IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

RIGHT TO RISE SUPER PAC, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-00730

Hon. Christopher R. Cooper

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION TO DISMISS

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TABLE OF ABBREVIATIONS

CLC	Campaign Legal Center
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
RTR	Right to Rise Super PAC, Inc.

SUMMARY OF ARGUMENT

From at least January 2015 to the close of former Florida Governor John Ellis "Jeb" Bush's presidential run, Bush and his allies ran a massive operation to outsource much of his nascent campaign to an "independent" political committee they created, Right to Rise Super PAC, Inc. ("RTR"), on the theory that this super PAC was not bound by the strict contribution limits and source restrictions that would otherwise apply to Bush's campaign under the Federal Election Campaign Act ("FECA"). RTR would ultimately report making over $86 million in expenditures to advocate Bush's nomination in the 2015-16 Republican presidential primary.

In an attempt to counter this unprecedented scheme to circumvent federal law, plaintiffs Campaign Legal Center ("CLC") and Democracy 21 filed two administrative complaints with the Federal Election Commission ("FEC") in 2015. The March 31, 2015 complaint alleged that Bush was illegally engaging in campaign activity without registering as a candidate or reporting this activity as FECA requires, and was using money raised outside the federal contribution restrictions ("soft money") to do so. Compl. Ex. B, Mar. Admin. Compl. (Dkt. No. 1-2). The May 27, 2015 complaint made related allegations that Bush and his agents had "established," "financed," "maintained," and "controlled" RTR Super PAC, 52 U.S.C. § 30125(e)(l), which "act[ed] on his behalf" by raising and spending millions of dollars of soft money, both before and after the official commencement of his candidacy, to promote his presidential campaign. Compl. Ex. A, May Admin. Compl. (Dkt. No. 1-1). Bush would not formally announce until June 15, 2015.

Now, more than five years later, the FEC still has not resolved the administrative complaints. In fact, it is unclear if the Commission has taken any action on the complaints at all. This goes far beyond agency delay; it is a stunning abdication by the FEC of its statutory responsibility to resolve administrative complaints as required by 52 U.S.C. § 30109(a)(8)(A).

And its inertia continues: although the Commission regained its quorum before the deadline to respond to this lawsuit, the FEC has not appeared to defend its inaction.

Instead, one of the administrative respondents, RTR, has intervened and now moves to dismiss the complaint on the ground that plaintiffs lack Article III standing—based almost solely on plaintiffs' supposed failure to state a cognizable informational injury. *See* Int.-Def. Mot. to Dismiss (Dkt. No. 11) ("Int. Br.") at 8-15.

This singular focus is surprising given that one of the central allegations in the administrative complaints is a straightforward reporting violation concerning Bush's failure to properly disclose his campaign activities prior to the formal commencement of his candidacy. *See* Compl. ¶ 10; Dkt. 1-2 ¶¶ 34-36, 49. Indeed, RTR all but concedes the potential informational injury that arises from these allegations. It cannot, and does not, dispute that the "statute (on the claimants' reading)," *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) ("*CLC I*") (quoting *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)), requires comprehensive reporting from candidates both during their candidacies and with respect to any pre-candidacy "testing the waters" activity. Instead, it argues that plaintiffs' "alleged informational deprivation is contingent on a legal determination by the Commission that Governor Bush was a candidate under FECA." Int. Br. at 3. Plaintiffs do not disagree. But this just underscores that their informational injury exists and can be redressed here. Plaintiffs contend that Bush *was* a candidate earlier than he claimed, and on a Rule 12(b)(1) motion to dismiss, factual disputes are resolved in plaintiffs' favor. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

Plaintiffs also suffer informational injury because the FEC has failed to investigate the nature of the relationship between RTR and the Bush campaign, and this relationship determines whether and to what extent the super PAC has subsidized the Bush campaign through coordinated

expenditures and other in-kind contributions. Compl. ¶ 9. Given the evidence that Bush and his agents "established," "financed," "maintained," and "controlled" RTR, there is strong reason to believe this type of in-kind support occurred, but neither RTR nor the Bush campaign reported any such in-kind contributions. Although Bush and his agents were prohibited by Section 30125(e)(l) from either establishing or operating a soft-money group like RTR in the first place, they nevertheless did both. Accordingly, plaintiffs are entitled to all reportable information that arose from this scheme. There is no dispute that FECA requires itemized reporting of in-kind contributions, including coordinated expenditures, on the part of both the political committee making them and the campaign benefiting from them. *See* 52 U.S.C. §§ 30104(b)(2), 30116(a)(7)(B); 11 C.F.R. § 104.13.

Rather than disputing that this activity is indeed subject to FECA's disclosure requirements, however, intervenor argues that plaintiffs can find all of this information in the committee reports that RTR filed with the FEC in the 2015-16 election cycle. That claim is wrong: existing reports do not enable plaintiffs to even retroactively deduce the scale and scope of RTR's possible in-kind support for the Bush campaign. The fact that RTR may have disclosed *all* of its disbursements in committee reports covering this pre-candidacy period does not mean that plaintiffs know *which* of RTR's disbursements, in whole or part, qualify as in-kind contributions to the Bush campaign. As this court recently found, administrative complainants—and the public—are entitled to meaningful, itemized accounts of in-kind contributions from a purportedly independent political committee to a presidential candidate. *CLC v. FEC*, No. 19-cv-02336-JEB, 2020 WL 2996592, at *5-*7 (D.D.C. June 4, 2020) ("*CLC II*").

Plaintiffs also have standing to sue because, as complainants under FECA, they have a right to have the FEC "act on [their] complaint during the 120-day period beginning on the date

the complaint is filed," 52 U.S.C. § 30109(a)(8)(A), and have suffered a concrete injury to their programmatic activities as a result of the FECA's failure to do so.

RTR ignores this second basis for plaintiffs' standing. But this injury is distinct from the informational injury CLC and Democracy 21 have suffered due to respondents' failure to provide all FECA-required reporting; there is an independent informational deprivation arising from agency inaction itself because the Commission's failure to resolve an administrative complaint means no information about the proceedings can be made publicly available, including any legal conclusions, factual findings, or vote records. *See id.* § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a); Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016); *see also* 5 U.S.C. § 552(a)(2), (a)(5). Plaintiffs' public education, legislative policy, and regulatory reform programs depend on this information, so the FEC's failure to act perceptibly impairs their ability to effectuate their organizational missions.

Lastly, CLC and Democracy 21 have organizational standing because the FEC's "action or omission to act 'injured the [plaintiffs'] interests,'" and plaintiffs "'used [their] resources to counteract that harm.'" *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*") (citation omitted). Complete and accurate FECA disclosure from candidates and timely FEC action on administrative complaints are both essential to the success of programmatic activities advancing plaintiffs' missions. FEC inaction here has forced plaintiffs to divert resources from other planned organizational needs to research, fill in the gaps in the disclosure reports filed by the Bush campaign and RTR, and explain to reporters and partner organizations how they might attempt to find information not properly reported.

Plaintiffs thus assert three valid bases for their Article III standing in this case, and intervenor's motion to dismiss should be denied.

BACKGROUND

I. Statutory and Regulatory Background

A. Federal candidates are required to report "contributions" and "expenditures" both during candidacy and in any "testing the waters" phase preceding candidacy.

"Candidate" is defined in FECA to mean "an individual who seeks nomination for election, or election, to Federal office," and an individual is deemed to seek nomination for election, or election "if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000." 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a). *See also* 52 U.S.C. § 30101(8)(A) (defining "contribution"), (9)(A) (defining "expenditure").

No later than 15 days after becoming a candidate for federal office, the candidate must designate in writing his principal campaign committee, 52 U.S.C. § 30102(e)(1), and such committee must register with the FEC no later than 10 days thereafter, *id.* § 30103(a). The candidate's authorized committee must then file regular, comprehensive reports disclosing all receipts and disbursements, *id.* § 30104, including receipt of in-kind contributions.

However, "[t]hrough its regulations, the Commission has established *limited exceptions* to these automatic thresholds which permit an individual to test the feasibility of a campaign for Federal office"—*i.e.*, to test the waters—"without becoming a candidate under the Act." Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (emphasis added). The testing-the-waters regulations thus create "limited exceptions" to the definitions of "contribution" and "expenditure," allowing would-be candidates to engage in pre-candidacy activities without triggering candidate status when the funds they raise or spend for this purpose exceed the $5,000 candidate registration threshold. 11 C.F.R. §§ 100.72, 100.131.

Importantly, such individuals must keep records of their testing-the-waters activities, and if they subsequently become candidates, they are required to report all funds received or payments

made while testing the waters as "contributions or expenditures under the Act," *id*. § 101.3, in "the first report filed by the principal campaign committee . . . regardless of the date the funds were received" or "the payments were made," *id*. §§ 100.72(a), 100.131(a).

Any payments by federal political committees for testing-the-waters activities benefiting eventual presidential candidates constitute in-kind "contributions" from the political committee to the candidate. *Id*. §§ 110.2(l), 9034.10; *see also* Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47387, 47407 (Aug. 8, 2003) (rulemaking addresses "situations where unauthorized political committees closely associated with a particular individual planning to run for President defray costs that are properly treated as in-kind contributions" "during the 'testing the waters' phase and before"). When the individual becomes a candidate, these payments must be reported as in-kind contributions to the campaign in the campaign committee's first disclosure report. *See* 11 C.F.R. § 101.3.

