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' REPLY IN FURTHER OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION FOR RECONSIDERATION

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INTRODUCTION

The basis for plaintiffs' informational injury is simple: they allege that Governor John Ellis "Jeb" Bush and his 2016 presidential campaign failed to fully disclose his expenditures to "test the waters" or conduct campaign activity before he formally announced his candidacy, as the Federal Election Campaign Act ("FECA") requires. Even intervenor Right to Rise Super PAC ("RTR") concedes that a disclosure violation underlies these proceedings. RTR Suppl. Br. 1 (ECF No. 28) (acknowledging plaintiffs' allegations that Bush "violated FECA by failing to comply with FECA's 'testing-the-waters' disclosure requirements").

There is no dispute that Bush incurred expenses for pre-candidacy activities, including many identified with particularity in the administrative complaints, that his campaign never disclosed. *See* May Admin. Compl. (ECF No. 1-1); Mar. Admin. Compl. (ECF No. 1-2). Plaintiffs maintain that these were activities undertaken to test the waters of candidacy—if not to further an undeclared, *de facto* candidacy—and were thus subject to disclosure under FECA. As this Court recognized in its February 19 order and opinion, "[d]eprivation of the disclosures that FECA requires for that disputed period constitutes an informational injury to sustain Article III standing." ECF No. 17 at 11. The inquiry should end there.

Instead, to support its own motion for reconsideration, RTR demanded the opportunity to supply this missing information now, claiming it could demonstrate that all of Bush's undisclosed campaign-related expenditures in the pre-candidacy period were in fact covered by the reported disbursements of RTR and/or Right to Rise PAC. Hr'g Tr. 12:8-17.

Plaintiffs believe that this entire endeavor is misplaced and inconsistent with relevant standing precedents: the informational rights created in FECA require more than the post hoc assemblage of unverified information recharacterizing a few transactions in the reports of two unconnected committees.

But these concerns may be moot, because RTR has utterly failed to make good on what it promised. Indeed, RTR appears to misunderstand the point of this supplemental briefing: to establish, with "declarations or evidence or something that the Court can actually cite," Hr'g Tr. 24:10-11, that all of the reportable expenses that Bush incurred over the pre-candidacy period but failed to disclose were fully paid for and reported by RTR or Right to Rise PAC.

Rather than submitting such evidence, RTR resumes its defense of Bush on the merits, reiterating the legal argument that Bush's pre-candidacy travel, public appearances, and meetings with party leaders and other potential supporters did not constitute testing-the-waters or campaign activity under FECA. *See, e.g.*, RTR Suppl. Br. 14 ("Bush's attendance at CPAC was not a testing-the-waters event"). In an even more pernicious misinterpretation of FECA, intervenor devotes its remaining pages to the legal proposition that the RTR committees were *required* to pay for Bush's expenses arising from non-RTR campaign-related events—on the pretext that the RTR committees "benefited" from his participation at such events. *Id.* at 13.

These arguments are wrong and do damage to FECA's core transparency and anti-corruption objectives, but more importantly, they are irrelevant to the standing inquiry. Their length and superficial complexity do not obscure that RTR failed to submit *any* evidence germane to the guiding inquiry here: whether, as *RTR* claimed, the RTR committees' 2015 reports contain the missing information that Bush failed to disclose from his pre-candidacy period. Indeed, the one declaration intervenor offers is from Bush's "Director of Scheduling," who attests only that Bush attended three events in 2015. A less revealing fact would be hard to muster.

While RTR's standing challenge grows more tenuous and self-contradictory with each successive round of briefing, its latest submission confirms that its guiding objective is less to elucidate the proceedings than to confuse and delay them. This Court should not reward the effort:

intervenor's motion for reconsideration should be denied.

ARGUMENT

I. RTR has offered no new facts or evidence that would provide the missing FECA-required disclosure information that plaintiffs seek.

This Court directed supplemental briefing to address intervenor's unsupported claim that all of Bush's undisclosed pre-candidacy expenses were paid for by the RTR committees and reported, in some form, in their 2015 FEC filings. In particular, it asked RTR to substantiate this claim, noting that the "word of counsel" was insufficient to show that "all of the required disbursements were either reported by the campaign or reported by the PAC," and that "declarations or [other] evidence" for this point were necessary. Hr'g Tr. 24:1-12.

