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' MOTION FOR RECONSIDERATION

Plaintiffs Campaign Legal Center ("CLC") and Democracy 21 respectfully move this Court under Rule 60(b) to reconsider its December 30, 2021 Order and Memorandum Opinion dismissing this case for lack of standing. Plaintiffs do not ask to revisit the question of informational standing that was ruled on by the Court, but instead seek a ruling in the first instance on their other, distinct basis for standing premised on organizational injuries caused by FEC delay.

A supporting memorandum of law accompanies this motion, and a proposed order granting the motion for reconsideration is attached as an exhibit hereto.

Pursuant to Local Rule 7(m), Plaintiffs' counsel conferred with counsel for Intervenor Right to Rise Super PAC, Inc., on February 1, 2022. Intervenor's counsel indicated that Intervenor opposes this motion.

Dated: February 2, 2022

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

In moving for reconsideration of this Court's December 30, 2021 Order and Memorandum Opinion, Plaintiffs seek a ruling in the first instance on their distinct claim to standing based on organizational injuries caused by the FEC's delay and inaction in this matter.

In its initial February 2021 order partially denying Intervenor Right to Rise Super PAC's ("RTR") motion to dismiss, the Court noted that it "d[id] not address plaintiffs' contention that they have standing based on organizational injury and FEC delay" because it found that Plaintiffs suffered an informational injury based upon Bush's deficient pre-candidacy reporting. Mem. Op. 9 n.1, Feb. 19, 2021, ECF No. 17. Upon reconsideration—and in light of RTR's belated claims that it or other entities had paid for and reported at least some of Bush's pre-announcement campaign activities—the Court determined that Plaintiffs did not suffer informational injuries sufficient for Article III standing.[1] *See* Mem. Op. 10, Dec. 30, 2021, ECF No. 33. But in denying

[1] Plaintiffs maintain that they also suffer informational injuries sufficient to confer Article III standing under *FEC v. Akins*, 524 U.S. 11 (1998), and preserve the issue for possible appeal.

the Plaintiffs' informational standing, the Court did not address the separate question it had previously deferred as to whether Plaintiffs have organizational standing based on the deleterious effects of FEC delay on their programmatic activities.

As Plaintiffs explain below and argued in their opposition to RTR's motion to dismiss, *see* Pls.' Opp'n to Int.'s Mot. to Dismiss ("MTD Opp'n") 29-43, ECF No. 13, the FEC's failure to act on their administrative complaints has inflicted concrete organizational injury on Plaintiffs by depriving them of access to key information they need to effectuate their missions as campaign finance reform organizations. This claim for organizational standing is analytically and legally distinct from Plaintiffs' claim for informational standing. Plaintiffs respectfully request consideration of this unresolved issue.

LEGAL STANDARD

Rule 60(b) authorizes a court to grant relief from an order or final judgment in specific circumstances, including for "mistake," "inadvertence," or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (b)(6). Although the moving party has the burden of demonstrating its entitlement to relief, the Court is "vested with a large measure of discretion to grant a Rule 60(b) motion." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). "The underlying purpose of both Rule 60(b)(3) and 60(b)(6) is to ensure that justice and fundamental fairness are not defeated." *Richardson v. Nat'l R.R. Passenger Corp.*, 150 F.R.D. 1, 8 (D.D.C. 1993), *aff'd*, 49 F.3d 760 (D.C. Cir. 1995).

ARGUMENT

Plaintiffs are entitled to relief under Rule 60(b)(1) and 60(b)(6) because the Court, after acknowledging but declining to address Plaintiffs' assertion of organizational standing in its first ruling on Intervenor's motion to dismiss, *see* ECF No. 17 at 9 n.1, ultimately left the issue

unresolved in its final order, *see* Order, ECF No. 32; Dec. 2021 Mem. Op., ECF No. 33. Upon considering this independent asserted basis for standing, the Court should deny RTR's motion to dismiss and grant Plaintiffs' motion for default judgment because Plaintiffs have suffered distinct organizational injuries sufficient to confer Article III standing.

I. Plaintiffs Have Standing to Challenge the FEC's Delay Based on Organizational Injuries Arising from the Delay Itself.

CLC and Democracy 21 both have organizational standing to challenge the FEC's failure to act on their administrative complaints because the agency's unexplained and egregious delay in reaching *any* disposition of their complaints deprives Plaintiffs of access to key information necessary to effectuate their missions as campaign finance organizations. An organization may establish Article III standing if it can show that an agency's action or omission "cause[d] a 'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'" *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). This is a two-part inquiry, requiring Plaintiffs to show, "first, whether the agency's action . . . 'injured [their] interest' and, second, whether [Plaintiffs] 'used [their] resources to counteract the harm.'" *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (citation omitted). Plaintiffs have satisfied both prongs, as explained fully in their opposition to RTR's motion to dismiss, *see* MTD Opp'n 29-43, ECF No. 13, which Plaintiffs herein incorporate.

First, the FEC's failure to resolve Plaintiffs' administrative complaints concretely injures Plaintiffs' interests by depriving them of key information necessary to advance their missions. FECA's confidentiality provision prevents the FEC from disclosing information about an open Matter Under Review (or "MUR"), 52 U.S.C. § 30109(a)(12), but as a corollary, the agency has a non-discretionary duty to disclose specific information and documents in the MUR file once the

matter is decided or otherwise terminated. The FEC's protracted delay thus ensures that information in the MUR file about the complaints cannot now—and may never—be provided to Plaintiffs or the public, including any legal conclusions, factual findings, or vote records generated by the Commission or its Office of General Counsel in processing the complaints. *See generally* MTD Opp'n 29-36, ECF No. 13.

The FEC is bound to publicly release this information with its enforcement dispositions pursuant to FECA, the Freedom of Information Act, and FEC regulations. *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"); *see also* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016). The MUR file contains not only vote records and final decisional documents, but also the legal analysis of the FEC's Office of General Counsel and the factual record generated by the proceedings, including any responses or other submissions by the respondents.[2] Even at the reason-to-believe stage, it is not uncommon

[2] Intervenor has admitted that the MUR file contains such responses, including one from Right to Rise Leadership PAC "highlight[ing] the distinction between it and [Intervenor RTR Super PAC]." RTR Mem. Supp. Mot. to Intervene 2 n.1, ECF No. 9. Given the apparently significant but partial role that RTR Leadership PAC played in financing and reporting Bush's pre-announcement campaign activities, reviewing its contemporaneous responses to the administrative complaint may shed light on the true scope of Bush's unreported expenditures. *See* RTR Suppl. Reply 9 n.7, ECF No. 30 (asserting that all of Bush's pre-announcement campaign activities were paid for and reported by the "appropriate entity," which was "usually RTR Leadership PAC").

for a MUR file to contain materials that illuminate or confirm the factual allegations in a complaint, such as a sworn affidavit from a respondent, or that reveal unusual voting behavior among Commissioners, such as successive abstentions on reason-to-believe votes. *See, e.g.*, MUR 6485 (W Spann LLC), https://www.fec.gov/data/legal/matter-under-review/6485.

But the Commission's failure to take any final action on Plaintiffs' complaints shields these documents and these facts from public view and deprives Plaintiffs of necessary information to effectuate their missions. *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); *Doe v. FEC*, 920 F.3d 866, 870-71 (D.C. Cir. 2019) (affirming that FECA's goals of "deterring future violations and promoting Commission accountability" underlie the Commission's "long-standing regulation requiring it to make public its action terminating a proceeding and 'the basis therefor'" (citing 11 C.F.R. § 111.20(a))).

Intervenor itself has repeatedly asserted that the Commission's failure to act on these complaints "serves as the functional equivalent of a dismissal" by virtue of a five-year statute limitations—and indeed, that supposition was the core of its argument for intervention as of right. *See* RTR Mem. Supp. Mot. to Intervene 3, 6-7, ECF No. 9 (positing that "Right to Rise has obtained a Commission *decision* not to move forward with an administrative investigation and action" (emphasis added)); *see also* RTR Opp'n to Default J. 8-11, ECF No. 24. Under D.C. Circuit precedent, the Commission, or the controlling group of Commissioners if the agency is evenly split, must "explain coherently the path [it is] taking" when it resolves an enforcement matter. *Dem. Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). If RTR's premise of a *de facto* dismissal were correct—and putting aside whether or how the relevant limitations period would actually constrain future civil enforcement, *see* MTD Opp'n 33 n.10, ECF No. 13—

the Commission would have "functionally dismissed" the complaints without providing the requisite explanation to complainants or the public, and a court would have no trouble finding such action contrary to law.

But RTR's speculation that an impasse among Commissioners prompted what it calls "the FEC's *decision* to not take public action," RTR Opp'n to Default J. 9, ECF No. 24 (emphasis added), is hardly a substitute for authoritative information about the agency's actual actions or reasoning. As long as the MUR proceeding remains in an unresolved limbo, the only thing that Plaintiffs know for sure is that the Commission's almost *seven-year* delay is extraordinary and unexplained.

As Plaintiffs have maintained throughout this litigation, *see, e.g.*, MTD Opp'n 29-30, 32-34, ECF No. 13, this informational vacuum arises from the fact of agency inaction itself and inflicts an injury that is distinct from the statutory informational injuries they assert under *Akins*. *See Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016) (recognizing that a deprivation of access to information can create an injury-in-fact sufficient for organizational standing separate from injuries asserted under *Akins*); *Ctr. for Biological Diversity v. U.S. Dep't of State*, No. 18-cv-563-JEB, 2019 WL 2451767, at *3 (D.D.C. June 12, 2019) ("The D.C. Circuit has established distinct frameworks for informational and organizational injury."). In asserting organizational injuries distinct from *Akins*, Plaintiffs do not suggest that the FEC's bare procedural failure to process administrative complaints under 52 U.S.C. § 30109(a)(8) always confers Article III standing. *Compare CLC v. FEC*, 860 F. App'x 1, *4 (D.C. Cir. 2021) (unpublished) (noting that section 30109(a)(8) does not confer standing but a "right to sue upon parties who otherwise already have standing" and declining to consider organizational standing argument raised for the first time on appeal). Rather, Plaintiffs argue that that the FEC's egregious delay in *this* instance inflicts

concrete and particularized injury to their organizational interests because it results in a MUR file that is closed indefinitely, and consequently deprives CLC and Democracy 21 of information necessary to advance their missions. Indeed, in *PETA*, the D.C. Circuit found that an organization can suffer concrete injury from being denied "key information that it relies on to educate the public," 797 F.3d at 1094, *even if* the organization does not have "any legal right" to the information sought, *id.* at 1103 (Millett, J., dubitante); *see also Am. Anti-Vivisection Soc'y*, 946 F.3d at 619 (recognizing that an organization can show standing under *PETA* even if it has no legal right to the information sought).

In this case, the FEC has shirked its mandatory duty to disclose information about closed enforcement matters by withholding final action on Plaintiffs' complaints for an indefensible length of time—now almost seven years, through two Presidential campaign cycles and well into the relevant pre-primary phase of the third. This unlawful delay concretely injures Plaintiffs' interests by depriving them of key information about the disposition of their complaints and the Commission's factfinding and decision-making. Indeed, while 2024 hopefuls are already laying the groundwork for their future campaigns and looking for every possible advantage, the FEC still has yet to decide—or reveal the Commissioners' views about—whether it was lawful for a *2015-16* presidential primary candidate to outsource his nascent campaign to an "independent" super PAC established and controlled by the candidate himself. As Plaintiffs have explained, *see* MTD Opp'n 38-43, ECF No. 13, without this information, Plaintiffs cannot effectively play their role as regulatory watchdogs, educate the public and partner organizations with informed policy analysis, or identify and prioritize necessary campaign finance reforms—all activities that depend on understanding the FEC's disposition of their administrative complaints. *See* Fischer Decl., ECF No. 13-1; Wertheimer Decl., ECF No. 13-2. Like the plaintiffs in *PETA*, Plaintiffs are "deprived

