IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Case No. 22-3319

Hon. Christopher R. Cooper

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF ABBREVIATIONS

CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
RTR	Right to Rise
TTW	"Testing the waters"

SUMMARY OF ARGUMENT

As far back as March 2015, plaintiffs Campaign Legal Center ("CLC") and Democracy 21 began sounding the alarm that former Florida Governor John Ellis "Jeb" Bush had commenced an active, but undeclared, presidential campaign starting in at least January of that year—without properly registering his candidacy or disclosing his spending in that period. *See* 52 U.S.C. §§ 30102(e)(1), 30103, 30104; 11 C.F.R. § 101.3. This subterfuge would continue until June of 2015, when Bush finally announced his candidacy and registered with the Federal Election Commission ("FEC"). As plaintiffs would assert in their two administrative complaints filed with the FEC in 2015,[1] these delaying tactics enabled Bush to establish, and begin fundraising for, the ostensibly independent Right to Rise Super PAC, Inc. ("RTR Super PAC")—unconstrained by the contribution limits and "soft money" restrictions that apply to federal candidates under the Federal Election Campaign Act ("FECA").

Only seven years later, when the FEC dismissed plaintiffs' administrative complaints and released its confidential case files, would plaintiffs learn that the FEC's Office of General Counsel ("OGC") had corroborated their concerns. In its First General Counsel's Report, OGC had advised the Commission to find reason to believe that Bush had failed to disclose his spending for travel and personal appearances between December 2014 and June 2015—likely because many of these expenses had been paid for by RTR Leadership PAC, another committee established by Bush. First General Counsel's Report 45, MURs 6915 & 6927 (Feb. 8, 2017), https://www.fec.gov/files/legal/murs/6927/6927_14.pdf ("OGC Rpt."). Even more surprisingly, plaintiffs would learn that in the years preceding the dismissal, all four FEC Commissioners to

[1] These administrative complaints are attached as Exhibits 1 and 2 to plaintiffs' complaint initiating this action. *See* Compl. (Oct. 28, 2022), Exs. 1 & 2, ECF No. 1-1 & 1-2 (Oct. 28, 2022).

consider the matter had agreed with these OGC recommendations, voting at various times to find "reason to believe" that Bush had illegally delayed the announcement of his candidacy and failed to disclose his receipt of in-kind contributions paying for his pre-candidacy campaign expenses.

Given the apparent consensus that there was reason to believe Bush committed significant disclosure violations, plaintiffs' claim that they suffered informational injury by reason of these reporting failures would seem to be beyond dispute. But this has not been plaintiffs' experience. Lacking any knowledge about either OGC's findings or the Commissioners' assessment of their administrative complaints—because FECA enforcement proceedings are kept confidential until complete, *see* 52 U.S.C. § 30109(a)(12)(A)—plaintiffs litigated their standing for over three years in a previous "delay" case challenging the FEC's inaction on their complaints. *See* Compl., *CLC v. FEC/ Right to Rise*, No. 1:20-cv-730-CRC (D.D.C. Mar. 13, 2020), ECF No. 1. The standing question there, however, was muddied by the FEC's failure to appear in its own defense and the intervention of RTR Super PAC, which alleged that *it* had paid for and reported Bush's undisclosed campaign activities, thereby supposedly remedying plaintiffs' informational injury. But those allegations, as plaintiffs learned when the FEC case file was finally released, were cast in considerable doubt by the Super PAC's contradictory statements during the FEC proceedings.

The analysis of plaintiffs' standing was also complicated by shifting Circuit precedent on the scope of a FECA complainant's informational rights in cases alleging that a political committee provided undisclosed in-kind support to a federal candidate, through coordinated expenditures or otherwise. In finding that CLC and Democracy 21 lacked informational standing in the delay suit, the Court cited a district court decision, *CLC v. FEC*, 507 F. Supp. 3d 79, 88 (D.D.C. 2020) ("*CLC I*"), to hold that "plaintiffs have no legally cognizable interest in labeling spending 'coordinated' if that spending has already been disclosed in some format." *CLC v. FEC* (*Right to Rise I)*, 520 F.

Supp. 38, 48 (D.D.C. 2021). But in 2022, following the Court's final ruling on plaintiffs' informational standing in the delay case, *CLC I* was reversed by the D.C. Circuit. *See CLC v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) ("*CLC II*"). As the Court of Appeals made clear, a plaintiff's inability to obtain complete and accurate disclosure information about reportable campaign contributions or spending qualifies as a cognizable injury-in-fact. That injury is not remedied when a political committee reports its in-kind contributions to a candidate as part of its "aggregated expenditures," without "[breaking] down its expenditures to show which were coordinated contributions" and thereby "reveal[ing] the amounts of any coordinated contributions." *Id*. at 783, 784. Deprivation of this disclosure was a "quintessential informational injury." *Id*. at 784.

* * * * *

Perhaps this history explains why the FEC's pending motion to dismiss, ECF No. 12, does not attempt to make any substantive argument that plaintiffs have failed to show informational injury sufficient to demonstrate standing in this case. Instead, the Commission attempts to cut off briefing on this question altogether—by arguing that plaintiffs should be barred from even attempting to establish standing because the delay case "already concluded that plaintiffs lack an informational or organizational injury, which is preclusive here." FEC Mot. 13.

But issue preclusion does not apply here. The FEC fails to meet its burden to show that (1) plaintiffs are attempting to relitigate the "*precise* issues of jurisdiction adjudicated" in a prior case, *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) (emphasis added) (citations omitted); (2) that these precise arguments for standing were "actually and necessarily determined by a court . . . in that prior case," *Palacios v. Modly*, No. 19-cv-450-CRC, 2020 WL 3972016, at *2 (D.D.C. July 14, 2020), *aff'd sub nom. Palacios v. Harker*, No. 20-5289, 2021 WL 1051220 (D.C. Cir. Mar. 8, 2021), and (3) that preclusion would "not work a basic unfairness to the party

bound by the first determination," *id*.

Most glaringly, the FEC all but ignores the intervening decision in *CLC II* that squarely addresses the informational standing analysis—as well as the subsequent release of the case file that likewise changes the factual record. Plaintiffs, almost by necessity, cannot make the same "precise" arguments for standing in this case because the legal landscape has shifted substantially since the delay case, and so too have their bases for informational standing.

Here, plaintiffs assert three arguments for informational injury, two of which were not raised in or decided by in the delay case, and a third that should be allowed under the third prong of this standard, because disregarding "an intervening change in legal principles" would work a basic unfairness on plaintiffs. *Graphic Commc'ns Int'l Union, Loc. 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988).

First, plaintiffs suffer informational injury due to Bush's failure to report all his pre-announcement campaign activity, including any in-kind contributions from RTR Super PAC and RTR Leadership PAC (collectively, the "RTR Committees") in the form of payments for Bush's travel in this period. As the intervening *CLC II* decision makes clear, the RTR Committees' disclosure reports, even insofar as they purport to include disbursements related to this activity, cannot "cure" plaintiffs' injury, because those reports do not contain all information that FECA requires with respect to these in-kind contributions to the Bush campaign. This was not an argument plaintiffs made—or could have made—in the delay case given its reliance on *CLC II*.

Second, and relatedly, plaintiffs can now identify, drawing on materials in the recently released public MUR file, additional specific campaign-related trips and events in the pre-announcement period, the costs of which Bush failed to disclose. This evidence was not before this Court in the delay case, and this precise claim to injury was therefore not raised or decided.

Third, with regard to the period *after* Bush's June 2015 announcement of candidacy, *CLC II* and FECA make clear that any expenditures that RTR Super PAC coordinated with the Bush campaign, or any campaign expenses the Super PAC otherwise paid for, would have to be reported as in-kind contributions to the campaign, with itemized information about their dates, amounts, and purposes. Neither respondent reported any such contributions. Although plaintiffs made this argument in the delay case, issue preclusion does not apply where there have been "significant changes in controlling facts or legal principles." *Montana v. United States*, 440 U.S. 147, 157 (1979).

Having thus demonstrated informational injury anew, plaintiffs also satisfy all other elements of Article III standing: CLC and Democracy 21 have been deprived of statutorily required information; there is no reason to doubt the information withheld is useful to both plaintiffs in carrying out their organizational work and advancing their missions; plaintiffs' injury is fairly traceable to the FEC's dismissal of their administrative complaints; and the injury is redressable by this Court. Plaintiffs are not precluded from making this showing. The FEC's motion should be denied, and this court should reject its challenge to plaintiffs' informational standing.

BACKGROUND

I. Statutory and Regulatory Background

A. Federal candidates are required to report all "contributions" and "expenditures," both during candidacy and in any "testing the waters" phase preceding candidacy.

The term "candidate" is defined in FECA to mean "an individual who seeks nomination for election, or election, to Federal office," and an individual is deemed to seek nomination for election, or election "if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000." 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a).

No later than 15 days after becoming a candidate, the individual must "file a Statement of Candidacy designating his principal campaign committee," 52 U.S.C. § 30102(e)(1), and such committee must register with the FEC no later than 10 days thereafter, *id.* § 30103. The candidate's authorized committee must then file regular, comprehensive reports disclosing all receipts and disbursements, *id.* § 30104, including receipt of in-kind contributions.

However, "[t]hrough its regulations, the Commission has established limited exceptions to these automatic thresholds which permit an individual to test the feasibility of a campaign for Federal office"—*i.e.*, to "test the waters" ("TTW")—"without becoming a candidate under the Act." *See* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992-93 (Mar. 13, 1985). The TTW regulations create "limited exceptions" to the definitions of "contribution" and "expenditure," allowing would-be candidates to engage in pre-candidacy activities without triggering "candidate" status when the funds they raise or spend for this purpose exceed the $5,000 registration threshold. 11 C.F.R. §§ 100.72, 100.131. Importantly, however, such individuals must keep records of their TTW activities, and if they later become candidates, they are required to report all funds received or payments made in connection with "testing the waters" as "contributions or expenditures under the Act" in "the first report filed by the principal campaign committee . . . regardless of the date the funds were received." *Id.* § 100.72.

