IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,	)	
Plaintiffs,	)	Case No. 1:20-cv-00730
v.	)	Hon. Christopher R. Cooper
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
RIGHT TO RISE SUPER PAC, INC.	)	
Proposed Intervenor-Defendant.	)	

_____/

DEFENDANT INTERVENOR RIGHT TO RISE SUPER PAC, INC.'S MOTION FOR RECONSIDERATION AND/OR CERTIFICATION FOR INTERLOCUTORY APPEAL

Right to Rise Super PAC, Inc., respectfully moves this Court under Rule 60(b)(1) or, in the alternative, Rule 60(b)(6) of the Federal Rules of Civil Procedure to reconsider that portion of its February 19, 2021, Memorandum Opinion and Order holding that Plaintiffs have standing to sue under FECA. Alternatively, Right to Rise respectfully requests the Court amend its Memorandum Opinion and Order to make the certification findings necessary under 28 U.S.C. § 1292(b) for the D.C. Circuit Court to consider the corresponding legal issues. A supporting memorandum of

points and authorities accompanies this motion, and a proposed order granting the motion to certify order for interlocutory appeal is attached hereto as **Exhibit A**.

Pursuant to Local Rule 7(m), counsel for Right to Rise conferred with Plaintiffs' counsel on March 4, 2021. Plaintiffs' counsel indicated that Plaintiffs oppose the instant motion.

Dated: March 5, 2021

Respectfully Submitted,

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REQUEST FOR HEARING

Intervenor-Defendant Right to Rise Super PAC, Inc., respectfully requests a hearing on its Motion for Reconsideration and/or Certification for Interlocutory Appeal.

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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.

/s/ Charles R. Spies
Charles R. Spies (Bar ID: 989020)

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Defendant,	)	
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RIGHT TO RISE SUPER PAC, INC.	)	
	)	
Proposed Intervenor-Defendant.	)	
	)	

_____/

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RIGHT TO RISE SUPER PAC, INC.'S MOTION FOR RECONSIDERATION AND/OR CERTIFICATION FOR INTERLOCUTORY APPEAL

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I. INTRODUCTION

Right to Rise Super PAC, Inc. ("Right to Rise") seeks reconsideration of that portion of the Court's February 19, 2021, Memorandum Opinion and Order holding that Plaintiffs have standing to sue under the Federal Election Campaign Act ("FECA"). Alternatively, Right to Rise requests the Court amend its February 19, 2021, Memorandum Opinion and Order to make the certification findings necessary under 28 U.S.C. § 1292(b) for the D.C. Circuit Court to consider the corresponding legal issues on appeal.

Reconsideration is appropriate on two grounds. First, under Rule 60(b)(1), the Court mistakenly relied on the wrong legal standard in holding that Plaintiffs sufficiently alleged informational injury such that they have standing to proceed on limited aspects of their FECA claim. Specifically, the Court relied on the Rule 12(b)(6) legal standard for motions to dismiss under Rule 12(b)(6), while determinations regarding subject matter jurisdiction generally—and standing specifically—are made under Rule 12(b)(1) and involve different legal standards and burden of proof. As this Court has explained, "the court must scrutinize the plaintiff's allegations more closely when considering a motion to dismiss pursuant to Rule 12(b)(1) than it would under a motion to dismiss pursuant to Rule 12(b)(6)." *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 65 (D.D.C. 2011). And Plaintiffs cannot demonstrate by a preponderance of the evidence that the Court has

subject-matter jurisdiction over their FECA claim because the facts alleged in their Complaint are inconsistent with the public record, which shows that Governor John Ellis "Jeb" Bush disclosed *all* his testing-the-waters activities through his presidential campaign's first campaign finance report.

Second, under Rule 60(b)(6), the Court's holding that Plaintiffs alleged a limited informational injury is based on a misconception of the facts—specifically, the inaccurate premise that Plaintiffs would obtain disclosure of *additional* information if they prevail on their FECA claim. In fact, Governor Bush disclosed *all* his testing-the-waters activities on his presidential campaign's first campaign finance report. So *even if* Plaintiffs were to succeed on their FECA claim, they would not obtain a scintilla of additional information. As a result, they could not have suffered an informational injury necessary for standing. Meanwhile, Plaintiffs have no cognizable interest in a legal determination from the Federal Election Commission ("FEC") that Right to Rise's expenditures were "coordinated" with Governor Bush and should be reported differently.

