UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION 1050 First Street, NE Washington, DC 20463 Defendant.	)	Civ. No. 22-3319 (CRC) SECOND MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S SECOND MOTION TO DISMISS

Pursuant to Rules 12(b)(1) of the Federal Rules of Civil Procedure, the Federal Election Commission ("Commission") hereby renews its motion for an order dismissing plaintiff's complaint, which seeks relief pursuant to 52 U.S.C. § 30109(a)(8)(C). The Court previously held that its prior holding finding plaintiffs had not suffered an informational injury sufficient to confer standing precluded a contrary finding here, but withheld judgment as to whether plaintiffs had suffered a sufficient organizational injury, and invited the parties to submit additional briefing to address the issues the Court raised. Because the Court's prior judgments preclude plaintiffs' organizational theory, and because plaintiffs cannot demonstrate an "ongoing" injury as required for the injunctive relief they seek, this theory fails, and plaintiffs lack standing to pursue their claims. Accordingly, this Court should dismiss for lack of jurisdiction.

Respectfully submitted,

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

/s/ Christopher Bell
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

January 26, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS SECOND MOTION TO DISMISS

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

Christopher H. Bell (D.C. Bar No. 1643526)
Acting Assistant General Counsel
chbell@fec.gov

FEDERAL ELECTION COMMISSION
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INTRODUCTION

The Federal Election Commission ("FEC" or "Commission"), hereby renews its motion for an order dismissing plaintiff's complaint, which seeks relief pursuant to 52 U.S.C. § 30109(a)(8)(C). In a prior proceeding before this Court, plaintiffs were afforded multiple opportunities to establish their right to information concerning the long-since terminated campaign of Jeb Bush in the 2016 presidential election. In response to the FEC's first motion to dismiss in this matter, the Court found that its prior holding that plaintiffs had not suffered an informational injury sufficient to confer standing precluded a contrary finding here. The Court further expressed skepticism that its categorial language regarding plaintiffs' lack of a legally cognizable interest in the information they seek would permit plaintiffs to prevail on a closely related theory of organizational standing, and invited the parties to address its concerns.

The Court's concerns were warranted, as its holdings in both the prior case and in this one foreclose any possible standing plaintiffs might have to pursue their claims further. First, issue preclusion bars plaintiffs from attempting to establish an interest in the information they seek here, a central element of their theory of organizational standing. Second, the law of this Circuit is clear that an organizational standing theory must fail when it is effectively identical to an informational theory the court has rejected. And third, plaintiffs cannot establish that their alleged injury is either ongoing or irreparable, necessary elements to establish their entitlement to the injunctive relief they seek. This Court's prior holdings, along with the march of time, preclude plaintiffs from establishing a live case or controversy for this Court to adjudicate. Plaintiff's Complaint should therefore be dismissed in its entirety.

BACKGROUND

I. THE FEC AND ITS ADMINISTRATIVE ENFORCEMENT PROCEDURES

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the statute. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. The Commission's consideration of such an administrative complaint is governed by detailed procedural requirements. After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation. *Id.* §§ 30106(c), 30109(a)(2).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause to believe that a violation of FECA has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt

to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). Entering into a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). The institution of a civil action under section 30109(a)(6)(A) requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c).

Absent waiver, proceedings on such complaints are covered by confidentiality protections until the Commission "terminates its proceedings." 11 C.F.R. § 111.20; *see* 52 U.S.C. § 30109(a)(12)(A) ("Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."); 11 C.F.R. § 111.21. FECA further provides for the imposition of a fine on "[a]ny member or employee of the Commission, or any other person, who violates" section 30109(a)(12)(A). 52 U.S.C. § 30109(a)(12)(B).

If, at any point in this process, the Commission dismisses an administrative enforcement matter, FECA provides the complainant with a narrow cause of action for judicial review of the Commission's dismissal decision. *See id.* § 30109(a)(8)(A) (detailing the procedure for seeking judicial review of an administrative dismissal and the scope of such review). That statutory provision also allows a party who has filed an administrative complaint with the Commission to

bring a civil action in this District alleging that the Commission has "fail[ed] to act" on its complaint within 120 days. *Id.* § 30109(a)(8)(A).

FECA expressly limits the scope of relief available to a plaintiff challenging an FEC dismissal decision or alleging that the Commission has failed to act on an administrative complaint. The reviewing court may only (a) declare that the Commission's failure to act or dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the Commission does not conform with such an order, the original administrative complainant may bring "a civil action to remedy the violation involved." *Id.*

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Administrative Complaint in MUR 6927

In 2015, plaintiffs filed and then supplemented an administrative complaint with the Commission alleging that Bush and RTR violated certain provisions of FECA in the course of Bush's 2016 presidential bid. Specifically, plaintiffs asserted that Bush had not timely registered as a candidate with the Commission or filed required reports disclosing his activities to "test the waters" for his presidential campaign, and that he had financed his campaign with "soft money," that is, money not subject to FECA's amount and source limitations. (Compl. ¶ 53.) Plaintiffs also alleged that Bush and his agents had established RTR while Bush was holding himself out as a federal candidate, which according to plaintiffs violated FECA's requirement that any entity "established, financed, maintained or controlled by or acting on behalf of" a federal candidate must abide by FECA's "limitations, prohibitions, and reporting requirements[.]" 52 U.S.C. § 30125(e)(1); (*see* Compl. ¶¶ 58, 62.) The Commission designated plaintiffs' complaint and its supplement as Matter Under Review ("MUR") 6927. (Compl. ¶ 4 n.3.)

