IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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DEFENDANT INTERVENOR RIGHT TO RISE SUPER PAC, INC.'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Plaintiffs fail to identify any expenditure that was not disclosed in violation of a specific FECA requirement. Right to Rise's supplemental brief rebutted the first five "examples" that Plaintiffs provided at oral argument on the reconsideration motion. And this brief rebuts the only additional "example" Plaintiffs identified in their own supplemental brief. Plaintiffs therefore lack informational standing.

What that leaves is Plaintiffs' actual request—that this Court (1) make a legal determination about when Governor Bush became a candidate, and (2) force Bush and Right to Rise to redisclose the same expenditures under different legal labels. But that's not an information injury, it is a demand for a legal conclusion. And the theory is squarely foreclosed by *Wertheimer v. Fed. Election Comm'n*, 268 F.3d 1070 (D.C. Cir. 2001). Accordingly, Plaintiffs' complaint should be dismissed.

II. THIS INQUIRY IS DRIVEN BY FECA'S DISCLOSURE STANDARDS, NOT BY WHAT PLAINTIFFS WISH THOSE STANDARDS WERE.

Plaintiffs have alleged that the Commission's handling of their administrative complaints has deprived them "of full disclosure about the activities undertaken by Bush and his agents to establish [Right to Rise], as well as the nature of the ongoing relationship between [Right to Rise] and the Bush campaign." Compl., ECF No. 1, at ¶¶ 9, 37. This informational injury requires Plaintiffs to show a specific instance where a statutory provision has explicitly created a right to information, and Plaintiffs have failed to obtain the information that must be publicly disclosed. *E.g.*, *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 2564 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing"); *Havens Realty Corp. v. Coleman*,

455 U.S. 363, 373–374, 102 S.Ct. 1114, 1121–1122 (1982) (deprivation of information required to be disclosed under the Fair Housing Act constitutes "specific injury" sufficient for standing).

Of course, "[n]ot every unrequited demand for information from the FEC is sufficient to establish Article III standing[.]" *Free Speech for People v. Fed. Election Comm'n*, 442 F. Supp. 3d 335, 342–43 (D.D.C. 2020). "Only if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) ("the existence and scope of an injury for informational standing purposes is defined by Congress").

Conversely, a plaintiff has suffered no injury in fact if it seeks information that a statute does *not* require to be disclosed. *CREW v. FEC*, 401 F.Supp.2d 115, 121 n.2 (D.D.C. 2005) aff'd, 475 F.3d 337 (D.C. Cir. 2007) (plaintiffs seeking exact value of contact list did not suffer an informational injury because FECA "does not require the FEC to value an in-kind contribution in the form of a contact list"); *Alliance for Democracy v. FEC*, 362 F.Supp.2d 138, 145 (D.D.C. 2005) (rejecting claim to quantify the value of a mailing list where the Act did not require it).

So the questions here are straightforward: (1) whether the information Plaintiffs seek is required to be disclosed under FECA, and (2) if so, whether Plaintiffs have proven by a preponderance of the evidence that the information sought has not been disclosed. Because Right to Rise's dismissal motion poses a "factual" challenge to the Court's subject-matter jurisdiction under Rule 12(b)(1), the Court "may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant, but must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Hamilton v. United States*, __ F.Supp.3d __, No. CV 19-1105 (RDM), 2020 WL 6709758, at *3 (D.D.C. Nov. 16, 2020). "[T]he factual allegations of the complaint are *not*

entitled to a presumption of validity, and the Court is required to resolve factual disputes between the parties. *Id*. (citing *Erby v. United States*, 424 F. Supp. 2d 180, 183 (D.D.C. 2006)). In doing so, "[t]he Court may consider the complaint, any undisputed facts, and the [C]ourt's resolution of disputed facts." *Id*. (cleaned up). It is Plaintiffs' burden to establish jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 114 S.Ct. 1673 (1994), and they must do so by a preponderance. *Schmidt v. U.S. Capitol Police Bd*., 826 F. Supp. 2d 59, 69 (D.D.C. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

