

**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 FOR RECONSIDERATION AND/OR CERTIFICATION FOR
INTERLOCUTORY APPEAL**

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INTRODUCTION

Plaintiffs are before this Court to remedy the Federal Election Commission's unlawful delay in acting on their two 2015 administrative complaints, which collectively allege that John Ellis ("Jeb") Bush and Intervenor-Defendant Right to Rise Super PAC ("RTR") violated the Federal Election Campaign Act ("FECA") during Bush's 2015-16 bid for the presidency.

Relying on credible public information and reporting, the administrative complaints establish that Bush had been "testing the waters" and/or actively campaigning long before he formally announced his candidacy on June 15, 2015. As early as December 16, 2014, Bush had "decided to actively explore the possibility of running for President of the United States." March 2015 Admin. Compl., ECF No. 1-2 ¶ 4 (quoting Bush). Shortly thereafter, Bush and his associates formed RTR, an "independent" super PAC, which he used to fuel a months-long, multi-million-dollar fundraising blitz across the country in support of his candidacy. *Id.* ¶¶ 10-11, 13; May 2015 Admin. Compl., ECF No. 1-1 ¶¶ 20-23. Bush also engaged in activities typical of candidates during the early months of 2015, like traveling to early primary states to meet with potential donors and staff, speaking at the Conservative Political Action Conference (where he functionally acknowledged that he was testing the waters), attending the Iowa agriculture summit, and committing to speak at the Iowa Republican Party's Lincoln dinner. ECF No. 1-2 ¶¶ 12, 17-19. In a video released on May 13, 2015, Bush even acknowledged that he was running for president and then "tried to take it back." ECF No. 1-1 ¶ 4. Despite all of these actions, however, Bush did not declare his candidacy until June 2015 and disclosed only a small fraction of his prior activities as testing-the-waters spending.

On March 31 and May 27, 2015, plaintiffs filed their 2015 administrative complaints with the Federal Election Commission ("FEC") detailing apparent violations of FECA's candidate

disclosure and registration requirements, testing-the-waters restrictions, contribution limits, and soft-money prohibitions. More than five years later, the FEC still has not resolved or taken any public action on them. Plaintiffs filed suit on March 13, 2020 alleging the FEC's failure to act is contrary to law under 52 U.S.C. § 30109(a)(8)(A), FECA's statutory remedy for unlawful delay.

The FEC has failed to appear in this case. RTR, seeking only to prolong inaction on this matter, intervened and filed a motion to dismiss challenging plaintiffs' standing under Rule 12(b)(1). After this Court denied that motion in part, RTR continued its delay campaign by filing the instant Motion for Reconsideration and/or Certification for Interlocutory Appeal.

The Court should reject RTR's motion because RTR fails to satisfy the heavy burdens required for reconsideration and certification for interlocutory appeal. First, regarding the motion to reconsider, RTR does not demonstrate any of the limited circumstances under which such a motion may be granted. Instead, RTR incorrectly claims that this Court (1) applied the wrong standard in assessing RTR's motion to dismiss and (2) should reconsider its ruling based on disputed facts that were included in RTR's previous briefing and that go to the merits of plaintiffs' underlying administrative complaints. Second, regarding the motion for certification for interlocutory appeal, RTR fails to show that there is a substantial ground for difference of opinion meriting appellate review. Moreover, rather than materially advancing the ultimate termination of this litigation, allowing immediate appeal will only prolong the proceedings. At bottom, RTR confuses its discontent with this Court's decision with the requisite grounds for relief. This Court should decline RTR's request to reconsider or to certify an interlocutory appeal.

BACKGROUND

I. Procedural History

Plaintiffs Campaign Legal Center ("CLC") and Democracy 21 filed their two administrative complaints against Bush and RTR on March 31, 2015 and May 27, 2015. The

complaints collectively allege that Bush 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. In particular, the March 2015 complaint detailed the activities in which Bush, his agents, and the super PAC were reportedly engaged, and alleged that this provided reason to believe Bush had been “testing the waters” and then engaging in an active campaign before he formally announced his candidacy on June 15, 2015. *See* ECF No. 1-2. The May 2015 complaint detailed the active role that Bush and his associates played in creating RTR and directing its staffing and operations in violation of FECA’s soft-money prohibitions. *See* ECF No. 1-1.