But the sum total of RTR's "evidentiary" submission is: (1) a declaration by Brandi Brown, a Bush scheduler,[1] who attested only that, "on information and belief," Bush in 2015 attended a College Republicans event and fundraisers for David Young and the South Carolina Republican House Caucus; and (2) a series of unsupported assertions that six "disbursements properly reported under FECA by either Right to Rise or Right to Rise Leadership PAC" "correlated" with several pre-candidacy events attended by Bush for which his campaign failed to report any expenditures.

This "evidence" is utterly unresponsive to the inquiry at hand. Indeed, the most charitable conclusion one could draw from it is that intervenor simply does not know the true scope of Bush's pre-candidacy activities, or who bankrolled them.

First, the declaration by Brown, who testifies only about three events Bush attended, has

[1] In another apparent example of an unreported Bush testing-the-waters expense, Brandi Brown attests that she was "Bush's Director of Scheduling from January 2015 through February 2016," ECF No. 28-1, but his campaign did not report any payments to her until June 30, 2015. *See* Ex. 1 to Pls.' Suppl. Br. (ECF No. 29-1); Jeb 2016, Inc., Disbursements to Brandi Brown, 2015-16, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00579458&recipient_name=brandi+brown&two_year_transaction_period=2016.

no relevance to whether RTR financed and/or reported any outstanding campaign-related expenses incurred by Bush in the pre-candidacy period. If anything, the declaration further corroborates the allegations in plaintiffs' two FEC complaints that Bush engaged in extensive campaign travel prior to June 2015. Otherwise, the utility of the declaration is unclear: plaintiffs certainly do not dispute that Bush attended many fundraisers.

Second, with respect to five Bush events in 2015 illustratively identified by plaintiffs, intervenor simply alleges that a small handful of expenditures reported by RTR and RTR PAC "correlate" with these events, Suppl. Br. 12-17; as to the factual basis of this allegation, the reader is left guessing. More specifically:

- With respect to the January 20 D.C. meeting with Republican lobbyists, intervenor flags a single "in-kind catering" transaction from RTR to Frederic Malek, *id*. at 12-13;
- With respect to Bush's February 27 CPAC speech and associated events, intervenor identifies no "correlating" disbursements by either RTR committee, *id.* at 13-14;
- With respect to the March 7 Iowa Agriculture Summit, intervenor points to three airfare transactions reported by RTR PAC that supposedly correlate with the event, and notes that on the same trip Bush attended a fundraiser for an Iowa House candidate to whom the PAC contributed,[2] *id*. at 14-15;
- With respect to the May 16 Lincoln Day Dinner, intervenor asserts that a $12,776.13 payment by RTR PAC "paid for" "Bush's airfare for the event," *id*. at 15-16; and
- With respect to the March 17 Chamber of Commerce event in South Carolina, intervenor identifies a $204.83 RTR PAC payment to the Greenville Embassy Suites that supposedly correlates with the event, *id.* at 16-17.

None of these six disbursements—five made by an entity *other than* RTR—were in any way designated for Bush or the events at issue by the reporting committee. One might even suspect that

[2] RTR PAC did report giving $5,200 to Young for Iowa, but on February 5, 2015, a month prior to the event, so it is unclear how this contribution is relevant to that fundraiser or the expenses arising from the Iowa Agriculture Summit. *See* Right to Rise PAC, Disbursements to Young for Iowa, 2015-16, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00571380&recipient_name=young+for+iowa&two_year_transaction_period=2016.

RTR simply plucked disbursements out of committee reports with dates that roughly corresponded to the events in question. Certainly, RTR introduces no sworn testimony that these disbursements actually paid for Bush-related expenses arising from these events. This is particularly problematic because intervenor is now asserting that RTR *PAC*, not intervenor RTR, was the committee that principally reported Bush's outstanding expenses. RTR PAC is not a party here and RTR asserts no authority to speak on its behalf; indeed, it stresses that the two are distinct.