of key information" they rely on to educate the public and to engage in the "normal process of submitting [FEC] complaints." *PETA*, 797 F.3d at 1094. These injuries to Plaintiffs' public education, legislative policy, and regulatory reform efforts "are 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); and they impede advancement of Plaintiffs' missions to strengthen U.S. democracy, *see* Fischer Decl. ¶¶ 5-6, 10-11, ECF No. 13-1; Wertheimer Decl. ¶¶ 2, 10, ECF No. 13-2.

Second, Plaintiffs have expended resources to counteract these organizational injuries, satisfying the second prong of the *PETA* test. *See* 797 F.3d at 1094. As alleged in Plaintiffs' Complaint, Compl. ¶¶ 14-19, 20-22, ECF No. 1, and in declarations of their organizational representatives, Fischer Decl. ¶¶ 20-21, ECF. No. 13-1, FEC inaction has forced Plaintiffs to divert resources from other planned organizational needs in various ways, including, for example, explaining to reporters how to find information not properly disclosed under FECA. At bottom, as organizations that advance their missions by informing the press, policymakers, and the public about the FEC and campaign finance law, CLC and Democracy 21 cannot perform their core programmatic activities effectively without timely information about how the Commission is interpreting and applying FECA. *See* Fischer Decl. ¶¶ 10, 34, ECF. No. 13-1.

Plaintiffs have therefore proven both prongs of the test for organizational injury and have proven their standing to challenge the FEC's unlawful nearly seven-year delay in acting on their administrative complaints; plaintiffs have done so by pursuing the judicial remedy Congress designed precisely for this circumstance, *see* 52 U.S.C. § 30109(a)(8) (permitting administrative complainants 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"). This Court should accordingly

reconsider its order dismissing the case, deny RTR's motion to dismiss, and grant Plaintiffs' motion for default judgment.

II. Plaintiffs Properly Preserved Organizational Injury as an Alternative and Independent Basis for Standing and the Motion is Timely.

Plaintiffs have asserted their organizational injuries as a separate and distinct basis for standing since the inception of this lawsuit and in virtually every brief filed in this matter. *See* MTD Opp'n 29-43, ECF No. 13; Pls.' Opp'n to Int.'s Mot. for Recons. 16-17, ECF No. 21; Pls.' Mot. for Default J. 10-11, ECF No. 23; Pls.' Reply in Supp. of Mot. for Default J. 7-8, ECF No. 25; Pls.' Suppl. Br. in Opp'n to Int.'s Mot. for Recons. 20, ECF No. 29; Pls.' Reply in Opp'n to Int.'s Mot. for Recons. 15, ECF No. 31. Plaintiffs have therefore properly preserved this issue for reconsideration, or rather, consideration in the first instance.

Finally, Plaintiffs have made this motion to reconsider within reasonable time. A Rule 60(b) motion must be made "within a reasonable time—and for reasons (1), (2) and (3) no more than a year after the entry of the judgment or order" at issue. Fed. R. Civ. P. 60(c). The Court issued its final order and memorandum opinion approximately five weeks ago, on December 30. This motion is therefore timely.

CONCLUSION

Plaintiffs respectfully request that the Court reconsider its December 30, 2021 Order and Memorandum Opinion, find that Plaintiffs have demonstrated organizational standing arising from the FEC's delay, deny RTR's Motion to Dismiss, and grant Plaintiffs' Motion for Default Judgment.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2022, I caused a true and correct copy of the foregoing documents 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.

Respectfully submitted,

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