To date, the Commission has not resolved the complaints—or, as far as plaintiffs are aware, taken *any* action on them beyond assigning them a MUR number. Compl. ¶ 33. Under 52 U.S.C. § 30109(a)(8)(A), the FEC had 120 days to act before plaintiffs could file suit for unlawful delay. The FEC has now failed to act for what equates to more than *seventeen* 120-day periods since the second administrative complaint was filed. Plaintiffs filed this lawsuit on March 13, 2020 seeking injunctive and declaratory relief to compel the FEC to act on its two complaints. After intervening, RTR filed a Motion to Dismiss on June 8, 2020.

II. The Court’s Memorandum Opinion and Order

On February 19, 2021, this Court issued a Memorandum Opinion and Order granting RTR’s motion to dismiss plaintiffs’ APA claim, but denying RTR’s motion to dismiss their FECA claim. ECF No. 17 (“Mem. Op.”). In its Memorandum Opinion, the Court held that “[t]o the extent that Bush was *either* a de-facto candidate *or* testing the waters at some point prior to June 2015, then plaintiffs have alleged an informational injury because further disclosures would be required.” *Id.* at 12. The Court focused, however, on plaintiffs’ testing-the-waters allegations, reasoning that such reporting would also encompass deficiencies while Bush was a *de facto* candidate. Finding

these informational injuries sufficient to maintain its jurisdiction, the Court did not decide whether plaintiffs also have standing based on organizational injury or injury from delay. *See* Pls.’ Opp’n to Int.’s Mot. to Dismiss, ECF No. 13 at 37-51. On March 5, 2021, Intervenor filed a Motion for Reconsideration and/or Certification for Interlocutory Appeal.

ARGUMENT

I. The Court Should Not Reconsider Its Memorandum Opinion.

Rule 60(b) permits a court to grant relief from an order based only on certain enumerated grounds, which the movant must specifically invoke and prove in its motion. *See* Fed. R. Civ. P. 60(b); *Green v. AFL-CIO*, 811 F. Supp. 2d 250, 254 (D.D.C. 2011) (“It is well-settled that the party seeking relief from a judgment bears the burden of demonstrating that he satisfies the prerequisites for such relief.”). This is a heavy burden because “Rule 60(b) motions are granted in very limited circumstances, requiring a showing of ‘fraud, mistake, extraordinary circumstances, or other enumerated situations.’” *Attias v. CareFirst, Inc.*, No. 15-cv-00882, 2021 WL 311000 at *5 (D.D.C. 2021) (quoting *Uberoi v. EEOC*, 271 F. Supp. 2d 1, 3 (D.D.C. 2002)). Intervenor fails to meet this burden in seeking reconsideration on grounds of “mistake” under Rule 60(b)(1) and “any other reason justifying relief” under Rule 60(b)(6).

“Relief under Rule 60(b)(1) motions is rare.” *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006). The movant must show that the Court’s order contains clear or “obvious error.” Fed. R. Civ. P. 60(b)(1); *Douglas v. D.C. Hous. Auth.*, 306 F.R.D. 1, 5 (D.D.C. 2014). Mere “disagreement with a district court’s legal reasoning or analysis is rarely, if ever, a basis for relief under Rule 60(b)(1).” *Avila v. Dailey*, 404 F. Supp. 3d 15, 22-23 (D.D.C. 2019) (quotation omitted).

And relief under Rule 60(b)(6) is “‘even more rare’ than relief under Rule 60(b)(1).” *Id.* at 27 (citation omitted). A Rule 60(b)(6) motion is “not simply an opportunity to reargue facts and theories upon which a court has already ruled,” and it cannot simply reiterate one of the grounds

for relief under clauses (b)(1) through (b)(5). *Id.* (internal quotation marks omitted). As the Supreme Court has held, Rule 60(b)(6) justifies relief “only in ‘extraordinary circumstances.’” *Id.* (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). This Circuit has further instructed that it “should be only sparingly used.” *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988); *see also United States v. Philip Morris USA Inc.*, 840 F.3d 844, 852 (D.C. Cir. 2016) (“Extraordinary circumstances is a high bar.”).

In support of its 60(b) motion, RTR contends that this Court applied the wrong standard of review in assessing its motion to dismiss and that, as a factual matter, RTR and Bush disclosed all of the contributions and spending at issue in this case. Neither argument has merit under any standard, nor can either clear the “high bar” necessary to grant relief.