Also key is that this limited "testing the waters" exception is "not applicable to individuals who have decided to become candidates," nor "for activities relevant to conducting a campaign." *Id*. § 100.72(b). "Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to" activities in which "*[t]he individual raises funds in excess of what could reasonably be expected to be used for exploratory activities* or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate" and "[t]he individual makes or authorizes *written or oral statements that refer to him or her as a candidate* for a particular office." *Id*. (emphases added). If the individual's activities and statements indicate that she has effectively become a candidate, she must designate a principal campaign committee and timely file the required FEC reports disclosing all receipts and disbursements. 52 U.S.C. §§ 30102(e)(1), 30103, 30104.

B. FECA's "soft money" prohibitions prevent circumvention of the contribution limits and its comprehensive disclosure regime for candidate committees.

In the 2015-16 election cycle, FECA limited the size of a contribution that a presidential candidate can accept from an individual donor to $2,700, 52 U.S.C § 30116(a)(l), and prohibited candidates from accepting any contributions from corporations or labor unions, *id.* § 30118(a). *See also Contribution limits for 2015-2016*, FEC (Feb. 3, 2015), https://www.fec.gov/updates/contribution-limits-for-2015-2016.

A "super PAC" is a political committee that may raise contributions outside the limits and source restrictions that otherwise apply to committees, *id.* § 30116(a)(1)(C), provided they make only independent expenditures and do not contribute to, or coordinate their spending with, candidates. Super PACs came into existence following *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc), which held that contributions to "independent expenditure-only" committees could not constitutionally be limited because such committees posed no significant threat of corruption. *See* FEC Advisory Op. 2010-11.

Single-candidate super PACs like RTR, *i.e.*, super PACs devoted to advocating the election of a single candidate, provide a potential avenue for donors to circumvent the contribution limits by directing unlimited, otherwise illegal soft-money contributions to PACs connected to their preferred candidates. But FECA contains provisions to prevent such circumvention. One such provision is the "soft money" prohibition in Section 30125(e)(l), which provides:

> A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly *established, financed, maintained or controlled* by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not–
>
> > (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act . . . .

52 U.S.C. § 30125(e)(l) (emphasis added).

By prohibiting a federal candidate from establishing or operating "soft money" entities like super PACs, Section 30125(e)(l) prevents candidates' use of such vehicles to circumvent the contribution limits, or to evade FECA's disclosure requirements applicable to their campaigns by "outsourcing" their operations to such PACs. Because a super PAC "established, financed, maintained or controlled" by a candidate would be likely, at least in part, to be coordinating operations with the candidate, Section 30125(e)(1) also works as a prophylactic measure to prevent the coordinated expenditures and other in-kind contributions that might otherwise result.

FECA provides that a person's payment for any goods or services for a candidate campaign is an in-kind contribution subject to FECA contribution restrictions and reporting requirements. *See* 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. §§ 100.52(d)(1), 104.13. In particular, in-kind contributions include "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 52 U.S.C. § 30101(8)(A)(ii). Thus, if a PAC pays for services rendered to a candidate's campaign, whether during candidacy or in any pre-candidacy testing-the-waters phase, those payments constitute in-kind contributions subject to FECA's contribution limits, source restrictions, and disclosure requirements. *Id.* §§ 30104, 30116(a)(1)(A), (a)(7)(B)(i); 11 C.F.R. §§ 100.52(d)(1), 104.13.

Furthermore, all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) are also treated as in-kind contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i). This is because coordinated expenditures function as "disguised contributions"—and failing to regulate them as such creates a risk of corruption and conceals the true sources of candidates' support. *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

For each reporting period, a candidate-authorized committee must disclose the total contributions received from other committees, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104(b)(2)(D). The candidate's report must itemize each committee contribution, and state its date, value, and whether it was in support of the candidate's primary or general election. *Id.* § 30104(b)(3)(B); *see Instructions for FEC Form 3P and Related Schedules* 10-11, https://www.fec.gov/resources/cms-content/documents/fecfrm3pi.pdf (updated May 2016). In addition, because in-kind contributions received by a campaign are also deemed "expenditures" of that campaign, the report must disclose an in-kind contribution not only as a contribution received, but also as an expenditure made by the campaign. 11 C.F.R. §§ 104.13(a)(2), 109.20(b), 109.21(b).

Likewise, for each reporting period and for the entire election cycle, a non-candidate committee must disclose its total contributions to other committees, including in-kind contributions, and itemize all contributions made to other committees, stating for each the date, value, and recipient's name and address. 52 U.S.C. § 30104(b)(6)(B)(i), (b)(4)(H)(i). In addition, because in-kind contributions by a committee are also expenditures of that committee, the report must disclose the person to whom each expenditure is made, its date, amount, and purpose, and the recipient's name and address. *Id*. § 30104(b)(5)(A).

C. The statutory framework for FEC administrative complaints.

Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the recommendations of its Office of General Counsel ("OGC"), the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. *Id*. § 30109(a)(2). After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, *id*. § 30109(a)(3), it seeks

a conciliation agreement with the respondent, which may include civil penalties. *Id*. § 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id*. § 30109(a)(6)(A). All of these decisions require four affirmative votes. 52 U.S.C. § 30106(c).

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission will dismiss the complaint. Once the matter is closed, the FEC must place materials from the MUR file on the public record. *Id*. § 30109 (a)(4)(B)(ii); *see also* 11 C.F.R. § 111.20(a); 81 Fed. Reg. 50702. "Any party aggrieved" by the Commission's dismissal of a complaint filed by such party or by "a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed" may seek review in this Court to determine whether the failure to act is "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (a)(8)(C).

II. Factual Background

A. Plaintiffs' Administrative Complaints

CLC and Democracy 21 filed two FEC complaints against RTR and Bush on March 31 and May 27, 2015, which collectively alleged that Bush, largely due to his direct and indirect role in establishing and operating RTR, had failed to comply with applicable FECA contribution restrictions and disclosure requirements, both before Bush formally announced his candidacy on June 15, 2015 and for the duration of his official campaign. Compl. ¶¶ 4-5.

Plaintiffs' March 2015 complaint detailed the activities in which Bush, his agents, and the super PAC were reportedly engaged prior to June 15, and alleged that this provided reason to believe Bush had been first "testing the waters" and then engaging in an active campaign before he formally announced his candidacy on that date. *See* Dkt. 1-2.

As early as December 16, 2014, Bush publicly announced that he had "decided to actively

explore the possibility of running for President of the United States." Dkt. 1-2 ¶ 4 (quoting Bush). Shortly thereafter, on January 6, 2015, Bush and his associates formed two PACs: the super PAC and a leadership PAC, also named Right to Rise, *id.* ¶ 5, which also supported Bush before and after he declared candidacy but could not, in contrast to the super PAC, raise contributions in unlimited amounts. According to reports, Bush's team set an initial fundraising goal of $100 million, and dozens of PAC fundraising events were soon scheduled for the first months of 2015. *Id.* ¶¶ 7-8.

In the early months of 2015, Bush engaged in a quantum of fundraising that demonstrated that he had moved beyond pre-candidacy or even testing the waters, and was operating as an active candidate. For example, news reports and Bush's own Twitter account documented that Bush engaged in extensive fundraising across the country for the super PAC in February and March of 2015. Dkt. 1-2 ¶¶ 10-11. Bush, who was "aggressively recruiting donors" for the super PAC, Dkt. 1-1 ¶ 23, made fundraising stops that included $100,000-per-ticket fundraisers for the super PAC in New York City in February and in Bel Air on March 31. *Id.* ¶ 23; Dkt. 1-2 ¶¶ 11, 13. During this period, Bush's mother and other members of his family were also fundraising for the super PAC. Dkt. 1-2 ¶ 9; Dkt. 1-1 ¶ 26.

Meanwhile, also in February and March 2015, Bush was engaged in a number of activities that were indistinguishable from those of a candidate: he traveled to early primary states like South Carolina and met with potential donors and staff; he spoke at the Conservative Political Action Conference and functionally acknowledged he was testing the waters for a presidential candidacy; he attended the Iowa agriculture summit and spoke about his policy positions alongside other Republican presidential hopefuls; and he was announced as a speaker for the Iowa Republican Party's Lincoln dinner scheduled later that spring. Dkt. 1-2 ¶¶ 12, 17-19.

On May 27, 2015, plaintiffs filed a second administrative complaint with the FEC, supplementing the March complaint with further evidence that Bush had indeed become a federal candidate as defined by FECA, and alleging that as a candidate, Bush had violated 52 U.S.C. § 30125(e) because he had "directly or indirectly established, financed, maintained or controlled" RTR Super PAC, and the super PAC was soliciting, receiving, directing, or spending contributions that did not comply with federal contribution limits and source prohibitions. Dkt. 1-1 ¶¶ 37-44.

The May complaint noted that Bush's aggressive "pre-candidacy" fundraising had continued through April and May of 2015. *Id.* ¶¶ 20-22. So successful was the fundraising, in fact, that after having "initially imposed a $1 million cap on donations to the super PAC" in order "to avoid the public perception that he'd been indebted to a few extremely wealthy benefactors," Bush lifted that cap in early May 2015, and was "rushing to fill the Right to Rise bank account" and attempting to "accelerate the cash flow." *Id.* ¶ 25. As further evidence of Bush's de facto candidacy, a video released on May 13, 2015 showed Bush acknowledging that he was running for president, but then "tr[ying] to take it back." *Id.* ¶ 4.

