UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)	Civ. No. 1:14-397 (AJT-IDD)
Plaintiffs,	)	
and	)	
AMERICAN FUTURE PAC,	)	
Plaintiff-Intervenor,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFF-INTERVENOR AMERICAN FUTURE PAC'S RESPONSE TO FEC'S SUPPLEMENTAL FACTUAL SUBMISSION AND BRIEFING

Response to Supplemental Undisputed Material Facts Regarding Intervenor American Future PAC

34-36. Admit.

37. Admitted, except Michael Morley is "assisting Najvar in representing AF PAC" solely in connection with this case, and is not providing any additional legal or other services to AF PAC beyond this case.

38-49. Admit.

50. Denied. *See* Supplemental Declaration of Jared Najvar (attached). Admitted to the extent that Cotton prevailed in the 2014 general election for U.S. Senate from Arkansas.

51-55. Admit.

I. THE FEC HAS FAILED TO ESTBALISH THAT IMPOSING A SIX-MONTH WAITING PERIOD ON AMERICAN FUTURE PAC IS A REASONABLY TAILORED MEANS OF FURTHERING ITS INTEREST IN PREVENTING ACTUAL OR APPARENT *QUID PRO QUO* CORRUPTION.

The FEC's only real defense of the six-month waiting period is that it is relatively easy for a newly formed political committee to collect more than 50 contributions, and to contribute to more than five candidates. FEC Supp. Br. at 11. The FEC points out that such a committee may receive large contributions from a relatively small number of people, and may choose to make large contributions to only a small number of candidates. *Id*. at 13-14. It argues that the six-month waiting period is therefore necessary to ensure that such entities may contribute a maximum of only $2,600 to the candidates it supports, rather than $5,000. *Id*. at 14-15.

The FEC's argument continues to suffer from one fundamental flaw: ***once a political committee has been registered for six months*** and qualifies as a multicandidate PAC**,** there is ***nothing illegal*** about that entity receiving large contributions from only a small number of people, or making large contributions to a small number of candidates. If such conduct does not constitute "corruption" or "circumvention" for a multicandidate PAC, there is no basis for concluding that it nevertheless constitutes "corruption" or "circumvention" for a newly formed political committee. *Cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2013) ("Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible" by contributions of a similar or lesser amount).

Moreover, *McCutcheon* precludes the FEC's argument that the six-month waiting period is necessary to prevent its contributors from circumventing base limits. *McCutcheon* rejects the

motion that a PAC's contributions may somehow be attributed to that PAC's contributors:

> When an individual contributes to . . . a PAC, the individual must by law cede control over the funds. *See* 2 U.S.C. § 441a(a)(8); 11 CFR § 110.6. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's. . . . As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. ***For those reasons, the risk of quid pro quo corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder."***

Id. at 1452 (emphasis added). Thus, even if a newly formed political committee that satisfies the other criteria for multicandidate PAC status (*i.e.*, they have received more than 50 contributions and have contributed to five or more candidates) is subsidized in large part by a few contributors, any contributions that committee makes cannot be attributed to its contributors—and therefore may not constitute "circumvention" of base limits by those contributors.

The FEC's argument boils down to the simple proposition that the six-month waiting period is necessary to delay new political committees from engaging in conduct that is perfectly legal once that waiting period expires that they attain multicandidate PAC status. The FEC, in effect, defends delay for its own sake. FEC Supp. Br. at 13 ("[T]he six-month period is an essential part of the three multicandidate PAC criteria, in part because the other two criteria can be satisfied quickly."). In itself, however, mere delay does not further the Government's interests in combatting corruption and circumvention. And it is precisely because the conduct of which the FEC complains is legal that the Government lacks any valid interest in delaying it.

The requirements for multicandidate PAC status easily could be rewritten to require that such entities receive no more than a certain percentage of contributions from a single donor (or group of donors), or that such entities disburse no more than a certain percentage of their total contributions to a single candidate. But federal law contains no such requirements. The FEC

complains about the timing of American Future's disclosures, FEC Supp. Br. at 15, but again the proper solution would be imposing more detailed or frequent reporting requirements, rather than imposing a blanket discriminatory contribution limit. The waiting period at issue here does nothing more than delay otherwise permissible and constitutionally protected conduct by certain entities. The Constitution does not permit the Government to impose waiting periods on the exercise of constitutionally protected rights. *NAACP, Western Region v. Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("A delay 'of even a day or two' may be intolerable when applied to ''political' speech in which the element of timeliness may be important.'") (quoting *Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968)); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167-68 (2002) (invalidating ordinance that required people to wait until a license was issued before they engaged in door-to-door solicitations, including for political or religious reasons); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (invalidating ordinance that required groups to wait at least 24 hours after notifying municipality before holding a "spontaneous" gathering); *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 790 F. Supp. 618, 629-30 (E.D. Va. 1992) (holding that a thirty-day waiting period for posting political signs violated the First Amendment), *vacated in part as moot*, 983 F.2d 587, 595 (4th Cir. 1993).