But this lack of any corroborating evidence also underscores a more fundamental problem with intervenor's claims: careful review of the representations in RTR's brief reveals that they almost universally stop short of saying that RTR or RTR PAC in fact *paid for* Bush's expenses. Instead, RTR merely reiterates that "[i]t was *appropriate*" for the RTR committees "to sponsor the Governor's travel and to disclose that expenditure." Suppl. Br. 15 (emphasis added). *See also id.* at 17 ("The Governor's participation in this event furthered the mission of Right to Rise Leadership PAC, which *correctly disclosed the travel expense*.") (emphasis added). But alleging that RTR's or RTR PAC's disbursements were "appropriate" is a conclusion of law and irrelevant to the informational standing analysis.[3] It may be that RTR meant to convey that it indeed *paid for* Bush's expenses, but it actually said something different.

Even if RTR had submitted evidence to substantiate its claims, however, and had specifically alleged that it *paid for* the costs Bush incurred, its showing would still be woefully incomplete. It cannot find any disbursements that even "correlate" to certain events identified by plaintiffs: most glaringly, with respect to Bush's CPAC speech, where instead RTR resorts to the legal argument that this "was not a testing-the-waters event." Suppl. Br. 14. A broader problem is

[3] The closest intervenor comes to saying that either RTR committee paid for and reported a specific Bush expense is its allegation that RTR PAC "appropriately paid for—and disclosed—Governor Bush's airfare" in connection to the Iowa Lincoln Day Dinner. RTR Suppl. Br. 16.

that even when intervenor RTR does flag a disbursement as "correlating" to an identified Bush trip, in each case, it highlights only *one* of the multiple expense categories that would arise from a day-long or weekend-long campaign swing—which would include, at a minimum, air and ground transportation and lodging, not just for Bush himself but also for his retinue of campaign staff. In addition, it would be typical for a well-financed frontrunner like Bush to also pay to develop talking points and speeches to promote his candidacy at these public events. But, for instance, with respect to Bush's January 20 D.C. meeting with Republican lobbyists, RTR flags only one payment it made for "in-kind catering," *id.* at 12-13, but no travel, lodging, or staffing costs for Bush.

Finally, this haphazard, piecemeal approach to identifying "correlating" RTR disbursements to cover information that the Bush campaign failed to disclose highlights the futility of this entire endeavor: RTR does not have the knowledge or authority to speak to the entire scope of Bush's reportable pre-candidacy activities, and indeed, has never claimed otherwise. RTR focused entirely on the five Bush events identified by plaintiffs in the April 20 hearing, but ignored plaintiffs' administrative complaints (and legal complaint), which made clear that these particular events were just the tip of the iceberg. As detailed in plaintiffs' supplemental brief, the copious news reports and Bush statements cited in their FEC complaints documented many months of continuous campaigning, with Bush crisscrossing the nation, appearing and speaking at public events, and meeting with elected officials, party leaders, and potential supporters. *See* Pls.' Suppl. Br. 4-6 (ECF No. 29). It is unclear if RTR is even aware of the full extent of this activity, some of which predated its existence; it certainly has not accounted for it.

II. Plaintiffs allege direct violations of FECA's candidate disclosure provisions, which are hardly satisfied by the post hoc and unverified assertions RTR offers here.

FECA is structured to shine the light of disclosure on all federal candidacies as soon as they commence. Accordingly, to vindicate the compelling interest in knowing "where political

campaign money comes from and how it is spent," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), the law requires prompt, accurate, and complete disclosure of all funds a candidate receives and spends, including "disguised contributions" in the form of payments for services rendered directly to candidates' campaigns or to defray their campaign costs, *see id.* at 46-47.

This disclosure mandate applies to a would-be candidate as soon as he begins "testing the waters" of candidacy. *See* 11 C.F.R. § 101.3. Indeed, the FEC's testing-the-waters regulations are a "limited exception" to the statutory rule that an individual immediately triggers candidate status by "receiv[ing] contributions aggregating in excess of $5,000" or "ma[king] expenditures aggregating in excess of $5,000." 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a). But the exception does not excuse individuals who *do* become candidates from their statutory disclosure obligations with respect to their pre-candidacy activity; it simply allows them to postpone *when* the disclosure occurs. Once an individual becomes a candidate, all funds received or payments made to test the waters are "contributions or expenditures under the Act," 11 C.F.R. § 101.3—including any payments by federal political committees for such activities, which constitute in-kind contributions to the candidate, *id*. §§ 110.2(l), 9034.10—and must be disclosed, *id*. §§ 100.72(a), 100.131(a).

There is no dispute that Bush spent the first half of 2015 crisscrossing the country to appear at numerous events, meetings, and fundraisers. Nor is there any dispute that Bush's lone reported $1,089.08 disbursement for testing-the-waters travel does not remotely account for all of this activity. *See* Pls.' Suppl. Br. 6-8. But rather than attempting to account for this informational shortfall, RTR repeats the tautology that all of "Bush's testing-the-waters expenses were disclosed as FECA requires," Suppl. Br. 3, so his undisclosed expenses were necessarily not for testing the waters—notwithstanding plaintiffs' allegations and evidence refuting both propositions.

But RTR primarily contends that other committees were permitted (or *required*) to

underwrite Bush's expenses for this effort without disclosing those payments as in-kind contributions to the Bush campaign, and without the Bush campaign disclosing them at all. *See* RTR Suppl. Br. 5-7, 12-17. That is a legal argument going to the merits of plaintiffs' administrative complaints—and a specious one, *see infra* Part IV, that also conveniently sidesteps whether or to what extent the committees *in fact* made these "appropriate and legally required" payments, RTR Suppl. Br. 12. *See supra* Part I.

RTR then devotes some five pages to "FECA's disclosure and verification requirements" for non-connected committees. RTR Suppl. Br. 5-7. By this, it seems to be suggesting that if RTR was not required to report information about Bush's testing-the-waters expenses with "a level of specificity" that would allow its reported disbursements to be "correlated" to Bush, then FECA did not require this information to be disclosed by anyone. *Id.* at 5. This argument borders on farcical. FECA does not require non-connected committees to bankroll months of a candidate's testing-the-waters activities in the first place, and in many cases it would be illegal. 11 C.F.R. § 100.72(a) ("Only funds permissible under the Act may be used" to test the waters). But if they do, the information is unquestionably subject to disclosure—by both the committee and *the candidate*. *Id.* §§ 100.52(d)(1), 101.3, 104.13, 110.2(l). Nor do *plaintiffs* "claim they should be able to correlate Governor Bush's pre-candidate activities with specific disbursements on FEC reports." RTR Suppl. Br. 5. The only reason they are even addressing this issue is because *intervenor* thinks it can rebut their informational injury by attempting such a "correlation."

Plaintiffs' informational harm stems from *the Bush campaign*'s failure to provide FECA-mandated disclosure with respect to payments for activities that, "on [plaintiffs'] view of the law," *FEC v. Akins*, 524 U.S. 11, 21 (1998), were undertaken to advance his candidacy and are thus subject to statutory disclosure. Their standing is thus predicated on "a deprivation of information

that, on their reading of the statute, they are legally entitled to receive." *Maloney v. Murphy*, 984 F.3d 50, 61 (D.C. Cir. 2020). But RTR primarily uses its supplemental brief to argue that its *own* spending, and that of other committees, was properly reported—which is neither true[4] nor germane to the factual challenge RTR asserts.

III. The disclosure information plaintiffs seek is not "already available" to them.

RTR has at times suggested, albeit not always intelligibly or with precision, that all of the missing information at issue here is available in its own FEC reports or elsewhere. Based on this premise, it argues that plaintiffs are only seeking a "legal determination" and not the type of FECA information that would support standing. RTR Suppl. Br. 19. But because intervenor's premise is wrong—for all of the reasons noted above—so too is this standing argument.

The touchstone of the informational standing analysis is "the nature of the information allegedly withheld." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). As this Court has recognized, "[t]he case law distinguishes between information in the form of legal conclusions and information in the form of facts; a plaintiff has no particularized right to the former, but does to the latter, so long as FECA requires that disclosure." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 13 (D.D.C. 2019). Circuit precedent thus draws a clear distinction between plaintiffs who show an informational injury based on their inability to obtain factual information subject to disclosure under FECA and plaintiffs whose supposed informational injury rests on the inability

[4] RTR asserts that "FECA does not require disclosure of any additional information" because "all three committees disclosed an adequate purpose for all their disbursements, and all disbursements were timely disclosed." Suppl. Br. 19 (citing 11 C.F.R. § 104.3(b)(3)(i)(A), which outlines how *non-candidate* committees may describe disbursements). This claim simply ignores whether *Bush* fully reported his pre-candidacy spending. And unless one assumes that none of the Bush activities plaintiffs identified were undertaken to test the waters—which is a merits judgment that is as misplaced as it is wrong—any payments by the RTR committees for these activities should have been reported as in-kind contributions. 11 C.F.R. §§ 110.2(l), 104.3(b)(3)(v).

to obtain "duplicative" information. *See, e.g.*, *Wertheimer*, 268 F.3d 1070, 1075 (D.C. Cir. 2001).