Plaintiffs also detailed the active role that Bush and his associates played in creating RTR and directing its design, staffing, and operations. As early as February and March of 2015, Bush and his aides were choosing close Bush associates to be senior staff for the super PAC, Dkt. 1-1 ¶¶ 12-15. By April and May 2015, Bush and his aides were reportedly shaping strategy for the super PAC and considering how to operate the PAC most effectively alongside the Bush campaign. *Id.* ¶¶ 16-19. For example, in a "concept[] in development for months," Bush was planning to "delegat[e] many of the nuts-and-bolts tasks of seeking the White House" to the super PAC and intended to have the super PAC perform "many of the duties typically conducted by a campaign." *Id.* ¶ 17. Another news report similarly described "a division of labor" that "had been established"

between the super PAC and the eventual Bush campaign. *Id.* ¶ 18.

B. Procedural Background

The FEC acknowledged receipt of each administrative complaint by letter, informing plaintiffs that both submissions would be designated Matter Under Review ("MUR") 6927. Compl. ¶ 33. To date, plaintiffs have received no further communications from the FEC about the status of either administrative complaint. Nor has the FEC publicly released any documents associated with this proceeding.

On June 15, 2015—nineteen days after plaintiffs filed their second complaint—Bush filed a statement of candidacy with the FEC and designated Jeb 2016, Inc. as his principal campaign committee ("Jeb 2016"). Ex. C (Jeb Bush Statement of Candidacy and Jeb 2016, Inc. Statement of Organization). Bush and his associates had raised approximately $90 million for RTR by that date.[1] RTR reported making its first independent expenditure supporting Bush on June 26, 2015.[2] From that date through February 2016, RTR reported to the FEC a total of $86.8 million in expenditures supporting Bush or attacking his opponents in the Republican presidential primary, and $118 million in disbursements. Ex. D (RTR Financial Summary). Plaintiffs commenced this lawsuit on March 13, 2020, but to date, the FEC has not appeared to defend its inaction.

RTR complains that the Commission has been without a four-member quorum for some period of time during this lawsuit, Int. Br. at 6, and thus lacked the four votes necessary for most significant Commission action. But the Commission did not lose its quorum until August 31, 2019,

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[1] RTR, Receipts, Jan. 1 – June 14, 2015, FEC, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00571372&two_year_transaction_period=2016&min_date=01%2F01%2F2015&max_date=06%2F14%2F2015 (last visited July 7, 2020).

[2] RTR, Independent Expenditures, Jan. 1, 2015 – Feb. 28, 2016, FEC, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00571372&is_notice=false&most_recent=true&min_date=01%2F01%2F2015&max_date=02%2F28%2F2016 (last visited July 7, 2020).

see FEC, *Matthew Petersen to depart Federal Election Commission* (Aug. 26, 2019), https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission—more than four years after plaintiffs filed their second administrative complaint and started the statutory 120-day clock. The Commission regained its quorum on June 5, 2020, only to lose it again on July 3, 2020. Rebecca R. Ruiz, *After Functioning for 28 Days, U.S. Election Regulator Will Be Powerless Again*, N.Y. Times (June 26, 2020), https://www.nytimes.com/2020/06/26/us/federal-election-commission.html.

LEGAL STANDARD

To demonstrate Article III standing, plaintiffs must establish three elements: (1) "injury in fact"; (2) causation; and (3) redressability. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). While plaintiffs bear the burden of proving that the Court has subject matter jurisdiction to hear their claims, on a motion to dismiss, plaintiffs "need only 'state[] a plausible claim' that each element of standing is satisfied." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). For purposes of the Rule 12(b)(1) motion, the Court "may consider materials outside the pleadings." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ARGUMENT

I. Plaintiffs Have Established Article III Standing Based on Informational Injury.

Plaintiffs satisfy all three elements of Article III standing. Intervenor's motion focuses almost exclusively on plaintiffs' claimed injury, and specifically, their informational injury, Int. Br. at 8-15, so plaintiffs will likewise focus on this prong of the standing test.

"The law is settled that 'a denial of access to information' qualifies as an injury in fact 'where a statute (on the claimants' reading) requires that the information be publicly disclosed and

there is no reason to doubt their claim that the information would help them.'" *Envtl. Def. Fund*, 922 F.3d at 452 (cleaned up). Plaintiffs CLC and Democracy 21 have been denied information that is required to be disclosed by FECA regarding (1) Bush's "testing the waters" and campaign activity in the period prior to his official declaration of candidacy in June 2015 and (2) the true value of in-kind contributions from RTR to his campaign arising from Bush's extensive involvement in RTR's formation and operations. The deprivation of this information is traceable to the FEC's inaction on plaintiffs' administrative complaints, and directly and concretely injures plaintiffs' interests in disseminating this information to voters and using it to support their other programmatic activities.

A. Plaintiffs Have Been Deprived of Information that FECA Requires to Be Disclosed.

"[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). In *Akins*, the Supreme Court held that the plaintiffs had suffered an injury in fact because they had been unable "to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on [the plaintiffs'] view of the law, the statute requires that AIPAC make public." *Id*. Because the plaintiffs had been deprived of that information and there was "no reason to doubt" that the concealed information would be helpful for evaluating candidates and their relationships with AIPAC, the plaintiffs' injury was sufficient to give them standing. *Id*.

Consistent with *Akins*, the D.C. Circuit and this Court have recognized that plaintiffs are injured in fact when an alleged FECA violation causes the concealment of information that the Act requires disclosed, including, for example: "how much money a candidate spent in an election," *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997), the true sources of political contributions funneled through corporate straw donors, *CLC I*, 925 F.3d at 354, and itemized

accounting of in-kind contributions from a purportedly independent political committee to a presidential candidate, *CLC II*, 2020 WL 2996592, at *6.

In this Circuit, "the nature of the information allegedly withheld is critical to the standing analysis." *Common Cause*, 108 F.3d at 417. To be sure, *Akins* standing is not available when the information plaintiffs seek is already available to them or is simply a legal determination about what FECA prohibits. *See id* at 418*; Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001). But injury-in-fact is established so long as plaintiffs "show that, if they prevail, some information helpful to them would be newly disclosed." *CLC II*, 2020 WL 2996592, at *5.

Here, if plaintiffs prevail, they would gain *new factual information* that is helpful and required to be disclosed under FECA, including information related to Bush's undisclosed campaign activities prior to announcing his candidacy on June 15, 2015 and the true value of RTR's in-kind contributions to the Bush campaign. Compl. ¶¶ 9-10. Intervenor argues that plaintiffs have not pleaded an informational injury because RTR and the Bush campaign "filed public reports and disclosed all information FECA requires." Int. Br. at 9. This is false and misunderstands the inquiry. The relevant question is not whether respondents filed any disclosure reports or disclosed some campaign finance information, but rather: "Would these disclosures look different if [plaintiffs were] successful in [their] suit?" *CLC II*, 2020 WL 2996592, at *6. The Court must evaluate, in other words, whether plaintiffs gain new disclosure information assuming their allegations are true. *See id.*

1. Plaintiffs do not know the extent of the Bush campaign's spending during his undeclared but de facto candidacy.

Bush signed his statement of candidacy on June 5, 2015 and formally declared his candidacy on June 15. *See* Ex. C. But reports and public statements suggest that he was a candidate "at least since January 2015." Dkt. 1-1 ¶ 5. Through much of the pre-June 15 period, therefore,

Bush was either a de facto candidate or was engaged in testing-the-waters activities; consequently, much of his and RTR's activity was subject to FECA's comprehensive disclosure requirements. Federal law requires the reporting of all "contributions" and "expenditures" connected to any testing-the-waters activity, and upon commencement of a candidacy, regular reporting of all campaign receipts and disbursements, including in-kind contributions from individuals or other committees. *See* 52 U.S.C. § 30104; 11 C.F.R. § 101.3; *see also Instructions for FEC Form 3P and Related Schedules* 5, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3pi.pdf. The Bush campaign's first FEC report, however, filed July 15, 2015, includes receipts and disbursements going back only to June 4, 2015.[3] At issue, then, are nearly six months of entirely unaccounted-for activities, including in-kind contributions from RTR, that plaintiffs contend were conducted either while Bush was testing the waters or had effectively commenced his candidacy.

Exactly when Bush commenced his active candidacy, as intervenor effectively concedes, determines what Bush's reporting obligations were and the extent of the information unlawfully withheld from plaintiffs and the general public. Indeed, RTR admits that plaintiffs' "alleged informational deprivation is contingent on a legal determination by the Commission that Governor Bush was a candidate under FECA." Int. Br. at 3. RTR thus implicitly agrees that if Bush had, in fact, become a candidate earlier than he claimed—as plaintiffs alleged in their administrative complaints, *see* Dkt. 1-1 ¶¶ 3-10—FECA's disclosure requirements would have applied earlier and respondents would have failed to meet them.

RTR has no real dispute with plaintiffs' theory of informational deprivation here—it only disputes certain facts alleged by plaintiffs in their complaints. *See* Int. Br. at 3 ("Bush was not a

[3] Jeb 2016, Inc., 2015 July Quarterly Report, FEC Form 3P (filed July 15, 2015; amended Jan. 31, 2016), https://docquery.fec.gov/pdf/580/201601319005221580/201601319005221580.pdf.

candidate for federal office at that time under FECA or corresponding regulations, so FECA's registration and reporting requirements had not yet been triggered."). But this kind of challenge to standing fails at the motion to dismiss stage because the Court "must take all of the factual allegations in the complaint as true," *Iqbal*, 556 U.S. at 678, and "draw all reasonable inferences . . . in the plaintiffs' favor." *Hancock*, 830 F.3d at 513-14.