III. PLAINTIFFS' SINGLE ADDITIONAL "EXAMPLE" OF INFORMATIONAL DEPRIVATION DOES NOT ESTABLISH AN INJURY

The purpose of the supplemental briefing was to give Plaintiffs a chance to show the *specific* information they didn't receive but which FECA required to be disclosed. (Tr. 3:11 – 15, the Court stating, "[a]nd so what I'd like to do now is to make sure that we're all on the same page with respect to what [the disclosures] actually say and what time period they cover and where they report the information that the plaintiffs allege they have been deprived of."). Indeed, during the motion hearing, Plaintiffs identified five events that Bush attended for which they professed that they could not "discernably designate" any payments related to the activities. (Tr. 14:14 – 25).

Right to Rise addressed and rebutted each of those examples in its supplemental brief by specifically identifying where each of the activities in question that was required to be reported has been reported in accordance with FECA. RTR's Supp'l Br., ECF No. 28 at 12 – 17. Plaintiffs do not seriously contest that rebuttal but instead proffer one additional example that pertains to events in New Hampshire in May 2015, Pl.'s Supp'l. Br., ECF No. 29, at 14. Former Governor Bush was in New Hampshire and, according to news reports and social media posts, he stayed at the Hilton Garden Inn Manchester, attended a house party in Bedford, taped a TV interview with WMUR, and participated in a local Chamber of Commerce event in Concord. At each event, Bush

discussed policy issues furthering the mission of Right to Rise Leadership PAC, which was formed to support both conservative candidates and conservative policies.[1] For example, at Portsmouth, Bush criticized both former President George W. Bush and President Obama for foreign-policy decisions. Allison King & Allison Sonfist, *Jeb Bush Returns to New Hampshire,* NECN (May 20, 2015), https://www.necn.com/news/politics/jeb-bush-returns-to-nh/175490/?amp.

Bush made the same criticisms during the WMUR interview. C-SPAN, WMUR-TV Interview with Jeb Bush (May 21, 2015), https://www.c-span.org/video/?326488-1/wmur-tv-interview-jeb-bush. At the Concord Chamber of Commerce breakfast, Bush disagreed with critics of the National Security Agency's policies on surveillance, stating there's "not a shred of evidence" that the NSA's policies had violated civil liberties. Leslie Larson, *Jeb Bush says there's 'not a shred of evidence' NSA surveillance violated civil liberties,* Business Insider (May 21, 2015), https://www.businessinsider.com/jeb-bush-not-a-shred-of-evidence-nsa-violated-rights-2015-5. Right to Rise Leadership PAC even issued a press advisory *prior to the trip* indicating Bush would be traveling on their behalf. *Jeb Bush to Visit New Hampshire on Wednesday, May 20, 2015, https://blog.4president.org/2016/2015/05/jeb-bush-to-visit-new-hampshire-on-wednesday-may-20-2015.html.* It was appropriate for Right to Rise Leadership PAC to sponsor Bush's travel because his travel *benefitted the organization*.

Plaintiffs claim that the New Hampshire activities were not sufficiently disclosed because none of Right to Rise Leadership PAC's "disbursement entries mention Bush or indicate the travelers, destination(s), or event(s) to which the payments corresponded." ECF No. 29 at 16. But FEC filings show the vendor paid, date, and purpose: not travelers, destinations, or events tied to

[1] Marc Caputo, Jeb Bush to form leadership PAC for fundraising, The Miami Herald (Jan. 6, 2015), https://www.miamiherald.com/news/state/florida/article5491587.html.

specific payments. Plaintiffs fail to cite any FECA provision requiring the reporting of such information—which, again, is the key element to satisfying their burden of proving an informational injury. Rather, the information that FECA requires to be disclosed was disclosed.[2]

Aside from New Hampshire, there are no other *specific* examples of information to which Plaintiffs claim they have been deprived despite a FECA disclosure obligation—even though Plaintiffs represented during the motion hearing that they had 50 such examples. (Tr. 13: 1-14). Instead, Plaintiffs make the generic, non-specific allegation that "they have been deprived of full disclosure of *all* reportable campaign spending from May 2014 to June 2015." ECF No. 29 at 18 (emphasis added). And Plaintiffs try to shift their burden, complaining that *Right to Rise* "has not provided any evidence whatsoever to substantiate [their assertion that the activities in question were disclosed]."