Any payments by federal political committees for TTW-related activities benefiting presidential candidates, made before the individual announces their candidacy, constitute in-kind "contributions" from the political committee to the candidate. *Id.* §§ 110.2(a)(l), 9034.10; *see also* Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47387, 47407 (Aug. 8, 2003). When the individual becomes a candidate, these payments must be reported as in-kind contributions to the campaign in the campaign committee's first disclosure

report. 11 C.F.R. § 101.3.

B. FECA's "soft money" prohibitions prevent circumvention of its contribution limits and disclosure requirements.

In the 2015-16 election cycle, FECA limited an individual's contribution to a presidential candidate to $2,700 in an election, *see* 52 U.S.C § 30116(a)(l), and prohibited candidates from accepting any contributions from corporations or labor unions, *id.* § 30118(a).

A "super PAC" is a political committee that may raise contributions outside the limits and source restrictions that otherwise apply to committees, *id.* § 30116(a)(1)(C), (a)(3), provided it makes only independent expenditures and does not contribute to or coordinate with candidates. *See also SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc); FEC Advisory Op. 2010-11. Because super PACs effectively operate outside of FECA's contribution limits and source restrictions, they present a potential avenue for the influx of unregulated "soft money" contributions to candidates, particularly when the super PAC has close ties with a candidate.

But FECA contains provisions to prevent such abuses, including the candidate soft-money prohibition in Section 30125(e)(l) providing:

> A candidate, individual holding Federal office, agent of a candidate or individual holding Federal office, or an entity directly or indirectly *established, financed, maintained or controlled* by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not
>
> > (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; . . .

52 U.S.C. § 30125(e)(l) (emphasis added).

By prohibiting a federal candidate from establishing or operating soft-money entities like super PACs, Section 30125(e)(l) prevents candidates' use of such vehicles to circumvent the contribution limits or to evade FECA's disclosure requirements. Because at least some expenditures made by a super PAC "established, financed, maintained or controlled" by a

candidate would necessarily be coordinated with that candidate, Section 30125(e) also works as a prophylactic measure to prevent excessive the coordinated expenditures and in-kind contributions that might otherwise result.

C. FECA's treatment of in-kind contributions

A person's provision of anything of value to a candidate without charge or for less than the usual and normal charge is an in-kind contribution subject to FECA contribution restrictions and reporting requirements. *See* 52 U.S.C. §§ 30101(8), 30104(b), 30116(a)(7)(B); 11 C.F.R. §§ 100.52(d), 104.13. Thus, if a political committee pays for services rendered to a candidate's campaign, whether during candidacy or in any TTW phase, the payment is an in-kind contribution subject to FECA's contribution limits, source restrictions, and disclosure requirements.

All expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) are likewise treated as in-kind contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i). This is because coordinated expenditures function as "disguised contributions"—and failing to regulate them as such creates a risk of corruption and conceals the true sources of candidates' support. *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

For each reporting period, a candidate-authorized committee must disclose the total contributions received from other committees, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104(b)(2)(D). The candidate's report must itemize each committee contribution, and state its date, value, and whether it was in support of the candidate's primary or general election. *Id.* § 30104(b)(3)(B); *see Instructions for FEC Form 3P and Related Schedules*, https://www.fec.gov/resources/cms-content/documents/fecfrm3pi.pdf (updated May 2016). In addition, because in-kind contributions received by a campaign are also deemed

"expenditures" of that campaign, the report must disclose an in-kind contribution not only as a contribution received, but also as an expenditure made by the candidate, with information about its date, amount, and purpose. 11 C.F.R. § 104.13(a).

Likewise, for each reporting period and for the entire election cycle, a non-candidate committee must disclose its total contributions to other committees, including in-kind contributions, and itemize all contributions made to other committees, stating for each the date, amount, and recipient's name and address. 52 U.S.C. § 30104(b)(6)(B)(i), (4)(H)(i). In addition, because in-kind contributions by a committee are also expenditures of that committee, the report must disclose the person to whom each expenditure is made and its date, amount, and purpose. *Id*. § 30104(b)(5)(A).

C. The statutory framework for FEC administrative complaints

Any person may file a complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the recommendations of its OGC, the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, it seeks a conciliation agreement with the respondent, which may include civil penalties. *Id*. § 30109(a)(3), (4)(A), (5). If the Commission is unable to enter a conciliation agreement, it may institute a civil action in federal district court. *Id*. § 30109(a)(6)(A).

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission will vote on whether to dismiss the complaint. Only once the matter is closed will the FEC place materials from the administrative case file on the public record. 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a). In cases of deadlock, the controlling group of Commissioners who voted not to proceed must issue a Statement of Reasons to serve as the basis

for any judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

"Any party aggrieved" by the Commission's dismissal of its complaint may seek review in this Court to determine whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A). If the court finds that the FEC's action was "contrary to law," it will order the FEC "to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform, FECA authorizes the complainant to bring a private right of action "to remedy the violation involved in the original complaint." *Id*.

II. Factual Background

A. Initiation of Administrative Proceedings

CLC and Democracy 21 filed two FEC complaints against RTR Super PAC and Bush on March 31, 2015 and May 27, 2015, which collectively alleged that Bush, largely due to his direct and indirect role in establishing and operating RTR Super PAC, had failed to comply with applicable FECA contribution restrictions and disclosure requirements, both before Bush formally announced his candidacy on June 15, 2015 and for the duration of his official campaign.

Plaintiffs' March 2015 complaint detailed the activities in which Bush, his agents, and the Super PAC reportedly engaged, and alleged that this provided reason to believe Bush had been first "testing the waters" and then actively campaigning without formally declaring his candidacy or filing required disclosure reports. As the complaint alleged, in the early months of 2015, Bush engaged in a quantum of fundraising confirming that he had moved beyond pre-candidacy or even testing the waters, and was operating as an active candidate. For example, news reports and Bush's own Twitter account documented that Bush engaged in extensive fundraising across the country for the Super PAC in February and March of 2015. ECF No. 1-1 ¶¶ 10-11. In the same period, Bush was also engaged in a number of activities that were indistinguishable from those of a

candidate: he traveled to early primary states like South Carolina and met with potential donors and staff; he spoke at the Conservative Political Action Conference and acknowledged he was considering a presidential candidacy; and he appeared at the Iowa agriculture summit alongside other Republican presidential hopefuls. *Id.* ¶¶ 12, 17-19.

On May 27, 2015, plaintiffs filed a second administrative complaint, supplementing the March complaint with further evidence that Bush had indeed become a federal candidate as defined by FECA, and alleging that as a candidate, Bush had violated 52 U.S.C. § 30125(e) because he and his agents had "directly or indirectly established, financed, maintained or controlled" RTR Super PAC, and the Super PAC was soliciting, receiving, directing, or spending contributions that did not comply with federal contribution limits and source prohibitions. ECF No. 1-2 ¶¶ 37-44.

Plaintiffs also detailed the active role that Bush and his associates played in creating RTR Super PAC and directing its design, staffing, and operations. As early as February and March 2015, Bush and his aides were choosing close Bush associates to be senior staff for the Super PAC. *Id.* ¶¶ 12-15. By April and May 2015, Bush and his aides were reportedly shaping strategy for the Super PAC and considering how to operate it most effectively alongside the campaign. *Id.* ¶¶ 16-19. For example, in a "concept . . . in development for months," Bush was planning to "delegat[e] many of the nuts-and-bolts tasks of seeking the White House" to the Super PAC and to have the PAC perform "many of the duties typically conducted by a campaign." *Id.* ¶ 17.

On June 15, 2015—nineteen days after plaintiffs filed their second complaint—Bush filed a statement of candidacy with the FEC and designated Jeb 2016, Inc. as his principal campaign committee ("Jeb 2016").[2] Bush and his associates had raised approximately $90 million for RTR

[2] Jeb Bush, Statement of Candidacy, FEC Form 2 at 1 (June 15, 2015), https://docquery.fec.gov/pdf/747/15031431747/15031431747.pdf; Jeb 2016, Inc., Statement of Organization, FEC Form 1 at 1 (June 15, 2015), https://docquery.fec.gov/pdf/751/15031431751/15031431751.pdf.

Super PAC by that date.[3] The Super PAC reported making its first purportedly independent expenditures supporting Bush on June 26, 2015; from that date through February 2016, RTR Super PAC reported to the FEC a total of $86.8 million in expenditures supporting Bush or attacking his opponents in the Republican presidential primary. OGC Rpt., Factual and Legal Analysis at 13.

B. Commission review of the administrative complaints

1. First General Counsel's Report

On February 8, 2017, after reviewing plaintiffs' administrative complaints and the respondents' written responses, OGC issued its report recommending that the Commission find reason to believe that: (1) Bush failed to timely register as a candidate, and his authorized campaign committee, Jeb 2016, failed to timely register and report with the Commission; (2) Bush received excessive, unreported in-kind contributions from RTR Leadership PAC because the PAC paid for his TTW and/or campaign activity, in particular his travel and speaking events; and (3) Bush violated 52 U.S.C § 30125(e) by establishing, financing, maintaining, or controlling RTR Super PAC, and the Super PAC violated this provision by soliciting and receiving soft money on behalf of the Bush campaign. *See* OGC Rpt. 45.[4]

OGC's findings of fact and conclusions of law largely corroborated the allegations in plaintiffs' administrative complaints, although it compiled a record that exceeded the information available to plaintiffs. Importantly, however, OGC's findings and reports were entirely confidential, and by law, the Commission cannot release any materials from the case file until the

[3] Right to Rise USA, Receipts, Jan. 1 – June 14, 2015, FEC, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00571372&two_year_transaction_period=2016&min_date=01%2F01%2F2015&max_date=06%2F14%2F2015 (last visited March 14, 2023).

