UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 22-3319 (CRC) REPLY IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Lisa Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Jacob S. Siler (D.C. Bar No. 1003383)
Assistant General Counsel
jsiler@fec.gov

Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

March 31, 2023

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

Statutes and Rules

Miscellaneous

The agency actions under review here involve an administrative complaint filed more than seven years ago, address underlying activity that began three presidential elections ago in 2014, and are well known to this Court from its consideration of plaintiffs' prior lawsuit challenging the Commission's failure to act. (*See* Compl. for Declaratory and Injunctive Relief ("Compl.") ¶¶ 64-67) (Docket No. 1); Compl. for Declaratory and Injunctive Relief, *Campaign Legal Ctr. et al. v. FEC*, Civ. No. 20-0730 (D.D.C. Mar. 13, 2020) (Docket No. 1). In its Motion to Dismiss (Docket No. 12) (the "Motion" or "Mot."), the Federal Election Commission ("FEC" or "Commission") demonstrated that this Court decided, in plaintiffs' prior delay action, that the underlying campaign finance violations alleged in the administrative complaint that underpin both that lawsuit and this one did not establish an informational injury sufficient to support Article III standing to sue. That issue, which plaintiffs had a full and fair opportunity to litigate, was actually decided in the delay suit, and there is no basis to revisit it when the underlying facts and law here are identical.

In their Response in Opposition to the FEC's Motion to Dismiss (Docket No. 19) ("Response" or "Resp."), plaintiffs attempt to do precisely what is foreclosed: re-litigate whether they have suffered an informational injury based on facts and law materially indistinguishable from what this Court considered previously. After a brief rebuttal addressing the instant Motion (Resp. at 22-26), the bulk of plaintiffs' Response asks this Court to consider the merits of their alleged informational injury (including under an organizational theory), and therefore standing to bring their claim (Resp. at 26-42). The doctrine of issue preclusion, however, forecloses precisely this inquiry. This exact same informational injury argument was raised and contested by the parties in the delay litigation, was actually and necessarily determined by this Court, and preclusion here would not work a basic unfairness on plaintiffs

who had every opportunity and incentive to contest the Court's ultimate decision. The elements of issue preclusion are met, and neither of the narrow exceptions to the doctrine apply here. Even if this Court's earlier rulings were "patently erroneous," they would nonetheless be entitled to preclusive effect. *Canonsburg Gen. Hosp. v. Sebelius*, 989 F. Supp. 2d 8, 16-17, 19 (D.D.C. 2013) (citations omitted), *aff'd*, 807 F.3d 295 (D.C. Cir. 2015).

Finally, the Commission's Motion also argued that remand of this matter would be futile, because a group of three Commissioners has indicated that they view the matter as long settled and expressed concerns related to the statute of limitations. (Mot. at 20-22.) Plaintiffs' Response alleges that accepting the Commission's futility argument would lead, in effect, to a slippery slope that the Commission could employ to shirk its responsibilities in future enforcement proceedings. (Resp. at 42.) These concerns are unwarranted because, under the unique circumstances of this particular proceeding, there is a clear and principled basis to find that remand here would be futile, and such a holding would pose little risk of abuse absent a repeat of the unprecedented circumstances here. Thus, even assuming this Court's jurisdiction to consider plaintiffs' claim, remanding this matter for further administrative proceedings would be a futile exercise.

I. PLAINTIFFS' ATTEMPT TO RELITIGATE THE MERITS OF THEIR ALLEGED INFORMATIONAL INUJRY IS IMMATERIAL TO WHETHER THESE ARGUMENTS ARE PRECLUDED AND FORECLOSED

Plaintiffs are correct that "the FEC's pending motion to dismiss . . . does not attempt to make any substantive argument that plaintiffs have failed to show informational injury sufficient to demonstrate standing in this case." (Resp. at 3.) That is because issue *preclusion* by its nature *precludes* re-litigation of an issue of fact or law already decided. This Court has already determined that plaintiffs have not suffered an informational injury sufficient to confer standing to bring its claim, and plaintiffs are precluded from re-litigating that issue.

The only relevant question here is whether plaintiffs' standing has already been decided in prior litigation, *regardless* of whether they could establish standing if given a second bite at the apple. It is black-letter law that a court applying issue preclusion does not revisit the earlier decision. *Canonsburg*, 989 F. Supp. at 17 ("A court conducting an issue preclusion analysis does not review the merits of the determinations in the earlier litigation.") (quoting *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1257 (D.C. Cir. 2006)); *Nat'l Post Off. Mail Handlers, Watchmen, Messengers, & Grp. Leaders Div. of Laborers' Int'l Union of N. Am. v. Am. Postal Workers Union*, 907 F.2d 190, 194 (D.C. Cir. 1990) ("The doctrine of issue preclusion counsels us against reaching the merits in this case, however, regardless of whether we would reject or accept our sister circuit's position."); *Yamaha Corp. of Am. v. United States*, 745 F.Supp. 734, 738 (D.D.C. 1990) (noting the D.C. Circuit's instruction "that collateral estoppel prevents a court from ever reaching the merits")). And "[a]lthough the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit[s] so as to make the case *res judicata* on the substance of the asserted claim, it does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) ("*Home Builders*") (alterations and emphasis in original) (quoting *GAF Corp. v. United States*, 818 F.2d 901, 912 n.72 (D.C. Cir. 1987)).