A. This Court properly applied the 12(b)(1) standard when denying RTR’s motion to dismiss for lack of standing.

RTR suggests that this Court acted as a “casual observer,” making the careless mistake of applying the 12(b)(6) standard in place of the proper standard under a 12(b)(1) motion to dismiss for lack of standing. Int.’s Mot. for Reconsideration, ECF No. 19 at 14. This suggestion, however, is completely at odds with the Court’s Memorandum Opinion, in which the Court clearly identified and applied the proper legal standard. *See* Mem. Op. at 7-8, 10-11. Indeed, this Court identified the 12(b)(6) standard and also stated that under the more exacting 12(b)(1) standard, “plaintiffs must show ‘by a preponderance of the evidence that the Court has subject matter jurisdiction to hear [the] case.’” *Id.* at 7-8 (quoting *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004)). The Court also properly noted that in considering 12(b)(1) motions, courts must nonetheless “assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff[s] the benefit of all inferences that can be derived from the facts alleged.” *Id.* at 7 (quoting *Am. Nat’l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139

(D.C. Cir. 2011)); *accord Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001) (“In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court must accept all the complaint’s well-pled factual allegations as true and draw all reasonable inferences in the plaintiff’s favor.”).

Thus, the proper standard for 12(b)(1) motions requires assessing whether the plaintiff has satisfied Article III by a preponderance of evidence *including* all facts alleged in their complaint and the reasonable inferences derived from those facts. Indeed, even in *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 70 (D.D.C. 2011)—the very case RTR cites as support for its supposedly stricter 12(b)(1) standard—the court recognized that a proper 12(b)(1) analysis means “drawing all reasonable inferences in favor of the plaintiff.”¹ While a court may “consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case,” it is under no obligation to do so where, as here, such consideration is neither necessary nor appropriate. *Id.* at 65 (quoting *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000)).

As this Court properly held, plaintiffs’ factual allegations and the inferences derived from those facts are sufficient to show by a preponderance of the evidence that the plaintiffs have standing, and therefore, that the Court has jurisdiction over this matter. Plaintiffs’ primary factual allegations at issue concern “[w]hether Bush did, in fact, begin testing the waters in January 2015,” Mem. Op. at 11, and whether Bush’s campaign failed to report all of his testing-the-waters spending. The inferences required to show that Bush was testing the waters prior to June 2015 and that his reporting was not sufficient to cover all those activities are not, as RTR claims, “inferences

¹ In its citation to *Lujan v. Defenders of Wildlife*, RTR mistakenly attributed a quotation from the U.S. District Court, D.C. in *Schmidt* to the U.S. Supreme Court in *Lujan*. ECF No. 19 at 14.

unsupported by the facts.” ECF No. 19 at 14 (quoting *Schmidt*, 826 F. Supp. 2d at 65). Rather, plaintiffs’ factual allegation that Bush engaged in more testing-the-waters activities prior to June 2015 than the campaign reported is not only specifically alleged in their complaint but also supported by the mountain of credible public reporting cited in their administrative complaints. *See infra* Part I.B.

RTR dismisses these reports as “nothing more than beltway gossip columns,” ECF No. 19 at 15, a characterization that might receive some pushback from the Pulitzer-prize winning newsrooms at *The Washington Post*,² *The New York Times*,³ *The Huffington Post*,⁴ *Bloomberg*,⁵ *Politico*,⁶ and the *Associated Press*,⁷ and presumably also from dedicated and decidedly non-

² *See, e.g.*, ECF No. 1-2 ¶¶ 5, 11 (citing Robert Costa, *Jeb Bush and his allies form leadership PAC and super PAC, both dubbed Right to Rise*, Wash. Post (Jan. 6, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/01/06/jeb-bush-forms-new-pac-right-to-rise>; Matea Gold, *Jeb Bush super PAC juggernaut heads to California next week*, Wash. Post (Mar. 23, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/03/23/jeb-bush-super-pac-juggernaut-heads-to-california-next-week>).

³ *See, e.g.*, ECF No. 1-2 ¶ 20 (citing Michael Barbaro, *Jeb Bush’s Team Plots Vast Effort to Win Florida*, N.Y. Times (Mar. 21, 2015), <https://www.nytimes.com/2015/03/22/us/politics/jeb-bushs-team-plots-vast-effort-to-win-florida.html>); ECF No. 1-1 ¶ 12 (citing Jim Rutenberg, *The Next Era of Campaign-Finance Crazyism is Already Underway*, N.Y. Times (Apr. 21, 2015), <https://www.nytimes.com/2015/04/21/magazine/the-next-era-of-campaign-finance-crazyism-is-already-underway.html>).