B. Plaintiffs' First Lawsuit Alleging Unlawful Delay

After the Commission took no public action on the administrative complaint, plaintiffs filed a lawsuit in this Court in March 2020 alleging that the Commission's failure to act was contrary to law under 52 U.S.C. § 30109(a)(8)(A). (Compl. ¶ 64.) To establish that the Commission's apparent inaction had caused them informational injury, plaintiffs alleged that they were entitled to know about "the extent of coordination" between RTR and the Bush campaign, and "the extent of Bush's campaign spending" while he was testing the waters and after he had become a candidate." *Campaign Legal Ctr. v. FEC*, 520 F. Supp. 3d 38, 42 (D.D.C. 2021) ("*RTR I*"). Plaintiffs further alleged that they had "suffered organizational injuries . . . because inadequate disclosure of federal campaign finance activity diverts funds and resources from other organizational needs." *Id.* The Commission did not appear through counsel in the delay case after authorization to defend the lawsuit did not secure the necessary four votes. Certification, MURs 6915 & 6927 (dated Aug. 14, 2020), https://www.fec.gov/files/legal/murs/6927/6927_21.pdf. RTR, on the other hand, was granted leave to intervene as a defendant. *RTR I*, at 42.

RTR challenged plaintiffs' standing, arguing that it and the Bush campaign fully disclosed all the information FECA required. This Court initially concluded that plaintiffs' allegations were sufficient to plead informational injury because, accepting their view of what FECA required to be disclosed and the allegations that Bush had engaged in testing-the-waters activity as early as January 2015, there appeared to be "over five months of information" that should have been disclosed but was not. *RTR I*, at 46.

With the benefit of additional briefing and argument, however, the Court granted RTR's motion to reconsider and concluded that plaintiffs had not met their burden to establish informational injury. *Campaign Legal Ctr. v. FEC*, 578 F. Supp. 3d 1, 580 (D.D.C. 2021) ("*RTR*

II"). In connection with that motion, RTR pointed to reports filed by RTR or the Bush campaign that revealed significant disbursements for Bush's activity between July 2014 and June 2015. *See id.* at 581. Some of that information was disclosed as testing-the-waters activity on the Bush campaign's first campaign finance report, while other disbursements were disclosed on RTR's reports because it viewed itself as the beneficiary of Bush's activity. *Id.* at 582 & n.3. Regardless of how it had been classified, however, the Court concluded that all of the expenses that plaintiffs had questioned had been disclosed. *Id.* at 583. And because plaintiffs had not "identified any other pre-candidacy events, travel, or speaking engagements from which the Court could infer the existence of still-undisclosed spending," they had not met their burden of establishing informational injury. *Id.*

Plaintiffs subsequently moved for reconsideration of the Court's decision finding plaintiffs lacked standing. *Campaign Legal Ctr. v. FEC*, Civ. No. 20-730 (D.D.C. July 14, 2022), Docket No. 39 (Memorandum Opinion and Order) ("*RTR III*"), at 2. Plaintiffs did not challenge the Court's ruling finding plaintiffs had suffered no cognizable informational injury, and instead sought only a ruling in the first instance on a theory of organizational standing based on organizational injuries caused by the FEC's delay in acting on their administrative complaint, which the Court had declined to rule on previously. *Id.* While that motion was pending, plaintiffs filed a notice of supplemental authority alerting the Court to a then-recently issued decision of the D.C. Circuit, *Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022). *Campaign Legal Ctr. v. FEC*, Civ. No. 20-730 (D.D.C. July 14, 2022), Docket No. 37 (Pls.' Notice of Suppl. Auth.). Plaintiffs argued that this supplemental authority "controverts the Court's holding that plaintiffs did not suffer informational injury" based on the Bush campaign's and Right to Rise's method of reporting Bush's testing-the-water activity. *Id.* at 4-5.

The Court subsequently denied plaintiffs' motion for reconsideration, finding that plaintiffs did not meet the standard for organizational standing under D.C. Circuit precent. *RTR III*, at 4-11. The Court acknowledged plaintiff's notice of supplemental authority, but found that it was relevant solely to "plaintiff's first theory of standing — informational injury — which they specifically did not challenge in the present motion for reconsideration[,]" and therefore declined to consider it. *Id.* The Court noted that "[p]laintiffs are free to raise this argument on appeal." *Id.* Plaintiffs did not appeal this decision, and the time for plaintiffs' appeal expired no later than Monday, September 12, 2022. *See* Fed. R. App. P. 4(a)(1)(B).