As another decision in this District recognized only a few months ago, to seek a determination of coordination (or, here, candidate status) is to seek a legal conclusion in which there "is no 'constitutionally cognizable' interest." *Campaign Legal Ctr. v. Fed. Election Comm'n*, *No*. CV 19-2336 (JEB), 2020 WL 7059577, at *1 (D.D.C. Dec. 2, 2020). The same is true here.

Alternatively, Right to Rise requests the Court certify its February 19, 2021 Memorandum Opinion and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The question of Plaintiffs' standing is a controlling question of law, that question has divided judges in this District over the last several months, and the D.C. Circuit's resolution of the question would substantially advance the termination of this litigation. There is little sense in litigating this case if the D.C. Circuit ultimately agrees that the dispute should have never left the starting line.

For these reasons, and as further explained below, Right to Rise respectfully requests that this Court partially reconsider its Order granting standing to Plaintiff, or in the alternative, certify its decision for interlocutory appeal.

II. BACKGROUND

A. Procedural Background

In March 2015, Plaintiffs filed an FEC complaint alleging that Governor Bush and "Right to Rise PAC" violated FECA by failing to comply with FECA's "testing-the-waters" disclosure requirements, candidate-contribution limits, and candidate registration and reporting requirements. Compl. Ex. B. Mar. Admin. Compl., ECF No. 1-2. Two months later, Plaintiffs filed a second FEC complaint, this time alleging that Governor Bush and Right to Rise violated FECA by failing to comply with the "testing-the-waters" restrictions, candidate-contribution limits, and so-called "soft money" prohibitions. Plaintiffs also alleged that Governor Bush

established, financed, maintained, and controlled Right to Rise in violation of FECA. Compl. Ex. A., May Admin. Compl. ECF No. 1-1. Plaintiffs' two FEC complaints were collectively designated by the FEC as Matter Under Review ("MUR") 6927.

Plaintiffs then filed the present action seeking injunctive and declaratory relief to compel the FEC to take up their complaints under 52 U.S.C. § 30109(a)(8)(A). Compl. ¶ 2. Specifically, Plaintiffs allege the FEC's inaction has deprived them of information regarding the extent of coordination between Right to Rise and the Bush campaign, *id.* ¶ 9, and the extent of Governor Bush's campaign spending, *id*. ¶ 10. Plaintiffs also alleged organizational injuries from the inaction, claiming the alleged-ly inadequate disclosure of those same campaign finance activities caused Plaintiffs to divert funds and resources from other organizational needs. *Id*. ¶¶ 19, 22.

The FEC has not publicly acted on MUR 6927 and has not appeared in this action. Right to Rise moved to intervene in June 2020, which this Court promptly allowed. Right to Rise then moved to dismiss Plaintiffs' complaint for lack of standing under Rule 12(b)(1) and, with respect to Plaintiffs' Administrative Procedure Act ("APA") claim, for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

B. The Court's Memorandum Opinion and Order

On February 19, 2021, this Court issued a Memorandum Opinion and Order granting most of Right to Rise's motion to dismiss. ECF No. 17. Specifically, the

Court concluded Plaintiffs' complaint failed to state a claim under the APA. *Id*. 18-19. As for Plaintiffs' FECA claims, the Court held that *Wertheimer v. FEC,* 268 F.3d 1070, 1075 (D.C. Cir. 2001), precluded holding that Plaintiffs had standing to pursue their FECA claim as it relates to any alleged coordinated spending between Governor Bush and Right to Rise. *Id*. 12-15.

But the Court reached a different conclusion regarding Plaintiffs' claim that Governor Bush "failed to disclose months of spending stemming from the testing-the-waters period of his nascent candidacy." *Id*. 10-12. There, the Court said that Plaintiffs' *do* have Article III standing due to informational injury sustained during the five-month period from January 2015 to June 2015, while Governor Bush was testing-the-waters. The Court reasoned that "[w]hether Bush did, in fact, begin testing the waters in January 2015 is a merits issue," and that "[d]eprivation of the disclosures that FECA requires for that disputed period constitutes *an informational injury* to sustain Article III standing." *Id*. 11 (emphasis added). It is this holding for which Right to Rise seeks reconsideration or, in the alternative, certification of the Court's Memorandum Opinion and Order for interlocutory appeal.