⁴ *See* ECF No. 1-1 ¶ 12 (citing Paul Blumenthal, *Jeb Bush Messes Up Charade of Not Running for President*, Huff. Post (May 13, 2015), https://www.huffpost.com/entry/jeb-bush-president_n_7278624).

⁵ *See* ECF No. 1-2 ¶ 7 (citing Michael C. Bender & Jonathan Allen, *Bush Team Sets Bold Fundraising Goal: \$100 Million in Three Months*, Bloomberg Politics (Jan. 9, 2015), <https://www.bloomberg.com/news/articles/2015-01-09/bush-team-sets-bold-fundraising-goal-100-million-in-three-months>).

⁶ *See, e.g.*, ECF No. 1-1 ¶¶ 11, 16, 21, 23, 25 (citing Ben White, *Jeb’s eye-popping event: \$100K per ticket*, Politico (Feb. 10, 2015), <https://www.politico.com/story/2015/02/jeb-bush-fundraiser-100k-per-ticket-115086>; Alex Isenstadt, *Jeb Bush’s \$100M May*, Politico (May 8, 2015), <https://www.politico.com/story/2015/05/jeb-bush-right-to-rise-super-pac-campaign-117753>).

⁷ *See* ECF No. 1-1 ¶ 12 (citing Thomas Beaumont, *Bush is preparing to delegate many of his campaign tasks to a super PAC that can raise unlimited amounts of cash*, Associated Press (Apr. 21, 2015), <https://www.miamiherald.com/news/nation-world/national/article19123962.html>).

“beltway” reporters at *The Texas Tribune*.⁸ These reports were brimming with extensive sourcing and evidence-based reporting about Bush’s and RTR’s activities during the period in question; in some cases, they were reporting on direct statements *from Bush himself*.⁹ RTR further ignores the many other types of sources that plaintiffs’ two administrative complaints cited in support of their allegations, including Bush’s own Twitter feed,¹⁰ his Facebook page,¹¹ a press release from the Iowa Republican Party,¹² a Right to Rise donation page,¹³ and a video of Bush’s remarks at the February 2015 Conservative Political Action Conference.¹⁴

By considering the allegations in plaintiffs’ complaint, as well as reasonable inferences derived from those allegations and from facts in the administrative complaints, this Court properly applied the 12(b)(1) standard to find that plaintiffs have established standing by a preponderance of the evidence. RTR’s false claim that the Court applied the wrong standard is little more than an attempt to mask its dissatisfaction with the Court’s application of the *proper* standard. Because the

⁸ See ECF No. 1-1 ¶ 26 (citing Patrick Svitek, *George P. Bush to Help Raise Cash for Dad’s Super PAC*, *Tex. Tribune* (Mar. 9, 2015), <https://www.texastribune.org/2015/03/09/george-p-bush-attend-fundraiser-dads-super-pac>).

⁹ See, e.g., ECF No. 1-2 ¶ 4 (citing Jose A. DelReal, *Jeb Bush forms PAC to explore presidential run*, *Wash. Post* (Dec. 16, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/12/16/jeb-bush-forms-pac-to-explore-presidential-run>).

¹⁰ See ECF No. 1-2 ¶ 10 (citing @JebBush, Twitter, <https://twitter.com/jebbush>).

¹¹ See, e.g., ECF No. 1-2 ¶ 4 (citing Facebook, *A Note from Jeb Bush* (Dec. 16, 2014), <https://www.facebook.com/notes/jeb-bush/a-note-from-jebbush/619074134888300>).

¹² See ECF No. 1-2 ¶ 19 (citing Press Release, Republican Party of Iowa, *Iowa GOP to Host Star-Studded Lincoln Dinner on May 16* (Mar. 26, 2015), <http://www.iowagop.org/2015/03/26/iowa-gop-to-host-star-studded-lincoln-dinner-on-may-16>) (archived version available at <https://web.archive.org/web/20150331230503/http://www.iowagop.org:80/2015/03/26/iowa-gop-to-host-star-studded-lincoln-dinner-on-may-16>).

¹³ See ECF No. 1-2 ¶ 9 (citing Right to Rise Super PAC, *Run Jeb Run Fund Contribution Page*, <https://contribute.righttorisesuperpac.org/run-jeb-run-fund/> (last visited Mar. 27, 2015)).

¹⁴ See ECF No. 1-2 ¶ 17 (citing Jeb Bush Remarks at CPAC (C-SPAN television broadcast Feb. 27, 2015), <https://www.c-span.org/video/?324558-16/governor-jeb-bush-r-fl-remarks-cpac-2015>).