Plaintiffs' many pages detailing why it has suffered an informational injury sufficient to confer standing to bring its claim (Resp. at 26-42) are thus irrelevant to the question of whether that precise argument is precluded based upon the well-established criteria for establishing preclusion under the law of this Circuit (*see* Mot. at 13-20). Even assuming the Court's prior determination was "'patently erroneous,'" this "'is not alone sufficient'" to avoid its preclusive

effect. *Canonsburg*, 989 F. Supp. 2d at 19 (quoting *Otherson v. Dep't of Just., I.N.S.*, 711 F.2d 267, 277 (D.C. Cir. 1983)); *Restatement (Second) of Judgments* § 28 comment j); *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 157–58 (2015) ("issue preclusion prevent[s] relitigation of wrong decisions just as much as right ones.") (internal citations omitted); *Home Builders* 786 F.3d at 44 (Silberman, J., concurring) (agreeing "with the court that we are precluded by our prior opinion from acknowledging appellants' standing" but writing separately because the prior opinion "is incorrectly decided and is quite at odds with our jurisprudence"); *NOW v. Operation Rescue*, 747 F. Supp. 760, 769 (D.D.C. 1990) ("Issue preclusion . . . is designed to prevent a second court from reweighing the evidence that formed the basis for the first court's judgment."), *aff'd in part, remanded in part sub nom. Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994); *cf. City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) ("A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect.").

II. THIS COURT HAS ALREADY CONCLUDED THAT PLAINTIFFS LACK AN INFORMATIONAL INJURY, WHICH IS PRECLUSIVE HERE

A. The Court's Prior Holding that Plaintiffs had not Suffered an Informational Injury Sufficient to Confer Standing Meets all the Criteria for Issue Preclusion Here.

Plaintiffs' attempts to argue that the Commission has not established the elements of issue preclusion are variations on a single theme: the idea that this Court has never held on the "precise issue" at bar, and thus plaintiffs' arguments are not precluded. (*E.g.*, Resp. 22-23.) This is incorrect, because the "precise issue" this Court decided in the delay suit was whether plaintiffs suffered an informational injury due to RTR Super PAC and the Bush Campaign's alleged lack of reporting during the 2016 presidential election cycle. *CLC v. FEC*, 578 F. Supp. 3d 1, 5-7 (D.D.C. 2021) (*RTR II*). The Court carefully considered precisely this issue over two

lengthy opinions in the delay litigation, considering both law and facts materially indistinguishable from this proceeding. The Court's prior holding clearly precludes further litigation as to this decided issue.

The criteria for establishing issue preclusion are well-settled and are not in dispute. (*See* Resp. at 22.) Three elements must be satisfied for a final judgment to preclude litigation of an issue in a subsequent case: "[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case[; 2] the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case[; and] [3] preclusion in the second case must not work a basic unfairness to the party bound by the first determination."[1] *Canonsburg*, 989 F. Supp. 2d at 16-17 (brackets in original) (quoting *Martin v. Dep't of Just.*, 488 F.3d 466, 454 (D.C. Cir. 1992). Plaintiffs briefly attempt to rebut each of these elements with respect to the Commission's Motion. Each is unavailing.

First, while issue preclusion is indeed limited to "the precise issues of jurisdiction adjudicated," *Home Builders*, 786 F.3d at 41, that test is easily met here. The precise jurisdictional issue adjudicated in the delay litigation was whether plaintiffs had suffered an injury in fact because they were deprived of information that RTR Super PAC and the Bush Campaign were required to report, depriving plaintiffs of standing to pursue their claim and divesting this Court of subject matter jurisdiction. *RTR II*, 578 F. Supp. 3d at 5-7. This Court determined that plaintiffs had not suffered such an injury. On a motion for reconsideration, the

[1] Plaintiffs do not appear to allege that they are exempt from the effects of issue preclusion simply because they are challenging the Commission's dismissal of their complaint under 52 U.S.C. § 30109(a)(8), instead of the Commission's delay in acting on that same complaint as in their first lawsuit. In any case such an argument would be unavailing. Both are section 30109(a)(8) claims and, even if they were not, "[i]ssue preclusion bars relitigation 'even if the issue recurs in the context of a different claim.'" *Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 73 (D.D.C. 2016) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)).

defendant-intervenors in the delay action alleged "plaintiffs do not lack access to any legally-mandated disclosures and have not suffered an informational injury." *Id.* at 5. With respect to that charge, the Court concluded that "the complaint does not contain more than the 'unsupported inference' that there is more spending to be disclosed" and "[p]laintiffs therefore lack standing to advance their claim under FECA." *Id.* at 6-7. Plaintiffs' informational injury has been decided, and "[a] second complaint cannot command a second consideration of the same jurisdictional claims." *UMC Dev., LLC v. D.C.*, 401 F. Supp. 3d 140, 157 (D.D.C. 2019) (citing *Home Builders*, 786 F.3d at 41).

The scope of the issue litigated and decided in the prior action and preclusive on this action was, therefore, plaintiffs' lack of informational injury to support Article III standing. Plaintiffs posit that it is error to find preclusive effect of a prior decision "on so capacious a legal injury as 'standing'" (Resp. 23), but that is precisely what the Court of Appeals concluded in *Home Builders* itself, *see* 786 F.3d at 42 ("Issue preclusion bars us from reconsidering whether Home Builders suffered Article III injury."); *id.* at 44 (Silberman, J., concurring) ("[W]e are precluded by our prior opinion from acknowledging appellants' standing."). Even if it remained to plaintiffs to establish standing on some other theory of injury — something they do not even attempt in response to the Commission's motion — at a minimum the Court's decision that plaintiffs lack informational injury is preclusive here.