As in *McCutcheon*, 134 S. Ct. at 1447, "[i]n addition to accounting for statutory and regulatory changes in the campaign finance arena, [American Future's] challenge raises distinct legal arguments that *Buckley* did not consider." Based on those arguments, this Court should invalidate the six-month waiting period for achieving multicandidate PAC status as applied to political committees that have received more than 50 contributions and contributed to five or more candidates.

II. THE FEC HAS FAILED TO ESTABLISH THAT IMPOSING A SIX-MONTH WAITING PERIOD ON ALL NEWLY FORMED POLITICAL COMMITTEES FURTHERS IS A REASONABLY TAILORED MEANS OF PREVENTING ACTUAL OR APPARENT *QUID PRO QUO* CORRUPTION.

Even assuming that the FEC has asserted a valid interest in limiting contributions from entities such as Stop PAC and American Future, it has completely failed to demonstrate that a blanket six-month waiting period that applies to all political committees is a reasonably tailored means of achieving that goal. To the extent that Stop PAC and/or American Future contain features that the FEC finds objectionable, a more tailored and constitutionally appropriate response would be for the Government to impose a waiting period on such entities, rather than indiscriminately abridging the First Amendment rights of all political committees.

It is undisputed that many people do not get informed about, interested in, or involved with the electoral process until the election is only weeks away; that is also the period in which people are most likely to band together to collectively participate in the political process. *Citizens United v. FEC*, 558 U.S. 310, 334 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). The six-month waiting period operates to restrict the ability of average grassroots voters and groups to become involved in the political process, and collectively associate themselves with candidates, to the same extent as longstanding, deeply entrenched interests that may seek to perpetuate the *status quo*.

The democratic principles that the Constitution embodies forbids the Government from looking askance at groups that form as an election draws near, at the very time when the average person is most likely to take action. Allowing such groups to associate with the candidates they support (through contributions) to a lesser extent than materially identical groups that happen to

be older is unconstitutional. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) ("CalMed") (holding that a contribution limit "violates the equal protection component of the Fifth Amendment," if it "burdens the First Amendment rights of [some] persons . . . to a greater extent than it burdens the same rights" of comparable entities, and "such differential treatment is not justified"); *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (opinion of Brennan, J.) (holding that a law that disparately "infringes constitutionally protected rights" for different groups is subject to "heightened scrutiny"); *see also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (holding that, under the Equal Protection Clause, a court must determine whether a "selective restriction on expressive conduct" is "far greater than is essential to the furtherance of [a substantial] interest").

III. AMERICAN FUTURE PAC'S CLAIMS (LIKE STOP PAC'S CLAIMS) REMAIN JUSTICIABLE DESPITE THE PASSAGE OF THE 2014 ELECTION AND THE UPCOMING EXPIRATION OF ITS SIX-MONTH WAITING PERIOD

A. The Justiciability of American Future's Claims Do Not Hinge on Whether Stop PAC's Claims Remained Justiciable at the Moment of Intervention

The FEC first contends that this Court somehow lacks subject-matter jurisdiction over American Future's claims because, at the moment this Court permitted it to intervene in this lawsuit, Stop PAC's claims already had become moot. FEC Supp. Br. at 10. It is undisputable, however, that this Court may exercise subject-matter jurisdiction over American Future's claims under 28 U.S.C. § 1331. And the justiciability of American Future's claims—whether it has standing, its claims are ripe, or those claims have become moot—do not depend in any way on Stop PAC's claims.

Because American Future seeks to pursue justiciable claims, it is irrelevant whether Stop PAC's claims remained justiciable at the point of intervention. In *Perry-Bey v. City of Norfolk*,

678 F. Supp. 2d 348, 390 n.37 (E.D. Va. 2009), this Court adopted the Eleventh Circuit's distinction between intervenors (such as American Future) that have "independent standing" and those seeking to invoke "piggyback standing." *See Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007); *see also City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079-82 (10th Cir. 2009) (adopting this approach). If a putative intervenor does not have its own justiciable claims, it may intervene in a pending lawsuit by "piggybacking" on the standing of an entity whose claims remain justiciable. *Dillard*, 495 F.3d at 1336; *Colorado Springs*, 587 F.3d at 1079. In such cases, intervention becomes inappropriate once the claims of the original plaintiffs in the suit become moot.