Court committed no mistake or “obvious error” in applying the 12(b)(1) standard, it should reject RTR’s motion to reconsider based on Rule 60(b)(1). *See* Fed. R. Civ. Pro. 60(b)(1); *Douglas*, 306 F.R.D. at 5.

B. RTR has no basis for its assertion that all testing the waters activity at issue here was publicly disclosed.

RTR’s 60(b)(6) claim rests on the premise that the Court’s Memorandum Order was “based on a ‘fundamental misconception of the facts.’” ECF No. 19 at 15 (quoting *Stanford v. Potomac Elec. Power Co.*, No. 1:04-1461, 2006 WL 1722329 at *3 (D.D.C. 2006)). RTR asserts that this Court’s ruling was incorrect because “[a]ll the information that must be disclosed under FECA was timely reported by the Bush campaign, and it is *all* publicly available in campaign finance reports on FEC.gov.” *Id.* at 16 (emphasis in original). This bare assertion, even if it were correct, is insufficient to reach the “high bar” of an extraordinary circumstance that would warrant relief under Rule 60(b)(6). *Shearill v. Peter N.G. Schwartz Mgmt. Co.*, 325 F.R.D. 28 (D.D.C. 2018) (quoting *Philip Morris USA Inc.*, 840 F.3d at 852).

RTR’s claim that the Bush campaign reported all testing-the-waters expenditures is just that—an unsubstantiated factual claim. Unless every single action between RTR and Bush’s campaign was coordinated, an allegation that RTR has “vehemently den[ie]d,” Int.-Def. Mot. to Dismiss, ECF No. 11 at 19, RTR has no way of knowing about the full scope of testing-the-waters spending by Bush and his campaign. RTR offers no evidence for its claim that Bush fully reported his testing-the-waters activity, and in fact, RTR *cannot* validate this claim, because this information is uniquely within the knowledge of Bush and his campaign. Finally, as discussed above, in ruling on a motion to dismiss for lack of standing, the Court must grant *plaintiffs* the benefit of all inferences that can be derived from their factual allegations. Thus, this Court properly found that RTR’s assertion that FECA required no further disclosures from Bush “is premature at

this stage in the litigation” and “a merits issue.” Mem. Op. at 10-11.

RTR nevertheless characterizes its own competing factual allegation that “Governor Bush’s campaign disclosed *all* his testing-the-waters activities” from January 2015 as an “unrebutted premise.” ECF No. 19 at 9, 16.¹⁵ Once again, RTR’s only “support” for this notion is that Bush reported *some* testing-the-waters activity—which plaintiffs did not deny. *See* Pls.’ Opp’n to Mot. to Dismiss, ECF No. 13 at 28 n.6 (noting 50 “ttw” or “testing-the-waters” disbursements);¹⁶ RTR Reply Supp. Mot. to Dismiss, ECF No. 15 at 10-11 (noting \$388k in ttw disbursements). RTR now reasserts, without citation, that Bush did report “\$386,020.15 of testing-the-waters

¹⁵ It is unusual that after denying that Bush was engaged in any testing-the-waters activities before June 2015, RTR is now mounting the defense that Bush instead properly reported testing-the-waters activities dating back to January 2015. *See* Mem. Op. at 11 (“Right to Rise strenuously denies that Bush was testing the waters prior to June 2015.”) (citing Int.’s Mot. to Dismiss). Indeed, unless RTR is confirming that (1) Bush became a candidate as of January 2015 and (2) RTR has this information because it was operating as Bush’s alter ego and de facto campaign committee, it is unclear on what basis RTR can claim to know the full extent of his campaign activity in that period. If RTR possesses admissible and persuasive insider knowledge sufficient to rebut the overwhelming objective indicia that Bush had decided to become a candidate long before his formal announcement, *see* 11 C.F.R. §§ 100.72(b); 100.131(b); FEC Adv. Op. 1981-32 (Oct. 2, 1981), it is free to present that evidence here for the Court’s consideration.

¹⁶ Plaintiffs note that there is some inconsistency in how the campaign dated Bush’s reported testing-the-waters activities. *Cf.* 11 CFR §§ 100.72(a), 100.131, 101.3. Of the 50 testing-the-waters disbursements the campaign disclosed, 47 were reported as in-kind contributions from Bush, meaning they were disclosed both as receipts and as disbursements; the campaign coded those transactions for June 5, 2015. Review of the notes for each such transaction as itemized on the disbursement side of the report, however, indicates different dates for the underlying testing-the-waters transactions, some dating back as far as May 2014. *See* Jeb 2016 Inc., 2015 July Quarterly Report, FEC Form 3P at 1675-90 (filed July 15, 2015; amended Jan. 31, 2016), <https://docquery.fec.gov/pdf/580/201601319005221580/201601319005221580.pdf>.

Whether this means that Bush would acknowledge, if investigated by the FEC, that he began testing the waters *as early as mid-2014* is unknowable given that he is not a party to this litigation and RTR is not privy to this information. But this fact about the duration of Bush’s “pre-candidacy” only drives home how much reportable activity has necessarily gone undisclosed. *Compare* Donald J. Trump for President, Inc., Disbursements for “ttw,” FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00580100&disbursement_description=ttw (last visited Mar. 19, 2021) (itemizing testing-the-waters disbursements by Trump 2016 campaign in the months before his June 2015 announcement).

activity for the period January 2015 through June 2015,” ECF No. 19 at 14-15, and this accounts for “*all* [of his] testing-the-waters activities.” *Id.* at 9. As explained above, plaintiffs did rebut this “premise”—by providing the FEC and this Court with extensive evidence that Bush failed to disclose all of his reportable receipts and expenditures for the period preceding his official campaign announcement, whether as testing-the-waters spending or otherwise. *See* ECF No. 1-1 at 3-4, 10-13; ECF No. 1-2 at 3-9, 15-16; ECF No. 13 at 18-21.

The dispute between the parties is not whether Bush’s campaign reported *some* portion of his testing-the-waters spending—plaintiffs already acknowledged this was the case—but whether this reporting was remotely complete or accurate. Given the factual record here, plaintiffs maintain that the existing reporting could not possibly have captured the full extent of Bush’s campaign travel or fundraising in the period before his official announcement. For example, despite Bush’s extensive travel for fundraising and campaign-styled events that public reports repeatedly documented prior to his official declaration of candidacy,¹⁷ his campaign reported only \$1,089 for “in-kind (ttw): travel/airfare/lodging.”¹⁸ All of Bush’s other disclosed testing-the-waters disbursements were described as paying for some kind of professional “consulting,”¹⁹ and indeed, most of the transactions were in 2014. Looking just at travel, then, Bush demonstrably failed to disclose all of his reportable spending. RTR’s presentation of its contrary view of the facts is

¹⁷ *See* ECF 1-1 ¶¶ 20-23; ECF 1-2 ¶¶ 10-11.

¹⁸ Jeb 2016 Inc., 2015 July Quarterly Report (amended), *supra* note 16, at 1688; *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 Mar. 18, 2021) (showing 50 total disbursement entries described as “ttw” or “testing the waters,” and only one such disbursement specified as travel-related).

¹⁹ Jeb 2016 Inc., 2015 July Quarterly Report (amended), *supra* note 16, at 1675-90; *see also* Jeb 2016, Inc., Disbursements for “ttw” or “testing the waters,” 2015-16, *supra* note 18 (showing 49 of 50 disbursement entries described as paying for some form of “consulting”).

refuted by the record, and certainly does not rise to the level of “extraordinary circumstances” needed to succeed on a 60(b)(6) motion.

II. The Court Should Not Certify Its Order for Interlocutory Appeal.

This Court should also deny RTR’s motion for interlocutory appeal. “Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed.” *Nat’l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 122 (D.D.C. 2009) (internal quotation marks omitted). This is because the “law is clear that certification under § 1292(b) is reserved for truly exceptional cases.” *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000) (citing *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984)); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (only “exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment”); *Selden v. Airbnb, Inc.*, No. 16-cv-933, 2016 WL 7373776 at *1 (D.D.C. Dec. 19, 2016) (same).²⁰

A court may certify an order for interlocutory appeal only if it first determines that the moving party has shown that a nonfinal order: “[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); *see also Citizens for Responsibility & Ethics in Washington v. Am. Action Network*, 415 F. Supp. 3d 143, 144-45 (D.D.C. 2019) (“AAN”).

Section 1292(b) thus imposes a “heavy burden,” *Selden*, 2016 WL 7373776 at *1, on the moving party if they are “to overcome the ‘strong congressional policy against piecemeal reviews,

²⁰ RTR insists that “Section 1292(b) is not limited by its language to ‘exceptional cases.’” ECF No. 19 at 18-19. But RTR does not cite a single case to support its claim, let alone engage with the overwhelming authority in this circuit affirming the opposite.

and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.”
Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Grp., 233 F. Supp. 2d 16, 20 (D.D.C. 2002)
 (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)); see also *Coopers & Lybrand*, 437 U.S.
 at 475 (same); *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 104 (D.D.C. 2003) (same).

RTR does not meet its heavy burden. The only issue for which RTR seeks immediate appeal is this Court’s ruling on plaintiffs’ standing and informational injury. While standing necessarily “involves a controlling question of law,” see, e.g., *APCC Servs.*, 297 F. Supp. 2d at 96-97, RTR fails to show either that there is substantial ground for difference of opinion about plaintiffs’ informational injury or that an order granting appeal will likely and materially advance the ultimate termination of this litigation. Plaintiffs therefore respectfully request that the Court deny certification for interlocutory appeal and allow this case to proceed to the merits.

A. RTR fails to establish a substantial ground for difference of opinion about plaintiffs’ informational injury.

To establish a substantial ground for difference of opinion, the movant must point to a difference existing in “controlling authority.” *Judicial Watch*, 233 F. Supp. 2d at 22. RTR purports to do that, stating that “other courts in this District and Circuit [] have rejected the notion that plaintiffs have a cognizable legal interest in legal determinations.” ECF No. 19 at 20 (citing *CLC v. FEC*, No. 19-cv-2336, 2020 WL 7059577 at *9 (D.D.C. Dec. 2, 2020); *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001)). But, as in its Motion to Dismiss, RTR misconstrues plaintiffs’ informational injury. Consequently, the only two authorities to which RTR cites are inapposite. These cases concern the right to determine whether *already disclosed* expenditures are *coordinated*, not the right to receive *undisclosed* factual information about campaign or testing-the-waters spending. See *Wertheimer*, 268 F.3d at 1074-75 (“[A]ppellants[] . . . did not dispute that all political parties currently report all disbursements or that each transaction appellants allege

is illegal is reported in some form.”); *CLC*, 2020 WL 7059577 at *9 (emphasizing that the FEC’s “failure to investigate confers standing . . . if the sought-after information would uncover nonpublic information that the plaintiffs have a cognizable interest in obtaining”).²¹

“The law is settled that a denial of access to information qualifies as an injury in fact where a statute (*on the claimant’s reading*) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them.” *CLC & Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (per curiam) (emphasis added) (citation omitted); *see also CREW v. AAN*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019) (“The Supreme Court has long recognized that FECA creates an informational right—the right to know who is spending money to influence elections, how much they are spending, and when they are spending it.”) (citing *FEC v. Akins*, 524 U.S. 11, 24-25 (1998)). Here, plaintiffs allege that they have been deprived of months of information about Jeb Bush’s testing-the-waters and/or candidate activities and RTR’s funding of them—information that is statutorily required to be disclosed and that would be helpful to plaintiffs’ organizational missions and activities. *See* ECF No. 13 at 35-37, 41-44, 46-51; Fischer Decl., ECF No. 13-1 at 2-13; Wertheimer Decl., ECF No. 13-2 at 2-5. These allegations and the ample evidence provided to support them are enough to constitute an informational injury sufficient for standing, as this Court recognized. *See* Mem. Op. at 10-11; *accord AAN*, 415 F. Supp. 3d at 145-46; *CLC v. FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017).

Still, RTR argues that “all [] Plaintiffs stand to gain” is a legal determination. ECF No. 19 at 20. But this is just a circular recasting of their earlier argument that plaintiffs have not been

²¹ RTR also contends that this Court’s analysis “conflicts with [these] decisions.” ECF No. 19 at 20. The decisions in *Wertheimer* and related cases were indeed the Court’s primary basis for concluding that plaintiffs *did not* have informational standing based on claims of undisclosed coordinated spending. *See* Mem. Op. at 21. Plaintiffs respectfully disagree with the Court’s expansive reading of *Wertheimer*, and preserve that issue for potential future appeal.

deprived of any information because RTR, Bush, and the Bush campaign fully complied with FECA's disclosure requirements—and thus, plaintiffs stand to gain only legal conclusions about when Bush's testing-the-waters activities (and candidacy) officially began. *See* ECF No. 11 at 17-19. The Court recognized rightly that this argument depends on *when* “Bush did, in fact, begin testing the waters” (or became a candidate), which “is a merits issue,” not a question of standing. Mem. Op. at 11.

In sum, RTR's argument is not grounded in precedent establishing a difference of opinion about plaintiffs' standing; rather, it is premised simply on RTR's disagreement with the Court's ruling. Such disagreement does not warrant interlocutory appeal. *See Judicial Watch*, 223 F. Supp. 2d at 20 (“Mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal.”) (internal quotation marks omitted); *see also In re Vitamins Antitrust Litig.*, 2000 WL 673936 at *3.

B. RTR fails to establish that immediate appeal will likely and materially advance the ultimate termination of this litigation.

Interlocutory appeal also is not warranted because RTR has failed to show that appeal will “likely and materially advance the ultimate determination” of this case. *Educ. Assistance Found. for Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. United States*, No. 11-1573, 2014 WL 12780253, at *3 (D.D.C. Nov. 21, 2014) (emphasis added); *see also Blumenthal v. Trump*, 328 F. Supp. 3d 77, 81 (D.D.C. 2019). A contrary appellate ruling on plaintiffs' standing would potentially resolve this case,²² but the mere possibility of that outcome is not the standard.

²² If the Court were to certify its decision for immediate appeal, plaintiffs could present their other bases for standing to the Court of Appeals, including the informational injury this Court found non-cognizable under *Wertheimer*.

To succeed on this point, RTR cannot simply “assume[] that [it] will prevail on appeal.” *Judicial Watch*, 233 F. Supp. 2d at 28. It must show that success on appeal is the “*likely* course of events.” *Id.* (emphasis added).

RTR makes no such showing. *See supra* Part I.B. Moreover, even if it could, immediate appeal would still not be warranted, as it would “prolong rather than hasten the termination of litigation.” *United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 167 (D.D.C. 2014); *accord Arias v. DynCorp*, 856 F. Supp. 2d 46, 54 (D.D.C. 2012); *Chennareddy v. Dodaro*, No. 87-3528, 2010 WL 3025164, at *2 (D.D.C. July 22, 2010). Further delay in this case would allow the FEC—and, by extension, Bush and RTR—to continue depriving plaintiffs and the public of FECA-required disclosure information about respondents’ role in the 2016 election, without any realistic expectation of a change in court opinion. This is exactly the type of piecemeal review that Congress sought to avoid. As such, the Court should deny RTR’s motion for interlocutory appeal and allow this case to finally proceed to the merits of the FEC’s unjustifiable five-year delay.

III. RTR’s Repeated Efforts to Prolong this Litigation Only Underline Plaintiffs’ Distinct Standing Based on Organizational Injury and Unlawful FEC Delay.

It bears repeating that the purpose of this lawsuit is to end the FEC’s unlawful delay of more than *five years* (and counting) in taking *any* action on plaintiffs’ administrative complaints. This motion is nothing more than an attempt to extend this delay by prolonging the litigation. Indeed, as RTR has acknowledged, “preserving the status quo”—that is, perpetuating delay—was its sole interest in seeking intervention. ECF No. 9 at 15.

As plaintiffs have explained at length, *see* ECF No. 13, they suffer distinct organizational injuries and cognizable harms based on this delay itself. The FEC’s failure to resolve plaintiffs’ administrative complaints means no information about its actions in this matter can be made publicly available, including any legal conclusions, factual findings, or vote records. *See* 52 U.S.C.

§ 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 depend on this type of information for their public education, legislative policy, and regulatory reform programs, so plaintiffs' ability to effectuate their organizational missions has been impaired by the FEC's failure to act. *See* ECF No. 13 at 35-37, 41-44, 46-51; Fischer Decl. ¶¶ 4-39; Wertheimer Decl. ¶¶ 2-10. Relatedly, plaintiffs have had to divert resources from other planned organizational needs to research, fill in the gaps in the Bush campaign's and RTR's disclosure reports, and explain to reporters and partner organizations how they might attempt to find information not properly reported by Bush and RTR. *See* ECF No. 13 at 46-47, 50-51; Fischer Decl. ¶¶ 20-21. So long as the FEC's delay continues, aided by RTR's intervention in this matter, plaintiffs' programmatic and organizational injuries will persist.

The FEC has had more than five years to cure these injuries and ample time since it regained a quorum on December 18, 2020 to appear in and defend this lawsuit, but there is no indication it has taken any action towards either end. An order of this Court directing the FEC to act within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C) would plainly redress plaintiffs' Article III injuries. Accordingly, this Court should deny RTR's motion for reconsideration and certification for interlocutory appeal.

CONCLUSION

For these reasons, Intervenor-Defendant's motion for reconsideration and certification for interlocutory appeal should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 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.

Respectfully submitted,

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