[4] The Commission considered plaintiffs' complaints in conjunction with a separate complaint filed by Brad Woodhouse and American Democracy Legal Fund, which made similar allegations about Bush and RTR Super PAC in connection to the 2016 election cycle. OGC Rpt. 1.

proceedings are resolved. 52 U.S.C. § 30109(a)(12)(A); 11 C.F.R. § 111.21.

First, OGC recommended finding reason to believe that Bush began spending funds to test the waters of a 2016 presidential candidacy in May 2014, and that Bush had decided to run for president at least as early as January 2015. OGC Rpt. 3.

It noted that after Bush's December 16, 2014 Facebook post announcing his exploratory efforts, he began travelling extensively and speaking at numerous events. Shortly thereafter, on January 6, 2015, Bush and his associates also formed two committees, RTR Super PAC and RTR Leadership PAC. *Id*. at 6 n.18. On January 20, 2015, Bush and his "operatives" reportedly announced plans to hold 60 fundraising events in cities across the country in coordination with both RTR Committees. *Id.* at 8.

As OGC observed, most of the money Bush raised in this period went into the coffers of RTR Super PAC, which had already amassed over $100 million in funds by June 2015 that would be used to support Bush's candidacy. *Id.* at 9. OGC regarded Bush's substantial participation in the Super PAC's fundraising efforts from January to June 2015 as further evidence that he had decided to run in January 2015, particularly given that the Super PAC's admitted purpose was to support Bush's eventual candidacy, not to explore the feasibility of a campaign. *Id*. at 15.

Second, OGC recommended finding reason to believe that Jeb 2016 violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to properly report all of Bush's pre-candidacy activity, and in particular, failed to report significant in-kind contributions from RTR Leadership PAC in the form of payments for Bush's pre-June 2015 travel.

In support of this recommendation, OGC noted that shortly after Bush's June 2015 official declaration of candidacy, Jeb 2016 filed its first disclosure report covering Bush's spending from May 2014 through June 2015, disclosing $516,870 for research and polling, consulting, and legal

fees, but only a single payment of $1,089 for travel expenses. OGC Rpt. 6. In contrast, RTR Leadership PAC reported spending $4,896,426 between January and June 2015, *id.* at 7, with travel expenses totaling over $800,000, *id.* at 29-30.

Indeed, respondents had conceded that RTR Leadership PAC funded some portion of Bush's travel and event schedule between January and June 2015, but argued that Bush was appearing at such events as RTR's Chairman. *Id*. at 29. As OGC rejoined, however, video footage of these events showed at least nine instances of Bush speaking about his campaign for office, without any references to RTR Leadership PAC or its work. *Id*. at 11, 29. OGC thus rejected Bush's contention that any references to his candidacy were merely "incidental" and not indicative of a campaign purpose.

As for RTR Super PAC, OGC found the record unclear as to whether the Super PAC may have funded any of Bush's pre-candidacy activities. It noted that respondents "denied that the Super PAC paid for [TTW] expenses," further explaining that "[w]hereas the Respondents admit that RTR [Leadership] PAC paid for Bush's travels, the Super PAC makes no such admission." *Id*. at 32. OGC thus recommended deferring any action on these allegations, while noting that if its recommended investigation into Bush's TTW activities uncovered evidence that either RTR Leadership PAC or Super PAC paid for additional campaign expenses, it would "make the appropriate recommendation" then. *Id.* at 34.

Third, because OGC found that "Bush became a candidate at least as early as January 2015," *id*. at 4, it found reason to believe that RTR Super PAC was established, financed, maintained, and controlled by Bush, and solicited and received non-federal funds while Bush was a candidate. The first basis for this conclusion was that OGC found "significant commonalities, including common or overlapping officers or employees," between the Super PAC and RTR

Leadership PAC, an entity Bush admitted he established and controlled. *Id*. at 21. OGC also found that prior to June 2015, it appeared that the Super PAC and the Bush campaign were coordinating their efforts. For example, Bush provided the Super PAC with material specifically intended to ensure the Super PAC could effectively support Bush's candidacy, including hours of interview footage that the Super PAC team could use in campaign commercials in the future. Bush was also an "integral" part of RTR's fundraising, noting that Bush's involvement may have gone beyond merely serving as a featured speaker at Super PAC fundraisers and included a substantive role in planning fundraisers as well. *Id*. at 22.

2. Commission Votes

As Commissioner Weintraub would later explain in her Statement of Reasons regarding the dismissal, the Commission's consideration of plaintiffs' complaint was marked by extraordinary stalemate and political infighting, even as judged against the Commission's long history of voting deadlocks and inaction. Statement of Reasons of Comm'r Ellen L. Weintraub 1, MURs 6915 & 6927 (Sept. 30, 2022), https://www.fec.gov/files/legal/murs/6927/6927_27.pdf. She recounted that her "colleagues were willing to acknowledge that Bush and his campaign filed a late statement of candidacy, and possibly received excessive in-kind contributions in the form of subsidized travel expenses, [but] they would not lift a finger to investigate the question that really mattered here—whether candidate Bush established, financed, maintained, or controlled the Right to Rise USA super PAC." *Id*. Essentially, although all then-serving Commissioners agreed that there was reason to believe that Bush illegally delayed announcing his candidacy and failed to fully report his pre-announcement campaign activity, they differed on whether to proceed with respect to the alleged soft-money violations under 52 U.S.C. § 30125(e). Consequently, the Commission held no vote—at least on the same motion—in which all four then-Commissioners

found reason to believe that the two pre-candidacy violations occurred, despite the apparent consensus on these two charges. Compl. ¶ 87, ECF No. 1.

On December 6, 2018, the Commission voted on OGC's three recommendations as a package, considering 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 his campaign committee failed to register and file disclosure reports in violation of 52 U.S.C. §§ 30103(a) and 30104; (2) Bush 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). The vote split 2-2, with Commissioners Walther and Weintraub voting affirmatively for the motion, and Commissioners Hunter and Petersen dissenting. *See* Certification, MURs 6915 & 6927 (dated Dec. 7, 2018), https://www.fec.gov/files/legal/murs/6927/6927_15.pdf.

On December 13, 2018, the vote flipped. The Commission again voted on reason to believe, but only on the two pre-candidacy charges, and not on the soft money-related violations under 52 U.S.C. § 30125(e). This resulted in a reversed split 2-2 vote, with Commissioners Hunter and Petersen voting affirmatively for the motion, and Commissioners Walther and Weintraub dissenting. Certification, MURs 6915 & 6927 (dated Dec. 14, 2018), https://www.fec.gov/files/legal/murs/6927/6927_23.pdf.

This gridlock on the substantive "reason to believe" question was followed by successive failed votes over the next three years on whether to close the file and dismiss plaintiffs' complaints. Compl. ¶¶ 89-91. On August 29, 2022, the Commission finally voted 4-1 to close the case file and thereby dismiss plaintiffs' complaints. *Id*. ¶ 92. At no point did any Commissioner issue a Statement of Reasons explaining their votes for or against finding reason to believe. *Id*. ¶ 88.

C. Delay Case

Plaintiffs were aware of none of these developments as they occurred—because FEC enforcement proceedings are conducted confidentially, with no information made public, including the Commission's legal analyses, factual findings, or vote records, until the matter is finally resolved. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a).

Consequently, on March 13, 2020, CLC and Democracy 21 filed suit under 52 U.S.C. § 30109(a)(8)(A), arguing that the FEC's failure to act on plaintiffs' administrative complaints for more than 120 days since their filing was contrary to law. *See* Compl., No. 1:20-cv-730-CRC (D.D.C. Mar. 13, 2020), ECF No. 1. The Commission's vote on whether to authorize a defense of suit also split 2-2, and thus the FEC did not appear in the lawsuit and was declared in default on March 5, 2021. Compl. ¶ 65. However, RTR Super PAC moved to intervene and its motion was granted. *Id*.

1. Intervenor's Motion to Dismiss. On February 19, 2021, this Court held that plaintiffs lacked informational standing to pursue their FECA claim as it related to any alleged coordinated spending between RTR Super PAC and the Bush campaign after his formal announcement of candidacy. *Right to Rise I*, 520 F. Supp. at 47-48. Plaintiffs had argued that they had suffered informational injury because neither respondent had disclosed "[RTR]'s in-kind contributions to the Bush campaign arising from Bush's extensive involvement in [RTR]'s operations." Pls.' Opp'n to Mot. to Dismiss 21, No. 1:20-cv-730-CRC (D.D.C. July 9, 2020), ECF No. 13 ("MTD Opp."). The Court rejected this basis for plaintiffs' standing, citing the now-overturned district court decision in *CLC I* for the proposition that "plaintiffs lack standing to determine which of Right to Rise's disbursements were coordinated with the Bush campaign," *Right to Rise I*, 520 F. Supp. 3d at 48.

The Court also concluded, however, that plaintiffs had sufficiently alleged an informational injury relating to the five-month period from January 2015 to June 2015, in which Governor Bush was concededly testing the waters, *see id.* at 45-46—and during which, plaintiffs alleged, Bush had crossed over into de facto candidacy but had failed to disclose all campaign-related spending. Regardless of whether "Bush was either a de-facto candidate or testing the waters at some point prior to June 2015," the Court held, "plaintiffs have alleged an informational injury because further disclosures would be required." *Id*. at 46.