Intervenor concedes that plaintiffs' allege that Bush violated FECA by failing to disclose his testing-the-waters activities, RTR Suppl. Br. 1, but attempts to recast the information sought as a "legal determination" and thereby shoehorn it into the *Wertheimer* line of cases. *See id.* at 19-20; Recons. Mot. 13 (ECF No. 19). But in those cases, the allegedly illegal spending at issue was discrete, identifiable, and already known to the complainant. For example, in a case where the plaintiff already knew "(1) that an in-kind contribution took place, (2) the source of the contribution, (3) the amount of the contribution, (4) the purpose of the contribution, and (5) the date of the contribution"—and yet "more" due to a federal criminal prosecution involving the same transaction—there was no informational injury because "FECA require[d] no further disclosures" about the payment at issue. *Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020). Likewise, in *Wertheimer*, neither party contested "that each transaction appellants allege[d] [was] illegal [was] reported in some form." 268 F.3d at 1074-75.

Cases like *Wertheimer* and its progeny involved the legal redesignation of a defined universe of reported transactions contained in the FEC filings of exactly one committee and exactly one candidate, *see id.* at 1072, or indeed, the reattribution of a *single* transaction about which all FECA-required facts were already available. *See, e.g.*, *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) (no informational injury from alleged non-disclosure of the complainant's *own* in-kind contribution). Moreover, some involved FEC complaints that failed to allege *any* disclosure violations, making the asserted informational harms unredressable. *See, e.g.*, *CREW v. FEC*, 475 F.3d 337, 339 (D.C. Cir. 2007) (CREW's only asserted informational injury was the *precise valuation* of a mailing list that Grover Norquist allegedly gave Bush-Cheney '04, which its FEC complaint did not seek and OGC had already deemed de minimis).

This case is different. Here, the full universe of Bush's pre-candidacy spending is *not* known—or knowable, absent action to remedy the disclosure violations alleged in plaintiffs' March 2015 administrative complaint. And there is simply no basis, legally or factually, for RTR's claim that Bush fully disclosed his extensive pre-candidacy campaign expenditures as FECA requires, nor for RTR's alternative claim that the missing information can be gleaned by reviewing the general disbursements reported by untold other groups—including, but perhaps not limited to, the two RTR committees. *See supra* Part I.

IV. RTR's legal challenges to the merits of plaintiffs' administrative complaints have no place in the standing inquiry—but fail regardless.

Intervenor dedicates much of its supplemental brief to legal arguments that go to the merits of plaintiffs' administrative complaints, not to whether they have shown informational harm. But "[w]hether a plaintiff has a legally protected interest that supports standing does not require that he show he will succeed on the merits . . . . Instead, 'when considering whether a plaintiff has Article III standing, a federal court must assume, *arguendo*, the merits of his or her legal claim.'" *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019) (citation omitted), *cert. denied*, 140 S. Ct. 947 (2020). Nevertheless, because RTR's arguments reflect such a blatant, and dangerous, misreading of FECA, plaintiffs will address them briefly.

A. RTR's legal arguments have no foundation in FECA and threaten to upend its entire system of candidate contribution limits and disclosure requirements.

RTR relies heavily on the claim that none of Bush's unreported activity over the pre-candidacy period constituted testing-the-waters activity, so no FECA disclosures were required, even with respect to numerous prototypical campaign events Bush attended in early primary states.