III. ARGUMENT

A. This Court Should Reconsider its Memorandum Opinion and Hold that Plaintiffs Lack Standing to Pursue their FECA Claim.

Rule 60(b) authorizes a court to grant relief from an order based on "mistake," Fed. R. Civ. P. 60(b)(1), or, "any other reason that justifies relief," *id.* 60(b)(6).

While the moving party bears the burden of demonstrating it is entitled to relief, *Green v. AFL–CIO*, 811 F.Supp.2d 250, 254 (D.D.C. 2011), the court "is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." *Twelve John Does v. D.C.*, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (citations omitted).

1. This Court Should Reconsider its Decision under the Legal Standard for Rule 12(b)(1) and Hold that Plaintiffs have not Shown by a Preponderance of the Evidence that the Court has Subject-Matter Jurisdiction over the Remainder of Their FECA Claim.

Relief under Rule 60(b)(1) is appropriate where an order contains a mistake or "obvious error." *Dist. of Columbia Fed'n of Civic Ass'ns v. Volpe*, 520 F.2d 451, 451–53 (D.C. Cir.1975). *Accord, e.g.*, *Douglas v. D.C. Hous. Auth.*, 306 F.R.D. 1, 5 (D.D.C. 2014). And the February 19th Order regarding Plaintiffs' standing satisfies that standard because it erroneously applies the legal standard and burden of proof that apply to Rule 12(b)(6) motions for failure to state a claim, rather than the legal standard and burden of proof that must be applied to standing challenges under Rule 12(b)(1) like that raised here by Right to Rise. Applying the proper standard, it is clear that Plaintiffs lack standing.

The underlying issue is Governor Bush's testing-the-waters spending. Plaintiffs claim that Governor Bush "failed to disclose months of spending stemming from the testing-the-waters period of his nascent candidacy," that Bush "was required to record and disclose all testing-the-waters spending in his first disclosure report," and that Plaintiffs "have been deprived of over five months of information

that is statutorily required to be disclosed." ECF No. 17 at 11. Recognizing what a casual observer might characterize as a factual dispute, the Order applied the classic 12(b)(6) standard, reasoning that the Court "must accept plaintiffs' factual allegations as true," and that "the Court assumes that plaintiffs are correct that Bush was testing the waters as of January 2015." *Id*.

But motions to dismiss for lack of subject matter jurisdiction under 12(b)(1) are subject to a different standard and burden of proof. It is the plaintiff who "bears the burden of proving by a preponderance of the evidence that the Court has subject-matter jurisdiction over her claims," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). What's more, "the court must scrutinize the plaintiff's allegations more closely when considering a motion to dismiss pursuant to Rule 12(b)(1) than it would under a motion to dismiss pursuant to Rule 12(b)(6)." *Schmidt v. U.S. Capitol Police Bd*., 826 F. Supp. 2d 59, 65 (D.D.C. 2011). While a court must accept a plaintiff's factual allegations, the court may *not* "accept inferences unsupported by the facts," and *may* "consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case." *Id*. *Accord, e.g.*, *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

Here, Plaintiffs cannot show—much less by a preponderance of the evidence—that they have suffered an informational injury. That is because the public record, which Plaintiffs notably omit from their allegations, reveals that Governor

Bush reported $386,020.15 of testing-the-waters activity for the period January 2015 through June 2015 in his presidential campaign's first disclosure report. Plaintiffs' allegations, which cite nothing more than beltway gossip columns, do not make it more likely than not that a favorable ruling will result in *additional*, non-disclosed spending. That information has already been disclosed to Plaintiffs and the public.

Plaintiffs do not meet the stringent Article III standing requirements for informational injury under the Rule 12(b)(1) legal standard and burden of proof. Right to Rise respectfully requests the Court reconsider and dismiss what remains of Plaintiffs' FECA claim on the ground that Plaintiffs lack Article III standing.

2. The Court Should Reconsider its Decision and Hold that Plaintiffs have not Sustained Informational Injury because All Contributions and Spending at Issue Here were Publicly Disclosed in 2015.