If, in contrast, the putative intervenor possesses its own justiciable claims, then it has "independent" standing. A putative intervenor with "independent" standing need not "piggyback" on the standing of the original plaintiffs, but rather may intervene regardless of the continued justiciability of the original parties' claims. *Dillard*, 495 F.3d at 1336 (holding that the existence of a continued controversy between the original parties is relevant only if an intervenor cannot "mak[e] an independent showing of Article III standing"); *Colorado Springs*, 587 F.3d at 1079 (holding that an intervenor may ***either*** establish that it has "independent Article III standing" ***or*** that a justiciable controversy between the original parties continues to exist); *see also Perry-Bey*, 678 F. Supp. 2d at 390 n.37 (E.D. Va.) (citing distinction between intervenors with "independent standing" and those with "piggyback" standing"). Here, American Future has independent Article III standing. Its intervention in this case does not depend on the continued justiciability of Stop PAC's claims at the moment of intervention. The FEC's argument to the contrary is incorrect.

All of the cases the FEC cited are entirely distinguishable. In *Houston Gen. Ins. Co. v.*

Moore, 193 F.3d 838, 840 (4th Cir. 1999) (cited by FEC Supp. Br. at 10), the Fourth Circuit held that a third party could not intervene in a lawsuit "more than 60 days after final judgment," after the district court proceedings had terminated and the time for appeal had expired. Thus, "there was no pending litigation in which [the third party] could intervene." *Id*. Here, in contrast, even if Stop PAC's claim had become moot by the time this Court ruled on American Future's intervention motion, this case had not yet been dismissed, and so intervention remains permissible.

In *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) (quotation marks omitted; quoted by FEC Supp. Br. at 10), the court held, "[I]f jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [third party] with a sufficient claim." In this case, of course, it is undisputed that this Court did possess jurisdiction "at the commencement of [the] suit." *Id*. *Disability Advocates* is therefore inapposite. Moreover, in *Disability Advocates*, the United States attempted to intervene in a lawsuit "six years into the litigation and after the conclusion of a trial on liability." *Id*. at 162.

Moreover, none of the authorities Plaintiffs cite engage with the extensive authority expressly permitting intervention for the purpose of maintaining the justiciability of a lawsuit, after the original Plaintiffs' claims have become moot. *See, e.g.*, *Mullaney v. Anderson*, 342 U.S. 415, 416 (1952) ("To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration."); *Cal. Credit Union League v. City of Anaheim*, 190 F.3d 997, 1001 (9th Cir. 1999) (holding that joinder under Rule 21 is appropriate "when the party seeking joinder requests the same remedy as the original party and offers the same reasons for that remedy and earlier

joinder would not have affected the course of the litigation"); *Atkins v. State Bd. of Educ.*, 418 F.2d 874, 875 (4th Cir. 1969) (per curiam) (remanding dismissed lawsuit so that the district court could allow plaintiffs with standing to intervene to litigate constitutional claims brought by the original plaintiff, who was found to lack standing); *see also* 13B Wright & Miller, Federal Practice & Procedure, Civil § 3533.1 (3d ed.) (urging courts to allow the substitution of "plaintiffs with live claims for former plaintiffs whose claims have been mooted" to "preserve the energy invested in the original action" while avoiding the "burdensome procedures of class actions"); 13C *id.* Civil § 3533.9 ("[A] court may cooperate in thwarting mootness by such devices as allowing intervention"). Thus, American Future's claims are justiciable regardless of whether Stop PAC had standing at the time this Court allowed intervention.

B. American Future's Claims Have Not Become Moot

Next, the FEC contends that American Future's claims have become moot by the passage of the November 2014 general election. FEC Supp. Br. at 11. This is inaccurate, for three reasons. ***First***, American Future retains its desire to immediately contribute funds in excess of $2,600 to Tom Cotton, but due to the six-month waiting period is unable to do so unless and until he files paperwork concerning the 2016 primary election. Najvar Supp. Decl. ¶ 5. ***Second***, based on public records concerning past election cycles, many candidates will begin filing with the FEC the paperwork necessary to begin fundraising for the 2016 primary election in December 2015 or January 2016. *Id.* ¶ 6. American Future will be continuing its fundraising activities, *id.* ¶ 4, and reasonably anticipates wishing to contribute funds in excess of $2,600 to one or more such candidates at the earliest available opportunity, *id.* ¶ 6. Due to the six-month waiting period, however, its rights remain limited and it will be unable to do so. *Id.* ¶ 7. ***Finally***, as discussed in the next Section, even if American Future's claims have become moot,

they are subject to the exception to the mootness doctrine for harms that are capable of repetition, yet evading review.