C. Commission Consideration of MUR 6927

On August 29, 2022, after the Court dismissed plaintiffs' delay suit, the Commission voted 4-1 to close the MUR 6927 file. In accordance with Commission policy, documents related to this case were placed on the public record within 30 days thereafter. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

That disclosure revealed for the first time the votes the Commission had taken while plaintiffs' delay suit had been pending. In December 2018, the Commission voted on whether, based on plaintiffs' administrative complaint, there was reason to believe either Bush or RTR violated FECA. (Compl. ¶¶ 85-86.) First, the Commission voted on whether to find reason to believe that: (1) Bush failed to timely declare his candidacy in violation of 52 U.S.C. § 30102(e)(l), and that the Jeb 2016 committee failed to timely register in violation of 52 U.S.C. §§ 30103(a) and 30104; (2) Bush and Jeb 2016 violated 52 U.S.C. § 30116 by accepting excessive contributions from RTR Leadership PAC in the period prior to the commencement of his official candidacy; and (3) Bush and RTR Super PAC violated the soft money restrictions at 52 U.S.C. § 30125(e). (Compl. ¶ 85 (citing Certification, MURs 6915 & 6927 (dated Dec. 7, 2018), https://www.fec.gov/files/legal/murs/6927/6927_15.pdf).) That vote split 2-2, with then-

Commissioners Hunter and Petersen dissenting.[1] (*Id.*) A subsequent vote to find reason to believe that Bush had not timely announced his candidacy, timely registered a principal campaign committee, and that RTR had made and Bush accepted excessive contributions, but take no action on any soft money violations at that time, likewise divided evenly. (Compl. ¶ 86 (citing Certification, MURs 6915 & 6927 (dated Dec. 14, 2018), https://www.fec.gov/files/legal/murs/6927/6927_16.pdf).) But that time, the vote flipped, with Commissioner Weintraub and then-Commissioner Walther dissenting. (*Id.*) Having twice split on whether to find reason to believe, the Commission held several votes on whether to close its file on the matter between December 2018 and January 2022. Each of these votes failed to garner the required four votes for agency action and the matter remained open.[2]

In the interim, several departures and appointments occurred at the Commission level,

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[1] At the time of the December 2018 votes in this matter, there were only four sitting Commissioners out of a maximum of six.

[2] Certification, MURs 6915 & 6927 (dated Dec. 14, 2018), https://www.fec.gov/files/legal/murs/6927/6927_16.pdf (December 13, 2018, close-the-file vote failed 2-2); Certification, MURs 6915 & 6927 (dated Apr. 9, 2019), https://www.fec.gov/files/legal/murs/6927/6927_20.pdf (April 9, 2019, close-the-file vote failed 2-2); *id.* (April 9, 2019, motion to close the file and authorize defense of future related litigation failed 3-1); Certification, MURs 6915 & 6927 (dated May 8, 2019), https://www.fec.gov/files/legal/murs/6927/6927_17.pdf (April 23, 2019, close-the-file vote failed 2-0); Certification, MURs 6915 & 6927 (dated May 7, 2019), https://www.fec.gov/files/legal/murs/6927/6927_18.pdf (May 7, 2019, close-the-file vote failed 2-0); Certification, MURs 6915 & 6927 (dated May 24, 2019), https://www.fec.gov/files/legal/murs/6927/6927_19.pdf (May 23, 2019, motion to close the file and authorize defense of future related litigation failed 3-1); Certification, MURs 6915 & 6927 (dated August 14, 2020), https://www.fec.gov/files/legal/murs/6927/6927_21.pdf (June 23, 2020, motion to close the file and authorize defense of *CLC v. FEC*, 20-cv-730 (D.D.C.) failed 2-2); Certification, MURs 6915 & 6927 (dated January 13, 2022), https://www.fec.gov/files/legal/murs/6915/6915_40.pdf (January 11, 2022, close-the-file vote failed 3-3). Two motions to dismiss the case based on prosecutorial discretion also failed, with no Commissioner voting in support. Certification, MURs 6915 & 6927 (dated May 24, 2019), https://www.fec.gov/files/legal/murs/6927/6927_19.pdf; Certification, MURs 6915 & 6927 (dated August 14, 2020), https://www.fec.gov/files/legal/murs/6927/6927_21.pdf.

changing the makeup of the Commission. The two Commissioners who had voted in 2018 against finding reason to believe with respect to the soft-money restrictions both departed the Commission and did not file any statement of reasons in this matter. (*See* Compl. ¶ 88.) On May 13, 2022, three Commissioners who had not been in office during the initial reason-to-believe votes — Commissioners Dickerson, Cooksey, and Trainor — placed a Statement of Reasons in the file explaining why they had voted to close the file in 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 ("Dickerson, et al. Statement"), MURs 6915 & 6927 (May 13, 2022), https://www.fec.gov/files/legal/murs/6927/6927_26.pdf).) On September 30, 2022, Commissioner Weintraub issued a Statement of Reasons explaining her position. (Compl. ¶¶ 94-96 (citing Statement of Reasons of Comm'r Ellen L. Weintraub ("Weintraub Stmt."), MURs 6915 & 6927 (Sept. 30, 2022), https://www.fec.gov/files/legal/murs/6927/6927_27.pdf).)

D. The Instant Proceeding

On October 28, 2022, plaintiffs filed this instant action alleging that the Commission's August 2022 closure of its file constitutes a dismissal contrary to law. (Compl. ¶¶ 1-2, 85-92.) Mirroring their prior court complaint, plaintiffs allege that they "have been deprived of FECA-required disclosure regarding" Bush's testing-the-waters or campaign activity prior to his official announcement and "any in-kind contributions made by [RTR] to Bush's campaign." (*Id.* ¶ 7; *see id.* ¶¶ 21-23.) Plaintiffs bring a single cause of action under 52 U.S.C. § 30109(a)(8)(A). (Compl. ¶¶ 104-108.)

On January 13, 2023, the Commission filed a motion to dismiss plaintiffs' complaint, Federal Election Commission's Motion to Dismiss (Docket No. 12) (the "Motion to Dismiss" or "MTD"), which was fully briefed by the parties on March 31, 2023. *See* Plaintiff's Response in Opposition to Defendant's Motion to Dismiss (Docket No. 19) (the "Response" or "MTD

Resp."); Federal Election Commission's Reply in Support of its Motion to Dismiss (Docket No. 20) (the "Reply" or "MTD Reply"). In its Motion to Dismiss, the Commission argued, *inter alia*, that this Court's prior determination that plaintiffs lacked standing to pursue their prior case precludes plaintiffs from relitigating that issue in a new action based on the same underlying facts. (MTD at 13-20.) Plaintiffs opposed the FEC's grounds for dismissal. (MTD Resp. at 22-45.)

On September 26, 2023, this Court issued a Memorandum Opinion and Order (Docket No. 23) (the "Opinion" or "Mem. Op.") in which it agreed that plaintiffs are precluded from re-alleging an informational injury but found that it did not have a sufficient basis to find that plaintiffs are precluded from re-alleging an organizational theory of injury. With regards to plaintiffs' organizational theory of injury, the Court identified "significant hurdles to this alternative basis for standing that the parties did not confront in their briefings." *Id.* at 2. In particular, "the parties did not examine whether the Court's prior judgments concerning informational injury spill over and contaminate the organizational injury asserted here, or whether the Plaintiffs plausibly alleged an ongoing injury to their groups stemming from this long-passed presidential campaign." *Id.* The Court denied the FEC's motion to dismiss without prejudice to renewal, *id.*, and "invite[d] the FEC to renew its jurisdictional challenge with a subsequent motion to dismiss" addressing the issues the Court raised. *Id.* at 29.

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for "lack of jurisdiction over the subject matter" of claims asserted in the Complaint. The party claiming subject matter jurisdiction bears the burden of demonstrating that jurisdiction exists. *Khadr v. United States,* 529 F.3d 1112, 1115 (D.C. Cir. 2008). When reviewing a motion to dismiss for lack of subject

matter jurisdiction, each court has "'an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.'" *Jones v. Ashcroft,* 321 F. Supp. 2d 1, 5 (D.D.C. 2004) (citation omitted). In evaluating such motions, courts review the complaint liberally and grants plaintiffs the benefit of all inferences that can be derived from the facts alleged. *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C. Cir. 2004). To determine whether it has jurisdiction over a claim, the court may consider materials outside the pleadings. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005). No action of the parties can confer subject matter jurisdiction on a federal court because subject matter jurisdiction is both a statutory requirement and a constitutional requirement under Article III. *Akinseye v. District of Columbia,* 339 F.3d 970, 971 (D.C. Cir. 2003). "The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception," since "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

II. PLAINTIFFS LACK STANDING BECAUSE THEY CANNOT ESTABLISH A COGNIZABLE INJURY TO THEIR ORGANIZATIONS' INTERESTS

A. The Law of Organizational Standing

For organizational standing, to determine whether an organization's injury is concrete and demonstrable or merely a setback to its abstract social interests, a plaintiff must first show "that the agency's action or omission to act injured the organization's interest," and second, the plaintiff must show that it "used its resources to counteract that harm." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*") (citation omitted) (cleaned up). "[A] mere [organizational] 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the

problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' " for standing purposes. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Instead, injury in fact "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35. For instance, although a "person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm," that does not mean that "anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566-67 (1992). Nor will standing be found where the alleged "service . . . impaired is pure issue-advocacy[.]" *PETA* at 1093-94 (citing *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C.Cir.2005)); *see Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 921 (D.C. Cir. 2015) (no ongoing injury where plaintiffs did not allege that the government "restricts the flow of information that FWW uses to educate its members" rather than merely impeding their advocacy efforts); *Elec. Priv. Info. Ctr. v. Fed. Aviation Admin.*, 892 F.3d 1249, 1256 (D.C. Cir. 2018) ("*EPIC II*") (plaintiffs failed to establish standing based upon "vague assertions in its brief that sound in pure issue advocacy").