The test to determine whether someone has transitioned from testing the waters into candidacy is a fact-intensive inquiry that hinges on the individual's subjective intentions after crossing the $5,000 threshold for "contributions" or "expenditures," 52 U.S.C. § 30101(2), as reflected in the would-be candidate's public statements, election activities, fundraising, and other indicia of intent. *See* FEC Advisory Op. 2015-09 at 5 ("[I]f an individual has raised or spent more than $5,000 on 'testing-the-waters' activities, the individual becomes a candidate when he or she decides to run for federal office."); 11 C.F.R. § 100.72(b) (non-exhaustive list of activities that may objectively indicate when a candidacy has commenced, such as fundraising in excess of what could be reasonably expected for exploratory activity and election activities over a protracted period of time). Accordingly, while there is ample "reason to believe" Bush became a candidate prior to June 2015, an investigation remains necessary to pinpoint when precisely Bush became a candidate and, consequently, when his FECA reporting obligations commenced.

Similarly, determining when a person has begun testing the waters prior to candidacy is a fact-intensive inquiry that merits an agency investigation. Dkt. 1-2 ¶ 42; *see also* 11 C.F.R. §§ 100.131, 110.2(l)(1) (listing de facto testing-the-waters activities including polling costs, travel, and administrative and staffing expenses for offices in presidential primary states). Even if the FEC found no "reason to believe" that Bush commenced a de facto campaign before June 2015, available facts show that Bush was at least testing the waters in this period, given that by March

he had already raised over $45 million dollars and reportedly made numerous trips to battleground states to meet with party leaders and conservative donors.[4] *See supra* at 11. Indeed, FEC advisory opinions have made clear that travel and other expenses related to a prospective candidate's trips to early primary election states to confer with party leaders and appear at state and regional party meetings constitute testing-the-waters activities. FEC Advisory Op. 1985-40 at 6-7. Under FECA, Bush was required to report all funds received or payments made in connection with such testing-the-waters activity as "contributions or expenditures under the Act" in "the first report filed by [his] principal campaign committee." 11 C.F.R. § 101.3; *see also id.* § 100.72(a). But because Bush has maintained that he did not commence even testing-the-waters activities in the months prior to June 2015, this would mean that the apparently extensive campaign-related activity he conducted in that period has not been reported *in any form*.

Regardless of the exact date Bush became a candidate, there is also reason to believe that he benefited from—and failed to report—in-kind contributions from RTR in the pre-June 2015 period when his candidacy is in dispute. Plaintiffs have alleged that Bush established, financed, maintained, or controlled RTR as a shadow campaign vehicle to raise funds, install campaign staff, and develop a campaign strategy. *See* Compl. ¶¶ 25-29; Dkt. 1-1 ¶¶ 12-17. In this period, RTR reported expenditures on, among other things, finance consulting, political strategy consulting, communications consulting, digital consulting, travel, survey research, and event expenses.[5] An FEC investigation is needed to determine the extent to which these and other expenditures

[4] RTR, Receipts (Jan. 1, 2015 – Feb. 28, 2015), FEC, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00571372&two_year_transaction_period=2016&min_date=01%2F01%2F2015&max_date=02%2F28%2F2015 (last visited July 8, 2020).

[5] RTR, Disbursements, Jan. 1 – May 31, 2015, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00571372&two_year_transaction_period=2016&min_date=01%2F01%2F2015&max_date=05%2F31%2F2015 (last visited July 8, 2020).

constituted unreported in-kind contributions to the Bush campaign.

Intervenor contends that plaintiffs do not actually lack any of this information because "[RTR] and the other respondents filed public reports and disclosed all information FECA requires." Int. Br. at 9. If RTR means to suggest that all of the FECA-required information outlined above can be found in its own FEC disclosure reports, this is false.

First, it is clear that RTR did not finance all of Bush's pre-candidacy campaign-related activities, and thus its reports could not cover all of the information the Bush campaign was required to disclose. For example, his campaign reported some in-kind contributions from Bush himself for purported testing-the-waters activities, but they do not appear to cover the full scope of Bush's campaign spending during the months preceding his official campaign announcement. The campaign reported only $1,089 for "in-kind (ttw): travel/airfare/lodging,"[6] but this amount cannot possibly account for Bush's reported zigzags around the country to meet with high-profile individuals and to attend countless fundraising events to solicit many hundreds of thousands of dollars to be spent in support of his campaign by RTR. *See* Dkt. 1-1 ¶¶ 20-23; Dkt. 1-2 ¶¶ 10-11.

Moreover, even with respect to Bush pre-candidacy activities connected to RTR, the super PAC's reports are not itemized in such a way as to disclose which of its disbursements directly subsidized Bush's activities, as is further described below. *See infra* Part I.A.2. Otherwise put, while RTR may have disclosed *all* of its disbursements in committee reports covering this pre-candidacy period, plaintiffs still do not know *which* of RTR's disbursements, in whole or part,

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[6] Jeb 2016 Inc., 2015 July Quarterly Report (amended), *supra* note 3, at 1,688; *see also* Jeb 2016, Inc., Disbursements for "ttw" or "testing the waters," 2015-16, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00579458&two_year_transaction_period=2016&disbursement_description=testing+the+waters&disbursement_description=ttw (last visited July 8, 2020) (showing 50 total disbursement entries described as "ttw" or "testing the waters," and only one such disbursement specified as travel-related).

qualify as in-kind contributions to the Bush campaign. Its reports simply do not answer the question that plaintiffs are asking. *CLC II*, 2020 WL 2996592, at *6.

2. Plaintiffs do not know the magnitude of Right to Rise's in-kind contributions to the Bush campaign arising from Bush's extensive involvement in Right to Rise's operations.

Plaintiffs have also been deprived of full disclosure of RTR's relationship with the Bush campaign, which in turn determines how much of RTR's supposedly independent spending in fact constituted in-kind contributions to the Bush campaign. Compl. ¶ 9. To be sure, Bush and his agents were prohibited by 52 U.S.C. § 30125(e)(l) from establishing or financing RTR in the first place, but since, as plaintiffs contend, they did take these actions, plaintiffs are entitled to all reportable information that arises from this illegal undertaking.

Under FECA, when a political committee like RTR makes a contribution, including any in-kind contribution, to a candidate committee, both the political committee and the candidate committee must disclose the contribution. *See* 52 U.S.C. § 30104(b)(2)(D), (b)(6)(B)(i). And because an in-kind contribution is also deemed an "expenditure," both committees must disclose it as such, along with the person to whom the expenditure was made and its date, amount, and purpose. *See id.* § 30104(b)(2)(H)(i), (b)(5)(A), (b)(6)(B)(i); 11 C.F.R. § 104.13(a). In other words, FECA requires complete, itemized disclosure of a political committee's in-kind contributions to a presidential candidate by both the committee and the candidate.

Expenditures that must be reported as in-kind contributions can arise from various circumstances. For instance, payments by a political committee for testing-the-waters activities benefiting a presidential candidate before an official announcement of candidacy are in-kind contributions, which must be disclosed in the candidate's authorized committee's first disclosure report. 11 C.F.R. §§ 100.72(a), 110.2(*l*), 9034.10. When a committee that is not deemed affiliated with an candidate committee but is "established, financed, maintained, or controlled by, or acting

on behalf of" a federal candidate pays "for costs that could and should otherwise be paid for by a candidate's authorized committee," those payments are also in-kind contributions. Leadership PACs, 68 Fed. Reg. 67013, 67017 (Dec. 1, 2003); *see also* 11 C.F.R. § 100.5(e)(6). And when a political committee makes a coordinated expenditure with a candidate, the candidate's campaign must report it as an in-kind contribution. 52 U.S.C. § 30116(a)(7)(B)(i); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 438 (2001) ("Expenditures coordinated with a candidate . . . are contributions under the Act.").[7]

In *CLC II*, the Court held that plaintiffs suffer informational injury when they lack knowledge about which disbursements, in whole or part, by a super PAC are actually in-kind contributions to a presidential campaign. 2020 WL 2996592, at *6. Plaintiffs in *CLC II* sued the FEC to challenge its dismissal of an administrative complaint alleging that Hillary Clinton's 2016 presidential campaign and a super PAC, Correct the Record ("CTR"), violated FECA by failing to report upwards of $6 million in coordinated expenditures. *Id.* at *1. The Clinton campaign and CTR intervened, arguing that any of CTR's expenditures that could be deemed coordinated (and therefore in-kind contributions) were already available to plaintiffs in existing disclosure reports. *Id.* at *5. The Court rejected this argument, accepting plaintiffs' allegations that the committees had coordinated on at least *some* expenditures, and finding that CTR's existing reports and its practice of reporting expenditures in lump sums made it impossible to know *which* of its disbursements and *how much* of its specific disbursements were "actually made in coordination with [the Clinton campaign]." *Id.* at *6. The Court also rejected any notion that the missing

[7] Intervenor's argument that "FECA does not require the disclosure of the relationship between RTR and the Bush campaign, with the exception of expenditures to common vendors," Int. Br. at 10, is clearly wrong. FECA requires all political committees to report contributions to federal candidates, including coordinated expenditures and other forms of in-kind contributions.

information was simply a legal conclusion or duplicative of information already disclosed. *Id.* at *5-6 (distinguishing *Wertheimer*, 268 F.3d at 1075).

