The FEC's Resource Constraints are Relevant to Whether Its Progress Has Been Reasonable 12

D. Plaintiffs Fail to Rebut the Deference Courts Owe to the Agency's Ordering of its Priorities 16

E. The 2015 Guidance and the FEC's Planned Website Upgrades Limit the Impact of Any Alleged Harm to Plaintiffs and the Public 22

II. THE COURT SHOULD DECLINE PLAINTIFFS' INVITATION TO INTERVENE IN AGENCY AFFAIRS PREMATURELY 26

CONCLUSION 33

TABLE OF AUTHORITIES

PAGE(S)

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 5

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 5

Bagherian v. Pompeo, 442 F. Supp. 3d 87 (D.D.C. 2020) 5

Buckley v. Valeo, 424 U.S. 1 (1976) 24

Campaign Legal Center v. FEC, 2021 WL 5178968 (D.D.C. Nov. 8, 2021) 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 4

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 26

Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) 9, 31-32

Cobell v. Kempthorne, 455 F.3d 301 (D.C. Cir. 2006) 30, 32

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 9, 30, 32

Common Cause v. FEC, 489 F. Supp. 738 (D.D.C. 1980) 12, 17

Common Cause v. FEC, 692 F. Supp. 1397 (D.D.C. 1988) 7

Ctr. for Sci. in the Pub. Int. v. FDA, 74 F. Supp. 3d 295 (D.D.C. 2014) 5

Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987) 8-9

Dallas Safari Club v. Bernhardt, 518 F. Supp. 3d 535 (D.D.C. 2021) 26

Defs. of Wildlife v. Dep't of Agric., 311 F. Supp. 2d. 44 (D.D.C. 2004) 4-5

Diamond v. Atwood, 43 F.3d 1538 (D.C. Cir. 1995) 4

FEC v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) 17

Filazapovich v. Department of State,
560 F. Supp. 3d 203 (D.D.C. 2021) 20

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) 31

Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003) 7-8, 31

Giffords v. FEC, 2021 WL 4805478 (D.D.C. Oct. 14, 2021) ... 19-20

Holcomb v. Powell, 433 F.3d 889 (D.C. Cir. 2006) ... 5

In re A Community Voice, 878 F.3d 779 (9th Cir. 2017) ... 31

In re Am. Rivers & Idaho Rivers United, 372 F.3d 413 (D.C. Cir. 2004) ... 6, 8

In re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991) ... 30

In re International Chemical Workers Union, 958 F.2d 1144 (D.C. Cir. 1992) ... 31

In re Pesticide Action Network North America, Natural Resources Defense Council, Inc., 798 F.3d 809 (9th Cir. 2015) ... 31

In re Public Employees for Environmental Responsibility, 957 F.3d 267 (D.C. Cir. 2020) ... 6, 7, 10, 31

In re United Mine Workers of America International Union, 190 F.3d 545 (D.C. Cir. 1999) ... 31, 32

Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105 (D.D.C. 2005) ... 12, 17

**Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003) ... 5, 6, 10, 12, 17

MCI Telecommunications Corp. v. F.C.C., 627 F.2d 322 (D.C. Cir. 1980) ... 9, 32

Midwest Gas Users Ass'n v. FERC, 833 F.2d 341 (D.C. Cir. 1987) ... 9

Milligan v. Blinken, No. 21-5017, 2021 WL 4768119 (D.C. Cir. Sept. 21, 2021) ... 6

Milligan v. Pompeo, 502 F. Supp. 3d 302 (D.D.C. 2020) ... 6

Muwekma Tribe v. Babbitt, 133 F. Supp. 2d 30 (D.D.C. 2000) ... 30-31

Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) ... 32

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) ... 30

Orion Rsrvs. Ltd. P'ship v. Kempthorne, 516 F. Supp. 2d 8 (D.D.C. 2007) ... 5, 30

Public Citizen Health Research Group v. Brock, 823 F.2d 626 (D.C.Cir.1987) ... 8

Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) ... 31

Scott v. Harris, 550 U.S. 372 (2007) 5

Tate v. Blinken, 2021 WL 3713559 (D.C. Cir. July 22, 2021) 5-6

Tate v. Pompeo, 513 F. Supp. 3d 132 (D.D.C. 2021) 5-6

**Telecommunications Research & Action Center v. FCC*,
750 F.2d 70 (D.C.Cir.1984).. *passim*

United Steelworkers of America, AFL-CIO-CLC v. Rubber Mfrs. Ass'n,
783 F.2d 1117 (D.C. Cir. 1986).. 29-30, 31

Whitlock v. DHS, 2022 WL 424983 (D.D.C. 2022) 6, 12, 16

STATUTES AND REGULATIONS

5 U.S.C. § 555(b) 5

5 U.S.C. § 706(1) 5

52 U.S.C. § 30106(c) 10, 21

52 U.S.C. § 30107(a)(6).. 21

52 U.S.C. § 30107(a)(8).. 10

52 U.S.C. § 30109(a)(2).. 18

52 U.S.C. § 30109(a)(8)(C) 21

52 U.S.C. § 30116(a)(9).. 2

52 U.S.C. § 30116(a)(9)(B) 24

52 U.S.C. § 30116(a)(9)(C) 23-24

11 C.F.R. § 102.17(c)(8).. 23

Fed. R. Civ. P. 56(c) 4

Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014).. 2, 24

INTRODUCTION

The Court should grant summary judgment to the Federal Election Commission ("FEC" or "Commission") on plaintiffs Campaign Legal Center ("CLC") and OpenSecrets' undue delay suit under the Administrative Procedure Act ("APA") concerning a rulemaking petition governing reporting for segregated national party committee accounts. As the FEC demonstrated in its opening brief, this Court is bound to engage in a fact-specific, comprehensive assessment of the alleged delay considering all relevant circumstances. Application of the *TRAC* multi-factor balancing test to the voluminous factual record the FEC has compiled in this case weighs in favor of the agency. The Commission has acted reasonably in appropriately ordering its priorities in light of both delays and resource constraints beyond its control *and* its diligent pursuit of other critical rulemakings, including rulemakings plaintiffs explicitly urged the Commission to prioritize. And while these factors do not permit the Commission to postpone a decision on plaintiffs' petition indefinitely, plaintiffs do not and cannot dispute that they are essential to the fact-bound inquiry that controls here.

If, despite this evidence, the Court determines that some level of judicial intervention is necessary here, it should nonetheless reject plaintiffs' unwarranted and unreasonable remedy. Plaintiffs' request imposes entirely unrealistic timelines requiring the agency to issue a notice of proposed rulemaking and complete that rulemaking within a total of 120 days. In addition to being incompatible with the agency's internal practices and procedures, this remedy violates the basic principle that courts will not micromanage agency affairs. If the Court determines that some kind of remedy is warranted, it should instead require the FEC to provide the Court and plaintiffs with regular updates, or at most require the agency to propose its own schedule for further action within three months. Such a remedy is more than sufficient to vindicate plaintiffs'

interests while permitting the agency to prioritize its resources in the midst of a Presidential election year.

BACKGROUND

On December 16, 2014, Congress enacted the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) ("Appropriations Act"), which created three separate, segregated party accounts. *See* 52 U.S.C. § 30116(a)(9). The FEC swiftly issued interim guidance on political party committees reporting contributions and disbursements for these accounts on February 13, 2015. FEC's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. No. 22) ("FEC MSJ" or "Motion") at 6-9.