Plaintiffs attempt to evade the preclusive effect of this Court's prior decision squarely addressing their alleged informational injury by fragmenting their argument and asking the Court to independently assess each of their three theories for standing based seemingly upon whether the underlying campaign activity occurred before or after Governor Bush's announcement in

June of 2015 officially declaring his candidacy for president.[2] (Resp. at 23; *see id.* 26-38.) Even on plaintiffs' own terms, however, each of these theories seeks to "establish[] Article III standing based on informational injury." (*Id.* at 26 (bold type removed).) All three of their proposed "theories for standing" (*id.* at 23), therefore, contradict this Court's prior dismissal for lack of informational injury.

Plaintiffs' approach has no basis in the law, and courts have cautioned against it explicitly. For instance, the Supreme Court has applied the doctrine of issue preclusion against the government to bar re-litigation of whether private contractors were authorized representatives under the Clean Air Act, despite significant factual distinctions in each case. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984). As that Court explained,

> Both *Stauffer I* and *Stauffer II* arose as a result of EPA's overview inspection program for supervising state efforts to enforce national air quality standards. [] In both cases private contractors, in addition to EPA and state employees, tried to inspect plants owned by respondent. The inspections occurred just over two weeks apart, and in each case, Stauffer refused to allow the private contractors to enter its plant. Any factual differences between the two cases, such as the difference in the location of the plants and the difference in the private contracting firms involved, are of no legal significance whatever in resolving the issue presented in both cases.

Id. Similarly, the D.C. Circuit has precluded plaintiffs from challenging an NLRB ruling based on the preclusive effect of a Sixth Circuit decision upholding that ruling, based on the substantial overlap between the management rights clauses and facilities at issue in both cases. *See Beverly Health & Rehab. Servs., Inc. v. N.L.R.B.*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003) ("Here, where the legal issue is identical and the factual settings so closely related, the exception [to issue preclusion] simply does not apply.").

---

[2] (*See* Resp. at 23 ("Of plaintiffs' three theories for standing here, only one—pertaining to respondents' failure to report post-candidacy coordinated spending as FECA requires—was 'raised' in substantially similar form in the delay litigation and 'necessarily decided' by the district court.").)

Plaintiffs cite no case in which the fine factual distinctions they attempt to draw were sufficient to defeat issue preclusion. Each of its supposedly distinct theories are in fact multiple ways of establishing a unified theory of Article III injury: that plaintiffs were deprived of information based on a lack of reporting during the 2016 federal campaign cycle. These facts are all in service of assessing a single "precise issue," namely whether plaintiffs suffered an informational injury. Plaintiffs' approach would have this Court hold that plaintiffs may raise a new jurisdictional "issue" by arbitrarily subdividing the evidence in support of a single question of law. If permissible, it would severely undermine the concept of issue preclusion by making its evasion as simple as repackaging old facts and interpretations in new clothes. But "[a] prior court's decision 'cannot be used as a mere instruction manual on how [a plaintiff] might correct defects in its claim of standing by doing a better job of pleading preexisting facts and arguing the law more forcefully in a new case.'" *UMC Dev., LLC v. D.C.*, 401 F. Supp. 3d 140, 156 (D.D.C. 2019) (alteration in original) (quoting *Home Builders*, 786 F.3d at 43); *see also Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191-92 (D.C. Cir. 1983) (dismissal of prior action based on allegation that amount in controversy was below jurisdictional threshold precluded later suit even though plaintiff alleged a sufficient amount in controversy).

Even assuming plaintiffs could permissibly subdivide its informational injury argument in three, they still could not prevail because each of its "theories" was in fact litigated and decided in the delay litigation. Plaintiffs' first theory of injury is due to "Bush's failure to report all his preannouncement campaign activity." (Resp. at 4.) However, this Court's prior opinion finding that plaintiffs lacked standing clearly and explicitly considered Bush's pre-announcement (pre-June 2015) spending. In *RTR II*, 578 F. Supp. 3d at 5, the Court explicitly noted "five

instances of Governor Bush's reported travel that seem like testing-the-waters activity" highlighted by plaintiffs:

> Plaintiffs respond that this reporting is still "demonstrably incomplete" because it reflects only one $1,089 disbursement for travel over the 13-month period during which Bush was testing the waters . . . . After hearing from counsel at the motion hearing and upon review of the supplemental briefing, however, the Court now agrees with RTR that the spending related to the four campaign events plaintiffs identified has been fully disclosed.

Id. at 6. The Court's opinion explicitly addressed this pre-announcement campaign spending; it did not fail to address "Bush's failure to report all his preannouncement campaign activity" as plaintiffs contend. (Resp. at 4.)

Plaintiffs' second theory of injury also involves an alleged failure to disclose "campaign-related trips and events in the preannouncement [testing the waters] period" and is differentiated from plaintiffs' first theory only by its reliance "on materials in the recently released public MUR file" that the Commission released after the close of MURs 6915 and 6927 in September of 2022. (Resp. at 4-5.) For the reasons detailed *infra* pp. 14-18, this allegedly "new" material should play no part in the Court's issue preclusion analysis because this information was previously available to plaintiffs, does not involve "occurrences subsequent to" this Court's prior holding on plaintiffs' standing, and thus does not qualify for the narrow "curable defect" exception to issue preclusion. Yet even if this information were relevant, plaintiff provides no basis for treating two sets of facts which go to the same narrow question of informational injury as distinct "theories" or "arguments" to be evaluated separately. Whether plaintiffs suffered an injury based on RTR Super PAC and the Bush Campaign's failure to report pre-announcement spending was squarely addressed in the delay litigation, *RTR II* at 5-7, and may not be re-litigated here.