But the FEC has explicit standards governing both when pre-candidacy activity qualifies as testing the waters, and when such activity indicates the commencement of a *de facto* candidacy. *See* 11 C.F.R. §§ 100.72(b); 100.131(b). Indeed, FEC regulations enumerate specific, non-

exhaustive examples of activities indicating that "an individual has decided to become a candidate," *id.*, and Bush engaged in most of them:

- Bush "raise[d] funds in excess of what could reasonably be expected to be used for exploratory activities" 11 C.F.R. § 100.131(b)(2), *e.g.*, in establishing RTR, which by its own admission was formed to "rais[e] a war chest" for Bush, RTR Mot. to Dismiss 2; *see also* Mar. Admin. Compl. ¶¶ 5-16; May Admin. Compl. ¶¶ 16-26.

- He "ma[de] or authorize[d] written or oral statements that refer to him or her as a candidate for a particular office," 11 C.F.R. § 100.131(b)(3), *e.g.*, when he confirmed on film in May 2015: "I'm running for president," May Admin. Compl. ¶ 4.

- He "conduct[ed] activities . . . over a protracted period of time," 11 C.F.R. § 100.131(b)(4): even Bush's minimally reported testing-the-waters activities span a period of *thirteen months*, *see* Ex. 1 to Pls.' Suppl. Br.

RTR does not engage with this authority, perhaps because it so convincingly refutes RTR's contrary characterizations of Bush's activity. Instead, it asserts the radical proposition that candidates can simply redesignate their testing-the-waters activity as "benefiting" another group and thereby avoid the contribution and disclosure requirements that would otherwise apply.

This proposition relies on two premises, both untenable: first, that Bush's attendance at various pre-candidacy events did not advance his campaign, but instead "furthered the mission" of some other group, whether RTR, RTR PAC, "College Republicans," or someone else; and second, that the "benefiting" committee was therefore "legally required" to pay for all of the activity. RTR Suppl. Br. 3-4, 11-17. The argument is both factually dubious and legally unfounded. And, more to the point, it is dangerous. This interpretation would invite individuals to hold themselves out as candidates to the public, organize one or more allied groups, and then, prior to the commencement of their formal candidacy, campaign for months outside of FECA's contribution limits and disclosure requirements—all under the guise of "furthering the mission" of the allied group.

The logic of intervenor's argument would allow a super PAC to avoid the strict requirement that it maintain independence from the candidates it supports and to pay for a candidate's campaign

activities on the pretext that these activities "benefit" the super PAC. *Id.* at 12-13. This makes a mockery of the "independence" upon which super PAC status is based. *See* Advisory Op. 2010-11 at 2 (Commonsense Ten) (conditioning super PAC status on agreement not to "make any monetary or in-kind contributions . . . to any other political committee"). While the FEC has permitted a candidate to *attend* a super PAC's fundraiser under strict guidelines, *see* Advisory Op. 2011-12 at 4-5 (Majority PAC), no law authorizes the super PAC to *pay the candidate* for such an appearance, and FECA provides quite the opposite, 52 U.S.C. § 30125(e)(1)(A) (federal candidate may not "solicit, receive, direct, transfer, or spend [soft-money] funds"). There is no authority for RTR's extraordinary misinterpretation of law, and RTR, tellingly, cites none. RTR Suppl. Br. 12.

B. Recently released dispositions and case files in similar FEC matters drive home the indefensibility of RTR's legal arguments—and of the Commission's inaction here.

RTR's insistence that plaintiffs lack any informational injury ultimately turns on its belief that Bush was not *required* to report any testing-the-waters expenses as long as they had some alleged nexus to an alternative purpose or committee. Even if it were appropriate in a standing inquiry to credit this characterization of the law and facts, RTR is simply wrong.

The FEC's recently released disposition in an enforcement case against another 2015-16 presidential candidate, former Wisconsin Governor Scott Walker, drives this point home.[5] There, FEC complaints alleged that Walker, his campaign, and an entity supporting his "pre-candidacy" activities committed testing-the-waters and soft-money violations that were similar to, but less

[5] The Commission also resolved a parallel matter against John Kasich, his presidential campaign, and a 527 group, finding reason to believe, *inter alia*, that the campaign failed to report testing-the-waters activities apparently funded in part by the 527. MURs 6955 & 6983 (Kasich), https://www.fec.gov/data/legal/matter-under-review/6955. Evidence for this finding included Kasich's travel to early primary states, his public statements regarding a prospective candidacy, and indicia that the 527 was formed to support his activities. *See* Factual & Legal Analysis ("F&LA") at 11-16, MURs 6955 & 6983 (May 1, 2019), https://www.fec.gov/files/legal/murs/6955/6955_14.pdf.

egregious than, the scheme undertaken here. The Commission's analysis of the allegations against Walker makes clear that a candidate cannot evade disclosure requirements or contribution limits merely by asserting that his testing-the-waters activities advanced a different group's mission.