On August 5, 2019, plaintiffs submitted a Petition to Promulgate Rules on Reporting of "Cromnibus" Accounts (the "Petition"), which the agency designated as Commission Regulations Matter 2019-04 ("REG 2019-04"), seeking improvements to an allegedly insufficient reporting scheme for segregated party accounts. *See* AR0001-07; *See* FEC MSJ at 9-10; Declaration of Neven Stipanovic (Doc. No. 23-1) ("Stipanovic Decl.") ¶ 5. Plaintiffs' petition ultimately requests that the Commission promptly publish a Notice of Availability of the Petition and initiate a rulemaking on how committees should report their segregated party accounts. AR0007. Only two weeks after receiving the Petition, the Commission's Office of General Counsel ("OGC") submitted to the Commissioners a draft Notice of Availability seeking comments, which the Commission approved. *See* AR0008, AR0015; Stipanovic Decl. ¶ 6. The Commission then conducted a public comment period for the Notice of Availability and received six comments. FEC MSJ at 11-12.

The Commission's progress on the instant rulemaking—and portions of other key aspects of the Commission's business—were halted by a protracted loss of a quorum for about 15 months. *See* FEC MSJ at 12-14. During both the brief quorum in June 2020 and regained quorum in December 2020, CLC submitted comments to the Commission predicated on the need for considerable agency prioritization on multiple aspects of the FEC's work because of the 446-day lack of quorum, and asking it specifically to prioritize seven rulemakings, one of which was the rulemaking at issue here, REG 2019-04. *Id.*; *see* AR 0050, AR0097-109; Stipanovic Decl. ¶¶ 8-9.

When the Commission was reconstituted in late-2020 it faced a historic backlog of enforcement, audit, and other time-sensitive matters amid various resources constraints. *See* FEC MSJ at 14-16. Nevertheless, the agency, including the Policy Division, began diligently working through the backlog during the 2021-22 election cycle. *Id.* at 17-18. Further, the Commission and OGC's Policy Division, remained occupied with an expected influx of work in the 2021-22 election cycle, especially as it relates to labor-intensive, fact-specific advisory opinions. *Id.* at 18; Stipanovic Decl. ¶ 13. Despite necessary diversion of resources to other efforts, the Commission continued to prioritize several important rulemakings over this timeframe and through 2023, including completing 23 rulemakings. *See* FEC MSJ at 17-23; Stipanovic Decl. ¶¶ 20-22. The current 2024 Presidential election cycle places particular demands on the Commission that dictate much of the Policy Division's workload, most acutely with respect to its role to respond to urgent advisory opinions that necessitate quick turnarounds and clear guidance. *See* FEC MSJ at 24; Stipanovic Decl. ¶¶ 26-27.

Despite anticipating an impending surge in agency-wide workload this year, the Commission has recently prioritized REG 2019-04. On January 9, 2024, the Commission voted

6-0 to direct the Office of General Counsel to draft for the Commission's consideration in an open meeting "reopened notices of availability or any similarly captioned draft items for both Regulation 2019-04 and Regulation 2014-10, for a comment period of 30 days." AR0059; *see* Stipanovic Decl. ¶ 23. The Commission voted 5-0 to approve OGC's Draft Notice of Inquiry on February 8, 2024, *see* AR0070, which was published in the Federal Register on February 14, 2024. AR0060-67, 0071-72; *see* Stipanovic Decl. ¶ 24. The Commission sought additional public input because of the relatively limited response during the prior comment period, and many interested parties supplied varying feedback as to how the Commission should proceed. AR0072; *see also* FEC MSJ at 25-28. Additionally, the Commission continues its simultaneous project improving its website by this August, including new functionality that will allow users to display contributions to and disbursements from segregated party accounts more effectively. *See* FEC MSJ at 28-30; *see also* Declaration of Paul Clark (Doc. No. 23-2) ("Clark Decl.") ¶¶ 4-8.

ARGUMENT

I. THE COURT SHOULD GRANT THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT BECAUSE UNDISPUTED MATERIAL FACTS SHOW THE COMMISSION HAS ACTED REASONABLY IN HANDLING PLAINTIFFS' PETITION FOR RULEMAKING.

A. Summary Judgment Standard and Claims of Delay Under the APA

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The court must "view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any

doubt as to the existence of any genuine issue of material fact." *Defs. of Wildlife v. Dep't of Agric.,* 311 F. Supp. 2d. 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 157-59 (1970)). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris,* 550 U.S. 372, 380 (2007); *Liberty Lobby,* 477 U.S. at 248.

The APA requires an agency to "proceed to conclude a matter presented to it" within "a reasonable time," 5 U.S.C. § 555(b), and directs courts to "compel agency action . . . unreasonably delayed." *Id.* § 706(1). "'In the context of a claim of unreasonable delay'" claim under the APA, *see* 5 U.S.C. §§ 555(b), 706(1), "the Court must consider whether the agency's failure to respond is 'so egregious' as to warrant relief." *Ctr. for Sci. in the Pub. Int. v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014) (quoting *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C.Cir.1984) ("*TRAC*")). "As a result, courts rarely compel an agency to render an immediate decision on an issue." *Orion Rsrvs. Ltd. P'ship v. Kempthorne*, 516 F. Supp. 2d 8, 11 (D.D.C. 2007). Courts in this Circuit apply the six-factor standard identified in *TRAC* to evaluate whether an agency has been unreasonably delayed. *See TRAC*, 750 F.2d at 80. Application of the *TRAC* factors reflect a key insight that determining whether a delay is unreasonable is a fact-based inquiry that "cannot be decided in the abstract.'" *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 94 (D.D.C. 2020) (quoting *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)). Ultimately, this Court has acknowledged that the most important *TRAC* factors are the first, which involves general considerations of reasonableness, and the fourth, which addresses an agency's choice of priorities. *See Tate v.*

Pompeo, 513 F. Supp. 3d 132, 148 (D.D.C. 2021), *dismissed sub nom. Tate v. Blinken*, No. 21-5068, 2021 WL 3713559 (D.C. Cir. July 22, 2021); *Milligan v. Pompeo*, 502 F. Supp. 3d 302, 319 (D.D.C. 2020), *dismissed sub nom. Milligan v. Blinken*, No. 21-5017, 2021 WL 4768119 (D.C. Cir. Sept. 21, 2021); *Whitlock v. DHS*, Civ. No. 21-807, 2022 WL 424983, at *5 (D.D.C. Feb. 11, 2022).

B. There is No Per Se Rule for Unreasonableness

As the Commission argued in its Motion, FEC MSJ at 34-35, this Court's determination of whether the FEC's actions constitute undue delay does not turn on the inordinately narrow question of how much time has passed since the Petition was brought to the agency. Rather, *TRAC* dictates that the standard for the proper timing of agency action is a general one of reasonableness, set forth by the first *TRAC* factor. *See TRAC*, 750 F.2d at 80 (time agencies take to make decisions must be governed by a "rule of reason"). This means a reviewing court, faithfully applying the APA's standard, must engage in a more holistic assessment than merely presuming "some number of months or years beyond which agency inaction is presumed to be unlawful" through an "abstract" inquiry. *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1102. Plaintiffs agree, conceding that "'[t]here is no *per se* rule as to how long is too long'" for an agency to act. 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 (Doc. No. 24) ("Pl. Resp." or "Response") at 5 (citing *In re Pub. Emps. for Env't Resp.*, 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))).

Importantly, the Commission does not contend that plaintiffs' Complaint is unmeritorious simply because there is "no set deadline to act" on the rulemaking Petition, *contra* Pl. Resp. at 5.