Alternatively, Rule 60(b)(6) grants a district court "discretion to vacate or modify [orders] when it is appropriate to accomplish justice." *United States v. 8 Gilcrease Lane*, 668 F. Supp. 2d 128, 131 (D.D.C. 2009), *aff'd sub nom. United States v. 8 Gilcrease Lane, Quincy, Fla. 32351*, 638 F.3d 297 (D.C. Cir. 2011). This Court has recognized such circumstances exist when an order is "based on a 'fundamental misconception of the facts' which entitled [the movant] to relief from the court's judgment." *Stanford v. Potomac Elec. Power Co.*, No. CIV.A. 104-1461RBW, 2006 WL 1722329, at *3 (D.D.C. June 21, 2006) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (cleaned up).

Here, the February 19th Order reasoned 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." ECF No. 17 at 12. Not so. *All* 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. There can be no informational injury because there is simply no more to disclose under FECA.

Starting with the unrebutted premise that there can be no further disclosures required under FECA, Right to Rise is entitled to relief under Rule 60(b)(6). Accordingly, this Court should reconsider that aspect of its Order. *See Computer Professionals for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996), amended (Feb. 20, 1996) ("it was incumbent on the court to examine the [papers] in order to determine whether its ruling on the Exemption 7(D) issue had been based on a correct understanding of the underlying facts. We are confident that had it done so, it would have taken the necessary corrective action.").

Moreover, the question of *when* Governor Bush became a candidate, just like the question of *whether* Right to Rise coordinated with Governor Bush, has nothing to do with standing or informational injury. *Even if* the FEC determined that Governor Bush was a candidate prior to when Right to Rise argues that occurred, or *even if* the FEC determined that Right to Rise and Governor Bush had indeed

coordinated in a way impermissible under FECA, no additional information stands to be disclosed. As this Court explained just 14 days ago, "plaintiffs' attempt to construe their request as being one for facts (rather than legal determinations) is precluded by *Wertheimer [v. FEC]*, 268 F.3d 1070 at 1075 (D.C. Cir. 2001)." ECF No. 17 at 14. "[I]t is well-established that a plaintiff has no legally cognizable interest in a legal conclusion that carries certain law enforcement consequences, nor in forcing the FEC to get the bad guys." *Id*. (cleaned up).

In sum, the remaining portion of Plaintiffs' FECA claim relating to Governor Bush's testing-the-waters activities must be dismissed, just like that portion of Plaintiffs' FECA claim alleging coordination, *id*. at 14-15, and so many others before that. *E.g.*, *Campaign Legal Ctr.*, CV 19-2336 (JEB), 2020 WL 7059577 at *9 (D.D.C. Dec. 2, 2020) (concluding, on second review, that plaintiffs lacked standing to determine whether expenditures were coordinated with candidate). Plaintiffs have not been deprived of any information that must be disclosed under statute because all such information has been publicly available for years.[1]

[1] The February 19th Order does not address Plaintiffs' argument that they have standing based on organizational injury and FEC delay. ECF No. 17 at 9 n.1. But if the Court corrects the Order and holds that Plaintiffs have not suffered an informational injury, the same would be true of the purportedly organizational injury: if all FECA-required information has been publicly disclosed, there is no injury and no Article III standing.

3. Right to Rise's Motion for Reconsideration is Timely.

A motion under Rule 60(b) must be made within a reasonable time—and for requests under sub-rules 60(b)(1), (b)(2), and (b)(3), "no more than a year after the entry of the judgment or order" at issue. Fed. R. Civ. P. 60(c). Only 14 days have passed since this Court issued the Memorandum Opinion and Order. As a result, this motion is timely. *See Carvajal v. Drug Enforcement Admin.*, 286 F.R.D. 23, 26-27 & n. 4 (D.D.C.2012) (collecting cases).

B. Alternatively, the Court Should Certify Its Order for Interlocutory Appeal.

Alternatively, Right to Rise seeks certification of the Court's February 19th Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The issue at the heart of this motion is dispositive, has been decided differently by different members of this Court, and would substantially advance the litigation if resolved now by the D.C. Circuit. Accordingly, this Court should amend its Order, consistent with Federal Rule of Civil Procedure 5(a)(3), to include the findings necessary for certification.

Interlocutory appeal from a non-final order may be taken only after the district court's certification of the order. 28 U.S.C. § 1292(b). Under § 1292(b), the district court's order must certify that the order: (1) "involves a controlling question of law"; (2) "as to which there is a substantial ground for difference of opinion"; and (3) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id*. Section 1292(b) "is not limited by its language to 'exceptional'

cases," but rather is characterized by its flexibility. 16 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3929 (3d ed. 2017). The February 19th Order easily satisfies all three factors here.