Plaintiffs' third theory of injury regards "the period after Bush's June 2015 announcement of candidacy," including "any expenditures that RTR Super PAC coordinated with the Bush campaign, or any campaign expenses the Super PAC otherwise paid for" during this period. (Resp. at 5.) Here plaintiffs candidly concede that the Court previously considered this post-announcement (post-June 2015) spending in the delay litigation. (Resp. at 23 ("[R]espondents' failure to report post-candidacy coordinated spending as FECA requires [] was 'raised' in substantially similar form in the delay litigation and 'necessarily decided' by the district court.").) Plaintiffs attempt to evade issue preclusion as to this third theory only on the basis that there has been a "significant changes in controlling facts or legal principles" (Resp. at 5), but for the reasons detailed *infra* pp. 18-21, this argument is incorrect.

Second, plaintiffs' informational injury was "actually and necessarily determined by a court of competent jurisdiction" in the delay case. *Canonsburg*, 989 F. Supp. 2d at 17 (internal quotation marks omitted). This point hardly needs elaboration, as it was this Court that issued the opinion squarely addressing plaintiffs' alleged informational injury supporting their standing, with respect to RTR Super PAC's and Bush's pre- *and* post-announcement reporting. *RTR II* at 5-7. Plaintiffs allege that the Court necessarily did not "decide" the impact of a subsequent D.C. Circuit opinion when it evaluated plaintiffs' informational injury arguments (Resp. at 23-24), but this cannot possibly help answer the question of whether the injury question was "actually and necessarily determined" by this Court, *Canonsburg*, 989 F. Supp. 2d at 17 (internal quotation marks omitted). Plaintiffs' analysis improperly shoehorns in the *exception* to issue preclusion for "significant changes in controlling facts or legal principles" (Resp. at 5), but that exception is inapplicable, as discussed *infra* pp. 18-21.

Third, here "preclusion in the second case [will] not work a basic unfairness to the party bound by the first determination." *Canonsburg*, 989 F. Supp. 2d at 17 (internal quotation marks omitted). As the Commission explained in its Motion (Mot. at 17), in examining "unfairness" for the purposes of issue preclusion, "the D.C. Circuit has been primarily concerned with whether 'the losing party clearly lacked any incentive to litigate the point in the first trial, but the stakes of the second trial are of a vastly greater magnitude.'" *Canonsburg*, 989 F. Supp. 2d at 18-19 (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)); *see also Proctor v. D.C.*, 74 F. Supp. 3d 436, 453 (D.D.C. 2014). Here, plaintiffs plainly had incentive to defend their standing to bring their own claims and did so earnestly over an extended period.

While it is true that "a change in controlling legal principles" can, "in a small set of cases," allow a party to re-litigate an issue of fact or law that would otherwise be barred, this is typically analyzed as a standalone exception to issue preclusion rather than as an aspect of "unfairness." *See Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 218 (D.C. Cir. 2004) (discussing change in controlling law exception without reference to unfairness). Plaintiff's argument that a change in the controlling law makes issue preclusion unfair in this case (Resp. at 25,) is thus misplaced, and in any case this exception does not apply here for the reasons detailed *infra* pp. 18-21.

B. The Court's Prior Holding that Plaintiffs Had Not Suffered Information Injury Under an Organizational Theory Also Meets the Criteria for Issue Preclusion.

In addition to their other alleged informational injury, plaintiffs also argue that they "have also suffered a distinct organizational injury sufficient to confer standing, because the FEC's failure to act on their complaints has 'injured the [plaintiffs'] interest[s],' and they 'used [their] resources to counteract that harm.'" (Resp. at 40 (citing *People for the Ethical Treatment of*

Animals v. USDA, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (alterations in original).) However, unlike their arguments with respect to their other alleged informational injury, plaintiffs do not appear to argue that this issue was not decided in the delay litigation and therefore precluded, and instead merely allege that they have met the requirements to establish such an injury in the first instance. (*Id.* at 38-42.) However, as the Commission noted in its Motion (Mot. at 6-7), in the delay litigation this Court held that plaintiffs did not meet the standard for organizational standing under D.C. Circuit precent. *Campaign Legal Ctr. v. FEC*, Civ. No. 20-0730 (D.D.C. July 14, 2022), Docket No. 39 (Memorandum Opinion and Order) ("*RTR III*"). As with plaintiffs' other theories for informational injury, this decision precludes plaintiffs from arguing that they have suffered an organizational injury in this case, notwithstanding any variations in how plaintiffs choose to argue the same issue here. *UMC Dev., LLC v. D.C.*, 401 F. Supp. 3d 140, 157 (D.D.C. 2019) ("'[A] second complaint cannot command a second consideration of the same jurisdictional claims.'") (quoting *Home Builders*, 786 F.3d at 41).

As discussed *supra* pp. 4-11, the Court's prior holding finding that plaintiffs lack an organizational injury, based on allegations materially indistinguishable from those it makes here, is preclusive regardless of how plaintiffs choose to characterize their arguments or "theories" in each proceeding. Nonetheless, plaintiffs' arguments in support of their organizational injury here are highly similar those the Court rejected in the delay litigation and fail for the same reasons. Plaintiffs argue that "[t]he FEC's failure to act on plaintiffs' administrative complaints deprives CLC and Democracy 21 of required FECA disclosure information that both plaintiffs need to inform the public about candidates' financial support" and to "conduct their regulatory practices before the FEC and other agencies." (Resp. at 40.) However, in *RTR III* this Court observed that "[t]he D.C. Circuit has repeatedly held that the FEC's failure to process an

administrative complaint in a timely manner is insufficient to create Article III standing." *RTR III* at 5 (citing *Common Cause*, 108 F.3d 413, 419 (D.C. Cir. 1997) (holding that § 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise already have standing"); *CLC v. FEC*, 860 F. App'x 1, 5 (D.C. Cir. 2021) (per curiam) (rejecting CLC's argument that "when the Commission violates the complainant's right to a prompt and lawful resolution of the complaint, the Commission causes an injury sufficient for Article III standing")). Plaintiffs' allegations that they have been injured by "persistent agency inaction" here (Resp. at 41) have been comprehensively addressed by this Court.