Instead of arguing it has "carte blanche" or "boundless discretion" to delay agency action indefinitely, which would surely contravene the APA's command, the FEC simply maintains that its prioritization of REG 2019-04 falls within the bounds of reasonableness in light of all relevant circumstances, including its resources and competing priorities, over the relevant timeframe. *See infra*, pp. 10-26. Accordingly, the Commission reiterates a well-established principle in this Circuit: the amount of time of the delay is not dispositive. *See Common Cause v. FEC*, 692 F. Supp. 1397, 1400 (D.D.C. 1988) (noting that some delays "have lasted upwards of five and ten years before courts have seen fit to impose deadlines on an agency").

Plaintiffs' position that the length of time since their Petition was filed should be dispositive in this matter is untenable, which is underscored by an examination of the authority they rely upon. *See* Pl. Resp. at 5-6. Each of their chosen cases presented those courts with facts that materially distinguish them from the case at bar, and only serve to underscore the importance of the fact-based inquiry the Court is bound to undertake. For instance, plaintiffs cite *In re Pub. Emps. for Env't Resp.*, 957 F.3d at 274, for the proposition that "a reasonable time for agency action is typically counted in weeks or months, not years." Pl. Resp. at 5-6. Crucially, that case concerned a law that included a mandatory two-year statutory deadline for agency action, implicating the second *TRAC* factor, that has no analogue in FECA. Against this deadline that court also considered an agency delay of *nineteen years*, far exceeding the relevant period in this case. *Id.* at 273 ("[f]or nineteen years, the agencies have failed to comply with their statutory mandate despite Congress's command to 'make every effort' to do so within two years of an application."). Had the FEC delayed for nearly two decades in taking an action it was required to complete within two years, the agency's actions might indeed "smack[] of

unreasonableness on it[s] face[.]" Pl. Resp. at 6 (quoting *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003)). That is simply not the case here.

Plaintiffs' reliance on *Norton* is also misplaced. Pl. Resp. at 6 (citing *Norton*, 294 F. Supp. 2d 92). The court's finding of delay in that case was due, in large part, to well-documented harm to human health and natural resources. *Norton*, 294 F. Supp. 2d at 114 ("The 1999 Petition documents numerous studies finding unacceptable levels of air pollution, traced to snowmobile engine emissions, in the parks . . ." and citing "record evidence that at existing levels of snowmobiling, the air quality in some park areas is so toxic that park rangers are forced to wear respirators to simply do their jobs in a national park."). These findings implicated the third *TRAC* factor and the court accordingly found that "NPS simply cannot debate that pressing human health concerns, as well as the possibility of grave environmental damage, demand prompt review." *Id*. Nothing remotely comparable to harm to "human health and welfare" exists here that could render any alleged delay "less tolerable." *TRAC*, 750 F.2d at 80. Moreover, even assuming plaintiffs' alleged harm in the form of insufficient disclosure were cognizable, it is mitigated by the Commission's diligent pursuit of other priorities that will increase disclosure to the public at large. *See* FEC MSJ at 28-30.

In *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004), the court was faced with an agency that had not only delayed a mere consultation with another federal agency for six years, but had in effect argued that it had no obligation to act at all.[1] In that case FERC argued that it had *no obligation* to respond to the petition at issue, and offered no "plea of

[1] This case is also noteworthy for citing to another case in which the court determined that an agency delay of six years, while serious, was not in fact unreasonable under the APA. *Id*. at 419, n.12 (citing *Pub. Citizen Health Research Group v. Brock,* 823 F.2d 626, 628 (D.C.Cir.1987)).

administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." *Id.* at 420 (quoting *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987)). In the instant case, the Commission has made an extensive showing of resource constraints and other obstacles to disposing of the Petition, and nonetheless has spent over 500 hours analyzing and reviewing the Petition internally. *See* Supplemental Declaration of Neven Stipanovic ("Stipanovic Supp. Decl."), FEC Ex. 1, ¶¶ 8-10.

Plaintiffs' remaining cases, *see* Pl. Resp. at 6-8, fare no better, as they are uniformly based on material facts that fully distinguish the case at bar. In *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 358-59 (D.C. Cir. 1987), the court's finding that the agency's delay in making a conflict of interest determination on a contract was not warranted because the agency's proffered reason, that the court should permit a related court proceeding to conclude first, would have surely delayed proceedings for a minimum of several years and would have led to direct and immediate economic harm. In *Cobell v. Babbitt*, the court similarly relied on plaintiffs' showing of irreparable injury absent relief, from a lack of agency action—the fifth *TRAC* factor—because delay would risk the plaintiffs' right to get an accounting of their financial assets and to recover them. 91 F. Supp. 2d 1, 47-48 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) ("*Corbell IV*"). Here, the reporting of segregated party accounts' contributions and disbursements is already occurring, even in the absence of a rulemaking, and the issue plaintiffs urge the Commission to take up is largely a matter of convenience in locating that information. *MCI Telecomms. Corp. v. FCC* is also distinguishable, despite finding a four-year delay unreasonable, because the delay at issue centered on a particularly limited-in-scope agency action—a one-off decision by the FCC on the

reasonableness of rates imposed by a communications carrier. 627 F.2d at 322, 324-25 (D.C. Cir. 1980).

In addition to these critical factual distinctions, what each of the cases plaintiffs rely upon have in common is that none involved a potentially complex rulemaking of the kind that would bind parties outside the litigation in perpetuity. Here, plaintiffs call on the Commission to issue a permanent rule that will do just that. Their Petition prompts the FEC to decide whether to pursue a potentially complex and resource-intensive rulemaking, and the stakes are high. It is for that reason that *TRAC* and its progeny consistently take a comprehensive, fact-specific view of agency's process, considering "the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency," over rigid and unrealistic timetables to determine if a given delay is unreasonable. *In re Pub. Emps. for Env't Resp.*, 957 F.3d at 274 (citing *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1102).

C. The FEC's Progress Has Been Reasonable

i. The Period in Which No Quorum Existed Should Not Count Against the Commission

In its Motion the Commission explained why the agency's lack of a quorum of FEC Commissioners for 15 months in 2019 and 2020 stymie the agency's efforts in a number of important areas, including its rulemakings like the one at issue here. FEC MSJ at 12-14. This is because the Commission is without authority to take binding actions in a number of areas under such circumstances, including with respect to rulemakings and the accompanying amendment of forms. 52 U.S.C. §§ 30106(c), 30107(a)(8). The Commission is further hamstrung in less formal ways, such as the Commissioner-driven Regulations Committee being unable to direct the prioritizing and content of various rulemakings. FEC MSJ at 18-19; *see* Stipanovic Decl. ¶ 15. And when the FEC's quorum was finally restored, the agency was forced to deal with a large

backlog of matters of all kinds, including 446 pending enforcement matters and 275 staff reports awaiting Commission decision at the time the quorum was regained. FEC MSJ at 38-39.

In their Response plaintiffs do not seriously dispute that the 15 months the FEC lacked a quorum should not count against the agency. Pl. Resp. at 8-10. Mr. Stipanovic's prior declaration laid out the ways in which a lack of quorum effectively halted most progress on crafting regulations, with which plaintiffs do not engage. By way of argument, plaintiffs offer only that when the agency lacks a quorum "Commissioners and staff alike can research and discuss topics in preparation for making formal decisions when a quorum is restored[,]" and thus this Court should not "fully discount the period in which the FEC lacked a quorum when evaluating if it unreasonably delayed responding to the Petition." Pl. Resp. at 9. But plaintiffs do not acknowledge that, in addition to legal and procedural roadblocks, a lack of a Commission quorum substantially inhibits the agency's ability to assess what its "formal decisions," *id.*, might be precisely because it lacks a sufficient number of Commissioners to affirmatively act. The agency is run not by a single individual but a commission of six, and when there are three or fewer, any "research" and "discussion" engaged in by the staff is speculative and may in fact become irrelevant when a new slate of Commissioners are confirmed and are able to express their own views and priorities.

Furthermore, plaintiffs do not acknowledge the continuing impact of the lack of a quorum on the FEC even after that quorum was restored. As noted, the lack of a quorum led to a large backlog of time-sensitive and in some cases statutorily mandated actions. FEC MSJ at 14-23. It further led to a lack of hiring during that period that impacted work at the Commission for years afterwards. *Id.* It is overly simplistic and misleading to say that "FEC staff is able to write recommendations on enforcement matters and draft factual and legal analyses when there is no

quorum," Pl. Resp. at 15, when those recommendations and analyses are crafted with the concerns of particular Commissioners in mind, each of whom may and do express unique perspectives and priorities on each matter. Given the long aftermath following the lack of a quorum, the Court should indeed "fully discount" the 15 months and should further recognize the episode's more long-term impact.

ii. The FEC's Resource Constraints are Relevant to Whether Its Progress Has Been Reasonable

Circuit law requires that courts consider, among other things, "the resources available to the agency" when evaluating the first TRAC factor. *See Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1102; *Whitlock*, 2022 WL 424983, at *5 (explaining that the first factor "requires an account of the resources available to the agency" (internal quotation marks omitted)). Relevant resources include, *inter alia*, available staff for the task. *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100 (noting that there was limited staff available to evaluate petitions to the agency in concluding that delay was not unreasonable); *see also Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 110 (D.D.C. 2005) (surveying agency resources and noting that, though "the number of applications for permanent labor certification increased, Department of Labor staffing did not"); *Common Cause*, 489 F. Supp. at 744 (explaining that in FECA cases, courts should evaluate available agency resources).

As the Commission explained in its Motion at 37-39, the well-documented budgetary and personnel challenges facing the agency over the last few years, which the Commission set forth in detail, *see* FEC MSJ 14-24, are relevant in considering whether the Commission has acted reasonably. The Commission's historic lack of resources – which are only starting to be replenished – did not impact abstract agency "ambitions" but rather agency *imperatives*. *See* Pl. Resp. at 11. As the Commission explained in budget justification documents, lack of staff for a

time "impaired the agency's ability to execute its mission." FEC MSJ at 15 (citing FEC, Fiscal Year 2022 Congressional Budget Justification 2 (May 28, 2021) ("FY 2022 Budget Justification"), https://www.fec.gov/resources/cms-content/documents/FEC_FY22_CBJ_May_28_2021.pdf). It is logical, then, that the Commission prioritized tasks such as the large volume of advisory opinion requests with strict statutory timetables. *Id.* at 43. That these tasks are required of the agency does not change the analysis: the agency's scarce resources were occupied. In addition, the agency has taken both the mandatory step of issuing a Notice of Availability and gathering comments, as well as the discretionary step of issuing a Notice of Inquiry to avail itself of additional expertise and experience. *Id.* at 24-28. And it is continuing its work on plaintiffs' Petition. Stepanovic Decl. ¶ 25. As the Commission explained and plaintiffs reiterated, it is now doing so with increased access to resources. *See* FEC MSJ at 22; Pl. Resp. at 12-13.

To a large extent, plaintiffs' Response consists of attacking a series of straw men. *See* Pl. Resp. at 11 ("the mere existence of resource constraints cannot excuse the FEC's inertia"); *id.* ("the fact that an agency's ambitions might outstrip its resources does not license it to postpone a mandatory action ad infinitum"). To the extent plaintiffs attempt to criticize the FEC's actions on their Petition itself, plaintiffs characterize the agency's decision whether to embark on a rulemaking as a "simple, minimally labor-intensive action" to be resolved with a thumbs up or down. *See* Pl. Resp. at 4, 11, 17, 19, 21. But this description is a fundamental misunderstanding of agency operation that aptly demonstrates, as the FEC explains below, why agency priorities must be left in the hands of the agency itself.

In fact, even "technical" rulemakings are labor-intensive. Even for rulemakings that require an update to a pre-existing rule, which plaintiffs in this case have described as

"technical" rulemakings, the FEC typically assigns at least one staff attorney, a paralegal, and an Assistant General Counsel to those projects. The stakes of "technical" rulemakings can be high, as avoiding any mistakes is imperative. In the case of rulemakings regarding annual civil monetary penalty inflation adjustments, for example, the drafts involve complex inflation adjustments for numerous penalty ranges, and a close review is necessary. Staff attorneys draft these rules, which are then reviewed in succession by the Assistant General Counsel, the Associate General Counsel, and by the Acting General Counsel, and then the Commissioners and their staff once approved by OGC. Even arguably more routine matters like civil monetary penalty inflation adjustments can take potentially hundreds of hours. Stipanovic Supp. Decl. ¶¶ 5-7.

More complex rulemakings require even more agency resources, including voluminous staff hours expended by a range of staff. For example, OGC personnel, including four staff attorneys, a paralegal, an Assistant General Counsel, the Acting General Counsel, and the Associate General Counsel spent collectively 3,066 hours on Commission Regulations Matter 2021-01 ("REG 2021-01") (concerning candidate salaries). Stipanovic Supp. Decl. ¶ 8. OGC staff have spent 1,164 hours on Commission Regulations Matter 2011-02 ("REG 2011-02") (concerning internet communication disclaimers) since August 2019, when plaintiffs' Petition at issue here, REG 2019-04, was filed. *Id.* OGC has devoted approximately 4,200 hours to REG 2011-02 since that process was initiated in 2011. *Id.* OGC have staff spent 1,263 hours on Commission Regulations Matter 2013-01 ("REG 2013-01") (concerning technological modernization) since plaintiffs filed their Petition in 2019. *Id.* OGC has devoted 4,360 hours to REG 2013-01 since 2013. *Id.*

Attempts to minimize the productivity of the FEC's Policy Division since 2019 also miss the mark. Plaintiffs' Response focuses on the 23 completed rulemakings, but that ignores the numerous other open rulemakings that the Commission is currently working through, some with hundreds of hours already invested. A case in point, OGC spent 587 hours on the very CLC Petition about which the plaintiffs are complaining, REG 2019-04. Stipanovic Supp. Decl. ¶ 10. And on last year's AI petition, OGC staff spent 717 hours and the project is still ongoing. *Id.* At present, the Policy Division's staff consists of 16 active attorneys. Stipanovic Supp. Decl. ¶ 9.

Moreover, plaintiffs grossly mischaracterize the decision before the agency as a simple "yes or no" on their Petition. Pl. Resp. at 4, 17, 19. As a practical matter, the Commissioners typically do not vote on a petition, and instead direct agency staff to draft Notice of Proposed Rulemaking (to initiate a rulemaking), or a Notice of Disposition ("NOD") (to dispose of a petition without initiating a rulemaking). This decision occurs only after thorough and painstaking analysis of the petition, the comments received in response to a Notice of Availability ("NOA"), relevant law and policy implications, the Commission's current and future workload, and resource allocation. Stipanovic Supp. Decl. ¶ 12. Such a decision—particularly a decision to initiate a rulemaking—requires a significant commitment of agency resources because rulemakings can and often do take years to resolve. *Id.* OGC typically spends over 200 hours per petition (before a rulemaking is initiated or petition is disposed), and sometimes significantly more than that if the issue is complex. *Id.*

These hours of consideration and review are necessary because rulemakings require an involved and detailed process. Drafting regulations requires agency staff to master the relevant provisions of FECA, their legislative history, and any relevant court decisions; anticipate potential issues that might arise in the application of the rules; weigh the various interests at

stake; and craft a detailed explanation of the Commission's policy objectives and questions. Stipanovic Supp. Decl. ¶ 15. The NPRM also must anticipate potentially different directions that the final rule might take, as a final rule must be the "logical outgrowth" of the proposed rule. *Id.*

Here, plaintiffs' Petition is itself potentially quite complex. OGC staff has already spent about 587 hours on the project, before even reaching the NPRM or NOD stage. Stipanovic Supp. Decl. ¶ 14. This matter is also potentially complex because it involves amendments to FECA that have not previously been addressed in a rulemaking and would thus require agency staff to propose an entirely new set of regulations. Further, the subject matter of the Petition overlaps with the subject of the pending rulemaking petition submitted by Perkins Coie LLP and carried forward by Elias Law Group ("Perkins Coie Petition"), *see* FEC MSJ at 11, and the latter petition may be a better vehicle for addressing the issues CLC raised but would necessitate a more comprehensive and thus more complex rulemaking. Stipanovic Supp. Decl. ¶ 14. This is, of course, in addition to the complexities inherent in any rulemaking. *Id.*; *see supra*, pp. 13-16.

In sum, reasonableness is judged *in context*. The Commission has made progress and continues to make progress on evaluating plaintiffs' Petition. Its approach has been reasonable considering the dual challenges of a historic workload and historic lack of resources, during which time the agency nonetheless fulfilled its mandate to interpret and enforce federal campaign finance law.

D. Plaintiffs Fail to Rebut the Deference Courts Owe to the Agency's Ordering of its Priorities

As the FEC explained in its Motion, the fourth TRAC factor explicitly calls on the Court to "consider the effect of expediting delayed action on agency activities of a higher or competing priority[.]" *See* FEC MSJ at 39-44 (citing *TRAC,* 750 F.2d 7at 80). Indeed, the fourth factor is so important that in some cases it may be dispositive. *Whitlock*, 2022 WL 424983, at *5

(explaining that the fourth factor can carry weight "so substantial as to be dispositive, even if all other factors cut against it"). Therefore, "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendence directing where limited agency resources will be devoted. [The courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

As noted, *supra* pp. 12-13, plaintiffs' Response consists of attacking a series of straw men that does not take issue with the indisputable fact that courts pay deference to agencies' allocation of their priorities. *See* Pl. Resp. at 11 ("the mere existence of resource constraints cannot excuse the FEC's inertia"); *id.* ("the fact that an agency's ambitions might outstrip its resources does not license it to postpone a mandatory action ad infinitum"). Plaintiffs' rejoinder also relies heavily on a gross mischaracterization of the impact of a decision to initiate a rulemaking and the resources involved. *See supra*, pp. 12-16.

To the extent plaintiffs take issue with the thorough record the FEC has presented demonstrating that the agency reasonably and diligently pursued numerous critical priorities since 2019, Pl. Resp. at 12-16, this rejoinder does not dispute the real constraints the FEC has worked under and how it has chosen to allocate its resources. For instance, the fact that the agency's staffing levels increased in 2023, Pl. Resp. at 12, merely underscores the understaffing that was chronic during and in the aftermath of the FEC's lack of quorum. *See* FEC MSJ at 38-39; *see also Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100 (noting limited staff available to evaluate petitions to the agency); *Liberty Fund, Inc.*, 394 F. Supp. 2d at 110 (noting a lack of increase in staffing); *Common Cause*, 489 F. Supp. at 744 (explaining that in FECA cases, courts should evaluate available agency resources). And plaintiffs do not dispute that advisory opinion requests are a statutorily mandated aspect of the work of the Policy Division

itself, Pl. Resp. at 13, and thus fail to rebut the impact this had on resource allocation during the relevant time period.

Plaintiffs' handwaving of the impact of the FEC's enforcement case backlog, Pl. Resp. at 15-16, also misses the mark. For instance, the fact that a significant portion of the agency's enforcement docket was resolved on tally does not speak directly to the complexity of those matters and the amount of work required to resolve them. *Id.* at 16. In addition, the relatively small number of active "investigations" the Commission is conducting is a highly misleading representation of the workload faced by enforcement. An "investigation" is a term of art under FECA that occurs only after an affirmative vote by at least four Commissioners determining that there is reason to believe a violation of the law occurred. *See* 52 U.S.C. § 30109(a)(2). Over the last five years and to this day, enforcement attorneys continue to handle a large number of complaints, which often require extensive research and drafting so that attorneys can make comprehensive recommendations to Commissioners that take into account, *inter alia*, (1) the known facts, (2) potential legal theories, (3) relevant Commission precedent, and (4) practical barriers to enforcement. All of this occurs prior to, and often without, any investigation occurring. For instance, MURs 7722 and 7723 (Mike Bloomberg 2020, Inc.) entailed a 51-page report that dealt with a novel and complicated issue. *See* First General Counsel's Report, FEC, FEC Matters Under Review 7722 & 7723 (May 4, 2023), FEC Ex. 2, https://www.fec.gov/files/legal/murs/7723/7723_12.pdf. Nor do these reports fully capture the extent of the Enforcement Division's work outside the realm of investigations, including multiple ongoing conciliations with administrative respondents and providing legal advice and analysis to Commissioners and their staff on an ad-hoc basis concerning ongoing MUR issues.

Plaintiffs' cited legal authority, Pl. Resp. at 18-21, does no more than establish the uncontroversial proposition that, even factoring in limited resources, there is an outer limit on how long agencies may delay certain actions. Pl. Resp. at 17. Of course. As the FEC has consistently maintained, context is critical to assessing the reasonableness of agency action under the APA, and there is no *per se* rule establishing either an agency safe harbor or an unreasonable delay.

Missing from plaintiffs' string citations is any attempt to analogize the facts of those cases to the case at bar. This may be because a review of the facts only serves to underscore the differences between this case and the cases plaintiffs rely upon. For instance, plaintiffs cite *Giffords* for the proposition that the agency "is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period." Pl. Resp. at 18 (quoting *Giffords v. FEC*, No. CV 19-1192 (EGS), 2021 WL 4805478, at *7 (D.D.C. Oct. 14, 2021)). However, plaintiffs' bold assertion that the FEC has failed to take "any meaningful action" on plaintiffs' Petition is flatly contradicted by the facts, including (1) the agency's interim guidance, (2) the two rounds of comments solicited and considered, and (3) the 587 hours *already* invested in considering plaintiffs' Petition. Stipanovic Supp. Decl. ¶¶ 10, 14.

Moreover, plaintiffs again egregiously overstate their case when they speak of the "relative simplicity" of the "yes or no decision to open a rulemaking[.]" Pl. Resp. at 19; *see supra* pp. 12-16 (discussing the resources the agency commits when it initiates a rulemaking). *Giffords* is a case in point. In that case the parties agreed that "the administrative complaints raise 'issues common to many FEC matters[,]'" indicating that when the agency is called to make a decision in a well-defined area of law it can be expected to move more quickly. *Giffords*, 2021 WL 4805478, at *5. Indeed, "the regulations underlying [Giffords'] claim date back to the

late 1970s." *Id.* Here, plaintiffs' Petition asks the Commission to draft rules implementing legislation for the first time. As the FEC's Associate General Counsel for Policy has explained, the novelty of the issues raised in the instant Petition contributes to its complexity, particularly in light of the pending Perkins Coie Petition from 2015 that encompasses the subject matter contained in CLC's Petition but is considerably broader, explaining in part why the FEC has invested over 500 hours of time in this rulemaking already. Stipanovic Supp. Decl. ¶ 14. In addition, in *Giffords* "the FEC [did] not seriously contest plaintiff's characterization of the nature of the threat posed by the alleged conduct." *Giffords*, 2021 WL 4805478, at *5. And critically, that case involved credible allegations of "millions of dollars in excessive, corporate, and unreported contributions to candidates for federal office[.]" *Id.* (observing that plaintiffs alleged "up to $35 million in contributions to candidate campaigns"). Here, in contrast, plaintiffs' purported injury relates only to the *disclosure* of national party account information, and the alleged harm is largely confined to the inconvenience of compiling information that is in fact being disclosed.

The force of plaintiffs' other cited authorities similarly wilts under scrutiny. In one of the rare instances where plaintiffs offer the court information about the facts at issue in their quoted precedent, plaintiffs analogize the State Department's "processing a group of visa applications" to argue that an FEC rulemaking would also not require the agency to "drop everything" to provide their requested relief. Pl. Resp. at 18-19 (quoting *Filazapovich v. Department of State*, 560 F. Supp. 3d 203, 238 (D.D.C. 2021)). However, the distinction between committing the FEC to conduct a rulemaking (and indeed to complete one) versus committing the much larger State Department to processing a group of visa applications is obvious on its face. Even if it were not, the FEC has presented record evidence demonstrating why the agency's decision to

commit to a rulemaking (let alone complete one), is a substantial undertaking that will certainly require the agency to set aside other priorities, including the more than 20 other rulemakings the FEC can expect to also be open at any point in time. Stipanovic Supp. Decl. ¶ 10.

Plaintiffs also rely on another case brought by plaintiff CLC for the proposition 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[.]'" Pl. Resp. at 19 (quoting *Campaign Legal Center v. FEC*, No. 20-cv-0809, 2021 WL 5178968, at *8 (D.D.C. Nov. 8, 2021)). What plaintiffs do not acknowledge is that there the court determined the fourth *TRAC* factor was "neutral at best" because "the Court simply does not have information to justify deference to unspecified agency priorities[.]" *CLC*, 2021 WL 5178968, at *8. The court lacked such evidence because the FEC did not appear in that case, as the agency's Commissioners did not authorize defense in that case by the required four affirmative votes. *See* 52 U.S.C. § 30106(c); 52 U.S.C. § 30107(a)(6). It is thus hardly surprising that there "the FEC ha[d] not indicated that the administrative complaint ha[d] been delayed because it is behind others" or that the court "d[id] not have information to justify deference to unspecified agency priorities[.]" *CLC*, 2021 WL 5178968, at *8. The voluminous evidence the FEC has put on the record here stands in sharp contrast, as does the relief at issue. *Id.* at *9 ("order[ing] the FEC to act on the [administrative] complaint within thirty days pursuant to 52 U.S.C. § 30109(a)(8)(C).").

Because the resources of the FEC's Litigation Division (like those of the Policy Division) are limited, a comprehensive refutation of each of plaintiffs' cited cases is not possible here. Suffice it to say that the quoted authorities plaintiffs offer cannot be taken at face value, and at best merely establish the basic contours of the decision the Court here must make, without aiding

the Court in its obligation to contextualize the relief plaintiffs seek against the "hexagonal contours" of *TRAC*, 750 F.2d at 80.

E. The 2015 Guidance and the FEC's Planned Website Upgrades Limit the Impact of Any Alleged Harm to Plaintiffs and the Public

In its Motion the Commission explained how the interim guidance it issued to the public in 2015 (the "2015 Guidance"),[2] following the enactment of the legislation introducing segregated party accounts, has provided valuable guidance to the regulated community, mitigating any alleged harm resulting from a lack of a formal regulation. FEC MSJ at 44-47. This view is not merely that of the Commission; according to public comments the agency solicited this year, this view is shared by various members of the regulated community that represent candidates and organizations across the political spectrum. FEC MSJ at 24-28. This includes the Elias Law Group, the successor to the Perkins Coie practice that filed a petition in 2015 seeking, in part, a rulemaking covering precisely the subject matter addressed in the instant Petition. FEC MSJ at 26. Furthermore, plaintiffs do not allege that segregated account transactions are not being reported, instead alleging that this reporting is inconvenient to review and assess by third parties like plaintiffs because various party committees do not uniformly label their transactions. Pl. Resp. at 24-25.

Plaintiffs criticize the 2015 Guidance because (1) it does not offer explicit instructions for each type of transaction a national party committee might undertake, (2) the 2015 Guidance does not facilitate enforcement of FECA, and (3) various party committees' report their transactions in inconsistent ways. Pl. Resp. at 21-25. These rebuttals are flawed, incomplete, and fail to rebut

---

[2] FEC, National Party Accounts for Certain Expenses, https://www.fec.gov/help-candidates-and-committees/registering-political-party/national-party-accounts-certain-expenses/. Plaintiffs continuously downplay the guidance by characterizing it as a Press Release. In fact, the Guidance was merely announced by a press release, and is evidently formalized on the FEC's website.

the FEC's central contention: that the 2015 Guidance has provided meaningful instructions to the regulated community and the public that undermines plaintiffs' claims that they are harmed by a lack of a formal rulemaking and that the public is unable to meaningfully assess the relevant party transactions.

First, just because there are not currently rules specific to transfers from joint fundraising committees ("JFCs") to separate segregated accounts ("SSAs"), or from SSAs to General Accounts ("GAs"), does not mean that there is no guidance available to the public or rules governing this activity. *See* Pl. Resp. at 21. For instance, 11 C.F.R. § 102.17(c)(8) ("Reporting of receipts and disbursements") addresses reporting by joint fundraising committees, and Commission staff have pointed interested parties to this provision for guidance in reporting their JFC-SSA transactions.

Second, and as explained in its Motion at 8-9, 44-45, the Commission retains the power to enforce the law with respect to SSAs. Standard 30 of the FEC's Reports & Analysis Division ("RAD") Procedures is titled "Other FECA Violations," and is a mechanism through which RAD can identify potential violations of FECA for Commission consideration, even if no specific rule has been formally adopted by the Commission formalizing procedures and standards.

Third, plaintiffs' alleged inconsistencies in party committee reporting, Pl. Resp. at 24-25, fail to demonstrate that the public is in any way deceived by the existing regime. Even in the carefully selected examples provided by plaintiffs, the alleged inconsistencies still contain the information relevant to the public: the amount of the receipt or disbursement and the pertinent SSA. It is not difficult to ascertain that "Legal Proc" and "HQ Account" designations for disbursements refer, respectively, to the separate, segregated accounts established to "defray expenses incurred with respect to . . . election recounts . . . and . . . legal proceedings," 52 U.S.C.

§ 30116(a)(9)(C), and to "defray expenses incurred with respect to . . . headquarters buildings," *id.* § 30116(a)(9)(B). *See* Reply at 25 (citing NRSC, 2024 May Monthly, FEC Form 3X, at 33,968, 35,160 (May 20, 2024), https://docquery.fec.gov/pdf/524/202405209646123524/202405209646123524.pdf).

What is clear is that reporting which indicates the amount of the receipt or disbursement and the relevant account *does* assist the public in gathering information about the money flowing in and out of separate, segregated accounts and serves the essential function of "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office." *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (internal citation omitted). And the short statutory language authorizing segregated party accounts passed in 2014 does not address how related reporting is to be disclosed, *see* Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014), meaning plaintiffs are without a benchmark to argue that the extensive reporting that is already occurring is insufficient.

Moreover, the planned upgrades to the Commission's website, which will be effective this August, will meaningfully address precisely the issues plaintiffs have raised in their Petition and this lawsuit. *See* FEC MSJ at 46-47; Clark Decl. (Doc. No. 23-2) ¶¶ 4-8. As explained in the Commission's Motion, access to a variety of campaign finance data, including the SSA transaction information at issue here, will be made easier when the Commission debuts data tables making itemized contributions and disbursements to separate, segregated accounts more easily searchable.

Plaintiffs' dismissal of this advancement in public disclosure on the basis that creating data tables will require "judgment calls," Pl. Resp. at 27, is inapt. Virtually any system

interpreting data relies to some extent on "judgment calls," not least in the realm of federal politics. Identifying and classifying various transactions will continue to utilize the Commission's standard two-step process used to guard against error that underlies the FEC's current disclosure architecture. The first stage of that process is for reports to go through an automated scanning process identifying certain transactions based on the form type and line number they were disclosed on. Once that step is complete, the manual process starts where FEC team members review all transactions. This step includes looking at any transactions that were coded during the automated process. Coding Clerks are carefully trained to interpret parties' reports and have faithfully and accurately done so with respect to separate, segregated accounts for years now. FEC MSJ at 8-9 (detailing RAD's work); *see generally* FEC, Reports Analysis Division Review and Referral Procedures for the 2023-2024 Election Cycle at 62-63 ("RAD Review and Referral Procedures"), https://www.fec.gov/resources/cms-content/documents/Final-Redacted-2023-2024-RAD-Review-Referral-Procedures.pdf. And while it is true that the tables will be limited to itemized receipts and disbursements from individuals, this reflects a practical necessity given the agency's staff and limited budget. Other transactions, such as transactions from other political committees, are itemized regardless of the amount.

Finally, plaintiffs baldly declare that "there is no guarantee that the Commission will release these new website features or stick to its 'anticipated' timetable" given its "years-long delay in deciding whether to craft regulations[.]" Pl. Resp. at 27-28. This rejoinder is entirely inappropriate. First, while plaintiffs may prefer if the FEC had organized its many competing priorities differently, the agency has not established a rigid timetable regarding plaintiffs' Petition and has broken no promise to plaintiffs or to the public. Here, the FEC has provided

sworn testimony from its Disclosure Business Architect about the anticipated date for activation of new technical developments, *see* Clark Decl. ¶¶ 4-8, and while the world remains an uncertain place, plaintiffs have provided no reason to suggest these plans will not be realized. Furthermore, they have provided no basis to overcome the "presumption of regularity" that attaches to judicial review of agency action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *see also Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535, 538 (D.D.C. 2021) (discussing the presumptive prohibition on requiring production of internal agency materials or depositions of agency officials regarding subjective motivations).

II. THE COURT SHOULD DECLINE PLAINTIFFS' INVITATION TO INTERVENE IN AGENCY AFFAIRS PREMATURELY.

A review of the *TRAC* factors demonstrates that the Commission has acted—and is acting—reasonably in its handling of plaintiffs' Petition. *See supra*, pp. 10-26. But if the Court determines that the FEC has unreasonably delayed acting on plaintiffs' Petition, it should nonetheless reject the unreasonable timeline plaintiffs have proposed for agency action.

In their Response plaintiff asks the Court to "enter an order requiring the FEC to issue a final decision on the Petition within 30 days[,]" and "[i]f 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." Pl. Resp. at 28. First, requiring the Commission to make a "final decision" on plaintiffs' Petition is the functional equivalent of requiring the Commission to issue a proposed rule (*i.e.*, an NPRM), and will certainly take longer than 30 days. The Commission does not typically take a vote one way or the other in response to a petition for a rulemaking. Instead, the Commission acts by voting on a draft NOD (to dispose of a petition) or a draft NPRM (to initiate a rulemaking). Stipanovic Supp. Decl. ¶ 12. Requiring a separate "final decision" on plaintiffs'

Petition followed by an NPRM would be essentially unprecedented and would interfere with well-established procedures.

More importantly, and as the Commission has explained in detail, *supra* pp. 15-16, a decision on whether to direct staff to draft either an NPRM or an NOD occurs only after thorough and painstaking analysis of the Petition, the comments received in response to the Notice of Availability, relevant law and policy implications, the Commission's current and future workload, and resource allocation. Stipanovic Supp. Decl. ¶ 12. A decision to initiate a rulemaking thus requires a significant commitment of agency resources because rulemakings can take years to resolve.

Even if the Commission were prepared to make such a commitment of time and resources at this stage, 30 days remains a wholly unrealistic timeline on which to issue an NPRM. At the NPRM stage, OGC would assign the project to two staff attorneys and allow them time to draft the NPRM. The Assistant General Counsel, Associate General Counsel, and the Acting General Counsel would then each require additional time to review, sequentially. After the Acting General Counsel approves the final OGC draft, this draft is circulated to the Regulations Committee. The Regulations Committee then deliberates before finalizing a draft of the rule for the Commission at large to consider. Stipanovic Supp. Decl. ¶ 18. Once the Regulations Committee approves the draft for public disclosure, the Commission considers the matter at an open meeting. Once the Commission approves the NPRM at an open meeting, and assuming it does so in one meeting, the approved draft is sent to the Federal Register for publication. The Federal Register usually reviews the draft for approximately three to five business days before publishing. Stipanovic Supp. Decl. ¶ 19.

In addition, issuing a Final Rule will certainly take longer than 90 days. Once the NPRM is published, an open comment period commences. Here the Commission's usual practice is to give 60 days for public comment. The Commission often holds a public hearing at this stage, which it is likely to do in this case. Stipanovic Supp. Decl. ¶ 20.

Once the comment period closes, the Policy Division reviews and summarizes comments, and then proceeds to the Final Rule stage. The time to do so depends on the number of comments received, how substantive those comments are, and the number of issues at stake. Based on the experience of the FEC's Associate General Counsel for Policy, for the type of a rulemaking at issue in this case, the agency expects to receive between 10 and 30 substantive comments that it will take OGC one to two weeks to review and summarize. If more interested parties participate in this process, the agency could potentially receive thousands of comments, and the Policy Division would have to review and categorize each one. If the Commission were to hold a hearing this would add additional time to the process. OGC would need to summarize witnesses' written testimony, review the hearing transcript (which the transcription service often takes around a week to provide), summarize oral testimonies, and complete other related tasks. At times, the Commission allows witnesses to follow up with additional written testimony after the hearing or reopens the record for additional public comment. Stipanovic Supp. Decl. ¶¶ 21-22.

The Regulations Committee then evaluates the proposed Final Rule and assents to its form. Depending on the number of unresolved issues, Commissioners may deliberate for weeks or potentially months, with the length of time generally increasing if the rulemaking involves difficult and/or novel issues. After consultations, the Regulations Committee instructs the Policy Division to begin drafting the Final Rule and Explanations and Justifications ("E&J"). Drafting

the Final Rule and E&J at this point can typically occur more quickly than the NPRM, though the length of time will vary depending on the number of comments the Commission received, that must be addressed. Stipanovic Supp. Decl. ¶¶ 23-24.