Here, as in *CLC II*, plaintiffs are deprived of information as to which of a super PAC's disbursements are actually in-kind contributions to a 2016 presidential campaign. By virtue of Bush's reported involvement in RTR's operations, it is likely that some, or even most, of RTR's spending financed Bush's purported testing-the-waters activities or paid for goods and services rendered to the Bush campaign—and any such spending had to be reported as in-kind contributions in itemized form as FECA requires. But neither RTR nor the Bush campaign disclosed *any* in-kind contributions between them, making it impossible to know the full scope of RTR's financial relationship with the Bush campaign. *See* Compl. ¶ 9.

One example is the hundreds of thousands of dollars RTR spent on travel in the period before Bush officially declared his candidacy. RTR reported, for example, $3,107 in a transaction dated April 13, 2015 to Delta Airlines for "travel." Ex. E (RTR Travel Payment). Plaintiffs' administrative complaints details Bush's extensive travel to attend lavish RTR fundraisers all over the country. If some proportion of that air travel "could and should otherwise have been paid for by" Bush, 68 Fed. Reg. at 67017, then that portion should have been reported by both RTR and the Bush campaign as an in-kind contribution to the candidate.

There is also reason to believe that RTR made "payment[s] . . . of compensation for the personal services of another person" rendered to the Bush campaign, 52 U.S.C. § 30101(8)(A)—which would also constitute an in-kind contribution under FECA. Plaintiffs' administrative complaints allege that in April and May of 2015, Bush and his agents planned to delegate certain "nuts and bolts" communications to RTR, such as "individualized online advertising and running phone banks," to parrot messaging developed by the campaigns authorized committee. Dkt. 1-1

¶ 17. As in *CLC II*, an FEC investigation of Bush's involvement in RTR operations during this time would shed light on whether some unknown part of the $1,232,500 spent on "digital media placement" and the nearly $130,000 spent on "phone calls" should have been reported as in-kind contributions to the Bush campaign.[8]

In short, plaintiffs have reason to believe that much of RTR's $118 million in total disbursements should have been reported as in-kind contributions to the Bush campaign. *See* Ex. D (RTR Financial Summary). But plaintiffs are left in the dark as to which of RTR's disbursements and how much of specific disbursements should have been reported as in-kind contributions.

3. Plaintiffs are not seeking a mere "legal determination."

Intervenor does not even attempt to claim that RTR or the Bush campaign reported any in-kind contributions, and instead maintains that plaintiffs merely seek a "legal determination" that respondents violated FECA. Int. Br. at 11-12. But none of the cases intervenor cites suggest that the information plaintiffs seek in this case—months of unreported expenditures by a presidential candidate and the precise amounts and purposes of in-kind contributions from a super PAC controlled by that candidate to his own campaign—amounts to a mere legal conclusion. Indeed, in *Common Cause*, the D.C. Circuit recognized that knowing "how much money a candidate spent in an election" is precisely the informational interest FECA is designed to protect. 108 F.3d at 418.

Intervenor's reliance on *Wertheimer* is similarly misplaced. The "impetus" for that lawsuit was plaintiffs' dissatisfaction with the FEC's failure to find that the DNC's spending on certain advertisements in connection to President Clinton's 1996 campaign constituted illegal coordinated expenditures under the Presidential Election Campaign Fund Act. 268 F.3d at 1072. But those plaintiffs *already knew* exactly what part of the DNC's spending was coordinated with President

[8] *See* RTR Independent Expenditures, *supra* note 2.

Clinton because, as no one disputed, FECA already required party committees to report their coordinated expenditures with presidential candidates. *Id.* at 1073; *see also id.* at 1075 (Garland, J., concurring) ("[A]ppellants do not dispute[] that political party committees are already required to report and to identify such coordinated expenditures as § [30116(d)] expenditures in their FECA filings."). If plaintiffs had prevailed, the result would have been to force the candidate to "disclose" the same coordinated expenditures already disclosed as such by the DNC. Here, neither RTR nor the Bush campaign has disclosed *any* in-kind contributions to each other.

Nor does *CREW v. FEC*, 799 F. Supp. 2d 78 (D.D.C. 2011) support intervenor's view that knowledge of in-kind contributions is a mere legal determination. That decision found that the plaintiffs lacked informational standing to challenge the FEC's failure to take enforcement action regarding an excessive in-kind contribution that a congressmember's PAC made to his presidential campaign in the form of $10,243 in travel expenses. *Id.* at 88. The plaintiffs already had all of the information they claimed to seek, because the FEC had conducted an investigation and published a report clarifying precisely how much the PAC spent on travel expenses, and under what factual circumstances. *Id.* The only remaining question was a legal dispute about how much of the $10,243 expenditure should be considered a contribution to the presidential campaign versus a non-contribution expenditure in furtherance of the PAC's own mission. *Id.* The court viewed the plaintiffs' desire as one simply to "reclassify disbursements of which they are already aware, and which are already part of the public record." *Id.* at 89. This case is different. Here, no FEC investigation appears to have occurred[9] and plaintiffs are unable to determine even which

[9] Based on intervenor's representations about the administrative proceedings, to the extent they can be credited as accurate or complete, the FEC has not undertaken any investigation or voted to proceed beyond the reason-to-believe stage. RTR Mot. to Intervene at 6. But RTR cannot speak for other key respondents: the Bush campaign and Bush himself. *See* MUR 6928 (Rick Santorum), https://www.fec.gov/data/legal/matter-under-review/6928 (designating candidate as "primary

disbursements of many millions of dollars in "independent" spending could constitute in-kind contributions. And as *CLC II* recently held, this is *factual* information indicating informational injury, not a mere legal determination. 2020 WL 2996592, at *6.

Intervenor also suggests that the information plaintiffs seek is already available to them in Jeb 2016's and RTR's existing "public reports." Int. Br. at 9. The foregoing discussion explains why RTR's and Bush's FEC filings leave huge informational gaps in the record. In any event, intervenor's authority for this argument is unavailing. In *Vroom v. FEC*, 951 F. Supp. 2d 175 (D.D.C. 2013), plaintiffs complained that the FEC had wrongly approved the disaffiliation of two corporate PACs, and as a result, the PACs' combined contributions exceeded FECA's contribution limit. *Id.* at 176. But the Court found that the plaintiffs sought information already reported in each PAC's respective filings, so did not "suffer[] a justiciable injury from having to review multiple filings . . . to ascertain contributions instead of . . . a single filing." *Id.* at 178-79. Here, there is no single filing or *combination* of filings by Bush and RTR that can account for the possibly millions of dollars in unreported spending and in-kind contributions arising from their activities.

B. Plaintiffs' Inability to Access FECA Disclosure Information Directly and Concretely Injures Their Interests.

A plaintiff suffers an injury in fact when it shows that it has been deprived of information that must be publicly disclosed pursuant to a statute and "there is no reason to doubt [the plaintiff's] claim that the information would help them." *CLC I*, 952 F.3d at 356 (quoting *Envtl. Def. Fund*, 922 F.3d at 452). "The helpfulness of the information does not depend on the plaintiff's status as a voter," *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 13 (D.D.C. 2019) ("*AAN*"), but on whether the information sought would be "useful" to plaintiffs and "to others to whom they would

respondent" in 2015-16 testing-the-waters case). The RTR leadership PAC also participated as a respondent before the FEC, but only the super PAC has intervened here. Int. Br. at 2.

communicate it." *Id.* The informational interests advanced by FECA apply in full to organizational plaintiffs like CLC and Democracy 21 who "communicate" such information to voters to facilitate informed participation in the political process. *Akins*, 524 U.S. at 21.

CLC's and Democracy 21's injuries in this case are concrete and directly impact their organizational missions to "advance[] democracy" and "mak[e] democracy work for all citizens." Compl. ¶¶ 14, 20; *see* Fischer Decl. ¶¶ 5, 10-11 (attached hereto as Ex. A); Wertheimer Decl. ¶¶ 2, 10 (attached hereto as Ex. B). In pursuing their missions, CLC and Democracy 21 are uniquely positioned among nonprofit organizations in their focus on issues of campaign finance and political disclosure and their concentration on legal work and public education in these areas.

CLC was founded in 2002 by Trevor Potter, a former FEC chairman and commissioner, initially for the purpose of defending the Bipartisan Campaign Reform Act of 2002 against constitutional challenge. Fischer Decl. ¶ 4. Today, CLC's mission includes advancing democracy by defending campaign finance reforms, ensuring their proper implementation and enforcement, providing advice and assistance in the drafting and implementation of new laws, and serving as a legal and policy resource for the public and other organizations. *Id.* ¶¶ 5-6. Multiple courts of this Circuit have recognized that "full and accurate campaign-finance reporting is crucial to CLC's mission of 'improving democracy and promoting representative, responsive, and accountable government for all citizens,' in service of which it 'engages in litigation, regulatory practice, legislative policy, and public education.'" *CLC II*, 2020 WL 2996592, at *6. *See also CLC I*, 952 F.3d at 355-56; *CLC v. FEC*, 245 F. Supp. 3d 119, 128 (D.D.C. 2017).

Democracy 21 was founded in 1997 by Fred Wertheimer, who previously served from 1981 to 1995 as President of Common Cause, a nonpartisan advocacy group focusing on campaign finance and other good government reforms, and who has worked for over four decades on issues

related to money in politics. Wertheimer Decl. ¶¶ 1-2. Democracy 21 also frequently participates in campaign finance litigation and has been active in filing comments and other submissions in proceedings before the FEC. *Id*. ¶¶ 6-8.