Even Plaintiffs' generic, non-specific allegations miss the mark. For example, Plaintiffs assert that Bush must have needed "staff to handle the logistics and substantive work" surrounding events he attended, apparently implying that such disclosures were not made. ECF No. 29 at 7. But Right to Rise Leadership PAC *did* disclose disbursements for such staffing,[3] and, separately, Governor Bush *did* disclose over $48,000 in payments to individuals (Sally Bradshaw & Kristy Campbell) who supported him while he was testing the waters.[4] Plaintiffs even acknowledge so

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[2] *See* Right to Rise PAC, Inc. 2015 Mid-Year Report, https://docquery.fec.gov/pdf/182/201507319000507182/201507319000507182.pdf; Right to Rise USA 2015 Mid-Year Report, https://docquery.fec.gov/pdf/819/201507319000471819/201507319000471819.pdf; and Jeb 2016, Inc. 2015 July Quarterly Report, https://docquery.fec.gov/pdf/887/201507159000159887/201507159000159887.pdf

[3] Right to Rise PAC, Inc., 2015 Mid-Year Report, Schedule B at pgs. 730-736, 776-779, 1085-1089, https://docquery.fec.gov/pdf/182/201507319000507182/201507319000507182.pdf.

[4] Jeb 2016, Inc., 2015 July Quarterly Report, Schedule B-P at pgs. 1675-1678, 1689-1690, 1694-1695, https://docquery.fec.gov/pdf/182/201507319000507182/201507319000507182.pdf.

in their supplemental brief. *See* ECF No. 29 at 7. Ms. Campbell specifically supported Governor Bush as Communications Director for his role as Chairman of Right to Rise Leadership PAC,[5] and then separately and subsequently as Jeb 2016, Inc.'s National Press Secretary.[6] *See* Declaration of Kristy Campbell, attached hereto as **Exhibit 1** (explaining Ms. Campbell's separate roles with Right to Rise Leadership PAC and Governor Bush's testing the waters efforts).

It is impossible for Right to Rise to prove a negative (*i.e.*, that no disclosable information has been withheld), and the law does not require it to do so. By pointing the Court to six, specific events—all of which have been linked to disclosures by Right to Rise in its supplemental briefing—Plaintiffs have failed to satisfy their own burden of establishing an informational injury. Instead, they seem to be complaining that *they dislike the way in which disclosures were made*. *Id*. at 18-19.

Plaintiffs' true claim of injury is legally deficient and dictates that their complaint be dismissed for lack of standing. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998) (FECA seeks to protect individuals from "failing to receive *particular* information about campaign-related activities.") (emphasis added; cleaned up).

IV. COURTS IN THIS CIRCUIT *DO* REQUIRE SHOWING OF A SPECIFIC INFORMATIONAL INJURY

Recognizing the glaring hole in their standing theory, Plaintiffs pivot and argue that "it cannot be plaintiffs' burden to identify in granular detail each and every campaign expenditure they allege a respondent has not reported under FECA in order to establish informational standing in an action under Section 30109(a)(8)." Pl.'s Supp'l. Br., ECF No. 29, at 8. That's not what Right

[5] Right to Rise PAC, Inc., 2015 Mid-Year Report, Schedule B at pgs. 734-736, https://docquery.fec.gov/pdf/182/201507319000507182/201507319000507182.pdf.
[6] Jeb 2016, Inc., 2015 July Quarterly Report, Schedule B-P at pgs. 1676-1678, 1695, https://docquery.fec.gov/pdf/182/201507319000507182/201507319000507182.pdf.

to Rise is arguing. As explained above, Plaintiffs *do* have the burden of showing specifically what information they've been deprived of despite a FECA disclosure obligation. And while Plaintiffs say that courts in this Circuit have "never required such a showing to sustain informational standing under Section 30109(a)(8)," *id.*, even the cases *Plaintiffs* cite show otherwise.