Intervenor RTR Super PAC moved for reconsideration of the February 2021 order on grounds that (1) the pre-June 2015 activities at issue were publicly disclosed on the first campaign finance report filed by Bush's campaign committee, and (2) any TTW/campaign activities in that period that Bush had failed to report had been paid for by RTR Super PAC or RTR Leadership PAC, and these payments were reflected in the RTR Committees' disclosure reports. RTR Mot. for Recons. 9, No. 1:20-cv-730-CRC (D.D.C. Mar. 5, 2021), ECF No. 19; RTR Reply Supp. Mot. for Recons. 5-6, No. 1:20-cv-730-CRC (D.D.C. Mar. 26, 2021), ECF No. 22.

In response, plaintiffs argued that although Bush had indisputably paid for and reported *some* pre-June 2015 campaign activity, he had reported virtually no spending for his extensive travel and public appearances. At the Court's request, *see* Hr'g Tr. 14:14-15, No. 1:20-cv-730-CRC (D.D.C. Apr. 27, 2021), ECF No. 39, plaintiffs then identified five Bush appearances between January and June 2015 that he had not reported, *see id*. at 14:16-25. Supplemental briefing was ordered by the Court, *id.* at 24:23-25:13, in which intervenor RTR Super PAC attempted to demonstrate that certain disbursements reported in the RTR Committees' existing FEC reports indeed paid for at least some of the expenses arising from these five events. *See, e.g.*, RTR Suppl. Br., No. 1:20-cv-730-CRC (D.D.C. May 11, 2021), ECF No. 28.

On reconsideration, the Court dismissed the case without prejudice for lack of standing with respect to all of plaintiffs' claims, principally on the strength of intervenor's assertions that any unreported TTW or campaign spending by Bush had been paid for and reported by the RTR Committees. *See CLC v. FEC*, 578 F. Supp. 3d 1, 583 (D.D.C. 2021) (*Right to Rise II*) ("The Court now agrees with RTR that the spending related to the [] campaign events plaintiffs identified has been fully disclosed.").

2. Plaintiffs' Motion for Reconsideration. On February 2, 2022, plaintiffs moved for reconsideration of the December order requesting that this Court clarify its ruling on plaintiffs' organizational standing. While this motion was pending, in April 2022, the D.C Circuit reversed *CLC I*, upon which this Court had relied in its February 19 decision to find that plaintiffs lacked an informational injury. *See CLC II*, 31 F.4th 781. Plaintiffs raised this decision in a notice of supplemental authority filed in the delay case on May 3, 2022. *See* Pls.' Notice of Suppl. Auth., ECF No. 37.

In *CLC I*, the plaintiffs had challenged the FEC's dismissal of their administrative complaint against a super PAC, Correct the Record, and Hillary Clinton's 2016 presidential campaign, claiming informational standing based on the respondents' failure to disclose which of Correct the Record's reported expenditures—or which portions thereof—were coordinated with Clinton and thus in-kind contributions to her campaign. 507 F. Supp. 3d at 87. After the district court concluded that plaintiffs lacked standing, *CLC II* reversed. The Court of Appeals noted that Correct the Record had reported its spending, including its coordinated spending, only as "'lump sum' disbursements . . . for various overhead expenses." *Id*. at 790. FECA, however, required the committee to report itemized information about the amounts, dates, and purposes of all in-kind contributions it made to the campaign. Thus, if plaintiffs prevailed in their challenge, FECA would

require disclosure "to reveal which portion of each [Correct the Record] expenditure funded coordinated activities," which in turn "would result in disclosure of the numerical amounts of any coordinated expenditures that were contributions to the Clinton campaign." *Id*. "Those amounts, currently unknown, constitute factual information core to [plaintiffs'] established interests in knowing 'who is funding presidential candidates' campaigns.'" *Id.* at 790-91 (citation omitted).[5] According to the D.C. Circuit, the Super PAC's failure to "disaggregate" even "already-reported expenditures to show which portions of those expenditures were coordinated contributions and which were not" was "a cognizable informational injury." *CLC II*, 31 F.4th at 788.

3. Final Ruling. On July 14, 2022, this Court rejected CLC's motion for reconsideration. In so holding, it also explicitly declined to reassess its earlier ruling based on the intervening decision in *CLC II*, finding that this subsequent decision was not properly before the Court. *See* Mem. Op. & Order, No. 1:20-cv-730-CRC (D.D.C. July 14, 2022), ECF No. 39. Before plaintiffs' deadline to appeal this ruling expired, the Commission voted on August 29, 2022 to dismiss the underlying administrative complaints, thereby mooting the delay case.

III. Procedural History

Plaintiffs initiated this action on October 28, 2022 to challenge the FEC's unlawful dismissal of their two administrative complaints. Compl., ECF No. 1. The FEC appeared and moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 12.

[5] *CLC II* also explained that *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001) would bar a finding of informational injury only when the plaintiff seeks purely "duplicative" information that is already available "from a different source." *Id*. at 791 (citing *Wertheimer*, 268 F.3d at 1075). *Wertheimer* would thus apply "only if Correct the Record had disclosed its coordinated contributions to the Clinton campaign and designated them as such, and [plaintiffs] were simply seeking reciprocal disclosure from Clinton's campaign of those same transactions." *Id.* at 791-92.

LEGAL STANDARD

To demonstrate Article III standing, plaintiffs must establish three elements: (1) "injury in fact"; (2) causation; and (3) redressability. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). With respect to informational standing, "a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (citation omitted).

While plaintiffs bear the burden of proving that the Court has jurisdiction to hear their claims, on a motion to dismiss, plaintiffs "need only 'state[] a plausible claim' that each element of standing is satisfied." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). In evaluating a motion to dismiss, 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). For purposes of the Rule 12(b)(1) motion, the Court "may consider materials outside the pleadings." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citation omitted). The Court "must take all of the factual allegations in the complaint as true," *id.*, and "construe[] the complaint liberally in the plaintiff's favor." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). For a Rule 12(b)(6) motion, the Court may only "consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Id.*

ARGUMENT

Plaintiffs satisfy all three elements of Article III standing. Plaintiffs have been deprived of

information about Bush's campaign contributions and expenditures that he failed to report; there is no reason to doubt this information is useful to CLC and Democracy 21 in advancing their missions and conducting their programmatic activities; and plaintiffs' injury is fairly traceable to the FEC's action—or inaction—and redressable by this Court.

The FEC does not make any substantive challenge to plaintiffs' standing but instead rests its motion entirely on the proposition that plaintiffs are barred from making any arguments to establish standing due to the purported preclusive effects of the delay case judgment. But it is clear that several of plaintiffs' arguments for informational standing are different here, and necessarily so, given that they rely on the intervening decision in *CLC II* and new evidence in the now-public case file. Furthermore, even insofar as plaintiffs press similar theories of injury, these intervening changes to the law and facts materially change the "legal landscape" in which plaintiffs are operating, and the doctrine of preclusion therefore does not apply.

I. Plaintiffs' standing arguments are not precluded.

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, 17 (D.D.C. 2013), *aff'd sub nom. Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295 (D.C. Cir. 2015). *See also Palacios*, 2020 WL 3972016, at *2. The FEC has failed to satisfy a single element of this test.

First, issue preclusion "only applies when the issues presented in each matter are *identical*." *Safadi v. Novak*, 574 F. Supp. 2d 52, 55 (D.D.C. 2008) (emphasis added). Accordingly, when applying issue preclusion to "threshold jurisdictional issues like standing," a jurisdictional decision

"will not bar relitigation of the cause of action originally asserted," but only "the *precise* issues of jurisdiction adjudicated.'" *Nat'l Ass'n of Home Builders*, 786 F.3d at 41 (emphasis added) (quoting *Cutler v. Hayes*, 818 F.2d 879, 888 (D.C. Cir. 1987)).

Of plaintiffs' three theories for standing here, only one—pertaining to respondents' failure to report post-candidacy coordinated spending as FECA requires—was "raised" in substantially similar form in the delay litigation and "necessarily decided" by the district court. The other two grounds for standing here assert either new legal arguments, in reliance on *CLC II*, *see infra* at 27-33, or present new factual allegations of injury, *see infra* at 33-35. The FEC errs in suggesting that a prior judgment on so capacious a legal inquiry as "standing" is necessarily preclusive in subsequent litigation concerning the same party, regardless whether the factual and legal basis for the party's standing may have changed. A judgment in a prior case will bar relitigation of only the "the *precise* issues of jurisdiction adjudicated,'" *Nat'l Ass'n of Home Builders*, 786 F.3d at 41. Indeed, this is necessarily the case because "a difference in pertinent facts, sufficient to substantially change the issue, renders the doctrine of issue preclusion inapplicable." *Safadi*, 574 F. Supp. 2d at 55-56.

Second, when the focus is narrowed to the "precise" arguments for informational standing that plaintiffs assert here, the FEC has not shown that they were "actually and necessarily determined" by this Court in the delay case. For instance, even if plaintiffs' notice of supplemental authority in the delay suit can be seen as "raising" the intervening decision in *CLC II*, *see supra* at 19-20, it is crystal clear that this Court did not "decide" that decision's effect on the standing analysis. The Court acknowledged that *CLC II* "bears directly on plaintiff's first theory of standing—informational injury," but deemed it beyond the scope of the pending motion for reconsideration, and therefore expressly stated that "the Court *declines to consider* it." Mem. Op.

at 11, No. 1:20-cv-730-CRC, ECF No. 39 (emphasis added). The FEC debates whether plaintiffs should have appealed this decision and the degree to which such an appeal would be futile as moot, *see* FEC Mot. 19, but this entire discussion is beside the point.[6] Only those precise issues and arguments actually decided by the prior court can have preclusive effect.