Plaintiffs have an injury in fact because "[t]here is 'no reason to doubt' that the disclosures they seek would further their efforts to defend and implement campaign finance reform." *CLC I*, 952 F.3d at 356 (*quoting Friends of Animals*, 824 F.3d at 1041). Indeed, the incredible scale of the potential violations in this case makes it evident that knowing such information is critical not only "to defend and implement campaign finance reform" but also to realize FECA's purpose of providing "transparency . . . of who is giving and who is spending money." *Kean for Cong. Comm. v. FEC*, 398 F. Supp. 2d 26, 38 (D.D.C. 2005). In the 2016 cycle, the Bush campaign reported $35 million in disbursements. Ex. F (Jeb 2016 Financial Summary). RTR reported $118 million in disbursements, including $87 million in independent expenditures. *See* Ex. D (RTR Financial Summary). Depending on the extent to which those disbursements should have been reported as spending by the Bush campaign, Bush's true 2016 cycle spending could be anywhere between $35 million and $153 million.

Plaintiffs use information from FEC disclosure reports to prepare complaints submitted to the FEC and to engage in rule-makings as part of its regulatory practice, Fischer Decl. ¶¶ 31-33; Wertheimer Decl. ¶ 8; to draft briefs and other materials submitted to state and federal courts in campaign finance litigation, Fischer Decl. ¶ 38; Wertheimer Decl. ¶¶ 6-7; and to prepare testimony submitted to legislators, craft legislation, and lobby for its enactment, Fischer Decl. ¶¶ 27, 29; Wertheimer Decl. ¶ 9.

Another key way that plaintiffs work to advance their missions involves researching the money used to influence elections—including, critically, analysis of FEC disclosure reports—and

communicating their research to voters. Fischer Decl. ¶¶ 12-19; Wertheimer Decl. ¶¶ 3-5. Plaintiffs rely on FECA disclosure information to develop a wide variety of public education materials, including fact sheets, reports, and op-eds, to inform voters about the sources and extent of candidates' financial support and the role of outside groups in elections. *Id.* These activities are harmed when candidates and committees fail to file accurate disclosure reports. Fischer Decl. ¶¶ 17, 20-21; Wertheimer Decl. ¶ 10.

II. The Commission's Complete Failure to Act Inflicts Discrete Injuries Uniquely Redressed Through FECA's Cause of Action for Unlawful Delay.

As the administrative complainants, CLC and Democracy 21 are the only persons legally entitled to seek judicial review of the FEC's failure to "act on [their] complaint[s] during the 120-day period beginning on the date the complaint is filed," by "fil[ing] a petition with" this Court. 52 U.S.C. § 30109(a)(8)(A). Congress therefore granted administrative complainants a right to FEC action on their duly filed complaints by conferring upon them a cause of action to enforce that right. The FEC's 1,870-day—and continuing—failure to act on plaintiffs' administrative complaints violates that right, and inflicts concrete injuries on plaintiffs in the process. Intervenor ignores this basis for plaintiffs' standing and ignores the unique informational consequences of the FEC's failure to act.

To be sure, "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). However, "the violation of a procedural right granted by statute *can* be sufficient in some circumstances to constitute injury in fact." *Id.* (emphasis added). One of those "circumstances," the Supreme Court recognized, is the "'inability' to obtain information that Congress ha[s] decided to make public" under statutes like FECA and FOIA. *Id.* (citing *Akins*, 524 U.S. at 20-25).

Here, there is a significant and independent informational injury—and one not present in a

suit under section 30109(a)(8) challenging the FEC's *dismissal* of an administrative complaint—arising from the fact of agency inaction itself, because the Commission's failure to resolve plaintiffs' administrative complaints means no information about its disposition of the complaints can be provided to the plaintiffs or made publicly available, as FECA, FOIA, and FEC regulations all require. *See* 52 U.S.C. § 30109(a)(4)(B)(ii) (requiring that the Commission "shall make public" any final conciliation agreement or "determination that a person has not violated" FECA); 5 U.S.C. § 552(a)(2)(A), (a)(5) (requiring publication of all final orders and opinions in agency adjudications and records of final votes of each member in "every agency proceeding" by multi-member agencies); 11 C.F.R. § 111.20(a) (providing that when the Commission finds "no reason to believe or no probable cause to believe or otherwise terminates its proceedings" in administrative enforcement matters, it "shall make public such action and the basis therefor").

A. Congress created a right to FEC action on administrative complaints by authorizing a judicial remedy for unlawful FEC delay.

When Congress enacts a statute entitling a person to request agency action and creates a cause of action to challenge the agency's failure to act upon that request, it exercises its authority to "define injuries and articulate chains of causation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment). Indeed, the Supreme Court and this Circuit have recognized that FECA is the type of statute that creates a legal right to certain action, similar to FOIA. *Akins v. FEC*, 101 F.3d 731, 736 (D.C. Cir. 1996) (en banc) (noting that "[a]lthough Congress may not 'create' an Article III injury that the federal judiciary would not recognize, any more than Congress could amend the Constitution . . . Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury"), *vacated on other grounds*, 118 S. Ct. 1777 (1998).

Congress provided that "[a]ny person who believes a violation of [FECA] has occurred[]

may file a complaint with the [FEC]," and that "[a]ny party aggrieved by an order of the [FEC] dismissing a complaint filed by such party . . . or by a failure of the [FEC] to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with" this Court. 52 U.S.C. § 30109(a)(8)(A). In providing for judicial review of agency delay, Congress exercised its power to "define injuries and articulate chains of causation that will give rise to a case or controversy" under Article III, *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring), and plaintiffs have identified concrete informational and organizational harms that flow from the FEC's violation of this congressionally conferred right.

As the facts of this case make clear, if plaintiffs' right to FEC action under section 30109(a)(8)(C) cannot be vindicated, the harm to plaintiffs is not simply the agency's failure to resolve their administrative complaints expeditiously, but rather its failure to resolve the complaints *at all* or provide any explanation for that failure. The injury here is thus analogous to that of a petitioner who fails to obtain an agency response to a petition for rulemaking. *See, e.g.*, *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 538 (S.D.N.Y. 2009) (agreeing that "an agency presented with a petition for rulemaking must, at a minimum, respond to that petition, and that the petitioning party has standing to compel a response unreasonably withheld"). Like a petitioner who has standing to sue for inaction, CLC and Democracy 21 seek to compel a response from the FEC on their administrative complaints. As in the context of a petition for rulemaking that languishes unanswered, FECA's statutory cause of action for delay is necessary to ensure complainants' right to agency action as well as to an explanation for the agency's failure to act. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a). *See also Dem. Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (holding the FEC must "explain coherently the path [it is] taking" when it resolves an enforcement matter).

Other district court decisions have assumed that FEC delay and FEC dismissal are identical for Article III purposes, but none have considered the unique consequences of FEC inaction on complainants' interests or involved a delay so severe that it bordered on constructive dismissal. *See CLC v. FEC*, No. 18-cv-0053-TSC, 2020 WL 2735590, at *2 (D.D.C. May 26, 2020) (holding that "§ 30109(a)(8)(A) does not confer standing to challenge [the] FEC's failure to take action within 120 days" but undertaking no analysis of the informational effects of protracted inaction); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (considering only the possible injury from "depriv[ation]" of the "benefit of FECA's timetable for processing complaints"). Neither of these decisions involved a scenario in which the FEC completely failed to resolve or "otherwise terminate[]" its proceedings on an administrative complaint, 11 C.F.R. § 111.20(a), much less considered allegations of concrete informational and organizational harm flowing specifically from that failure. Nor did either analyze whether different stages of the administrative process could give rise to different Article III injuries. Both simply held that under *Common Cause*, there is no distinction between the two causes of action. *See* 2020 WL 2735590, at *2.

But *Common Cause* was a dismissal case, not a delay case, and stated only that section 30109(a)(8)(A) does not by itself automatically confer standing under Article III. 108 F.3d at 419. The decision had no occasion to address whether FEC inaction is distinct from an unlawful FEC dismissal for constitutional standing purposes. *Common Cause* certainly did not purport to bar plaintiffs from demonstrating how "the violation of a procedural right granted by statute" "constitute[s] injury in fact" unique to their circumstances and interests. *Spokeo*, 136 S. Ct. at 1549; *accord Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064 (D.C. Cir. 2019) ("'[A]n alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests.'") (quoting *Strubel v. Comenity Bank*,

842 F.3d 181, 190 (2d Cir. 2016)). In fact, there is ample reason to treat dismissal and delay actions under FECA as distinct for Article III purposes, not least because of the unique informational deficits arising in a delay suit. Indeed, the delay here—which, as RTR emphasizes, Int. Br. at 5, will likely extend beyond the five-year statute of limitations[10]—threatens to permanently deprive plaintiffs of information to which they are entitled under FECA. Plaintiffs thus can and do show that the FEC's extreme paralysis in these matters concretely injures their informational interests and directly impairs activities central to their organizational missions. *Common Cause* cannot be read to preclude such a showing.

B. The FEC's complete failure to act on plaintiffs' administrative complaints deprives plaintiffs of information that they have a legal right to receive and impedes their advancement of their missions.