Finally, to establish the right to injunctive relief, including under an organizational theory of standing, plaintiffs must prove the existence of an ongoing or future injury. "[W]here the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). Instead, Plaintiffs must "establish an ongoing or future injury that is 'certainly impending.' " *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

B. This Court's Categorical Statements Finding Plaintiffs Lack an Interest in the Information They Seek Precludes Their Establishing an Organizational Injury Here.

In its Opinion the Court concluded that its sole decision addressing plaintiffs' organizational theory of standing, *RTR III*, "does not preclude Plaintiffs from claiming organizational standing here." Opinion at 27. The Court re-iterated its observation in *RTR III* that "the elements of informational and organizational standing diverge in important respects[,]" namely that "[w]hile a party asserting informational injury must show it is legally entitled to the information, a plaintiff claiming organizational injury need only demonstrate that deprivation of the information impairs its daily operations." *Id.* (citing *RTR III* at 8 n.2 (in turn citing *PETA*, 797 F.3d at 1092, 1095–96)). At the same time, the Court recognized that even if plaintiffs' organizational theory permits them to demonstrate a mere "interest" in the disclosure of coordinated spending (combined with interference with their daily operations), this nonetheless clashed with the Court's "categorical language that Plaintiffs have 'no legally cognizable interest in labeling spending coordinated if that spending has already been disclosed in some format' " and suggesting that this "may slam shut that door to federal court." *Id.* (citing *RTR I*, 520 F. Supp. 3d at 48).

The Court's concerns are warranted. While issue preclusion may not bar plaintiffs from alleging an organizational injury here, it does bar the Court from revisiting its holding that plaintiffs lack a cognizable legal interest in the information they seek, and that holding is fatal to plaintiffs' organizational theory. 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." *Canonsburg Gen. Hosp. v. Sebelius*, 989 F. Supp. 2d 8, 16-17 (D.D.C. 2013) (brackets in original) (quoting *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007). "A court conducting an issue preclusion analysis does not review the merits of the determinations in the earlier litigation." *Id.* at 17 (quoting *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1257 (D.C. Cir. 2006)).

These criteria are easily met here. Whether plaintiffs have a legally cognizable interest in information regarding allegedly coordinated spending between the Bush campaign and the Right to Rise PAC was central to the prior litigation, and was thus both "contested by the parties" and "necessarily determined" by this Court. *Canonsburg*, 989 F. Supp. 2d at 16-17. In *RTR I* the Court observed that "*Wertheimer* held that plaintiffs have no legally cognizable interest in labeling spending 'coordinated' if that spending has already been disclosed in some format . . . *which is precisely the case for the expenditures plaintiffs seek to uncover through this lawsuit*[.]" *RTR I* at 48 (emphasis added). Indeed, whether the information plaintiffs sought was already a matter of public record was the subject of "an entire round of briefing and a hearing to this issue." Opinion at 24 (citing *RTR II*, 578 F. Supp. 3d at 5–7). Nor can there be any dispute that the information plaintiffs sought in that litigation is the same they seek here, given that in both cases plaintiffs challenge the Commission's actions with respect to MUR 6927. *See* Compl. ¶¶ 3-4 (describing allegations in MUR 6927). And preclusion in this case would not work a "basic unfairness" to plaintiffs, the parties "bound by the first determination." *Canonsburg*, 989 F. Supp. 2d 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)). Plaintiffs plainly had incentive to defend their legal interest in the information they sought, and as noted, were given ample opportunities to do so by this Court.

Because plaintiffs are precluded from establishing a legally cognizable interest in the information they seek, their organizational theory must fail. Even if plaintiffs' organizational theory does not require them to establish a "legal *right* to the disclosure of coordinated expenditures[,]" as the Court has previously explained, it does require them to establish "a weighty *interest* in those disclosures[.]" Opinion at 27; *see PETA*, 797 F.3d at 1094 (organizational injury requires showing that "that the agency's action or omission to act injured the organization's interest"). Simply put, plaintiffs "cannot ground organizational injury on a non-existent interest." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) ("*EPIC*").

Moreover, even in cases where a prior holding does not *per se* preclude the courts from considering whether plaintiffs have suffered organizational harm, this Circuit has found that where an alleged organizational injury is "part and parcel of [an] alleged informational injury" the court has rejected, the organizational theory must "fail with it." *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 848 F. App'x 428, 431 (D.C. Cir.) (per curiam), cert. denied, 142 S. Ct. 228, 211 L. Ed. 2d 101 (2021) (citing *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26, 33 (D.D.C. 2020)). In *Lawyers' Committee*, two organizations and one individual brought action seeking an order requiring the FBI to evaluate and report on certain evidence related to the terrorist attacks of September 11, 2001. That court first determined that plaintiffs lacked an informational injury sufficient to confer standing, then found plaintiffs also failed to establish an organizational injury. This latter holding was based in large part on the court's

determination that the alleged organizational injury was "part and parcel of the alleged informational injury[,]" and because "the organizations have suffered no informational injury . . . the alternative theories also fail." This holding was echoed by the Circuit Court on appeal. *Wray*, 848 F. App'x at 431 (organizational theories of injury were "[t]o a large extent . . . 'part and parcel of the alleged informational injury' and thus fail with it.") (quoting *Lawyers' Comm. for 9/11*, 424 F. Supp. 3d at 33)).