Once staff attorneys have completed drafting the Final Rule, the Assistant General Counsel, the Associate General Counsel, and the Acting General Counsel each sequentially have the opportunity to review the draft and provide input. Once the Acting General Counsel approves, the final draft is circulated to the Regulations Committee for approval. As with the NPRM, the extent of the Commissioners' deliberations at this part of the process is unpredictable. Once the Regulations Committee approves the draft, it is usually made public one week before the open meeting. If the Commission approves the Final Rule at the open meeting, the draft is sent to the Federal Register, which typically takes three to five business days to process and publish it. The Rule would not go into effect immediately, as Congress would have 30 legislative days, not calendar days, to review.[3] In sum, there can be no reasonable doubt that this process will take longer than the 90 days plaintiffs have proposed, perhaps substantially longer.

Even if plaintiffs' proposed timeline were realistic, it represents an inappropriate micromanagement of agency affairs. *See United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (rejecting plaintiffs' proposed "expedited

---

[3] Moreover, any such final rule may well include specific reporting requirements necessitating changes to both the reporting forms party committees complete and file with the FEC as well as the Commission's electronic filing system. Finalizing the implementation of such form updates requires months of work before regulated committees are able to file reports in accordance with the new rule. While this process does not necessarily impact when the Commission may promulgate a final rule, it is emblematic of the overall commitment of resources a rulemaking entails, and demonstrates that the practical impact of plaintiffs' proposed rulemaking will most likely not be felt in this election cycle, diminishing the urgency of the relief they request.

timetable" for urged agency action) ("even were we to conclude that that delay was unreasonable, judicial imposition of an overly hasty timetable at this stage would ill serve the public interest."); *see id.* (declining to "say *in advance* that the amount of time the agency contemplates taking to reach a final determination will constitute an 'unreasonable delay,'" since "in reaching its determination, the agency must, of necessity, deal with a host of complex . . . issues."). An "agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way," which "is not for [courts] to hijack." *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Accordingly, the APA authorizes challenges to "discrete" federal agency action; it does not contemplate entangling the courts in managing the day-to-day business of the agencies. *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64, 66-67 (2004). The Court may not "require the agency to follow a detailed plan of action" and "may not prescribe specific tasks for [the agency] to complete[.]" *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006). Rather, "it must allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Id.* (citing *Cobell VI*, 240 F.3d at 1099, 1106).

Even in cases where a court has found that a federal agency unduly delayed a decision, imposing timelines like those plaintiffs have proposed is often disfavored compared to a more flexible and pragmatic approach enabling the court and plaintiff to stay apprised of the agency's continued progress. *See Orion Rsrvs. Ltd. P'ship*, 516 F. Supp. 2d at 11 ("courts rarely compel an agency to render an immediate decision on an issue"); *see also Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 41 (D.D.C. 2000) (disregarding plaintiffs' request for an order compelling review of its petition in twelve months, noting that "[t]he court does not, by its ruling, intend to mandate that the agency act within a prescribed time frame at this point," instead directing the

agency to submit a proposed schedule for resolving the petition); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999) (ordering agency to make a designation "as soon as possible" but declining to set a firm timetable).[4] In *TRAC* itself the D.C. Circuit ordered only that the FCC should inform the Court within 30 days when it anticipates resolving the relevant action, and the Court required the agency provide progress updates every 60 days. *TRAC*, 750 F.2d at 81.

Rather than unilaterally imposing rigid schedules for agency action, the more common approach, including in cases plaintiffs rely upon, is to either (1) issue a deadline for the agency to submit its own proposed schedule for action and/or (2) require the agency to simply submit regular status reports. *See, e.g.*, *In re Pub. Emps. for Env't Resp.*, 957 F.3d at 275-76 (retaining jurisdiction "to approve the plan and monitor the agencies' progress" and requiring agencies "to submit updates on their progress every ninety days" after setting a 120-day deadline for the agencies to issue a schedule for the relevant action and noting an aspirational two-year deadline to complete the action, consistent with a statutory mandate); *Cobell v. Babbitt*, 91 F. Supp. 2d at

---

[4] Where courts have found unreasonable delays in the context of agency rulemakings, as opposed to more discrete agency actions, courts appear to order agencies to adhere to strict deadlines primarily when promulgating rules that concern dangers to human health and safety. *See, e.g.*, *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (concerning OSHA rulemaking on cadmium as a carcinogen); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1159 (D.C. Cir. 1983) (concerning OSHA rulemaking on industrial exposure to ethylene oxide); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) (concerning NPS snowmobiling emissions rulemaking); *In re A Cmty. Voice*, 878 F.3d 779, 788 (9th Cir. 2017) (concerning EPA rulemaking on lead-based paint) (relying on court-ordered process for rulemaking concerning pesticide ban in *In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 815 (9th Cir. 2015)). And even in some cases of this sort, the D.C. Circuit has opted for an approach permitting periodic status reports. *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 556 (D.C. Cir. 1999) (diesel engines used in underground coal mines); *United Steelworkers of Am., AFL-CIO-CLC*, 783 F.2d at 1119 (exposure to industrial gas). As explained in referencing the third *TRAC* factor, *supra* p. 8, the subject of instant rulemaking Petition does not pose such a risk to human health or physical well-being, and accordingly, warrants greater flexibility to the Commission.

58-59 (retaining jurisdiction on the matter for a period of five years and requiring quarterly status reports); *MCI Telecomms. Corp.*, 627 F.2d at 292-93 (providing FCC 30 days to supply a feasible schedule for final determination and maintaining jurisdiction to ensure compliance) (citing *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (allowing agency-driven timeline resulting in a final decision that occurred in 17 months from the court's order)); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d at 556 (deciding that the Court "will court will retain jurisdiction over this case until there is a final agency disposition" and ordering the agency to "advise the court on the date such disposition occurs, and of the status of th[e] matter" on particular dates over a two-year period).

Here, if the Court finds the Commission has unreasonably delayed acting on the instant Petition, it should do no more than require the Commission to make quarterly progress reports to the Court updating it on the status of REG 2019-04. Such an approach is warranted by the diligent attention the Commission has already paid to this matter, and the numerous other competing priorities that will bear on the Commission in a Presidential election year. If the Court believes that this is the unusual case in which a judicially-imposed timetable is warranted, it should provide the FEC with at least 90 days to issue a proposed timetable for further action. This approach will have the virtue of allowing the FEC the opportunity to consult with knowledgeable staff and Commissioners so that it can make a realistic proposal that factors in the agency's expertise, capacity, and competing priorities. *See Cobell*, 455 F.3d at 307 (the court "must allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates.") (citing *Cobell VI*, 240 F.3d at 1099, 1106).

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Summary Judgment should be denied, and the Commission's Motion for Summary Judgment should be granted.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Christopher H. Bell (D.C. Bar No. 1643526)
Acting Assistant General Counsel
chbell@fec.gov

Sophia H. Golvach (D.C. Bar No. 1656365)
Attorney
sgolvach@fec.gov

/s/ Blake L. Weiman
Blake L. Weiman (D.C. Bar No. 1725165)
Attorney
bweiman@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

June 28, 2024

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

/s/ Blake L. Weiman
Blake L. Weiman
Attorney
bweiman@fec.gov