Indeed, the FEC's focus on what arguments or appeals plaintiffs *should have* made or what determinations this Court *could have* issued betrays that it entirely misapprehends—or misapplies—the doctrine of issue preclusion. Its arguments sound more in claim preclusion, where "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). A litigant cannot escape the effects of *claim* preclusion, or res judicata, "merely by raising a new legal theory or seeking a different remedy in a new case." *MacKenzie v. Fudge*, No. 1:20-cv-411-TNM, 2021 WL 1061220, at *4 (D.D.C. Mar. 18, 2021), *aff'd*, No. 21-5069, 2021 WL 3716796 (D.C. Cir. July 23, 2021), *cert. denied*, 142 S. Ct. 1144 (2022). But the FEC does not assert claim preclusion, nor could it, as this doctrine only encompasses merits judgments. The "preclusive effect" of a "jurisdictional judgment," by contrast, "is limited to matters actually

[6] The FEC argues that the prospect that plaintiffs' appeal of an already moot case might have resulted in vacatur of the relevant order is reason for this Court to disregard the "change in the law" effected by *CLC II*. FEC Mot. 19. Apart from this argument's irrelevance to the application of preclusion doctrine here, the FEC also misapprehends the equitable purpose of vacatur in those circumstances: namely, to protect the party seeking relief from an adverse judgment from unfair outcomes when "mootness results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994). *Cf. Hurd v. District of Columbia*, 864 F.3d 671, 681 (D.C. Cir. 2017) ("The *Munsingwear* rule involves 'equitable' considerations and it gives way when 'fairness' requires."). Here, the FEC unilaterally mooted the delay case when it dismissed the underlying administrative complaints—perhaps strategically—after final judgment in the delay case in which it defaulted. The Commission cannot justify invoking a form of relief meant to shield a non-prevailing party from this type of gamesmanship as reason to block that party from raising intervening changes in the governing law that indisputably "bear[] directly on [their] . . . theory of standing." *See* Mem. Op. & Order at 11, No. 1:20-cv-730-CRC (D.D.C. July 14, 2022), ECF No. 39

raised and necessarily decided; it does not extend to matters that *could have been raised*, as would the preclusive effect of a judgment on the merits." *GAF Corp. v. United States*, 818 F.2d 901, 913 (D.C. Cir. 1987) (emphasis added). The FEC conflates these two doctrines in a misguided attempt to bar plaintiffs here from "raising a new legal theory" or pressing undecided issues—neither of which are barred by an earlier jurisdictional judgment. *MacKenzie*, 2021 WL 1061220, at *4.

Third, "if the first two prerequisites for application of the issue preclusion doctrine are met, the plaintiff 'must be permitted to demonstrate . . . that he did not have a fair opportunity procedurally, substantively, and evidentially to pursue his claim the first time.'" *Canonsburg Gen. Hosp.*, 989 F. Supp. 2d at 17 (citations omitted). In addition to a plaintiff's lack of opportunity to pursue a claim the first time, "a sufficient shift in the legal landscape" can "make application of issue preclusion unfair." *Id*. at 20. Indeed, "issue preclusion does not apply when there has been an intervening change in legal principles." *Graphic Commc'ns Int'l Union*, 843 F.2d at 1493. This is clearly the effect of the *CLC II* decision. The FEC makes a feeble effort to claim that the "decision did not alter the controlling law," FEC Mot. 18, but *CLC II* expressly *reversed CLC I*, a decision upon which the Court in the delay case had relied in rejecting plaintiffs' theories of informational injury. It would be hard to imagine a more impactful "shift in the legal landscape" than a reversal of a decision upon which the prior court decision had rested. Thus, even if the FEC has satisfied the first two elements of issue preclusion—which it has not—finding preclusion here would "work a basic unfairness" on plaintiffs. *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007).

Finally, even if the FEC had met all—or any—of the three of elements of this test, the "curable defect" exception would apply to certain of plaintiffs' claims. This exception permits relitigation of claims of jurisdiction that would normally be barred by issue preclusion 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." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (citations omitted). When a case is dismissed for lack of jurisdiction, a "curable defect" is one in which the "jurisdictional deficiency [found by the court in the original suit] could be remedied by occurrences subsequent to the original dismissal." *Id.*

Plaintiffs here are proceeding under a distinct cause of action and challenging an entirely different agency action as contrary to law—FEC dismissal, not delay—where the challenged dismissal both postdated final judgment in the delay suit and occasioned the release of new and significant factual material in the administrative record. Insofar as plaintiffs rely upon OGC's factual findings, respondents' sworn responses to the administrative complaints, or other materials in the newly-released MUR file to augment earlier arguments or to make new standing arguments, this exception applies. Indeed, it is fundamental to the doctrine of issue preclusion that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159.

II. Plaintiffs have established Article III standing based on informational injury.

"[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). Consistent with *Akins*, the D.C. Circuit has recognized that plaintiffs are injured in fact when an alleged FECA violation causes the concealment of information that the Act requires to be disclosed, including, for example, "how much money a candidate spent in an election," *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997), the sources of political contributions funneled through corporate straw donors, *CLC*, 952 F.3d at 354, and itemized information about the amounts, dates, and purposes of any in-kind contributions received by a federal candidate, *CLC II*, 31 F.4th at 785.

Plaintiffs CLC and Democracy 21 assert that they have suffered informational injury

because, first, Bush failed to report all his campaign activity in the pre-candidacy period prior to June 2015, in particular, his spending for travel and public speaking events, and under *CLC II*, the RTR Committees' disclosure reports cannot remedy this injury. Relatedly, drawing on the OGC report, plaintiffs can identify additional specific trips and events in the pre-candidacy period that Bush failed to disclose. Second, any expenditures that RTR Super PAC coordinated with the Bush campaign, or any Bush campaign expenses the Super PAC otherwise paid for, were required under FECA to be disclosed as in-kind contributions to Bush's campaign, with itemized information about the dates, amounts, and purposes of each such contribution or transfer. But neither of the RTR committees nor Bush's campaign reported making or receiving any such contributions, and *CLC II* confirms that plaintiffs' failure to receive such statutorily required disclosure inflicts cognizable informational harm.

The deprivation of this information constitutes informational injury, *see Akins*, 524 U.S. at 21, and directly and concretely injures plaintiffs' interests in disseminating this information to voters and using it to support their programmatic activities.

A. Plaintiffs have been deprived of information that FECA requires to be disclosed with respect to Bush's campaign spending prior to June 2015.

Bush's failure to report all of his pre-candidacy expenditures as FECA requires, in particular his receipt of in-kind contributions from the RTR committees covering his expenses for travel and public events from December 2014 to June 2015, constitutes informational injury to plaintiffs. The RTR Committees' reports filed with the FEC in 2015 and 2016 do not supply the outstanding information FECA requires—*i.e.*, itemized information about the amounts, dates, and purposes of any such in-kind contributions—or otherwise "cure" plaintiffs' injury.

1. The RTR Committees' reports cannot "cure" the informational injury arising from Bush's failure to report all campaign spending before June 2015.

a. Contemporaneous reports suggested that Bush began testing the waters in May

2014, and Bush confirmed as much in the FEC proceedings. OGC Rpt. 5. As OGC later found, there was also reason to believe Bush was operating as a "candidate" within the meaning of FECA "at least since January 2015." *Id.* at 15. Thus, for more than a year preceding his June 15 announcement, Bush was either already a federal candidate or engaging in extensive TTW activities with an eye to becoming one.

There is also reason to believe that Bush failed to report all of his campaign activity in this period in violation of 52 U.S.C. § 30104(b). Federal law requires the reporting of all "contributions" and "expenditures" connected to any TTW activity, and upon the commencement of a candidacy, regular reporting of all campaign receipts and disbursements, including in-kind contributions from individuals or other committees. *See id.* § 30104; 11 C.F.R. § 101.3. The Bush campaign reported only $1,089 for "in-kind (ttw): travel/airfare/lodging"[7] in the period prior to June 2015, an amount that cannot possibly account for Bush's extensive cross-country travel to attend numerous fundraising events, speaking appearances and other political meetings prior to June 2015. OGC Rpt. 3, 29-30.

Finally, as OGC found, there is reason to believe that these travel and event expenses were subsidized by the RTR Committees and, in particular, that Bush failed to report significant in-kind contributions from RTR Leadership PAC in the form of payments for Bush's pre-candidacy travel. *Id.* at 27-32. Although the Bush campaign reported scarcely more than a thousand dollars on travel, RTR Leadership PAC, by contrast, reported disbursements for travel totaling over $800,000 in the same period. *Id.* at 29-30. And in the administrative proceedings, the Leadership PAC ultimately "concede[]d" that it "funded Bush's travel," *id.* at 29, even as it "deni[ed]" that it "funded Bush's

[7] *See* Jeb 2016, Inc., 2015 July Quarterly Report, at 1,688, (filed July 15, 2015; amended Jan. 31, 2016), https://docquery.fec.gov/pdf/580/201601319005221580/201601319005221580.pdf.

testing the waters activities," *id*. at 28. It declined, however, to provide any information about the specific in-kind contributions it made to the Bush campaign in connection to its spending on travel, nor did it amend its FEC disclosure reports to include this information.