C. American Future's Claims Are Subject to the Exception to the Mootness Doctrine for Claims That Are Capable of Repetition, Yet Evading Review

Even if American Future's claims are moot, they remain justiciable because they are capable of repetition, yet evading review. This exception generally requires that the same plaintiff face the alleged constitutional violation in the future. In election-related disputes—including constitutional challenges to campaign finance laws—however, courts have held that this exception may be invoked even where the same plaintiffs cannot be subjected to the restrictions again in the future, but the challenged provisions will continue apply to other people and entities. *See Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014) (holding, in a constitutional challenge to a waiting period in a campaign finance regulation, that "in election law cases such as this one, where (1) the state plans on continuing to enforce the challenged provision, and (2) that provision will affect other members of the public, the exception [to the mootness doctrine] is met"); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) ("[T]he fact that the controversy almost invariably will recur with respect to some future potential candidate or voter in Ohio is sufficient to meet the second prong because it is somewhat relaxed in election cases."); *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) ("[W]hile canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition by the same plaintiff, the courts . . . do not interpret the requirement literally, at least in abortion and election cases") (internal citations omitted). At least one other district court within this Circuit has recognized this exception to the mootness doctrine's "same parties" requirement. *See Delaney v. Bennett*, No. 1:02-CV-741, 2003 U.S. Dist. LEXIS 24059, at *11 (E.D.N.C. Dec. 24,

2003) ("While many courts have cited the "same party" requirement as necessary to sustain a claim, courts adjudicating election disputes have been willing to disregard the 'same party' requirement.") (internal citations omitted). Thus, American Future's claims are not subject to dismissal for mootness.

Respectfully submitted,

Dated November 21, 2014

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	Civ. No. 1:14-397 (AJT-IDD)
Plaintiffs,	
and	
AMERICAN FUTURE PAC,	
Plaintiff-Intervenor,	
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

DECLARATION OF JARED NAJVAR IN SUPPORT OF AMERICAN FUTURE'S RESPONSE TO FEC'S SUPPLEMENTAL FACTUAL SUBMISSION AND BRIEFING

I, JERAD NAJVAR, ESQ., hereby declare as follows:

1. All of the statements contained in this declaration are based on my personal knowledge, except where stated otherwise.

2. I am at least 18 years old, of sound mind, and am competent to testify to the matters contained in this declaration. I am counsel for, and treasurer of, American Future Political Action Committee ("American Future").

3. American Future has contributed $2,600 to Senator Tom Cotton.

4. American Future, like many PACs, continues to seek to raise funds to facilitate its ongoing mission, which includes (but is not limited to) associating with, and contributing to, candidates who support our military veterans and seek to reform and strengthen the laws that

protect them.

5. American Future continues to wish to immediately contribute funds in excess of $2,600 to Tom Cotton. Unless and until Senator Cotton files paperwork with the FEC concerning the 2016 elections, it is prohibited from doing so as a result of federal law's six-month waiting period.

6. American Future reasonably anticipates wishing to contribute funds in excess of $2,600 to one or more candidates in connection with the 2016 primary election. Based on candidate filings in past election cycles, fundraising for that election is likely to commence for many candidates in December 2014 or January 2015—well within American Future's six-month waiting period.

7. American Future's First Amendment rights continue to be limited by the six-month waiting period despite the passage of the November 2014 general election.

I declare under penalty of perjury that the foregoing is true and correct.

Dated November 21, 2014

Respectfully submitted,
/s/ Jerad Najvar, Esq.
Jerad Najvar, Esq.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)	Civ. No. 1:14-397 (AJT-IDD)
Plaintiffs,	)	Judge Anthony John Trenga
v.	)	Magistrate Judge Ivan D. Davis
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this this 21st day of November 2014, I did cause a true and complete copy of Plaintiff-Intervenor American Future PAC's Response To FEC's Supplemental Factual Submission And Briefing to be filed via the court's CM/ECF system, which effected service upon:

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