Furthermore, while plaintiffs allege that they "have also expended resources to counteract these organizational injuries" (Resp. at 41), this too has been asked and answered. In *RTR III* the Court considered plaintiffs' several purported resource drains based on their lack of information about FEC proceedings and respondents' alleged lack of reporting. *Id.* at 9-10. This Court nonetheless observed that "nowhere do plaintiffs show, as they must, that they have diverted any of their resources to counteract [their] lack of information." *RTR III* at 10. Even assuming that plaintiffs in this litigation have proffered new and additional facts as to how they have diverted resources, there is no reason to believe that this evidence was unavailable when the Court issued its decision in *RTR III*, and there is no reason to reopen this decided issue. *See UMC Dev., LLC*, 401 F. Supp. 3d at 156 (quoting *Home Builders*, 786 F.3d at 43).

Finally, plaintiffs' attempt to establish an organizational injury is not precise as to what information it currently lacks, but plaintiffs appear to allege that they lack information as to the extent of reporting violations by RTR Super PAC and the Bush Campaign. (Resp. at 39 ("the incredible scale of the potential violations in this case makes it evident that knowing such information is critical").) This basis for injury is likewise foreclosed because, as the Court

previously observed, "a plaintiff cannot 'establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred.'" *RTR III* at 10 (quoting *Common Cause*, 108 F.3d at 418). "Plaintiffs have therefore shown only a setback to their 'abstract social interests,' which is insufficient for Article III standing." *Id.*

Plaintiffs' alleged organizational injury was conclusively addressed by this Court in the delay litigation, and plaintiffs do not allege that they qualify for an exception to preclusion on this precise question. This matter is decided and may not be revisited here.

C. The "Curable Defect" Exception Does Not Apply

Plaintiffs argue that this Court's prior judgment that they lack informational injury and thus standing is subject to the "curable defect" exception, but their reliance is misplaced. Plaintiffs point to no material facts or occurrences that post-date the Court's prior judgment, and certainly none that were unavailable to it in the delay litigation. There is thus no factual or legal basis to revisit the Court's holding.

The "curable defect" exception is "sharply limited." *Home Builders*, 786 F.3d at 41. That exception permits re-litigation of jurisdictional dismissals when a "'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit." *Id.* at 41 (citing *Dozier*, 702 F.2d at 1192). However, the "precondition requisite" must identify "*occurrences subsequent to the original dismissal*" that "remed[y] . . . the jurisdictional deficiency." *Id.* "The exception permits litigants whose claims were dismissed on jurisdictional grounds to establish jurisdiction in a subsequent case only if a material change following dismissal cured the original jurisdictional deficiency." *Id.* (citing *Dozier*, 702 F.2d at 1192 & n.5, 1193 n.7). That limitation prevents the "curable defect" exception from undermining the preclusive effect of issues already fairly and finally determined in prior litigation. *Id.* at 41-42 (citing *Dozier*, 702 F.2d at 1192-94).

Plaintiffs invoke the exception based solely upon the allegedly "significant factual material in the administrative record" released by the Commission in September of 2022. (Resp. at 26.) Plaintiffs argue that "[i]nsofar as plaintiffs rely upon OGC's factual findings, respondents' sworn responses to the administrative complaints, or other materials in the newly released MUR file to augment earlier arguments or to make new standing arguments, this exception applies." (*Id.*) This argument fails for two independent and sufficient reasons.

First, even assuming the Commission's release of the MUR 6527 file included information relevant to plaintiffs' informational injury, all of that evidence goes to occurrences that happened in 2014-2015, not to events that occurred subsequent to this Court's dismissal. The Commission's release of the MUR 6927 file did not reveal any information regarding "*occurrences subsequent to the original dismissal*[.]" *Home Builders*, 786 F.3d at 41 (citing *Dozier*, 702 F.2d at 1192). As explained in the Commission's Motion (Mot. at 18), the time period relevant to RTR Super PAC and the Bush Campaign's alleged failure to report began with activity by Bush in late 2014[3] and ended with Bush's suspension of his campaign in February of 2016.[4] All the relevant "occurrences" were thus well in advance of the Court's decision finding in December of 2021 that plaintiffs lacked standing. *See RTR II*.

Plaintiffs' argument that this supposedly "new" information could constitute a new injury is similar to arguments raised by plaintiffs in *Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 73 (D.D.C. 2016), and should be rejected for similar reasons. There plaintiffs argued "that an injury that continues to occur after the entry of judgment constitutes a new injury post-dating

---

[3] (Compl. ¶ 71 (noting that "OGC found that Bush began spending funds to test the waters of a 2016 presidential candidacy in May 2014").)