For example, in *Campaign Legal Ctr. v. Fed. Election Comm'n*, 245 F. Supp. 3d 119 (D.D.C. 2017), the plaintiffs alleged they had been denied access to information concerning campaign contributions. This Court rejected an FEC dismissal motion for lack of standing based on the absence of an informational injury because the plaintiffs had shown they had been deprived of information regarding *specific* "$1 million contributions made to the super PAC Restore Our Future in the names of F8 LLC and Eli Publishing LC," information that FECA required be disclosed. *Id.* at 26 (plaintiffs had standing to seek disclosure of the *true names* of individuals who had contributed to super PACs through corporate straw donors because FECA required that information to be disclosed).

Likewise, in *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 356 (D.C. Cir. 2020), the same plaintiffs as those here alleged that "individuals made political contributions to Super PACs by using closely held corporations and limited liability companies (LLCs) as straw donors, thereby violating § 30122," which ensures accurate disclosure of contributor information by prohibiting the making of a contribution in the name of another. The court concluded that the plaintiffs had sustained an informational injury stemming from the deprivation of *specific* information—that being the public disclosure of campaign contributor information, or, said another way, the identity of who made the specific contributions at issue. *Id.* at 356.

The same can be said of the remaining FECA cases Plaintiffs cite in their supplemental brief. *See Citizens for Resp. & Ethics in Washington v. Am. Action Network,* 410 F. Supp. 3d 1, 13-14 (D.D.C.), *motion to certify appeal denied,* 415 F. Supp. 3d 143 (D.D.C. 2019) ("Because FECA requires the disclosure of the information CREW seeks [*i.e.*, donor information] and because CREW has suffered a cognizable informational injury, it has established injury in fact."); *Akins*, 524 U.S. at 21-22 ("The 'injury in fact' that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures" that must be disclosed under FECA).

In stark contrast here, Plaintiffs point to six examples of informational injury. Each example involves (1) information that *was* publicly disclosed, (2) information that FECA *does not require* to be disclosed, or (3) both these things. Given Plaintiffs' failure to satisfy their burden of showing by a preponderance that they have suffered a specific informational injury under a specific statutory requirement, Right to Rise's motion to dismiss should be granted on reconsideration.

V. PLAINTIFFS' RUMINATIONS ABOUT WHEN GOVERNOR BUSH BECAME A CANDIDATE DO NOT SOLVE THEIR STANDING PROBLEM

In a vacuum, it may seem curious why Plaintiffs keep focusing on the timing of Bush's candidacy. *E.g.* Pl.'s Supp'l. Br., ECF No. 29, at 2 (asserting that Right to Rise claimed it paid for all "of Bush's unreported pre-candidacy activities," which Plaintiffs characterize as a "potential admission" of violations of FECA's soft-money ban). This focus is irrelevant to the supplemental brief's purpose of showing a specific informational injury. And it ignores that Right to Rise paid for Bush's activities *on behalf of Right to Rise* as the law required because the benefit of those

activities ran to Right to Rise. All of Bush's pre-candidacy activities were paid for by the appropriate entity and reported – if legally required – by such entity.[7]

So why even bring it up? Plaintiffs' theory is that Right to Rise's payment for Governor Bush's activities on behalf of Right to Rise could be a violation of FECA's soft-money ban if there was a legal determination that such activities were Bush campaign activities rather than Right to Rise activities. This is why Plaintiffs keep calling Bush activities "campaign" activities. What Plaintiffs desire is a court ruling about when Bush's pre-candidacy activities became candidate activities. Their problem is that's not an actionable claim for undisclosed expenditures.

In the same vein is Plaintiffs' confusing emphasis on the fact that neither Right to Rise nor Bush reported any payments from Right to Rise to Bush, ECF No. 29, at 12, even while acknowledging that such reporting would constitute *illegal* in-kind contributions. Plaintiffs then restate their unfounded allegation that *all* costs incurred (and disclosed) in connection with Bush's pre-June 2015 activities were in fact expenditures of his campaign. *Id*. But that's not a failure of anyone to disclose expenditures; it is a request for a legal determination that certain transactions were mislabeled because of a legal conclusion about Bush's candidate status. And Plaintiffs have no right to such a legal determination.

The D.C. Circuit made that exact point in *Wertheimer v. Fed. Election Comm'n*, 268 F.3d 1070 (D.C. Cir. 2001). There, the plaintiffs alleged standing based on several injuries, one being that "the FEC's failure [to act] deprived them of required information about the source and amount of candidates' financing." *Id.* at 1073. Like Plaintiffs here, the *Wertheimer* plaintiffs relied on *FEC*

[7] Right to Rise's counsel could have been more precise at the hearing and, instead of explaining that every single activity is fully reported either by the campaign on their testing-the-waters disbursements "or by Right to Rise Super PAC," should have said "or by the appropriate entity benefiting from such activity," which was usually Right to Rise Leadership PAC.

v. Akins, 524 U.S. 11 (1998), for the notion that a claimant suffers cognizable injury under FECA when deprived of information that the Act requires be disclosed. *Id*. at 1074.

But the *Wertheimer* court held that plaintiffs "failed to show . . . that they are directly being deprived of any information." 268 F.3d at 1074-75. Central to that conclusion, the Court reasoned "[d]uring oral argument, counsel for appellants was asked what facts, specifically, were not being disclosed. Counsel responded that the 'fact' of 'coordination' was being withheld. But 'coordination' appears to us to be a legal conclusion that carries certain law enforcement consequences." *Id*. at 1074-75. "As far as we can determine," the court continued, "appellants do not really seek additional facts *but only the legal determination that certain transactions constitute coordinated expenditures*." *Id.* at 1075 (emphasis added).

So too here. In fact, this Court tracked *Wertheimer*'s logic when it asked Plaintiffs' counsel at the reconsideration hearing, "Why is that not an end run around the seeking a legal conclusion? Why is that not an end run around *Wertheimer*?" (Tr. 21:22 –22:3). Plaintiffs' answer—that "FECA is structured to shine the light of disclosure on all *candidacies* as soon as they form," (Tr. 22:15-16)—proves the point, as the issue of whether and when Governor Bush became a candidate as that term is defined by FECA[8], and whether Bush's reported activities on behalf of other organizations should be treated as testing the waters activities,[9] is precisely the sort of legal conclusion that *Wertheimer* prohibits being characterized as an informational injury for purposes of establishing standing. Here as in *Wertheimer*, Plaintiffs' *true* objective is "a legal

[8] An individual becomes a candidate under FECA if he or she receives contributions or makes expenditures in excess of $5,000, or consents to another doing so on his or her behalf. 52 U.S.C. §§ 30101(2); 11 C.F.R. Sec. 100.3(a)

[9] *See* 11 C.F.R. Sec. Sec. 100.72(a), 100.131(a); *see also* Explanation and Justification for Final Rules of Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9592 (Mar. 13 1985).

characterization or duplicative reporting of information that under existing rules is already required to be disclosed." 268 F.3d at 1075.

And that's the gist of Plaintiffs' entire action. They want this Court to make a legal determination that Bush was a candidate before he said he was. Such a ruling would not result in a single additional expenditure being disclosed; it would, at most, result in the duplicative reporting of information under a different legal label. *Wertheimer* forecloses that theory. And Plaintiffs' inability to identify any expenditure disclosure that was not made and that FECA required forecloses their information-standing theory. Plaintiffs Complaint should be dismissed.

VI. 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: May 21, 2021

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/ Charles R. Spies

Charles R. Spies, Bar ID: 989020
Jessica G. Brouckaert
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
Telephone: (202) 466-5964
Facsimile: (844) 670-6009
cspies@dickinsonwright.com
jbrouckaert@dickinsonwright.com

Robert L. Avers
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com

John J. Bursch*
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Attorneys for Defendant-Intervenor

**Pending Admission*

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.

/s/ Robert L. Avers