The *Lawyers Committee* court relied to a large extent on this Circuit's opinion in *EPIC v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017), where the court similarly rejected an organizational theory of injury closely linked to an alleged informational injury. In that case EPIC, an advocacy organization, challenged the government's "failure to produce a privacy impact assessment" under section 208 of the E-Government Act, and alleged both informational and organizational theories of injury. *Id.* at 377. The court rejected both theories "without necessarily agreeing that they are in fact analytically separate[,]" after observing that EPIC "identifie[d] no organizational harm unrelated to its alleged informational injury." *Id.* at 377–78. After finding that EPIC failed to establish an informational interest because section 208 did not protect the ability of nonprofits to ensure transparency, the court determined that EPIC's organizational theory of injury was based on an effectively identical informational interest, and "EPIC thus could not 'ground organizational injury on a non-existent interest.'" *Id.* at 379.

Notably, the *EPIC* court did not hold that an organizational theory of standing must always fail where plaintiffs fail to establish an informational injury. Instead, in a concurring opinion, Judge Williams agreed that EPIC asserted no organizational harms unrelated to its alleged informational injury, and helpfully contrasted this situation with a case in which the court

correctly analyzed the two theories separately. *See id.* at 381 (Williams, J., concurring) (citing and discussing *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13 (D.C. Cir. 2011)). Specifically, in *Feld Entertainment* the plaintiff complained about a circus group's techniques for controlling its elephants. 659 F.3d at 17. That plaintiff's theory of informational injury was that the group's failure to seek a permit for its activity deprived it of information "to which it would be entitled in the course of a permit proceeding." *Id.* at 19. Its theory of organizational injury, meanwhile, was that "it had to expend resources to combat [the group's] treatment of elephants." *Id.* at 19, 26. Therefore, "the organizational injury had nothing to do with the informational injury[,]" as that plaintiff "expended resources because of the circus group's alleged mistreatment of elephants, not because anyone had deprived it of information." *Wray*, 424 F. Supp. 3d at 34 (describing and citing *Feld*, 659 F.3d at 19, 26).

Even if issue preclusion did not forbid the reconsideration of plaintiffs' legal interest in the information they seek, these cases would thus present the question whether plaintiffs allegedly distinct theories of informational and organizational injury in *this case* are sufficiently similar that they must rise or fall together. That is, the Court would still need to determine whether plaintiffs' organizational and informational theories of injury are distinct, as in *Feld Entertainment*, or the same, as in *Lawyers Committee* and *EPIC*. The answer would be the latter. *Lawyers Committee* and *EPIC* foreclose plaintiffs' reliance on an organizational theory of standing that is indistinguishable from its informational theory.

Here, plaintiffs' informational and organizational theories of injury are effectively identical, and this Court's "categorical" language rejecting plaintiffs' interest in the information they seek is fatal to both. Opinion at 27. As this Court observed, plaintiffs' alleged "informational injury" argued that the FEC "*depriv[ed] them of FECA-required disclosures*

related to Bush's testing-the-waters activities and coordinated expenditures with Right to Rise[.]" Opinion at 12 (emphasis added). Similarly, plaintiffs' assertions of organizational injury derive "from the Commission's alleged failure to enforce the law to require the Bush campaign and Right to Rise to divulge '*required FECA disclosure information* that both plaintiffs need to inform the public about candidates' financial support.'" *Id.* at 26-27 (quoting MTD Resp. at 40 (in turn citing Compl. ¶¶ 14–15, 19)) (emphasis added). In both cases this "FECA disclosure information" is the same. It consists of "(1) Bush's 'testing the waters' and/or campaign expenditures in the period prior to his official declaration of candidacy in June 2015; and (2) the dates, amounts and purposes of any in-kind contributions made by RTR Super PAC to Bush's campaign arising from the extensive involvement of Bush and his agents in RTR's formation and operations, and the possible coordination of their activities." Compl. ¶ 7. The Complaint's only reference to plaintiffs' "injur[ies]" refers to precisely this set of information, *id.*, and the Complaint does not distinguish between the information giving rise to an informational injury vs. the information impacting plaintiffs' organizational activities.