[4] Jordan Frasier, Jeb Bush Suspends 2016 Presidential Campaign, NBC News (Feb. 21, 2016), https://www.nbcnews.com/politics/2016-election/jeb-bush-ends-2016-presidential-campaign-n522831.

such judgment," citing as evidence the ongoing limitations on the supply of timber at the heart of that lawsuit. *Id.* The court rejected this reasoning, noting that "these 'current' situations are not new injuries postdating the [court's prior decision], but rather are ongoing, pre-existing injuries." *Id.* "Because these injuries are the continuing result of the alleged timber shortage, [plaintiffs] do not satisfy the requirements for the curable defect exception." *Id.* So here, plaintiffs do not and cannot allege that a lack of reporting in 2014-16 is any basis for establishing an injury subsequent to this Court's dismissal for lack of standing, and thus fail to overcome issue preclusion. Simply put, no development now could affect whether plaintiffs were injured in that time period.

***Second*,** because it relates exclusively to occurrences in 2014-2016, the information plaintiffs rely on was available to plaintiff through other publicly available sources prior to this Court's prior judgment, and plaintiffs should bear the consequences of its failure to find and present this information to the Court in that earlier proceeding. *See GAF Corp.*, 818 F.2d at 913 (noting that the "curable-defect exception" does not permit "relitigating any issue of law or fact determined against [a party] in the first action which it had full opportunity to litigate"). FECA and the Commission's enforcement procedures require an affirmative finding of "reason to believe" a violation occurred prior to the commencement of any "investigation." 52 U.S.C. § 30109(a)(2); *see* FEC Statement of Policy Regarding Commission Act in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("'[R]eason to believe' findings indicate only that the Commission found sufficient legal justification *to open an investigation* to determine whether a violation of the Act has occurred.") (emphasis added). Prior to such a finding the Commission has no investigative authority, and the Office of General Counsel prepares its recommendation regarding whether there is "reason to believe" violations

occurred based upon either "a complaint" or "information ascertained in the normal course of carrying out its supervisory responsibilities," which may include publicly available information. 52 U.S.C. § 30109(a)(2); FEC Office of the General Counsel, *OGC Enforcement Manual* 10-11 (June 2013), *available at* https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc_docs/generalcounsel%27smemorandumdatedjune262013.pdf. Because the Commission made no "reason to believe" finding here, there was no investigation, and thus the agency's record does not contain relevant information previously unavailable to plaintiffs. In their Response plaintiffs do not appear to contest that all evidence relevant to the dispositive standing issues disclosed in the MUR 6927 file was from public sources and available to plaintiffs prior to the file's release.

What was revealed by the public disclosure of the agency's administrative record was staff analysis of the evidence it had compiled from public sources. (*See* Resp. at 28-29, 33-34.) Indeed, this is apparent on the fact of the documents the Commission released. For instance, plaintiffs claim that they "can now identify from the recently-released public case file" nine "Bush campaign events that his campaign failed to report." (Resp. at 33-34.) The events plaintiff list appear to be direct references to transcripts included with the Appendix to the Commission's First General Counsel's Report. First General Counsel's Report, Appendix A at 16-42, MURs 6915 & 6927 (Feb. 8, 2017), https://www.fec.gov/files/legal/murs/6927/6927_14.pdf ("FGCR"). A review of those transcripts, however, makes clear that they are in all cases campaign events that were by their nature public. For instance, the Appendix references an interview of Bush at the Conservative Political Action Conference at the National Harbor, MD on February 27, 2015. *Id.* at 7-15. That interview, and thus the entire contents of the FEC's self-produced transcript, are available online for access by the public and by plaintiffs. *Road to the*

White House 2016, Jeb Bush Remarks at CPAC, C-SPAN (Feb. 27, 2015), https://www.c-span.org/video/?324558-16/governor-jeb-bush-r-fl-remarks-cpac-2015. Plaintiffs do not suggest otherwise. Consistent with the matter's pre-investigatory status, all the transcripts were indeed made from videos obtained by OGC staff from publicly available sources.[5]

In addition to relying on publicly available information, the staff analysis plaintiffs rely on was not adopted by an operative majority of Commissioners, and therefore has no legal force. *Cf. Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (declining to consider staff recommendation). Plaintiffs were obliged to present their best case for informational injury in the first action. Absent some factual development subsequent to the dismissal, the curable defect exception does not allow parties to present additional evidence already in existence to bolster its case after unsuccessfully arguing injury in the first action.

D. The "Significant Change in Controlling Law" Exception Does Not Apply

There has been no "change in controlling law[,]" much less a change that is "significant" since the Court held that plaintiffs had not suffered an informational injury. *Canonsburg*, 989 F. Supp. 2d at 20. As the Commission has previously noted (Mot. at 14-15), only "on rare occasions [have] the courts . . . been willing to override the bar of res judicata for reasons of compelling public policy[.]" *Hardison v. Alexander*, 655 F.2d 1281, 1288-89 (D.C. Cir. 1981) (stating that in general res judicata applies even if there has been a subsequent change in the law

[5] *See, e.g.*, FGCR Appendix A at 16-18 (transcript of *Road to the White House 2016, Jeb Bush Remarks in New Hampshire*, C-SPAN (March 13, 2015), https://www.c-span.org/video/?324756-1/governor-jeb-bush-r-fl-remarks-hampshire); FGCR Appendix A at 19-20 (transcript of *Road to the White House 2016, Jeb Bush Remarks in Iowa*, C-SPAN (March 6, 2015), https://www.c-span.org/video/?324712-1/governor-jeb-bush-r-fl-remarks-iowa); FGCR Appendix A at 24-27 (transcript of *Jeb Bush Politics and Eggs 4/17/2015*, YouTube (last visited March 30, 2023), https://www.youtube.com/watch?v=hkgGmEgbQSw).

of the circuit, but noting that there are exceptions for reasons of compelling public policy, such as cases involving important questions of constitutional law). However, this is no such case.