OGC found that the record was unclear as to whether RTR Super PAC may have funded any of Bush's campaign activities in this period. OGC thus recommended no action "at this time" on these allegations, noting, however, that if its recommended investigation into Bush's pre-candidacy activities uncovered evidence that the Super PAC paid for Bush expenses, it would "make the appropriate recommendation" at that time. *Id.* at 34. It is thus eminently plausible to conclude that both RTR Committees paid for at least some travel-related expenses incurred by the Bush campaign; in fact, RTR Super PAC maintained that *it* had covered Bush's travel expenses in the delay litigation even as this testimony contradicted its statements to the FEC.[8]

b. *CLC II* controverts the RTR Committees' arguments that plaintiffs did not suffer informational injury because Bush's undisclosed campaign spending is reflected in some form in the committees' existing FEC reports. Even if this were true—and plaintiffs dispute that intervenor provided any sworn testimony or other evidence in the delay case sufficient to show that the RTR Committees in fact reported all undisclosed Bush campaign activity—*CLC II* makes clear that a committee's reporting of its general disbursements does not rectify the informational harm caused by its failure to report alleged in-kind contributions to a candidate with the itemized information

[8] In the delay litigation, RTR Super PAC claimed that it had paid for certain unreported TTW activities by Bush, *see, e.g.*, RTR Suppl. Br. 12, 1:20-cv-730-CRC (D.D.C. May 11, 2021), ECF No. 28 (claiming RTR Super PAC covered catering costs of January 20, 2015 bundler event); RTR Reply Supp. Mot. for Recons. 8 (noting that "the extensive Bush travel reported in Plaintiffs' news articles was on behalf of Right to Rise and paid for and reported by Right to Rise"). But in the administrative proceedings RTR Super PAC denied paying for any Bush TTW expenses. *See* OGC Rpt. 32 ("The Respondents deny that the Super PAC paid for [TTW] expenses. Whereas the Respondents admit that RTR [Leadership] PAC paid for Bush's travels, the Super PAC makes no such admission.").

FECA requires. 31 F.4th at 790.

Under FECA, when a political committee makes an in-kind contribution to a candidate committee, both the political committee and the candidate committee must disclose the transaction as a contribution and an "expenditure," along with itemized information about its date, amount, and purpose. *See* 52 U.S.C. § 30104(b)(2)(D), (4)(H)(i), (5)(A), (6)(B)(i); 11 C.F.R. § 104.13(a). FECA thus requires complete, itemized disclosure of a political committee's in-kind contributions to a presidential candidate by both the committee and the candidate.

To return to the example of Bush's travel expenses in the pre-candidacy period, if these costs were paid for by RTR Leadership PAC, rather than by Bush himself, then the PAC was required to report them as in-kind contributions to the Bush campaign, disaggregated from its undifferentiated reported disbursements for "travel"—and, perhaps more importantly, the Bush campaign was also required to report *receiving* those contributions. For example, RTR Leadership PAC reported hundreds of thousands of dollars of its own travel-related disbursements in that period—spanning over 900 entries on its mid-year report. It is undisputed that RTR Leadership PAC also conducted fundraising and events unrelated to Bush, and indeed, made over $283,800 in contributions to other federal committees and candidates in 2015. OGC Rpt. 7. Thus, RTR Leadership PAC's disbursements—including its travel disbursements—are likely allocable to both its Bush-related activities and its other organizational activities, including its fundraising and support of other federal candidates. But none of the Leadership PAC's reporting is broken down to indicate which of its disbursements—or which portions of any particular disbursement—represent an in-kind contribution to Bush in the form of payment for his travel or other expenses.

But to fully account for the missing disclosure information in a way that meets FECA requirements, the RTR Committees' reports would have to disclose, at a minimum: (1) which

reported expenditures related to travel expenses incurred by Bush in connection to campaign activity; (2) how these expenditures for "travel" should be allocated between expenses incurred by Bush and, *e.g.*, expenses incurred by other committee staff; and (3) the dates, amounts, and purposes of any such in-kind contributions to the Bush campaign, as "disaggregated" from the committees' undifferentiated reported travel expenditures. *CLC II*, 31 F.4th at 788, 792. So, for instance, it would not be sufficient for RTR Leadership PAC to point to its reported disbursement of $4,337.30 to Aventura Worldwide Transportation for "Travel" on February 10, 2015[9] and allege that this expenditure in some manner covered a Bush travel expense. Instead, this lump sum disbursement would have to be broken down to reveal what amount constituted an in-kind contribution to Bush. If, hypothetically, we assume $999 of the $4,337.30 disbursement covered Bush's personal transportation costs, then the Leadership PAC would have to report making, and Bush have to report receiving, an in-kind contribution of $999 for "travel" on February 10, 2015.

Thus, under *CLC II*, the RTR Committees' reports are insufficient to satisfy their disclosure obligations under FECA—even assuming they generally accounted for Bush's outstanding travel and event expenses "in some form"—and fail to cure plaintiffs' informational injury.

c. The FEC may argue that plaintiffs raised similar factual and legal allegations in the delay case. But insofar as this Court in the delay case made findings with respect to whether *Bush* had disclosed all his pre-candidacy spending, the record points in plaintiffs' favor: there was reason to believe, the Court noted, that Bush had not disclosed all of his pre-June 2015 campaign spending, particularly the area of travel. *Right to Rise I*, 520 F. Supp. 3d. at 45-46; *Right to Rise*

[9] A search of the FEC's databases for the Leadership PAC's disbursements to "Aventura Worldwide Transportation" produces a list of over 20 transactions, *see* https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00571380&recipient_name=Aventura (last searched Mar. 15, 2023).

II, 578 F. Supp. 3d at 582. Indeed, intervenor RTR conceded this was the case, and claimed instead that the RTR Committees had paid for certain outstanding expenses arising from Bush campaign events that plaintiffs identified. *Id.* at 582-83. Insofar as there is any preclusive effect of Court's findings on this front, it cuts in favor of plaintiffs.

The reason this Court subsequently found on reconsideration that plaintiffs lacked informational injury is because intervenor purported to testify that the RTR Committees had paid for and reported any TTW or campaign expenses not reported by Bush, thus providing plaintiffs with all information they were due under FECA. *Id.* at 582-83. What plaintiffs argue now—given that "legal principles have changed significantly since the [delay case] judgment," *Montana*, 440 U.S. at 155—is that intervenor's allegations in the delay litigation regarding the RTR Committees' existing reports are irrelevant to whether this information is "available" to plaintiffs, because even assuming the reliability of intervenor's allegations, these reports did not provide the information in the form and with the detail that FECA requires. Indeed, the RTR Committees at no point even claimed their reports met this standard.[10]

The key argument plaintiffs make here simply could not have been made in the delay case because the authority upon which it relies, *CLC II*, 31 F.4th 781, was not issued until after the district court's Reconsideration order. It was the D.C. Circuit decision that made clear that even if a Super PAC reported its coordinated expenditures or other in-kind contributions to a candidate "in some form"—typically as "aggregated expenditures" by the PAC—reporting would not satisfy FECA disclosure requirements or vitiate plaintiffs' informational standing. *Id*. at 783. To be sure, plaintiffs brought the *CLC II* decision to the Court's attention in the delay case, *see* Pls.' Notice of

[10] RTR Super PAC acknowledged that no committee report designated any disbursements for Bush's travel or other expenses. Hr'g Tr. 18:6-12.

Suppl. Auth. at 2, 4, but this Court explicitly "decline[d] to consider it." Mem. Op. at 11, No. 1:20-cv-730-CRC, ECF No. 39. Issue preclusion, however, bars only "successive litigation of an issue of fact or law *actually litigated and resolved* in a valid court determination." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added) (internal quotation marks omitted).

2. The public file provides new information about Bush's undisclosed pre-June 2015 spending.

a. In the delay case, the Court suggested that plaintiffs should identify with specificity those trips or events they contended Bush failed to report to substantiate their claims to informational injury. Hr'g Tr. 14:14-15; *Right to Rise II*, 578 F. Supp. 3d at 582-83. As a result, the parties there litigated whether intervenor had offered sufficient evidence to show that the RTR Committees had paid for and reported Bush's costs associated with five specific pre-candidacy events: (a) a January 20, 2015 meeting in Washington between Bush and "Republican lobbyists"; (b) Bush's February 27, 2015 speech at CPAC; (c) the March 7, 2015 Iowa agricultural summit; (d) a March 27, 2015 "Chamber of Commerce breakfast meeting" in Greenville, South Carolina; and (e) the May 16, 2015 annual Lincoln Dinner hosted by the Iowa Republican Party. *Right to Rise II*, 578 F. Supp. 3d at 582-83.

Insofar as this approach still governs the standing inquiry here, plaintiffs can now identify from the recently-released public case file several additional Bush campaign events that his campaign failed to report. As OGC explained, after analyzing video footage of multiple appearances by Bush at events paid for by RTR Leadership PAC, it determined that nine such events should be deemed campaign appearances by Bush, and not events in which he appeared merely "as a representative" of RTR. OGC Rpt. 11, 29 & Appendix. These include:

- March 13, 2015: Bush attended a House Party hosted by Fergus Cullen in Dover, NH (OGC Rpt. App. 16-18).

- March 16, 2015: Bush appeared at David Young Fundraiser in Urbandale, IA (*id*. at 19-20).
- March 18, 2015: Bush spoke at the Horry GOP Breakfast in South Carolina (*id*. at 21-23).
- April 17, 2015: Bush appeared at GOP summit in Nashua, NH (*id*. at 24-27).
- April 17, 2015: Bush appeared at a "Politics & Eggs" event in Nashua, NH (*id*. at 28-31).
- May 18, 2015: Bush gave a speech at the RNC's Annual Spring Meeting in Scottsdale, AZ (*id*. at 25-40).
- May 22, 2015: Bush attended the Southern Republican Leadership Conference in Oklahoma City, OK (*id*. at 41-42).

