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 SUPPORT OF THEIR MOTION FOR RECONSIDERATION

Intervenor Right to Rise Super PAC, Inc. ("RTR") does not dispute the basis for the motion for reconsideration filed by plaintiffs Campaign Legal Center ("CLC") and Democracy 21: that this Court has not resolved the distinct question, deferred in its initial February 2021 order, as to whether plaintiffs have organizational standing based on the deleterious effects of FEC delay on their programmatic activities. Intervenor's Opp'n to Pls.' Mot. for Recons. ("Opp'n") 5, 9, ECF No. 35. Intervenor argues, however, that "such inadvertence was harmless," *id.* at 5; however, a finding that plaintiffs have organizational standing would warrant reversal of this Court's December 30, 2021 order dismissing their case, *see* Mem. Op. 10, ECF No. 33, and provide grounds to grant their motion for default judgment against the FEC. Intervenor is really just reiterating its view that plaintiffs' "organizational-standing theory" lacks merit. Opp'n at 9.

But intervenor is wrong. Plaintiffs have demonstrated all elements of organizational injury based on unlawful agency delay and the resulting deprivation of information contained in the Commission's file in Matter Under Review ("MUR") 6927, the administrative proceeding

underlying this action. As plaintiffs argued in multiple submissions, but chiefly in their opposition to intervenor's motion to dismiss, *see* Pls.' Opp'n to Int.'s Mot. to Dismiss ("MTD Opp'n") 29-43, ECF No. 13, the FEC's failure to act on their administrative complaints has inflicted concrete organizational injury on plaintiffs by depriving them of access to key information they need to achieve their missions as campaign finance reform organizations and to engage effectively in their programmatic activities. *See also* Pls.' Opp'n to Int.'s Mot. for Recons. 16-17, ECF No. 21; Pls.' Mot. for Default J. 10-11, ECF No. 23; Pls.' Reply Supp. Mot. for Default J. 7-8, ECF No. 25.

Plaintiffs are entitled to relief under Rule 60(b)(1) and 60(b)(6) because the Court, after previously acknowledging but declining to address plaintiffs' assertion of organizational standing, *see* ECF No. 17 at 9 n.1, ultimately left the issue unresolved, *see* Order, ECF No. 32; Mem. Op., ECF No. 33. Upon considering this distinct basis for standing, the Court should deny intervenor's motion to dismiss and grant plaintiffs' motion for default judgment because plaintiffs have suffered distinct organizational injuries sufficient to confer Article III standing.

ARGUMENT

I. Plaintiffs Have Established Organizational Injury.

Organizational standing is founded on a two-part inquiry, requiring plaintiffs to show, "first, whether the agency's action . . . 'injured [their] interest' and, second, whether [Plaintiffs] 'used [their] resources to counteract that harm.'" *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (citation omitted). Contrary to the views of RTR, plaintiffs have satisfied this test.

First, the FEC's failure to resolve plaintiffs' administrative complaints concretely injures their interests by depriving them of key information they need to advance their missions, including information in the MUR file revealing how the Commission is interpreting FECA and exercising its statutory responsibilities. MTD Opp'n 29-36. This informational deprivation arises from the fact of agency inaction itself, not from the administrative respondents' failure to provide FECA-

required disclosures, and thus inflicts a harm that is distinct from the statutory informational injuries plaintiffs assert under *FEC v. Akins*, 524 U.S. 11 (1998). *See Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016). It is also an injury unique to this case and these plaintiffs: the harm here is not simply that the FEC has exceeded the statutory 120-day period after which inaction on a complaint may be reviewed for unlawful delay. It is that the *totality* of the agency's intransigence—which it has not appeared here to explain or defend—threatens to prevent plaintiffs from ever learning the basis for the FEC's failure to act.

Plaintiffs have also satisfied the second prong of the *PETA* test, demonstrating through uncontroverted affidavit testimony that they have expended resources to counteract these organizational injuries. *See* Compl. ¶¶ 14-19, 20-22, ECF No. 1; Fischer Decl. ¶¶ 20-21, ECF. No. 13-1. CLC and Democracy 21 cannot perform their core programmatic activities effectively without timely information about how the Commission is interpreting and applying FECA, including any fact-finding undertaken and votes cast by the Commissioners in the course of resolving plaintiffs' administrative complaints. *See* Fischer Decl. ¶¶ 10, 34.