Furthermore, as the Court correctly observed, plaintiffs here do not identify any new testing-the-waters expenditures that were not disclosed previously, providing this Court with no basis to revisit its conclusion that plaintiffs lack a cognizable interest in the labeling of this information as "coordinated" when it has already been disclosed in some form. In its Opinion, the Court rejected plaintiffs' argument that the "dismissal of their administrative complaints and ensuing release of the MURs, including the Office of General Counsel's findings, provided them with the facts they need to assert an informational injury[,]" thus qualifying their claims for the "curable defect" exception to issue preclusion. Opinion at 23-24. The court noted that "just as such speculation about unreported testing-the-waters expenditures did not suffice in *RTR II*, it

does not cut it here[.]" *Id.* at 24. Furthermore, "Plaintiffs fail to explain why they were unable to identify these alleged testing-the-waters events in the delay case when the Court afforded them ample opportunities to do so," despite the relevant information being publicly available. *Id.* Plaintiffs did not identify additional spending that could save their claim, and have lost their opportunity to do so.

The "disclosure" at issue in this case is thus the same as the Court considered in *RTR I*, *II*, and *III*, and with respect to plaintiffs' informational and organizational theories. Plaintiffs' failure to identify any previously undisclosed spending, combined with their lack of a legally cognizable interest in relabeling the spending that has already been disclosed, forecloses any possible further "interest" organizational plaintiffs could have in this proceeding. Where a plaintiff fails to establish an informational interest, and "identifies no organizational harm unrelated to its alleged informational injury[,]" it may not "ground organizational injury on a non-existent interest." *EPIC*, 878 F.3d at 377-79 (citing *Feld*, 659 F.3d at 24-25)) (failure to establish an interest in the disclosure of privacy impact under section 208 of the E-Government Act was fatal to informational and organizational theories of standing); *Wray*, 848 F. App'x at 430 (failure to establish legally cognizable interest in the public disclosure of terrorism evidence was fatal to informational and organizational theories of standing).

Plaintiffs are precluded from establishing an interest in the information they seek, and even if they were not, the failure of their informational theory is fatal to their organizational theory brought on the same basis and based upon identical facts. Plaintiffs' organizational theory is "part and parcel" to the informational theory, and they must fall together. *Id.* at 431.

C. Even If the Court's Prior Holdings are Not Preclusive, Plaintiffs Cannot Allege a Plausible and Ongoing Injury to Their Organizations Stemming From This Long-Concluded Presidential Campaign.

In its Opinion the Court correctly observed that plaintiffs must "prove an *ongoing* injury that the Court can remedy with the injunctive relief sought." Opinion at 28-29 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)) (emphasis added). In addition, injunctive relief requires the demonstration of irreparable harm. Here, even assuming plaintiff organizations were injured by a lack of FECA-required reporting, this harm is neither ongoing nor irreparable. Because previously reported information about a former presidential candidate who has not run for public office since February of 2016 cannot meet the standards for injunctive relief, this is an independent and sufficient reason for the Court to dismiss this matter.

It is the law of this Circuit that an organization's lack of access to discrete, one-off pieces of information is insufficient to establish standing, and instead plaintiffs must point to a stream of information (or lack thereof) that plaintiffs seek to use in a specific, regular way as part of its established activities. "Recent caselaw in this Circuit suggests that an informational injury is sufficiently concrete if an organization wishes to use a stream of information in a specific, regular way as part of its established activities[;]" while at the same time "[t]he Circuit has [] consistently rejected allegations of informational injury based solely on an organization's lack of access to discrete, one-off pieces of information[.]" *Doc Soc'y v. Blinken*, Civ. No. 19-3632, 2023 WL 5174304, at *6 (D.D.C. Aug. 11, 2023) (listing and describing cases).

Where an organization alleges that it was denied information at a particular point or points in time, this is insufficient to establish an ongoing injury for purposes of an injunction. For instance, in *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33, 48 (D.D.C. 2019), the court found that immigrant advocacy groups failed to establish ongoing or future injury based on Department of Homeland Security's (DHS) alleged

failure to create records of agency policy and decisions, because the evidence they put forward indicated only that "the agency refused to issue guidance in the first place," not that the agency "failed to memorialize policy decisions or guidance" on an ongoing basis. *See id.* ("claim three does not point to an ongoing or future injury and therefore that Plaintiffs lack standing to bring that claim"). This follows a similar pattern in this Circuit and elsewhere where courts have declined to issue injunctions based on an alleged lack of access to a single discreet report or piece of information. *See EPIC*, 878 F.3d at 378–79 (upholding denial of preliminary injunction based on defendant's failure to produce a single "privacy impact assessment," even if plaintiff wished to use that information to create educational materials); *Ohio A. Phillip Randolph Inst. v. Husted*, 350 F. Supp. 3d 662 (S.D. Ohio 2018) (finding no ongoing violation of the National Voter Registration Act resulting from inadequacy of prior confirmation notices, where state revised confirmation notice and intended to comply with the NVRA); *Food & Water Watch*, 808 F.3d at 921 (finding no ongoing injury where plaintiffs did not allege that the government "restricts the flow of information that FWW uses to educate its members" rather than merely impeding their advocacy efforts); *EPIC II*, 892 F.3d at 1256 (determining that plaintiffs failed to establish standing based upon "vague assertions in its brief that sound in pure issue advocacy").