First, plaintiffs' attempt to invoke the "change in controlling law" exception depends entirely on the fact that the Court's decisions in the delay litigation relied in part upon a district court opinion, *CLC v. FEC*, 507 F. Supp. 3d 79 (D.D.C. 2020) (*CLC I*) that was later overturned, *CLC v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) (*CLC II*). However, this Court's dismissal of plaintiffs' claims in the delay litigation for lack of standing did not rely on *CLC I* in any significant way, and arguably did not rely on that case *at all* with regards to plaintiffs' informational injury.

Of the Court's two published opinions in the delay litigation, only the Court's first opinion, *CLC v. FEC*, 520 F. Supp. 3d 38 (D.D.C. 2021) (*RTR I*), cites *CLC I* in any respect. *RTR I* cites the *CLC I* opinion three times, first regarding the definition of coordinated contributions as expenditures, *RTR I* at 47, second by use of the "see also" signal for the point that "there is no statutory right to determining whether an expenditure should be deemed a 'coordinated' (and thus an in-kind) contribution[,]" *id.* at 47-48, and finally in a footnote to support its conclusion that FECA precludes review of plaintiffs' claim under the Administrative Procedure Act in that case, *id.* at 51 n.4. Of these three citations, only the second has any relevance to plaintiffs' informational injury. However, *CLC I* was merely one of *three* cases this Court relied upon to support the sentence in question (no right to a determination that expenditures are coordinated). The Court relied principally on *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001), and also relied upon *Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 344 (D.D.C. 2020), both of which remain good law. There is simply no basis to believe that *CLC I* was central or even significant to the Court's conclusion that plaintiffs lacked

standing to compel the FEC to investigate alleged coordinated expenditures. And there is of course no reason to believe that *CLC I* played any part in the Court's decision in *RTR II*, where it was not cited at all.

Second, and as the Commission detailed previously (Mot. at 18-19), there has been no "change in controlling law" as evidenced by the fact that the *CLC II* court *explicitly disclaimed* any such change. The *CLC II* court was explicit that the district court in that case misapplied "settled law," and made no pretensions to overrule or modify precedent in this Circuit. *See CLC II* at 793 (finding that "the Intervenors' approach runs contrary to settled law"); *id.* at 783 ("The law is settled that a denial of access to information qualifies as an injury in fact[.]"). When the Court of Appeals makes its intentions clear with such an explicit disclaimer, this is manifestly strong evidence that it has not overturned settled law. *See Canonsburg*, 989 F. Supp. 2d at 21 (finding plaintiff had not demonstrated that its cited authority represented a change in the law, in part because the court in the opinion cited by plaintiff "did not suggest that the ruling . . . was breaking any new ground"). Plaintiffs' Response quotes the *CLC II* opinion extensively (Resp. at 2-5, 20-26, 31-32, 34-39), but does not clearly state which "controlling legal principles" were overturned in that case, and does not address or attempt to distinguish the language in that opinion stating that the court was applying "settled" law. Plaintiffs thus provide no reason to suppose that *CLC II* in any way changed controlling law, as opposed to merely undertaking the commonplace work of Courts of Appeals in reversing the trial court's implementation of settled legal principles.

It is true that "on rare occasions" an intervening decision by the Court of Appeals or Supreme Court that "expressly overrule[s]" a question of law central to a prior action, this may be sufficient to overcome issue preclusion. *See Graphic Commc'ns Int'l Union, Loc. 554 v.*

Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1493 (D.C. Cir. 1988); *see also Chippewa & Flambeau Imp. Co. v. FERC*, 325 F.3d 353, 356 (D.C. Cir. 2003) (change in legal definition "subsequently adopted by the Supreme Court"); *Fed. Lab. Rels. Auth. v. U.S. Dep't of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1456 (D.C. Cir. 1989) (subsequent Supreme Court decision constituted "a change or development in the controlling legal principles") (quotations and citations omitted). This is no such case. Where plaintiffs cannot demonstrate either that *CLC I* was necessary to this Court's prior decision in the delay litigation that plaintiffs failed to demonstrate an informational injury, or that *CLC II* altered the controlling legal principles, it has provided no basis for overcoming issue preclusion here.

III. A FINDING OF FUTILITY IS MERITED UNDER THE CIRCUMSTANCES, AND WOULD NOT UPEND JUDICIAL REVIEW

In its Motion the Commission argued that remand of this matter would be futile because a group of three Commissioners, enough to control the outcome on reconsideration, indicated that they view the matter as long settled and expressed concerns related to the statute of limitations. (Mot. at 20-22.) Under these circumstances, a remand would serve no purpose other than necessitating yet another round of administrative proceedings where the outcome of those proceedings is effectively preordained.

Plaintiffs' Response alleges that accepting the Commission's futility argument would lead, in effect, to a slippery slope that "would be an excuse the agency could—and likely would—deploy in each and every FECA challenge to its actions." (Resp. at 42.) However, the Commission is not asking this Court to find a general futility exception that the agency could call upon at will to defeat review of its actions under 52 U.S.C. § 30109(a)(8). Rather, under the unique circumstances of this particular proceeding, there is a clear and principled basis to find that remand here would be futile, which poses little risk of abuse in future proceedings.