First, it cannot be disputed that the Order involves a controlling question of law: subject-matter jurisdiction. Under § 1292(b), a controlling question of law is "one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 4 (D.D.C. 2018) (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). "Controlling questions of law include issues that would terminate an action if the district court's order were reversed." *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003). Thus, issues of subject matter jurisdiction—such as standing to sue—are controlling questions of law because "reversal of the district court's order would terminate the action." *Id.* (citations omitted); *accord, e.g.*, *Montesa v. Schwartz*, 836 F.3d 176, 194 (2d Cir. 2016) (reviewing on § 1292(b) interlocutory appeal whether plaintiffs had standing to bring an Establishment Clause challenge); 16 Fed. Prac. & Proc. § 3931 (rulings rejecting challenges to subject-matter jurisdiction and justiciability are among those "that may be obviously suited for interlocutory appeal") (citations omitted).

Second, it cannot be disputed that there exists substantial ground for a difference of opinion as to the issue of Plaintiffs' standing to proceed on their FECA claim. "Substantial ground for difference of opinion" under § 1292(b) may be established "where a court's challenged decision conflicts with decisions of several other courts." *APCC Servs.*, 297 F. Supp. 2d at 97–98. Here, the Order's conclusion that Plaintiffs have standing despite all disclosures required under FECA having been made conflicts with decisions from other courts in this District and Circuit that have rejected the notion that plaintiffs have a cognizable legal interest in legal determinations—as that is all that Plaintiffs stand to gain here. *E.g.*, *Campaign Legal Ctr.*, CV 19-2336 (JEB), 2020 WL 7059577 at *9 (D.D.C. Dec. 2, 2020) (plaintiffs lacked standing to seek determination whether expenditures were coordinated with candidate); *Wertheimer*, 268 F.3d at 1075.

Sensibly, a court may find a "substantial ground for difference of opinion" even where it is confident in the correctness of its ruling. *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 33142129, at *2 (D.D.C. Nov. 22, 2000) ("Although this Court firmly believes that the facts of this case warrant a ruling in favor of application of the Federal Rules to jurisdictional discovery, the Court recognizes that the arguments in support of the opposite conclusion are not insubstantial."). Here, there is substantial ground for difference of opinion as to Plaintiffs' standing to sue because the Order interprets and extends D.C. Circuit and

D.C. District Court precedent in a novel way that warrants immediate review in the Court of Appeals.

Finally, it cannot be disputed that an immediate appeal would advance this litigation's ultimate termination. "To satisfy this element a movant need not show that a reversal on appeal would actually end the litigation;" the relevant inquiry "is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock*, 317 F. Supp. 3d at 6. Further, the Court should consider whether an immediate appeal "would *likely* and *materially* advance the ultimate determination of the litigation. *Blumenthal v. Trump,* 382 F. Supp. 3d. 77, 81 (D.D.C. 2019) (citation omitted).

Here, certification of the Court's February 19th Order would likely and materially advance the termination of the litigation. "When there are substantial grounds for difference of opinion as to a court's subject matter jurisdiction, courts regularly hold that immediate appeal may materially advance the ultimate termination of the litigation." *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009). Likewise, an immediate appeal in this instance—the heart of which rests on justiciability—could very well conserve judicial resources, which satisfies the third element in and of itself. *APCC Services, Inc.*, 297 F. Supp. 2d at 100 (D.D.C. 2003). ("[I]n the event that it is ultimately found that this Court lacks jurisdiction to litigate

[this] case, it would be far better for all concerned, including plaintiff, to have these matters resolved now, as opposed to sometime in the distant future.") (cleaned up).

An immediate appeal and a D.C. Circuit ruling for Right to Rise would terminate this litigation for lack of subject matter jurisdiction immediately, eliminating years of litigation and conserving the Court's and parties' resources. Accordingly, certification for interlocutory appeal is appropriate.

IV. CONCLUSION

Right to Rise respectfully requests that the Court reconsider that portion of its February 19, 2021 Memorandum Opinion and Order holding that Plaintiffs have Article III standing to pursue the remainder of their FECA claim, or, in the alternative (or in addition to), certify the Order for interlocutory appeal under 28 U.S.C. § 1292(b).

Dated: March 5, 2021

Respectfully Submitted,

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**Pending Admission*

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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.

/s/ Charles R. Spies