In contrast, this Circuit has been more receptive to claims that an organization has been denied access to a stream of information it utilizes in a specific, regular way as part of its established activities. *See PETA*, 797 F.3d at 1095–96 (finding concrete injury where an agency's alleged failure to apply a regulatory requirement meant the agency was not issuing reports that would have aided the plaintiff in preparing its own educational materials for the public, which it ordinarily did); *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 619 (D.C. Cir. 2020) (concluding there was concrete injury where an agency did not promulgate

regulations that would have obviated informational materials that it prepared, saving the plaintiff time and money); *Doc Soc'y*, 2023 WL 5174304, at *6 (finding standing based upon impairment of plaintiffs' activities based upon their regular use of information posted on social media for research); *NWDC Resistance v. Immigr. & Customs Enf't*, 493 F. Supp. 3d 1003, 1017 (W.D. Wash. 2020) (holding that plaintiffs sufficiently alleged "a pattern of ongoing selective enforcement" based upon a demonstrated fear that their members would be subject to retaliation for speaking out).

Here, even assuming the truth of plaintiffs' allegations, they can point to no more than the denial of information at a particular point and time, and certainly cannot claim that they are suffering an ongoing injury from a "stream of information" that has long gone stale.[3] Plaintiffs maintain they have "had to divert resources from other planned organizational needs to research relevant law and fill in the gaps to the best of their ability, including by explaining to reporters, researchers, and partner organizations how they might attempt to find information not properly reported." Opinion at 41–42; *see also* Compl. ¶¶ 17, 20. However, plaintiffs have failed to establish an "ongoing injury" from this 2016-era alleged violations. To the extent CLC had a concrete interest in a "stream of information" in the form of campaign reporting by the Jeb Bush campaign, that stream dried up no later than February 2016, when Bush suspended his campaign,[4] and CLC makes no allegation of an ongoing policy of withholding information or of

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[3] In addition, even if plaintiffs could demonstrate that an injunction here would mitigate their "damages," this would not be sufficient to establish their entitlement to an injunction. *Chrysafis v. Marks*, 573 F. Supp. 3d 831 (E.D.N.Y. 2021) ("A movant for extraordinary relief, that is, a preliminary injunction, cannot mask an ongoing failure on its part to mitigate its damages as an ongoing instance of irreparable harm.").

[4] MJ Lee and Ashley Killough, *Jeb Bush suspends his campaign*, CNN (Feb. 21, 2016), https://www.cnn.com/2016/02/20/politics/jeb-bush-drops-out-2016/index.html.

continuing selective enforcement. *Compare NWDC*, 493 F. Supp. 3d at 1017 ("Unlike the plaintiff in *Lyons*, Plaintiffs here do allege a pattern of ongoing selective enforcement.").

The Campaign Legal Center claims "reporters often contact CLC for guidance as to whether or where they can find the campaign finance information that is not being properly reported." *Id.* ¶ 17. Even assuming the truth of this assertion, it does not speak to whether the information plaintiffs seek in this case remains relevant to such calls today. The Court appropriately expressed skepticism that such is the case. Opinion at 28 ("But are reporters still dialing CLC's line to ask about Jeb Bush's campaign tabs from 2015? That, after all, is what Plaintiffs must demonstrate to prove an ongoing injury that the Court can remedy with the injunctive relief sought.") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). And to the extent CLC continues to divert resources based on a lack of reporting by a candidate whose last campaign ended nearly eight years ago, plaintiffs' alleged expenditures "cannot plausibly be said to flow from the claimed unlawful conduct; they [are] instead 'a self-inflicted budgetary choice that cannot qualify as an injury in fact.'" *EPIC*, 878 F.3d at 379 (quoting *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011)).

Finally, the injunctive relief plaintiffs seek also requires the demonstration of irreparable harm, a barrier plaintiffs cannot meet here. While it is true that "the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm[,]" this is the case only "where the information is highly relevant to an ongoing and highly public matter." *EPIC*, 266 F. Supp. 3d at 319 (citing *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 41 (D.D.C. 2006) ("information vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program"); *Washington Post v. Dep't of Homeland Sec.*, 459 F.Supp.2d 61, 75 (D.D.C. 2006) (FOIA request

"predicated on a matter of current national debate"). In contrast, "stale information is of little value ... [,]" *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988), and the harm in delaying disclosure is not necessarily redressed even if the information is provided at some later date, *see Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) ("Byrd's injury, however, resulted from EPA's failure to furnish him with the documents until long after they would have been of any use to him."). Previously reported information about a former candidate who has not run for public office since February of 2016 clearly cannot meet this standard.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,

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

/s/ Christopher H. Bell
Christopher H. Bell (D.C. Bar No. 1643526)
Acting Assistant General Counsel
chbell@fec.gov

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2024, 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)
Acting Assistant General Counsel
chbell@fec.gov