The posture of this proceeding is rare, if not unprecedented, aside from a small number of matters that are the subject of recent litigation. Plaintiffs' complaint was first filed in 2015 and was subject to at least eight Commissioner votes between 2018 and 2022. (Mot. at 7-11.) During that span, five new Commissioners were seated, and three Commissioners who did not vote on the agency's initial, substantive consideration of the matter later filed a statement explaining their reasoning for opposing revisiting the case in the recent period. (*Id.* at 9-10.) In addition, the sole Statement of Reasons ("SOR") that controls as the explanation for the Commission's actions in this case was issued by Commissioner Weintraub in September of 2022, and advocates at a broad level for further investigation and enforcement rather than arguing that dismissal was appropriate in this matter. (*Id.* at 10-11.) To counsel's knowledge, aside from one other matter currently being litigated,[6] no other Commission enforcement matter in the history of the agency has presented this profile. Outside of those two matters, no other case involved a divided Commission in which the vote against further proceedings was explained through the reasoning that failing to enforce a particular allegation was contrary to law.

Given the "novel" circumstances of this case, it is hardly surprising that "[n]one of the[] cases" involving judicial review under FECA in the Commission's Motion consider closely analogous fact patterns. (Resp. at 42-43.) It is also why there is little risk of this matter setting a precedent for the FEC or other agencies to disregard their obligations to carefully evaluate the matters before them on a case-by-case basis. A finding of futility is always based on the unique circumstances of the proceeding in question. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35 n.10 (D.D.C. 2016) ("At this point, it would be near impossible to

[6] *See Citizens for Resp. & Ethics in Wash. v. FEC*, Civ. No. 22-3281 (D.D.C. Oct. 27, 2022) (seeking judicial review of FEC Matter Under Review 6589 (American Action Network)).

square a requirement that the Forest Service's exercise of its limited authority be done expeditiously with an order from this court directing the Forest Service to engage in further evaluation or produce additional documentation."). Here, the length of time and statute of limitations concerns present exceptional factual circumstance that should give the Court pause before remanding this matter for yet more agency proceedings.[7]

Despite the relative novelty of the circumstances presented here, plaintiffs are wrong to suggest that there is no support for the proposition that a futile remand need not be ordered. In *Common Cause v. FEC*, 842 F.2d 436, 450 (D.C. Cir. 1988), the Court of Appeals concluded that the rule requiring the Commission to issue a SOR to explain deadlocks that result in rejection of a general counsel's recommendation would not apply retroactively, finding this "would be an exercise in futility and a waste of the Commission's resources." The court noted that "only two of the six Commissioners who participated in the challenged vote still remain at the FEC" and that the Commissioner "who cast the deciding vote" was no longer at the Commission, thus "[t]o attempt to reconstruct and review his reasoning at this late date when he is no longer a public official would be to engage in a strange exercise indeed." *Id.* As the Commission noted in its Motion, here three of the Commissioners who voted successfully to close the file in this matter in September of 2022 explained their vote by noting their reluctance

[7] The available information about the rationale for earlier Commissioner opposition to terminating a group of matters is that it was to enable private suits like the one that plaintiffs seek to file on the allegations here. *See* Statement of Commissioner Ellen L. Weintraub On the Voting Decisions of FEC Commissioners, 2-4 (Oct. 4, 2022), https://www.fec.gov/resources/cms-content/documents/2022-10-04-ELW-Statement-on-Voting-Decisions.pdf (explaining that a Commissioner "quite consciously and intentionally cast votes that put [certain] matters on their . . . paths" of enforcement through citizen suit). Plaintiffs thus should not be heard to complain that the administrative matter's duration may not be invoked against them at this juncture. (Resp. at 45.) Plaintiffs' failure to maintain the delay suit and obtain a private right of action on the allegations at issue here occurred due to their inability to establish standing, not any strategic action by the FEC.

to revisit a matter on which several of their colleagues, nearly all of whom no longer serve as Commissioners, had declined to proceed. (Mot. at 9-11.) Similar to *Common Cause*, the reluctance of three Commissioners to re-consider a matter on which so many of their colleagues had declined to proceed, over such an extended period, demonstrates the pointlessness of requiring the agency to reopen the matter. (Compl. ¶¶ 97-101 (citing Statement of Reasons of Chairman Allen Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor, III, MURs 6915 & 6927 (May 13, 2022), https://www.fec.gov/files/legal/murs/6927/6927_26.pdf).) As this Circuit has already made clear, this Court need not be blind to the futility of remand when a sufficient number of Commissioners to control the outcome have made that point explicit.

Similar reasoning establishes why plaintiffs' reliance on *FEC v. Akins* is misplaced. (Resp. at 44-45 (citing 524 U.S. 11 (1998)).) The *Akins* Court rejected the Commission's argument that an administrative complainant failed to establish causation and redressability under Article III because it was "possible" that the Commission "would still have decided in the exercise of its discretion not to require [the respondent] to produce" certain information "even had the FEC agreed with the [complainant's] view of the law." *Akins*, 524 U.S. at 25. The Court rejected that argument because it could not "know that the FEC would have exercised its prosecutorial discretion in this way." *Id.* Here, by contrast, the Court has before it an affirmative statement of the views of a sufficient number of Commissioners to control any remand.

If the Court rightly determines that remand would be futile under these circumstances, there is little risk that such a holding could or would be expanded to generally exempt the Commission from undertaking its statutory responsibilities for some pretextual reason. This case

is unique, and there is no need for a remand when a sufficient number of Commissioners to control the outcome have clearly expressed their view that the time for substantive agency consideration has passed.

CONCLUSION

For the foregoing reasons, the Commission's Motion should be granted, and plaintiffs' complaint dismissed for lack of standing.

Respectfully submitted,

Lisa Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Jacob S. Siler (D.C. Bar No. 1003383)
Assistant General Counsel
jsiler@fec.gov

/s/ Christopher H. Bell
Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

March 31, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

/s/ Christopher H. Bell

Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov