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) MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Federal Election Commission ("Commission") hereby moves for an order dismissing plaintiff's complaint, which seeks relief pursuant to 52 U.S.C. § 30109(a)(8)(C). Plaintiffs lack Article III standing to sue because, as this Court previously held in a prior proceeding involving the same underlying factual allegations, they have not suffered any cognizable informational or organizational injury, and plaintiffs are precluded from re-litigating that issue here. Furthermore, the relief plaintiffs seek, a remand to the agency, would not serve a discernible interest and avoiding another round of administrative proceedings related to plaintiffs' administrative complaint, filed with the Commission over seven years ago, is supported by the futility doctrine. A supporting memorandum and a proposed order accompany this motion.

Respectfully submitted,

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January 13, 2023

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) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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

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INTRODUCTION

Plaintiffs Campaign Legal Center and Democracy 21 challenge the decision of the Federal Election Commission ("FEC" or "Commission") to dismiss an administrative complaint they filed alleging that former Florida Governor John Elias "Jeb" Bush and Right to Rise Super PAC, Inc. ("RTR"), violated the Federal Election Campaign Act ("FECA") by raising and spending money that was not subject to FECA's source and amount limitations in support of Bush's unsuccessful 2016 presidential campaign and by not disclosing certain money raised and spent to test the waters of a potential candidacy. 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. ¶¶ 64-67; Compl., *Campaign Legal Ctr. v. FEC*, Civ. No. 20-0730 (D.D.C. Mar. 13, 2020) (Docket No. 1). In that action, this Court concluded that plaintiffs lacked standing to challenge the Commission's alleged failure to act because they had not established an informational injury or any other constitutionally sufficient basis to sue. That was so, this Court reasoned, because all the information about Bush's testing-the-waters activity plaintiffs claimed had not been fully disclosed had been. Plaintiffs did not appeal that decision.

The admittedly long and winding path of Commission consideration of plaintiffs' administrative complaint ended when the agency closed its file on the matter on August 29, 2022. But that action does not grant plaintiffs a right to a second bite at the standing apple. The issue of plaintiffs' standing was decided in the prior lawsuit, which is preclusive here, and there is no basis to revisit it when the underlying facts and law are identical.

Even if plaintiffs could establish constitutional standing to sue, their complaint should still be dismissed because the only relief available to them — a remand to the agency — would serve no discernible interest. Closing its file in this matter caused the FEC to reveal publicly for the first time the reasoning in various Commissioner statements that explain the path this matter took at the agency. Those statements reveal that three current Commissioners — enough to block any further enforcement on any remand — have indicated that even if they were inclined to agree with plaintiffs' view of what FECA requires, they believe the time for the agency's substantive consideration of this matter has long passed and the statute of limitations indicates the Commission should do no more. As such, remanding this matter for further administrative proceedings would be a futile exercise.

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) ("*CLC 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. *CLC 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. *CLC 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) ("*CLC 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) ("*CLC 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. *CLC 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 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]

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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

In the interim, several departures and appointments occurred at the Commission level, 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).) Those Commissioners declined to take a position on the merits of the votes by their predecessors which lacked the required votes to find reason to believe a violation occurred. *See* Dickerson, et al. Statement. They indicated that "[e]ven if [they] disagreed with the Commission's 2018 decision," they viewed the previous votes as having concluded the matters without enforcement. *Id.* at 5. As a result, and because the "five-year statute of limitations has long passed," those Commissioners "voted to close the file." *Id.* at 5 & n.28 (citing 52 U.S.C. § 30145(a) and 28 U.S.C. § 2462).

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/6927/6927_21.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.

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).) Because Commissioner Weintraub's vote against the second reason-to-believe vote had the effect of preventing the Commission from further enforcement on allegations that Bush had not timely announced his candidacy, registered a campaign committee, and that Bush had accepted and RTR had made excessive contributions, her statement provides the rationale for the Commission for purposes of judicial review for those claims. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Commissioner Weintraub explained that she had voted against pursuing those allegations because "the only path forward . . . would have been to ignore the much larger and also very well-documented" allegations that Bush and RTR had used soft money to advance Bush's presidential campaign, a result that she concluded was "contrary to law." Weintraub Stmt. at 7. Because Commissioner Weintraub's "colleagues refused to pursue" that allegation, she was unwilling to sacrifice the larger violation in pursuit of the smaller. *Id.* at 9.

Commissioner Weintraub's partially controlling statement also disclaimed reliance on prosecutorial discretion or statute of limitations. *Id.* at 6-7. As Commissioner Weintraub explained, the statute setting the limitations period on Commission enforcement actions applies to "any action, suit, or proceeding for the enforcement of 'any civil fine, penalty, or forfeiture, pecuniary or otherwise.'" *Id.* at 6 (quoting 28 U.S.C. § 2462 (emphasis omitted)). While acknowledging that the Commission "may not impose a civil penalty on a respondent" past the five-year statute of limitations, she further stated that FECA "separately gives the Commission

the power" to seek other "equitable remedies" such as an order seeking a respondent to "file missing reports [or] amend its filings." *Id.* at 7.

D. The Instant Complaint

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.)

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 grant 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)).

Dismissal of a complaint is appropriate pursuant to Rule 12(b)(6) where, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in a plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim must be dismissed "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp.*, 550 U.S. at 558.

The court "can take judicial notice [and apply intervening binding precedent] to gauge the futility of allowing the current proceedings to drag on into another round." *Checkosky v. S.E.C.*, 139 F.3d 221, 227 (D.C. Cir. 1998). "[W]hen a district court is reviewing agency action . . . the legal questions raised by a 12(b)(6) motion and a motion for summary judgment are the same." *Ecological Rts. Found. v. U.S. Env't Prot. Agency*, Civ. No. 19-2181, 2022 WL 4130818, at *4 (D.D.C. Sept. 12, 2022) (citing *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).) "[B]ecause a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cnty. Health Care Auth.*, 988 F.2d at 1226. In evaluating a motion to dismiss for failure to state a claim, "a court may consider 'the facts alleged in the complaint, documents

attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *United States ex rel. Scott v. Pac. Architects & Eng'rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017) (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

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

The law regarding issue preclusion is well settled in this Circuit, and precludes successive litigation of a decided point of fact or law. After extensive briefing and argument in plaintiffs' prior case, this Court issued no less than three opinions addressing whether plaintiffs have a cognizable injury-in-fact to pursue a claim challenging the Commission's handling of its administrative complaint. The Court ultimately concluded that plaintiffs lack standing to pursue such a claim. That decision is final and precludes revisiting the issue in this or any other proceeding.

A. Issue Preclusion, or Collateral Estoppel

"The doctrine of issue preclusion, or collateral estoppel, bars successive litigation of an issue of fact or law actually litigated and resolved" that was "essential to the prior judgment, even if the issue recurs in the context of a different claim." *Nat'l Ass'n of Home Builders v. E.P.A.*, 786 F.3d 34, 41 (D.C. Cir. 2015) ("*Home Builders*") (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 & n.5 (2008)); *see also Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007). The doctrine serves to "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Home Builders*, 786 F.3d at 41.

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*, 488 F.3d at 454). Notably, "[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)) (citing *Nat'l Post Office 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")).

Issue preclusion applies to threshold jurisdictional issues like standing as well as issues going to the merits of a case. *Home Builders*, 786 F.3d at 41 (citing *Underwriters Nat'l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982); *Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22–23 (D.C. Cir. 2006); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983)). With respect to jurisdictional dismissals, issue preclusion "will not bar relitigation of the cause of action originally asserted," but it "may preclude . . . relitigation of the precise issues of jurisdiction adjudicated." *Id.* (quoting *Cutler v. Hayes*, 818 F.2d 879, 888 (D.C. Cir. 1987)). Therefore, "a second complaint cannot command a

second consideration of the same jurisdictional claims." *Id.* (quoting *GAF Corp. v. United States*, 818 F.2d 901, 912 & n.72 (D.C. Cir. 1987)).

Issue preclusion is subject to the "curable defect" exception, which permits relitigation 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.* (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.* (citing *Dozier*, 702 F.2d at 1192-94).

Furthermore, "in a small set of cases, a change in controlling legal principles may allow a party to relitigate a claim that would otherwise be barred by res judicata." *Apotex, Inc. v. Food & Drug Admin*., 393 F.3d 210, 218 (D.C. Cir. 2004) (citing *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 of the circuit, but noting that there are exceptions for reasons of compelling public policy, such as cases involving important questions of constitutional law)). To constitute a sufficient shift in the legal landscape to make application of issue preclusion unfair there must be a "significant change in controlling law." *Canonsburg*, 989 F. Supp. 2d at 20 (citing *Apotex*, 393 F.3d at 218); *see Hardison*, 655 F.2d at 1288 (noting that only "on rare occasions [have] the courts . . . been willing to override the bar of res judicata for reasons of compelling public policy").

B. This Court's Prior Holding on Plaintiffs' Standing Meets All Criteria for Issue Preclusion

In 2021 this Court held that plaintiffs lacked standing to challenge the Commission's alleged failure to act on their administrative complaint, MUR 6927. *CLC II*, at 584 ("Having found a lack of standing, the Court will dismiss the case for want of jurisdiction.") The issue was fully briefed and litigated by the parties in that case over a period of more than two years, and determined by a valid, final judgment of the Court. Under binding precedent of this Circuit plaintiffs are barred from re-litigating that issue in this or any other proceeding.

First, plaintiffs' standing was clearly "contested by the parties and submitted for judicial determination in the prior case." *Canonsburg*, 989 F. Supp. 2d at 16-17. This precise issue was the primary focus of litigation for over two years between March 2020 and the Court's final judgment in July 2022. *See supra* pp. 5-7. Defendant-Intervenor RTR challenged plaintiffs' standing at the outset of that matter, resulting in a mixed verdict in which the Court found plaintiffs did not have standing to seek a determination from the FEC that certain of RTR and Bush's expenditures were "coordinated," but did have standing regarding respondents' alleged failure to disclose spending during the testing-the-waters phase preceding Bush's candidacy. *CLC I*, at 45-48. The Court then reversed itself and granted RTR's motion for reconsideration, finding that plaintiffs did not identify any additional "pre-candidacy events, travel, or speaking engagements from which the Court could infer the existence of still-undisclosed spending[.]" *CLC II*, at 583. Finally, the Court then denied plaintiffs' motion for reconsideration, finding that plaintiffs did not meet the standard for organizational standing (the sole issue raised in that motion) under D.C. Circuit precent. *CLC III*, at 4-11. Plaintiffs did not appeal this final ruling, and the decision became final on or before September 12, 2022. *See* Fed. R. App. P. 4(a)(1)(B).

Nor can plaintiffs dispute that their standing was "actually and necessarily determined by a court of competent jurisdiction in that prior case." *Canonsburg*, 989 F. Supp. 2d at 17. As noted, plaintiffs' lack of standing was the sole reason for the Court's dismissal of its complaint. *CLC II*, at 584 ("Having found a lack of standing, the Court will dismiss the case for want of jurisdiction.")

Finally, 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)). Here, as detailed *supra* pp. 5-7, plaintiffs plainly had incentive to defend their standing to bring their own claims and did so earnestly over an extended period.

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 (citing *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 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.").

C. None of the Exceptions to Issue Preclusion Apply

Where issue preclusion applies, it may be overcome only upon a showing of either (1) a material and subsequent change in the pertinent facts, or (2) a "significant change in controlling law." *Canonsburg*, 989 F. Supp. 2d at 20; *Home Builders*, 786 F.3d at 41. Neither applies here.

First, plaintiffs offer no new facts that could call the Court's original holding into doubt. Just as with its first complaint alleging unlawful delay, here plaintiffs allege injury

> because they, as well as the public, have been deprived of FECA-required disclosure regarding: (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.) Critically, the period during which all of the relevant reporting (or alleged lack thereof) occurred ran from May of 2014[3] until Bush suspended his campaign in February of 2016.[4] That reporting was available to the Court when it found plaintiffs lacked standing in 2021, as was all information regarding how plaintiffs were harmed (which is in any case in plaintiffs' possession). Furthermore, even if plaintiffs could offer additional evidence to "remed[y] . . . the jurisdictional deficiency[,]" this evidence would be of no moment unless it involved "*occurrences subsequent to the original dismissal*[.]" *Home Builders*, 786 F.3d at 41.

Nor has there been any "change in controlling law[,]" much less a change that is "significant[.]" *Canonsburg*, 989 F. Supp. 2d at 20. While plaintiffs' motion for reconsideration of the Court's holding in the initial proceeding was pending, plaintiffs filed a notice of supplemental authority alerting the Court to the D.C. Circuit Court of Appeals' holding in *Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) ("*Correct the Record*"). *See supra* pp. 6-7. However, that decision did not alter the controlling law, and cannot overcome issue preclusion in this case. The *Correct the Record* court was explicit that the district court there had

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[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.

misapplied "settled law," and made no pretensions to overrule or modify precedent in this Circuit. *See Correct the Record*, 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[.]"); *see also 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").

In any event, plaintiffs could have — and indeed did — bring *Correct the Record* to the Court's attention while that case was pending. *Correct the Record* was decided on April 19, 2022, nearly three months before this Court's denial of plaintiffs' motion for reconsideration in the delay case on July 14, 2022, and nearly five months before plaintiffs' time for appeal expired on September 12, 2022. *See* Fed. R. App. P. 4(a)(1)(B). Parties who have previously received adverse opinions routinely request relief in circumstances like this, including in cases that have become moot. *See, e.g.*, *Planned Parenthood of Wisc., Inc. v. Azar*, 942 F.3d 512, 519 (D.C. Cir. 2019) (noting D.C. Circuit's "general practice" to "vacate and remand with instructions to dismiss" when "a pending appeal becomes moot"); *Rubin v. The Islamic Republic of Iran*, 563 F. Supp. 2d 38, 40 (D.D.C. 2018) (explaining that mootness provides a reason to grant relief from judgment). While that prior case remained open, plaintiffs could have sought additional review based on *Correct the Record*, or at a minimum sought vacatur of the Court's standing decision. Plaintiffs did neither.

There is, therefore, no basis to conclude that any change in the law occurred *subsequent to this Court's dismissal* of plaintiffs' delay claim, and no basis for revisiting the Court's standing analysis in that case. *See, e.g., 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 an "intervening change in legal principles") (quotations and citations omitted). This is consistent with the principle that only factual occurrences "*subsequent to the original dismissal*" may constitute grounds to overcome issue preclusion. *Home Builders*, 786 F.3d at 41.

Because there has been no change in either the law or the facts underlying the Court's decision, plaintiffs are precluded from relitigating their standing to pursue their claim.

III. THIS COURT SHOULD NOT ORDER A FUTILE REMAND

Assuming jurisdiction, the Court should dismiss this action because three Commissioners have indicated that they view the matter as long settled and expressed concerns related to the statute of limitations. *See supra* pp. 9-10. Under these circumstances, a remand would serve no purpose other than necessitating yet another round of administrative proceedings, but the outcome of agency consideration of enforcement is preordained.

This administrative matter has had an unusually long lifespan. Plaintiffs filed their first administrative complaint on March 31, 2015. (Compl. ¶ 3.) Since that date MUR 6927 has been subject to at least eight Commissioner votes. *See supra* pp. 7-9. During that span, five new Commissioners have been 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. *See supra* pp. 9-10. There are thus considerably more changed circumstances and more information about the status at the agency in the period after a reviewed vote than in the ordinary event when a court considers remanding a potential enforcement matter.

Even assuming the Commissioners who originally voted against enforcement on the soft-money allegations in December of 2018 made an error in not explaining their reasoning, a

remand is not required when the "remand would be futile." *Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001). Here, three Commissioners — a sufficient number to vote down any reason to believe vote on remand — have released a statement explaining that they "take no position on the merits of" the prior Commission votes in which reason to believe was not found against RTR, but viewed these votes as "the end of these Matters," particularly given their concerns regarding "the elapsed statute of limitations," and hence committed to vote "to close the file." Dickerson, et al. Statement at 5. Declining to commence enforcement when "Commissioners [a]re concerned that the statute of limitations had expired or was about to" is a routine ground for choosing to dismiss and would be obviously within the discretion of Commissioners in the event of any remand. *E.g.*, *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018).

In light of that statement, any remand to the agency would only needlessly prolong this stale matter. *See Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35-36 n.10 (D.D.C. 2016) (applying futility principles after more than six years). There is "not the slightest doubt that the" three Commissioners issuing that statement "would simply reaffirm" the reasoning in their prior statement on the matter. *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982). Because the "outcome of a new administrative proceeding is preordained," this Court "may forego the futile gesture of remand to the agency." *Keats v. Sebelius*, Civ. No. 13-1524, 2019 WL 1778047, at *7 (D.D.C. Apr. 23, 2019) (internal quotation marks omitted) (finding remand likely futile where intervening events made obvious how agency would handle a required review that may have been missed).

In an analogous situation in *FEC v. Legi-Tech, Inc.*, the D.C. Circuit considered whether to remand administrative matters to the FEC after it was reconstituted without ex-officio

members. 75 F.3d 704, 706 (D.C. Cir. 1996). The Court concluded that a later ratification of earlier actions was adequate because it was unlikely that FEC would reach different outcome if it repeated administrative process from beginning. *Id.* at 709. The same is true here, where the record shows that the agency would not reach a different outcome. The approach of three current Commissioners to the passage of more than seven years since the complaint was lodged with the agency and eight years since the conduct giving rise to the complaint occurred means that the outcome of additional votes by the agency on proceeding with enforcement is preordained. Accordingly, the district court should forego "the futile gesture of remand to the agency." *Keats*, 2019 WL 1778047 at *7 (citations omitted). 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, plaintiffs' complaint should be dismissed in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 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.

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