Finally, plaintiffs have also demonstrated the causation and redressability requirements for Article III standing, because their organizational injuries flow directly from the FEC's failure to act on their administrative complaints, and can be redressed by a court order under 52 U.SC. § 30109(a)(8)(C) directing the Commission to act on plaintiffs' complaints. *See* MTD Opp'n 43.

II. Intervenor Raises No Argument that Refutes Plaintiffs' Organizational Standing.

Intervenor raises various objections to plaintiffs' organizational standing, most echoing arguments they have repeated throughout this litigation. None have merit.

A. The Commission's inaction has "injured [plaintiffs'] interest[s]."

RTR does not dispute that the FEC is legally bound to disclose its dispositions and votes in closed enforcement matters, as well as most documents in the MUR file. *See* 52 U.S.C.

§ 30109(a)(4)(B)(ii); 5 U.S.C. § 552(a)(2)(A), (a)(5); 11 C.F.R. § 111.20(a). Nor does it dispute that the FEC has not released the MUR file in this matter and is barred by statute from doing so until it puts an end to its delay and finally resolves this case. Opp'n at 2.

Instead, RTR first argues that plaintiffs' theory of organizational standing is "intertwined with the informational-injury theory of non-disclosure," Opp'n at 5, 7-8, by which it appears to mean that plaintiffs' organizational injury claim relies on the absence of the same FECA-required reporting as plaintiffs' informational injury claim under *Akins* did. This is incorrect, or a misunderstanding. In this motion, plaintiffs are not arguing organizational standing based on the administrative respondents' alleged failure in the 2016 election cycle to report all information FECA requires, but rather based on the deprivation of information caused by the FEC's complete failure to resolve plaintiffs' administrative complaints, and thereby give them access to the relevant MUR file. The latter informational deprivation is a cognizable basis for organizational injury distinct from the statutory informational injuries recognized in *Akins*. *See Jewell*, 828 F.3d at 994 (recognizing that a deprivation of access to information can create an injury in fact sufficient for organizational standing separate from injuries asserted under *Akins*).[1]

[1] Ignoring this precedent, intervenor seems to make a half-hearted argument that plaintiffs cannot "proceed upon organizational standing where the . . . claimed injury in fact is based on the deprivation of information," relying on a single district court decision that predates *Akins* and *PETA*. Opp'n at 8 (citing *Found. on Econ. Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992)). The D.C. Circuit has since clarified that lack of access to information can inflict organizational injuries. *See Jewell*, 828 F.3d at 994; *PETA*, 797 F.3d at 1094; *Ctr. for Biological Diversity v. U.S. Dep't of State*, No. 18-cv-563-JEB, 2019 WL 2451767, at *3 (D.D.C. June 12, 2019) ("The D.C. Circuit has established distinct frameworks for informational and organizational injury.").

Insofar as intervenor is arguing that this Court already decided the fate of plaintiffs' *Akins* standing claim[2] and they cannot resurrect it in the guise of organizational standing, plaintiffs do not disagree. But intervenor clearly understands that plaintiffs' actual argument is that the FEC's protracted delay has injured plaintiffs by depriving them of information about the FEC's disposition of their complaints, including MUR materials such as Commission vote records and final decisional documents, submissions from respondents, and factual findings generated by the Commission or its Office of General Counsel ("OGC") in processing or investigating the complaints. *See* Opp'n at 12-15. To this argument, intervenor raises two objections: first, that plaintiffs have not sufficiently shown that this deprivation injures their activities or burdens their resources as *PETA* demands; and second, that any such injury is not actually the result of agency delay but instead of a deadlocked Commission vote. *Id.* at 14.

First, Intervenor attempts to draw a distinction between this case and *PETA* by suggesting that the *PETA* plaintiffs had shown that "the defendant's conduct literally restrained or prevented plaintiff from carrying out its mission such that plaintiff's activities were not feasible." *Id.* at 10. Even accepting this characterization of the case law, intervenor does not explain why PETA was "literally" any more impeded by the informational deprivation alleged there than plaintiffs are in this case. CLC and Democracy 21 have described in great detail how the failure to resolve their pending administrative complaints impedes their public education work, campaign watchdog efforts, and legislative policy efforts. MTD Opp'n at 38-43, ECF No. 13. As plaintiffs noted, the information they seek is vital to their public education efforts—not simply to their communications about this specific controversy, but also to their broader effort to educate the public about the role

[2] Plaintiffs maintain that they also suffer informational injuries sufficient to confer Article III standing under *Akins*, although this Court ruled otherwise in its December order, and preserve the issue for possible appeal.

the FEC plays in interpreting and applying the federal campaign finance laws. When the Commission allows administrative complaints to languish unresolved across multiple election cycles, plaintiffs are hindered in their ability to identify emerging problems in the FEC's interpretations of the Act or its administrative processes; to make informed policy recommendations to address such problems before they recur; and to gather concrete evidence to support such policy proposals. Fischer Decl. ¶¶ 28, 34.

In response, RTR makes the bare accusation that plaintiffs did not "demonstrate that those same activities are now *infeasible*" and consequently "fall far short of [the] mark" of *PETA*. Opp'n at 10 (emphasis added). But simply saying this case is different does not make it so. The FEC's extended inaction hinders plaintiffs' programmatic activities by "depriv[ing] [them] of key information that [they] rel[y] on to educate the public" and to engage in the "normal process of submitting [FEC] complaints" and in Commission rulemakings and other proceedings. *See PETA*, 797 F.3d at 1094. These injuries are "both concrete and specific to the work in which [plaintiffs are] engaged." *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986).

Intervenor's second argument is equally unavailing. It contends, without evidence, that any informational deprivation here is actually the result of a Commission "deadlock" and constructive dismissal, not delay. Opp'n at 14-15. Even if intervenor is correct in its suppositions about what is transpiring behind the scenes at the FEC, it does not explain why this recharacterization of agency inaction here would make plaintiffs' organizational injury any less concrete. If anything, it does the opposite. RTR speculates that "the *fact* that the FEC has deadlocked on this MUR signals to Plaintiffs that the Commission disagrees on how to interpret the law here, and/or on the priority of this MUR," and then suggests this "should actually help Plaintiffs' mission" because they "are free to educate the public as to their disagreement with the current state of affairs." Opp'n at 11

(emphasis added). RTR appears to be arguing that plaintiffs should just presume the reasons for FEC inaction on their complaints and then educate the public that they disagree with these imagined reasons. But it is not public "education" to publicly communicate on matters about which one has no information. The possibility that plaintiffs might undertake pure conjecture on a public platform does not advance their missions or make their educational, watchdogging, or legislative programmatic activities "feasible."

More fundamentally, intervenor's speculation about the FEC's possible non-public activities in this matter is just that: speculation. No party here has any information about the Commission's views on the substantive allegations in plaintiffs' administrative complaints, nor what preliminary actions the Commissioners or FEC staff have taken, or not taken, in this proceeding. If intervenor has somehow received information about actual deliberations or votes in this proceeding, plaintiffs certainly have not. Nor can they, unless or until their complaints are finally resolved.[3]

Intervenor's conjecture about non-public split votes also undercuts its argument that "what Plaintiffs really seek here is 'a legal conclusion that carries certain law enforcement consequences' in which they have 'no legally cognizable interest.'" Opp'n at 11 (citing *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001)). This charge is demonstrably false: plaintiffs have repeatedly stressed that they seek the respondents' submissions and the Commission's fact-finding generated by the MUR proceedings. *See, e.g.*, MTD Opp'n 33-36; Pls.' Mot. for Default J. 10-11. But if intervenor's conjecture about the FEC's behind-the-scenes activities is credited and the FEC's

[3] If RTR's theory of a *de facto* dismissal were correct, the Commission would have "functionally dismissed" the complaints without providing the requisite explanation to complainants or the public. As plaintiffs noted in their initial memorandum supporting reconsideration, this failure to provide a rationale for agency action would be de facto contrary to law. Pls.' Mot. for Recons. at 7-8, ECF No. 34.

inaction is in fact a result of split votes and gridlock, then there will never be a definitive legal ruling with majority support and precedential force in the administrative proceedings. Plaintiffs' organizational interest in obtaining the factual findings and other MUR materials in the absence of any such "law enforcement consequences," however, is undiminished. And insofar as there is any *other* explanation for the Commission's extreme delay on these particular complaints, when it has resolved numerous others from the same time period raising comparable claims, plaintiffs are entitled to know what that explanation is.

B. Plaintiffs have "used [their] resources to counteract the harm."

Plaintiffs have also demonstrated that they have expended resources to counteract these organizational injuries. *See PETA*, 797 F.3d at 1094.

Intervenor objects that "all of Plaintiffs' allegations pertaining to the diversion of resources stem from allegations of improper or inadequate disclosures under FECA." Opp'n at 12. This ignores that the non-public file in MUR 6927 contains various kinds of "campaign finance information" that plaintiffs have alleged they are missing, *see* Compl. ¶¶ 16, 18, 21, including but not limited to factual information bearing on respondents' alleged FECA violations, both disclosure-related and otherwise.[4] But more basically, organizational resources do not grow on trees: plaintiffs specified, without restriction, that they depend upon campaign finance information—including present and historical information about "the nature, origin, and magnitude of candidates' support"—to carry out their public education activities. Fischer Decl. ¶¶ 16, 19. They made an unrebutted showing that being deprived of such information caused them

[4] In assessing the sufficiency of a complaint's allegations of injury, Courts "draw[] all reasonable inferences from those allegations in plaintiffs' favor," and "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *La Roque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

to divert resources to investigate and attempt to remedy that deprivation. That diversion occurs with respect to *all* information about "the nature" of candidates' support, whether or not it entails a distinct FECA disclosure obligation. Plaintiffs do not fail to clear the Article III bar merely because they asserted two distinct theories of injury.

Additionally, intervenor ignores that the delay itself—and consequent inability to access information about the resolution of their complaints—hampers plaintiffs' organizational missions of watchdogging campaign practices and promoting FEC accountability. MTD Opp'n 40. As plaintiffs explained in opposing the motion to dismiss, they regularly file complaints against individuals or organizations that violate federal election law, and participate in rulemaking and advisory opinion proceedings at the FEC; they estimated filing more than seventy administrative complaints with the FEC between March 2015 and July 2020, the date plaintiffs' opposition to the motion to dismiss was filed. MTD Opp'n 40; Fischer Decl. ¶ 32. Plaintiffs have met their burden of showing organizational injury.

C. Plaintiffs' organizational injury is redressable.

As intervenor acknowledges, plaintiffs alleged that their organizational injury was redressable; it counters that the method of redress was insufficiently explained. *See* Opp'n at 13-14 (quoting plaintiffs' statement that their "organizational injuries flow directly from the FEC's failure to act on their administrative complaints, and this Court is empowered under 52 U.S.C. § 30109(a)(8)(C) to redress that failure"). It professes to be confused as to "*how* . . . their claimed organizational injury would be redressed by an order from this Court." *Id.* at 14 (emphasis added). But it is difficult to see what further detail plaintiffs can add to explain why an action brought under 52 U.S.C. § 30109(a)(8)(A) for "failure of the Commission to act" that requests a court order directing the Commission *to act* would address the agency's delay. *See Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc) ("[I]t has *always* been an acceptable feature of judicial review

of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning."), *vacated on other grounds*, *FEC v. Akins*, 524 U.S. 11 (1998). This is tantamount to asking plaintiffs to state the obvious, but in more words.

* * *

Plaintiffs have demonstrated all elements of organizational injury and have proven their standing to challenge the FEC's unlawful nearly seven-year delay in acting on their administrative complaints. Plaintiffs have submitted copious evidence and argument in support of their claim for organizational standing. *See* Fischer Decl., ECF No. 13-1; Wertheimer Decl., ECF No. 13-2; MTD Opp'n 29-43, ECF No. 13; Pls.' Opp'n to Int.'s Mot. for Recons. 16-17, ECF No. 21; Pls.' Mot. for Default J. 10-11, ECF No. 23; Pls.' Reply in Supp. of Mot. for Default J. 7-8, ECF No. 25; Pls.' Suppl. Br. in Opp'n to Int.'s Mot. for Recons. 20, ECF No. 29; Pls.' Reply in Opp'n to Int.'s Mot. for Recons. 15, ECF No. 31.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I caused a true and correct copy of the foregoing documents to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

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