As revealed in the recently released case file,[6] the Commission unanimously found reason to believe that Walker, his campaign, and a 527 group, Our American Revival ("OAR"), violated the law when OAR made, Walker and his campaign accepted, and the campaign failed to disclose excessive in-kind contributions from OAR in the form of payments for Walker to test the waters; it also found reason to believe that Walker filed his statement of candidacy late.[7] In making its recommendation to proceed at the reason-to-believe stage, the FEC's Office of General Counsel ("OGC") notably rejected arguments that the campaign "properly disclosed its activities during Walker's testing the waters period," which relied in large part on the claim that these activities advanced OAR's mission; OGC also emphasized that it would "require an investigation to ascertain the *amount* that OAR paid for Walker's testing the waters activities."[8]

To support its reason-to-believe recommendations, OGC relied on facts close to those here: Walker's involvement in creating OAR, and statements from Walker and his associates that he intended to use the group "to determine whether his ideas resonated with voters"; OAR's subsidization of Walker's travel to events at which he "made statements regarding a potential candidacy"—such as Walker's own February 2015 CPAC speech, delivered the day before Bush's;

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[6] *See* MURs 6917 & 6929 (Walker *et al.*), https://www.fec.gov/data/legal/matter-under-review/6929/.

[7] *See* Certification at 1-2, MURs 6917 & 6929 (Apr. 24, 2019), https://www.fec.gov/files/legal/murs/6929/6929_13.pdf; F&LA at 1-2, MURs 6917 & 6929 (May 1, 2019), https://www.fec.gov/files/legal/murs/6929/6929_14.pdf.

[8] First Gen. Counsel's Rep. at 3-4, 7-9, 20, MURs 6917 & 6929 (Mar. 6, 2017), https://www.fec.gov/files/legal/murs/6929/6929_12.pdf (emphasis added).

and Walker's "solicit[ation of] funds for a potential candidacy through events sponsored by OAR."[9] Following OGC's investigation, it recommended a probable cause finding, again rejecting the argument that Walker's OAR-funded activity pertained to "issues": "It is OAR's payment, with Walker's consent, for activities directed to an evaluation of the feasibility of Walker's candidacy that is the basis of Walker and the Committee's liability under the Act, *irrespective of Walker's or OAR's engagement on issues*."[10]

Reviewing the disposition and OGC analyses in this matter confirms that RTR's legal arguments have no grounding in agency precedent, much less in FECA. But it also highlights a separate concern. The revelation that the Commission has taken action in *other* matters involving substantially similar conduct—and even proceeded to investigations—makes its apparent failure to take any action on *these* administrative complaints all the more bewildering and inexcusable. Plaintiffs thus reiterate that they suffer distinct informational and organizational injuries based on the FEC's delay itself, *see* Pls.' Suppl. Br. 20; until it resolves the case, plaintiffs have no access to its decisionmaking and related documents in the MUR file. 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20. Because the MUR file remains confidential, plaintiffs can only guess at the reasons for the disparate treatment of their complaints and the Commission's now six-year delay

CONCLUSION

For these reasons, intervenor's motion for reconsideration should be denied.

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[9] *See id.* at 11-13.

[10] Gen. Counsel's Br. to Walker at 2, 19-20, 28, MURs 6917 & 6929 (May 11, 2020), https://www.fec.gov/files/legal/murs/6929/6929_26.pdf (emphasis added); Gen. Counsel's Br. to OAR at 2, 28, MURs 6917 & 6929 (May 11, 2020), https://www.fec.gov/files/legal/murs/6929/6929_25.pdf. The Commission ultimately dismissed the complaints on discretionary grounds, citing a "significant case backlog." Statement of Reasons of Vice Chair Dickerson & Comm'rs Cooksey & Trainor at 2-4, MURs 6917, 6929, 6955 & 6983 (Apr. 29, 2021), https://www.fec.gov/files/legal/murs/6929/6929_47.pdf.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2021, 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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