As with all of Bush's campaign travel during this period, the expenses he incurred traveling to and attending these campaign events were not reported by his own campaign. Instead, as suggested by OGC, some of these costs were likely paid for by RTR Leadership PAC, OGC Rpt. 28-30—although it is impossible to discern the true magnitude of those ostensible payments, because neither Bush nor the Leadership PAC reported them as FECA requires, 52 U.S.C. § 30104. Plaintiffs suffer injury because they have been deprived of such information.

Plaintiffs maintain that under *CLC II*, the RTR Committees' existing reports do not, and cannot, cure their informational injury because even if their undifferentiated disbursements for "travel" reflect payments for these Bush expenses "in some form," they fail to account for the Committees' in-kind contributions to Bush with the itemized information that FECA requires. But even if this Court does not interpret *CLC II* in this manner, there is no evidence that the RTR Committees' reports *in fact* reported payments in connection to this list of undisclosed Bush campaign events—or at least, there is no way to ascertain whether the committees' undesignated disbursements for "travel" or related purposes covered these outstanding events.

b. This "precise" argument is not precluded. Plaintiffs did not raise, and the parties did not litigate, whether the RTR Committees paid for and reported the expenses described above in the delay litigation. As the D.C. Circuit has repeatedly stressed, "The preclusive effect of the

first jurisdictional judgment is limited to matters *actually raised and necessarily decided*; it does not extend to matters that could have been raised, as would the preclusive effect of a judgment on the merits." *GAF Corp.*, 818 F.2d at 913 (emphasis added). The FEC's speculation about whether plaintiffs could have or should have previously identified these events is beside the point. Because this precise argument was not made, the doctrine of preclusion does not apply here.

And if the FEC were to object that this claimed injury is too granular, its quarrel would not be with plaintiffs, but with this Circuit's precedent. "The nature of the information allegedly withheld is critical to the standing analysis." *Common Cause*, 108 F.3d at 417. Indeed, the specificity required in the informational standing analysis led to this Court's request in the delay case that plaintiffs identify the particular trips they believed Bush failed to report in the pre-June 2015 period. The Commission *defaulted* in that case, and cannot now attempt to bar plaintiffs from raising *different* undisclosed Bush events in the manner prescribed by the Court to establish informational injury.

B. Plaintiffs have been deprived of information about the in-kind contributions made by RTR Super PAC and received by Bush following the commencement of his candidacy.

By virtue of Bush's reported involvement in the founding and operation of RTR Super PAC, it is likely that some, or even most, of the Super PAC's spending paid for goods and services coordinated with, or otherwise rendered to, the Bush campaign—and any such spending had to be reported as itemized in-kind contributions to the campaign as FECA requires. But neither RTR Super PAC nor the Bush campaign disclosed *any* such in-kind contributions made or received, depriving plaintiffs of information they are entitled to under FECA.

a. OGC recommended finding reason to believe that Bush had decided to run for President at least as early as January 2015, but failed to timely file a statement of candidacy and designate a principal campaign committee. OGC Rpt. 12-19. Thus, according to OCG, any

expenditure by RTR Leadership PAC or RTR Super PAC after January 2015 that was made "in cooperation, consultation or concert with, or at the request or suggestion of" Bush or his agents constituted an in-kind contribution to his campaign. Because Bush failed to report the in-kind contributions that arose from the likely coordinated spending between RTR Super PAC and his campaign, he deprived plaintiffs, and the public, of information to which FECA entitled them.

Further, OGC's finding that Bush likely commenced his candidacy in January 2015 provides further evidence that such coordination did in fact occur. As OGC noted, prior to June 2015, "Bush and/or his staff appear to have collaborated with the Super PAC in discussing broad campaign strategy and allowing the Super PAC to film video footage of himself to be used for commercials after he officially declared his candidacy." *Id.* at 9. Indeed, there was evidence that in the pre-candidacy period, staff was not even attempting to avoid "coordination." For example, twelve days *after* Bush filed his Statement of Candidacy, officers of the Super PAC reportedly announced during a conference call with donors that they "'can't coordinate anymore' with the campaign," *id.* at 9 n.38, suggesting that the Super PAC's leadership was aware that their close relationship with the campaign prior to Bush's announcement of candidacy would likely support a finding of coordination.

RTR Super PAC failed to report any coordinated expenditures as in-kind contributions to the Bush campaign with the information FECA requires. *See* 52 U.S.C. § 30104(b)(2)(D), (4)(H)(i), (5)(A), (6)(B)(i); 11 C.F.R. § 104.13(a). It is true that disclosing such contributions would be tantamount to admitting to illegal coordinated activity and associated violations of FECA's contribution restrictions, given that Bush and his agents were prohibited by 52 U.S.C.

§ 30125(e)(l) from establishing or financing RTR Super PAC in the first place.[11] But as OGC found, there is reason to believe that such violations in fact occurred, and so plaintiffs are entitled to all reportable information that arises from this illegal undertaking. Here, as in *CLC II*, plaintiffs are deprived of information as to which of a super PAC's purported "independent" disbursements were actually coordinated expenditures or otherwise represented in-kind contributions to a 2016 presidential campaign.

b. Plaintiffs did make this argument in the delay case—and at length, *see* MTD Opp'n *supra*, at 21-24—but this Court rejected this basis for plaintiffs' standing in its February 2021 order, citing *CLC I* for the proposition that "there is no statutory right to determining whether an expenditure should be deemed a 'coordinated' contribution.'" *Right to Rise I*, 520 F. Supp. 3d at 47-48. But because *CLC I* was subsequently reversed, precluding this argument now would "work a basic unfairness" on plaintiffs, *Palacios*, 2020 WL 3972016, at *2. *See also Montana*, 440 U.S. at 157 (noting issue preclusion applicable only "absent significant changes in controlling facts or legal principles"). It is also reason for this Court to hold differently now.

There is no question that *CLC II* directly applies to the reasoning of the February 2021 order in the delay case. As in *CLC II*, "[i]f [plaintiffs] win on the merits, [respondent] would be required to disaggregate its reporting to show the actual amounts of various expenditures that were in-kind contributions" to a candidate's campaign. 31 F.4th at 790. Plaintiffs would thereby "gain access to FECA-required information about coordinated [in-kind] contributions from [RTR Super PAC] to the [Bush] campaign." *Id.* And, as *CLC II* made clear, *Wertheimer* would bar standing only if plaintiffs were seeking purely "duplicative" reporting from one coordinating committee of

[11] It is likely that RTR Super PAC would forfeit its status as an "independent expenditure-only committee," or super PAC, by making contributions to federal candidates, instead of exclusively making independent expenditures as it pledged to do as a condition of its status.

transactions already reported by the other. *Id.* at 791. But here, *neither* Bush nor RTR Super PAC have itemized or reported any of the in-kind contributions that plaintiffs allege occurred. Under *CLC II*, the Super PAC's failure to report these in-kind contributions with itemized information about their dates, amounts, and purposes as FECA requires constitutes cognizable informational injury.

III. Plaintiffs' inability to access FECA disclosure information directly and concretely injures their interests.

A plaintiff suffers an injury in fact when it shows that it has been deprived of information that must be publicly disclosed pursuant to a statute and "there is no reason to doubt [the plaintiff's] claim that the information would help them." *CLC*, 952 F.3d at 356 (citation omitted). "The helpfulness of the information does not depend on the plaintiff's status as a voter," *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 13 (D.D.C. 2019), but on whether the information sought would be "useful" to plaintiffs and "to others to whom they would communicate it." *Id.*

A. There is no reason to doubt that undisclosed information here would help CLC and Democracy 21 advance their missions.

CLC's and Democracy 21's injuries in this case are concrete and directly impact their organizational missions to "strengthen democracy" and "mak[e] democracy work for all citizens." *See* Compl. ¶¶ 12, 18.

In pursuing their missions, CLC and Democracy 21 are uniquely positioned among nonprofit organizations in their focus on issues of campaign finance and political disclosure and their concentration on legal work and public education in these areas. Even as plaintiffs have been challenged in their claims to informational injury in various FECA cases, their organizations' ongoing use of FECA information in an array of programmatic activities has repeatedly been affirmed by the courts. As the D.C. Circuit found in a recent case concerning the disclosure of contributor information, there is "no reason to doubt" that the disclosure CLC and Democracy 21

sought "would further their efforts to defend and implement campaign finance reform." *CLC*, 952 F.3d at 356; *see also CLC II*, 31 F.4th at 783 (noting that the outstanding information would "help [Appellants] (and others to whom they would communicate it) to evaluate candidates for public office, . . . and to evaluate the role that [Correct the Record's] financial assistance might play in a specific election") (quoting *Akins*, 524 U.S. at 21).

So too here. "There is 'no reason to doubt' that the disclosures [plaintiffs] seek would further their efforts to defend and implement campaign finance reform." *CLC*, 952 F.3d at 356. Indeed, the incredible scale of the potential violations in this case makes it evident that knowing such information is critical not only to defend and implement campaign finance reform but also to realize FECA's purpose of informing voters about "how much money a candidate spent in an election." *Common Cause*, 108 F.3d at 418. In the 2016 cycle, the Bush campaign reported raising $32 million, whereas RTR Super PAC reported raising more than $118 million. OGC Rpt. 10. Depending on the extent to which RTR Super PAC's disbursements should have been considered spending by the Bush campaign, Bush's true 2016 cycle spending could be anywhere between $35 million and $153 million.