As RTR acknowledges, "[a]dministrative investigations under [section 30109] remain confidential until the Commission completes its administrative process." Int. Br. at 5 (citing 52 U.S.C. § 30109(a)(12)). However, RTR fails to connect this observation to a key consequence of the FEC's failure to act on the complaints here: the FEC has a non-discretionary duty to disclose its findings to the complainants and place certain materials in the enforcement file on the public record, but only once the administrative process is complete. By withholding final action on the complaints, the FEC shirks its statutory and regulatory obligations to reveal its decision-making to complainants and the public and deprives plaintiffs of information to which they are entitled.

[10] RTR incorrectly identifies 52 U.S.C. § 30145 as the relevant statute of limitations, but that section applies only to *criminal* FECA violations. As this Court has noted, "FECA itself contains no explicit limitations period" applicable to civil enforcement actions, but "courts have applied the catch-all five-year limitations period set forth in 28 U.S.C § 2462" to cases brought by the FEC. *AAN*, 410 F. Supp. 3d at 23. It is well settled, however, that FECA's statute of limitations does not apply to actions for declaratory or injunctive relief. *FEC v. Nat'l Repub. Sen. Comm.*, 877 F. Supp. 15, 20 (D.D.C. 1995); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), *abrogated in part by Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

The Commission's complete failure to take action here inflicts a distinct form of informational harm on CLC and Democracy 21, even apart from any missing FECA disclosures from the administrative respondents: it permanently cuts off plaintiffs' ability to access portions of the enforcement file that FECA and agency regulations require the FEC to make public as soon as it resolves or "otherwise terminates" enforcement cases. 11 C.F.R. § 111.20(a). Therefore, unlike actions under section 30109(a)(8) challenging the unlawful *dismissal* of an FEC complaint, which hinge on the Commission's substantive justifications for its action as provided in relevant decisional documents, "delay" suits challenge the FEC's complete failure to take action on an administrative complaint—meaning there is no substantive explanation available because the case files remain confidential. 52 U.S.C. § 30109(a)(12)(A); 11 C.F.R. § 111.21 (confidentiality).

Under FECA, FOIA, and FEC regulations, the FEC is bound to make its enforcement dispositions public, whether or not they ultimately reflect a substantive determination of liability. First, FECA itself expressly requires the Commission to disclose conciliation agreements, as well as any "determination that a person has not violated" the law. 52 U.S.C. § 30109(a)(4)(B)(ii). In addition, the Commission has implemented FECA's statutory publication requirements by affirmatively committing to release any "finding of no reason to believe or no probable cause to believe" or other "terminat[ion of] proceedings" and "the basis therefor," 11 C.F.R. § 111.20(a)—and obviously the Commission is bound to follow its own regulations. Finally, FOIA compels the FEC to make public all opinions and orders in adjudications, as well as commissioner voting records in all agency proceedings. 5 U.S.C. § 552(a)(2)(A), (a)(5).

The D.C. Circuit recently affirmed that FECA's goals of "deterring future violations and promoting Commission accountability" were sufficient to justify not only the Commission's "long-standing regulation requiring it to make public its action terminating a proceeding and 'the

basis therefor,'" but also its 2016 Disclosure Policy Statement further committing to place 21 specific categories of enforcement documents on the public record in all closed matters, "regardless of the outcome." *Doe 1 v. FEC*, 920 F.3d 866, 870-71 (D.C. Cir. 2019) (citing 11 C.F.R. § 111.20(a); 81 Fed. Reg. at 50703). The court rejected the contention that "FECA's specification of what the Commission is *required* to disclose deprives the Commission of authority to disclose anything else," *id.* at 870 (emphasis added), instead noting that the FEC has permissibly bound itself to provide additional disclosure through a "properly promulgated, substantive agency regulation." *Id.*

Intervenor speculates about the possible reasons for the Commission's inordinate delay in this matter, but this hypothesizing only underscores the informational vacuum created by the FEC's failure to resolve plaintiffs' complaints. *See* Int. Br. at 5 (suggesting primarily that inaction might be the result of "an impasse" among Commissioners). Indeed, while FEC regulations and enforcement policies provide administrative *respondents* with numerous avenues to inquire and remain informed about the status of open matters, they afford no such opportunities to complainants until the process concludes. *See FEC Guidebook for Complainants and Respondents on the FEC Enforcement Process* 11, https://transition.fec.gov/em/respondent_guide.pdf (noting that respondents will receive status reports at regular intervals when the Commission fails to take any action within twelve months and "may contact OGC at any time to ask questions they may have about a matter, such as the current status of the case"). Complainants such as CLC and Democracy 21, meanwhile, are left in the dark until the matter is closed and appropriate investigative documents are put on the public file.

The FEC's failure to take any action on plaintiffs' administrative complaints for over four and half years harms concrete and particularized interests that FECA aims to protect. By refusing

to decide or take dispositive action, the Commission withholds factual information in the MUR file and shields its decision-making processes from the public scrutiny that FECA, FOIA, and FEC regulations require; as a result, plaintiffs are directly deprived of disclosure regarding the disposition of their complaints. *See Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (finding cognizable injury where agency inaction deprived plaintiff of key information needed to effectuate mission). This withholding of information also means that complainants have no knowledge of any factual record generated by the proceedings or an investigation, nor of the Commission's legal interpretation of the FECA provisions and FEC regulations at issue.

This informational deficit has a concrete impact on plaintiffs' programmatic activities detailed in the discussion of plaintiffs' organizational standing, including their longstanding watchdog programs and public education efforts. *See infra* Part III. Without information about the disposition of their FEC complaints or the Commission's decision-making, plaintiffs are unable to perform effectively as regulatory watchdogs, provide informed policy analysis to the public and partner organizations, or identify and prioritize necessary reforms to the campaign finance laws. All of these programmatic efforts rely on knowing how the FEC is interpreting and applying FECA. *See infra* Part III.

C. Congress empowered complainants to challenge unlawful FEC delay to vindicate informational rights and procedural safeguards essential to FECA's core purposes.

The existence of a separate cause of action for complainants to challenge unwarranted delay is an integral feature of FECA's carefully balanced enforcement regime, which gives the FEC an initial and exclusive gatekeeping role in the civil enforcement process but relies on private complainants to perform essential accountability functions when that process breaks down. Indeed, the delay suit is the sole mechanism Congress provided to ensure that the FEC processes administrative complaints even-handedly and consistent with the law; it is likewise the only way

complainants can vindicate concrete informational rights specific to the enforcement process itself. *See, e.g.*, *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (finding that FECA precludes delay suits by administrative respondents and noting that "Section [30109(a)(8)] is the only provision of the Campaign Act that provides for judicial review at behest of private parties—and although it creates a cause of action for unreasonable delay, it does so only in the District of Columbia and only for people who have filed an administrative complaint.").

Congress enacted section 30109(a)(8)(A) to emphasize the importance of a complainant's right to action at the agency level and to make that right judicially enforceable. The 120-day period prior to judicial review reflects a congressional attempt to give the FEC sufficient time to act while also ensuring that complainants faced with FEC inaction could turn to the federal judiciary—not to address the merits in the first instance, but to force the FEC to do so.

Without the ability to compel agency action in court, complainants have no way to uncover "the basis" of FEC inaction, *see* 11 C.F.R. § 111.20(a), although statutory and regulatory provisions all anticipate that FEC enforcement proceedings will be handled "expeditiously," 52 U.S.C. § 30107(a)(9), and thereafter be made public, *id.* § 30109(a)(4)(B)(ii). *See also* 5 U.S.C. § 552(a)(2), (a)(5). Nothing in FECA or the FEC's longstanding enforcement rules and policies permits the Commission to simply hold a matter open in perpetuity and thereby preempt these disclosure requirements. And indeed, Congress provided complainants the right to sue for delay to protect against that very eventuality. *Cf. CREW v. FEC*, 711 F.3d 180, 186-87 (D.C. Cir. 2013) ("Although the agency may desire to keep FOIA requests bottled up in limbo for months or years on end, the statute simply does not countenance such a system.").

As the FEC itself recently explained in defense of its enforcement-related disclosure practices, FECA and FEC regulations prescribe transparency in connection with closed

enforcement matters to foster openness and accountability, and to enable judicial review:

> An important part of FECA's regime is its detailed statutory framework for enforcement—one which permits more disclosure and openness to scrutiny of legal determinations when enforcement matters are resolved than for other agencies. Congress ensured that the FEC's constructions of FECA during the enforcement process would be open to public and judicial review. . . . FECA's judicial review provision demonstrates that public confidence in the Commission's performance of its enforcement duties in a fair, consistent, and nonpartisan manner is necessary to FECA's goal of preserving public faith in our electoral system.

Br. for FEC, *Doe 1 v. FEC*, 920 F.3d 866 (D.C. Cir. 2019) (No. 18-5099), 2018 WL 3032942, at *27, *29 (D.C. Cir. 2018). FECA's cause of action for delay in unresolved administrative matters is thus preservative of the same "disclosure and openness" interests the Act as a whole is designed to achieve. *Id.*

Permitting total inaction by the FEC is clearly contrary to the intent of Congress, which provided complainants a discrete means of challenging unwarranted delays to ensure "that the Commission does not shirk its responsibility to decide" whether to pursue their administrative complaints. 125 Cong. Rec. S19099 (daily ed. Dec. 18, 1979) (statement of Sen. Pell). Complainants and the public are entitled to know how the FEC administers the vital transparency and anti-corruption laws it is entrusted to enforce. That is why Congress required the Commission to disclose its dispositions and findings when the enforcement process concludes—and in the event it "shirks" this obligation to expose its decision-making to public scrutiny by deferring action on a complaint indefinitely, Congress "provide[d] that a total failure to address a complaint within 120 days is a basis for a court action." *Id.*

III. FEC Inaction Has Caused Organizational Injury by Depriving Plaintiffs of Key Information They Need to Effectuate their Missions.

CLC and Democracy 21 have also suffered organizational injury sufficient to confer standing, because the FEC's failure to act on their complaints has "injured the [plaintiffs'] interest," and they "'used [their] resources to counteract that harm.'" *PETA*, 797 F.3d at 1094

(citation omitted). Timely FEC action resolving administrative complaints and remedying the FECA violations underlying them is essential to the success of programmatic activities advancing plaintiffs' missions, including their public education work to inform voters about campaign spending, legislative advocacy to improve campaign finance laws, and watchdog efforts to monitor officeholders' and candidates' compliance with the law. The Commission's failure to act on the allegations here has forced plaintiffs to divert resources from other planned organizational needs to research and fill in the missing disclosure information they seek in the complaints, including for the benefit of reporters and partner organizations.

The FEC's failure to act on plaintiffs' administrative complaints impairs plaintiffs' activities in two distinct ways. First, the FEC's failure to resolve plaintiffs' administrative complaints means no information in the MUR file can be provided to plaintiffs or the public, depriving CLC and Democracy 21 of any factual or legal analysis generated by the Commission or its Office of General Counsel in processing the complaints. *See supra* Part II. Second, the FEC has failed to require RTR and the Bush campaign to report all FECA-required information about their activities, both before and after Bush formally declared his candidacy. *See supra* Part I.

This informational deprivation has harmed plaintiffs' public education efforts and strained several other key programmatic activities central to their mission. The FEC's protracted delay deprives CLC and Democracy 21 of required FECA disclosure information that both plaintiffs need to inform the public about candidates' financial support and relationships with donors. Fischer Decl. ¶¶ 17-21; Wertheimer Decl. ¶ 10. In addition to their public education efforts regarding this specific controversy, both plaintiffs devote significant resources to educating the public about the role the FEC plays in interpreting and applying federal campaign finance laws. When the Commission allows administrative complaints to languish unresolved across multiple

election cycles, plaintiffs are hindered in their ability to identify emerging problems in the FEC's interpretations of the Act or make informed policy recommendations to address such issues before they recur. Fischer Decl. ¶¶ 28, 34.

Moreover, the FEC's inaction has also directly harmed plaintiffs' watchdog activities by depriving plaintiffs of information they need to conduct their regulatory practice before the FEC and other agencies. To advance their organizational missions of promoting government transparency and accountability, plaintiffs regularly file complaints against individuals or organizations that violate federal election law and participate in rulemaking and advisory opinion proceedings at the FEC to ensure the proper interpretation and enforcement of those laws. Fischer Decl. ¶ 31-33; Wertheimer Decl. ¶ 8. Since their initial administrative complaint in this matter was filed in March 2015, for instance, CLC has filed approximately seventy complaints with the FEC. Fischer Decl. ¶ 32. And with respect to more than forty of CLC's pending FEC complaints, the Commission has exceeded the statutorily allotted 120-day response window. *Id.* The continued failure to act inhibits plaintiffs' regulatory practice, hindering efforts to oversee the enforcement of federal campaign finance laws and hold the FEC accountable.

Finally, FEC inaction also impedes plaintiffs' legislative policy efforts. Complete and accurate disclosure in FEC reports assists plaintiffs in identifying weaknesses in the law or problematic campaign practices that require legislative solutions; plaintiffs then use such information to work with lawmakers to craft such legislation or lobby for its enactment. Fischer Decl. ¶¶ 27-29; Wertheimer Decl. ¶ 9. The FEC's failure to resolve plaintiffs' administrative complaints also means there is incomplete public information about how the FEC interprets and applies, among other key FECA provisions, the reporting requirements for testing-the-waters activity, 11 C.F.R. § 101.3, and the soft money prohibition in 52 U.S.C. § 30125(e)(l). This failure

to provide clarity about the Commission's interpretation of the law impedes a full analysis of the efficacy of FECA and hamstrings plaintiffs' development of policy to improve or extend campaign finance and disclosure laws. Fischer Decl. ¶¶ 22-29.

Plaintiffs' injury here is analogous to, but goes "well beyond," *CLC II*, 2020 WL 2996592, at *16, the injury suffered by the *PETA* plaintiffs. In that case, PETA alleged that the USDA's failure to apply the Animal Welfare Act to birds injured its organizational interests by depriving PETA of information it needed to conduct public education activities central to its mission of preventing animal cruelty and denying it the ability to combat bird abuse through USDA enforcement complaints. 797 F.3d at 1094-95. The Court agreed, finding that the USDA's inaction "deprived PETA of key information that it relies on to educate the public" where public education efforts were "[o]ne of the 'primary' ways in which PETA accomplishe[d] its mission." *Id*. at 1094 (citation omitted). The Court concluded that the agency's inaction, which resulted in the deprivation of "investigatory information," resulted in an injury sufficiently "concrete and specific" to confer organizational standing. *Id*. at 1095.

Similarly, persistent agency inaction here prevents plaintiffs from achieving their mission of strengthening the U.S. democratic process through public education, legislative advocacy and regulatory watchdog efforts. The FEC's extended inaction hinders these efforts by "depriv[ing] [plaintiffs] of key information that [they] rel[y] on to educate the public" and to engage in the "normal process of submitting [FEC] complaints" and in Commission rulemakings and other proceedings. *See PETA*, 797 F.3d at 1094. These injuries are "both concrete and specific to the work in which [plaintiffs are] engaged." *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986).

Intervenor contends that plaintiffs lack organizational standing because the "allegations do

not offer any specific information as to how any particular activity was hampered by Right to Rise's alleged inadequate disclosure." Int. Br. at 17. Not so. Plaintiffs have detailed at length how the deprivation of information related to RTR's and the Bush campaign's financial activities directly harm their specific programmatic efforts in public education, legislative advocacy and regulatory watchdogging. Fischer Decl. ¶¶ 17, 20-21, 26-29, 33-34; Wertheimer Decl. ¶¶ 3-5, 9-10. Regardless, at this stage, "general factual allegations" of injury are sufficient because the court assumes that they "embrace those specific facts that are necessary to support the claim." *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (citation omitted). Plaintiffs' programmatic activities are concretely and directly impaired, and these injuries are more than enough to satisfy the first prong of the organizational standing test. *See CLC II*, 2020 WL 2996592, at *16 ("[T]he injury to CLC's public-education activities goes well beyond those deemed sufficient in *American Anti-Vivisection Society* and *PETA*.").

Plaintiffs have also expended resources to counteract these organizational injuries. *See PETA*, 797 F.3d at 1094. For instance, because of the FEC's failure to compel required disclosure relating to the relationship between RTR and the Bush campaign and any in-kind contributions that resulted, CLC has had to divert resources from other planned organizational needs to research relevant law and fill in the gaps to the best of their ability, including by explaining to reporters, researchers, and partner organizations how they might attempt to find information not properly reported. Fischer Decl. ¶¶ 20-21.

RTR claims that plaintiffs have failed to "allege that their resources have been diminished," asserting that these "shortcomings are fatal in this context." Int. Br. at 17. But CLC has shown that it has been denied information vital to its programmatic activities and has had to divert resources—for instance, to explain incomplete disclosure to reporters—from other planned activities to

counteract that harm. Fischer Decl. ¶¶ 20-21. As the court in *CLC II* explained, "[r]esources do not grow on trees—when an organization has to 'divert' them from an area where it planned to spend time and money to one where it did not, that leaves fewer resources for its 'other organizational needs.'" 2020 WL 2996592, at *17.

RTR also asserts that "[p]laintiffs could have pointed [reporters] to the organizations' FEC reports or to any of the many press reports about RTR and Governor Bush that Plaintiffs cited in their administrative complaint," concluding that "[t]here was no injury involving Plaintiffs having to provide such information to reporters." Int. Br. at 16-17. But plaintiffs have already shown that existing FEC and press reports are insufficient because they are *incomplete*. CLC has been forced to divert resources in a futile attempt to find the information sought here, reviewing incomplete disclosure reports and reallocating staff time to assist reporters and partner organizations. And plausible claims of injury based on the diversion of organizational resources clear the Article III bar, especially at this stage of the case. *See Abigail All.*, 469 F.3d at 132; *PETA*, 797 F.3d at 1096.

IV. Plaintiffs' Injuries Are Fairly Traceable to the FEC's Failure to Act on their Complaints and Likely to Be Redressed by a Favorable Court Decision.

Finally, plaintiffs meet the causation and redressability requirements for Article III standing. Plaintiffs' informational and organizational injuries flow directly from the FEC's failure to act on their administrative complaints, and this Court is empowered under 52 U.SC. § 30109(a)(8)(C) to redress that failure. If the Court agrees that the FEC's 1,870-day delay was contrary to law, then it will remand the case and order the FEC to conform.[11]

[11] RTR argues that judicial review under the APA is available only where the action is not made reviewable by another statute, and moves to dismiss Count II. Int. Br. at 22. Although plaintiffs maintain that the APA provides an alternative legal basis for challenging the Commission's inaction, they are agnostic as to whether the relief they seek is ultimately provided under FECA or the APA. At this point in the proceedings, however, dismissal of the APA claim would be premature. *CLC II*, 2020 WL 2996592, *15.

CONCLUSION

For these reasons, intervenor's motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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