IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

RIGHT TO RISE SUPER PAC, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-00730

Hon. Christopher R. Cooper

PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

Pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, plaintiffs Campaign Legal Center ("CLC") and Democracy 21 respectfully move for the entry of default judgment against Defendant Federal Election Commission ("FEC" or "Commission"). Plaintiffs brought this action on March 13, 2020, challenging the FEC's unlawful failure to act on plaintiffs' administrative complaints alleging certain named respondents violated the Federal Election Campaign Act ("FECA" or "the Act"). Service was effected on April 6, 2020, and the FEC's deadline to file a responsive pleading was June 5, 2020. *See* ECF No. 7. The FEC has failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and the Clerk of Court entered a default against the FEC on March 5, 2021. *See* ECF No. 20.[1]

For the reasons described below, entry of default judgment against Defendant FEC is appropriate because the uncontroverted evidence establishes that the FEC has failed to act on

[1] Plaintiffs conferred with counsel for Intervenor-Defendant Right to Rise Super PAC, who indicated that RTR opposes this motion.

plaintiffs' administrative complaint, and that this failure to act is contrary to law. Pursuant to 52 U.S.C. § 30109(a)(8)(C), plaintiffs ask this Court to declare that the FEC's failure to act is contrary to law and to direct the FEC to conform within 30 days. A proposed order is attached.

STATEMENT OF FACTS

1. On March 31 and May 27, 2015, plaintiffs CLC and Democracy 21 filed two FEC complaints against former Florida Governor John Ellis "Jeb" Bush and Right to Rise Super PAC, Inc. ("RTR"), which collectively alleged that Bush, by directly and indirectly establishing and operating RTR, had failed to comply with applicable FECA contribution restrictions and disclosure requirements, both before he formally announced his presidential candidacy on June 15, 2015 and for the duration of his official campaign. *See* Declaration of Megan P. McAllen ¶ 2, attached hereto as Exhibit 1; Mar. 31, 2015 Admin. Compl., ECF No. 1-2; May 27, 2015 Admin. Compl., ECF No. 1-1.

2. Relying on publicly available information and news reports discussing Bush's speeches, travel, fundraising, and other activities, as well as publicly reported statements and activities of Bush's key campaign staff, the two administrative complaints establish that Bush and his allies outsourced much of his campaign—including some of his "testing-the-waters" activities—to RTR, an "independent" political committee that they created and maintained. ECF No. 1-2; ECF No. 1-1.

3. Plaintiffs' March 2015 administrative complaint detailed the activities undertaken by Bush, his agents, and RTR prior to June 15, 2015, and alleged that these activities provided reason to believe Bush was "testing the waters" and engaging in active campaigning without registering or reporting as a candidate, as FECA requires. ECF No. 1-2 ¶¶ 1-2.

4. As early as December 16, 2014, Bush publicly announced that he had "decided to actively explore the possibility of running for President of the United States." *Id.* ¶ 4.

5. On January 6, 2015, Bush and his associates formed two political action committees: (1) the independent expenditure-only committee or "super PAC" RTR and (2) a separate leadership PAC, also named Right to Rise, *id.* ¶ 5, which also supported Bush after he declared his candidacy but could not, in contrast to a super PAC, raise contributions in unlimited amounts. According to reports cited in plaintiffs' March 2015 administrative complaint, Bush advisors oversaw the operations of both of these political committees. *Id.* ¶¶ 6-8. Indeed, Bush and his team set an initial fundraising goal of $100 million, and dozens of PAC fundraising events were soon scheduled for the first few months of 2015. *Id.* ¶¶ 7-8.

6. News reports and Bush's own Twitter account documented that Bush traveled extensively across the country to RTR fundraisers in February and March 2015. *Id.* ¶ 10. These fundraising stops included $100,000-per-ticket events in New York City in February and in Bel Air on March 31. *Id.* ¶¶ 11, 13. Bush's family, including his mother, also fundraised for RTR during this period. *Id.* ¶ 9. According to reports during this time, the purpose of this "nonstop fundraising tour raking in millions" was "to back his expected presidential bid." *Id.* ¶ 11.