Plaintiffs use information from FEC disclosure reports to prepare complaints submitted to the FEC and to engage in rulemakings as part of its regulatory practice, to draft briefs and other materials submitted to state and federal courts in campaign finance litigation, and to prepare testimony submitted to legislators, craft legislation and lobby for its enactment. Compl. ¶¶ 14-16, 19-20. Plaintiffs also advance their missions by analyzing FECA disclosure information to develop a wide variety of public education materials, including fact sheets, reports, and op-eds, to inform voters about the sources and extent of candidates' financial support and the role of outside groups in elections. *Id.*

When such FECA information is unavailable or inaccurate, such as when candidates are allowed to use supposedly "independent" groups as de facto coordinated arms of their campaigns, it impedes plaintiffs' ability to fulfill their missions and harms their efforts to provide the public with accurate information about the financing of federal campaigns. *Id.* ¶¶ 17, 19.

B. The FEC's dismissal of plaintiffs' complaints has caused organizational injury by depriving plaintiffs of key information.

CLC and Democracy 21 have also suffered a distinct organizational injury sufficient to confer standing, because the FEC's failure to act on their complaints has "injured the [plaintiffs'] interest[s]," and they "used [their] resources to counteract that harm.'" *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*") (internal quotation marks omitted). Timely FEC action resolving administrative complaints and remedying the FECA violations underlying them is essential to the success of programmatic activities advancing plaintiffs' missions, including their public education work to inform voters about campaign spending, legislative advocacy to improve campaign finance laws, and watchdog efforts to monitor officeholders' and candidates' compliance with the law.

The FEC's failure to act on plaintiffs' administrative complaints deprives CLC and Democracy 21 of required FECA disclosure information that both plaintiffs need to inform the public about candidates' financial support. Compl. ¶¶ 14-15, 19. Moreover, the FEC's dismissal has directly harmed plaintiffs' watchdog activities by depriving them of information they need to conduct their regulatory practices before the FEC and other agencies. To advance their organizational missions of promoting government transparency and accountability, plaintiffs regularly file complaints against individuals or organizations that violate federal election law and participate in rulemaking and advisory opinion proceedings at the FEC to ensure the proper interpretation and enforcement of those laws. *Id*. ¶¶ 16, 19.

Plaintiffs' injury here is analogous to the injury suffered by the *PETA* plaintiffs. In that case, PETA alleged that the USDA's failure to apply the Animal Welfare Act to birds injured its organizational interests by depriving PETA of information it needed to conduct public education activities central to its mission of preventing animal cruelty and denying it the ability to combat bird abuse through USDA enforcement complaints. 797 F.3d at 1094-95. The Court agreed, finding that the USDA's inaction "deprived PETA of key information that it relies on to educate the public" where public education efforts were "[o]ne of the 'primary' ways in which PETA accomplishe[d] its mission." *Id*. at 1094 (citation omitted). The Court concluded that the agency's inaction, which resulted in the deprivation of "investigatory information," resulted in an injury sufficiently "concrete and specific" to confer organizational standing. *Id.* at 1095.

Similarly, persistent agency inaction here prevents plaintiffs from achieving their mission of strengthening the U.S. democratic process through public education, regulatory watchdog efforts and litigation. The FEC's extended inaction hinders these efforts by "depriv[ing] [plaintiffs] of key information that [they] rel[y] on to educate the public" and to engage in the "normal process of submitting [FEC] complaints" and in Commission rulemakings and other proceedings. *See PETA*, 797 F.3d at 1094. These injuries are "both concrete and specific to the work in which [plaintiffs are] engaged." *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986).

Plaintiffs have also expended resources to counteract these organizational injuries. *See PETA*, 797 F.3d at 1094. For instance, because of the FEC's failure to compel required disclosure relating to the relationship between RTR Super PAC and the Bush campaign and any in-kind contributions that resulted, CLC has 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. Compl. ¶¶ 17, 20. Thus the Commission's failure to act on the allegations here has forced plaintiffs to divert resources from other planned organizational needs to research and fill in the missing disclosure information they seek in the complaints, including for the benefit of reporters and partner organizations. *Id*.

III. Plaintiffs' injuries are fairly traceable to the dismissal of their administrative complaints and redressable by a favorable court decision.

Finally, plaintiffs meet the causation and redressability requirements for Article III standing. Plaintiffs' informational and organizational injuries flow directly from the FEC's failure to act on their administrative complaints, and this Court is empowered under 52 U.SC. § 30109(a)(8)(C) to redress that failure. If the Court agrees that the FEC's dismissal was contrary to law, then it would remand the case and order the FEC to conform to its order.

IV. The FEC's attempt to invent a "futility" excuse for its unlawful dismissal of plaintiffs' complaints is frivolous.

After arguing that plaintiffs are precluded from even asserting any claims to standing here, the FEC also argues that this Court should dismiss this action because remand to the FEC would likely be "futile." FEC Mot. 20. It identifies not a single FECA delay or dismissal case to support this novel and extraordinarily self-serving proposition, and that is because there are none.

Permitting the Commission to sidestep a challenge to its dismissal of an administrative complaint by invoking "futility" would eviscerate FECA's provision of judicial review at 52 U.S.C. § 30109(a)(8). If the FEC's claimed reluctance to reconsider or reverse course with respect to a previous agency delay or dismissal renders a remand "futile," then this would be an excuse the agency could—and likely would—deploy in each and every FECA challenge to its actions. Granting the FEC relief on this basis would not only be contrary to fundamental principles of administrative law, but would also perversely reward the agency for shirking its responsibilities

under FECA even after a court finds its inaction unlawful.

There is no "futility" defense in a § 30109(a)(8) action—and unsurprisingly, the FEC cites nothing on point. Instead it attempts to rely on authority where remand was "futile" because the outcome was mandated by law, *see Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001) ("the decision was not only right but legally inevitable"); *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35 n.10 (D.D.C. 2016) (any action on remand "would be near impossible to square [with] a requirement that the Forest Service's exercise of its limited authority be done expeditiously"); or on authority that did not even resolve the question, *see Keats v. Sebelius*, No. 13-1524, 2019 WL 1778047, at *7 (D.D.C. Apr. 23, 2019) (raising, but not deciding, whether remand would be futile to decide if agency had carried out a legal duty to review employee file for employee being tried for possession of child pornography). None of these cases consider an argument remotely like the one the FEC tests here: that a legal challenge to an agency decision should be dismissed simply because the agency might decline to change its decision in the event the Court finds it unlawful.

Nor does the only FECA-related case the FEC cites, *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996), support such a claim. The court there found that it would be futile to remand the FEC's discretionary decision to file suit against the defendant—because even though the original decision was unlawfully voted on by ex-officio members, the FEC had already "ratif[ied]" the decision with a properly constituted Commission. *Id*. at 708. Notably, the court rejected the claim that it had "statutory authority to review the FEC's decision to sue," and contrasted that with "a decision not to sue" and other acts the court recognized were reviewable under 52 U.S.C. § 30109(a)(8). *Id*. at 709. In other words, a remand to require reconsideration of an FEC decision to file suit was futile precisely because it was not subject to review under FECA; the opposite is true of "an order of the

Commission dismissing a complaint," *see id.* § 30109(a)(8)(A).

Indeed, while it is difficult to glean a coherent legal theory from the FEC's assortment of unrelated case law, it appears to be making the same redressability argument that the Supreme Court rejected in *Akins*. *See* FEC Mot. 22 (claiming that "the record shows that the agency would not reach a different outcome" on remand). In *Akins*, the FEC's unsuccessful standing challenge turned on similar claims about the "obstacles to redressability" for plaintiffs seeking to remedy informational injuries caused by the FEC's failure to enforce the law. Pet'r Reply Br., *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 675443, at *4. The Supreme Court, for its part, agreed that it was "possible that even had the FEC agreed with [plaintiffs'] view of the law, it would still have decided in the exercise of its discretion not to require [the PAC] to produce the information." *Akins*, 524 U.S. at 25. Notwithstanding that possibility, however, the Court had no trouble finding a redressable injury—because "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground . . . even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Id.*

The FEC's "futility" arguments are indistinguishable from the redressability arguments rejected in *Akins*, and fail for the same reasons. The FEC is subject to no mandatory obligation to dismiss this matter in the event of a remand; it retains the discretion to take any other enforcement actions authorized under FECA. Accordingly, as in *Akins*, plaintiffs' standing is not extinguished by the possibility that the FEC will decline enforcement for a different reason. *See also CREW v. FEC*, 209 F. Supp. 3d 77, 85 n.3 (D.D.C. 2016) ("[T]he mere fact the FEC has discretion to dismiss CREW's complaint for another reason does not vitiate the redressability of CREW's claim.").

Nor is there any free-floating "staleness" defense, as the FEC attempts to assert here—

while brazenly ignoring that any "staleness" of this matter is entirely due to the FEC's own inaction and delay. *See* FEC Mot. 22 (noting "more than seven years" had passed since administrative complaints filed without acknowledging that the FEC had failed for seven years to resolve complaints). But the passage of time alone does not moot an § 30109(a)(8) suit. This is also made clear by *Akins*, where the original administrative complaint was filed on January 9, 1989, and involved activity that took place between 1980 and 1990; the Supreme Court nevertheless upheld the redressability of the plaintiffs' informational injury in 1998. *See* 524 U.S. at 25. And litigation spurred by the original *Akins* complaint continued through 2010, despite involving alleged violations that ceased after the 1980s. *Akins v. FEC*, 736 F. Supp. 2d 9, 13-16 (D.D.C. 2010). The FEC cannot invoke its own delay in resolving plaintiffs' administrative complaints as grounds to dismiss plaintiffs' § 30109(a)(8) action as "futile," nor to escape its fundamental obligation to conduct its proceedings in accordance with standards of reasoned decision-making.

CONCLUSION

For these reasons, the FEC's motion to dismiss should be denied.

Dated: March 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2023, I caused a true and correct copy of the foregoing documents to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

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