7. As chronicled in plaintiffs' first administrative complaint, Bush also engaged in other activities in February and March 2015 that were indistinguishable from those of a candidate: traveling to early primary states like South Carolina and meeting with potential donors and staff, *id.* ¶ 12; speaking at the Conservative Political Action Conference (where he acknowledged he was testing the waters for a presidential candidacy), *id.* ¶ 17; attending the Iowa agriculture summit alongside other Republi.can presidential candidates, *id.* ¶ 18; and committing to speak at the Iowa Republican party's annual Lincoln Dinner, *id.* ¶ 19. But the Bush campaign eventually reported

only a small fraction of his apparent expenditures as testing-the-waters disbursements. *See* Pls.' Opp'n to Mot. to Dismiss, ECF No. 13 at 28 n.6; Pls.' Opp'n to Mot. to Recons., ECF No. 21 at 16 n.16.

8. On May 27, 2015, plaintiffs filed a second administrative complaint, supplementing the March complaint with more evidence that Bush had become a candidate as defined by FECA. ECF No. 1-1 ¶¶ 3-10. The complaint also alleged that as a candidate, Bush had violated FECA because he "indirectly established, financed, maintained, or controlled" RTR, 52 U.S.C. § 30125(e), and that RTR was soliciting, receiving, directing, or spending contributions that did not comply with FECA's contribution limits and source prohibitions, ECF No. 1-1 ¶¶ 37-44.

9. Based on public statements and reports, the May administrative complaint detailed Bush's extensive fundraising, which continued through April and May 2015. *Id.* ¶¶ 20-22. Bush's fundraising efforts were so serious, in fact, that his advisers initially "imposed a $1 million cap on donations to the super PAC" in order to "avoid the public perception that he'd been indebted to a few extremely wealthy benefactors." *Id.* ¶ 25. Bush lifted that cap in early May 2015 and returned to "rushing to fill the Right to Rise bank account" and "accelerat[ing] the cash flow." *Id.*

10. Plaintiffs' May 2015 administrative complaint presented further compelling evidence that Bush viewed himself as a candidate. In a video released on May 13, 2015, Bush said "I'm running for president in 2016" and then quickly "tried to take it back." *Id.* ¶ 4 (quoting a published report on the May 13 video).

11. The May administrative complaint also detailed the active role that Bush and his associates continued to play in creating RTR and directing its staffing and operations by, for example: choosing close Bush associates to be RTR's senior staff, *id.* ¶¶ 12-15; timing his official campaign announcement in concert with RTR fundraising efforts, *id.* ¶ 16; delegating "nuts-and-

bolts" tasks of a campaign to RTR, *id.* ¶ 17; and dictating that RTR would act as an amplifier and "echo chamber" for the "official campaign arm," which "would take the lead on dictating messaging," *id.* ¶ 18.

12. RTR ultimately reported making expenditures of over $86 million to advocate Bush's nomination during the 2015-16 Republican presidential primary. ECF No. 13-4 (RTR Financial Summary).

13. On April 3, 2015, the FEC sent plaintiffs a letter acknowledging receipt of their March 2015 administrative complaint and designating it as Matter Under Review ("MUR") 6927. *See* Letter from Jeff S. Jordan, Assistant General Counsel, FEC, to J. Gerald Hebert, Campaign Legal Center (Apr. 3, 2015), attached hereto as Exhibit 2; McAllen Decl. ¶ 8.

14. On June 4, 2015, the FEC sent plaintiffs a letter acknowledging receipt of their May 2015 administrative complaint, treating it as a supplement to their first complaint, and designating both complaints collectively as MUR 6927. *See* Letter from Jeff S. Jordan, Assistant General Counsel, FEC, to J. Gerald Hebert, Campaign Legal Center (June 4, 2015), attached hereto as Exhibit 3; McAllen Decl. ¶ 9.

15. Since receiving the FEC's final acknowledgment of receipt of both administrative complaints on June 4, 2015, plaintiffs have received no further communications from the FEC regarding MUR 6927. *See* McAllen Decl. ¶ 7.

16. Plaintiffs filed this action on March 13, 2020 to compel the FEC to take action on MUR 6927.

17. To date, at least 2,130 days—more than five and a half years—have elapsed since plaintiffs filed their second administrative complaint, but the Commission has taken no known action on MUR 6927. *See* FEC, *Search Closed Matters Under Review*, https://www.fec.gov/data/

legal/search/enforcement (last visited Mar. 25, 2021) (search for "6927" in "MUR Number" field yields no results); McAllen Decl. ¶ 7.

18. More than four years after plaintiffs filed their second administrative complaint, the FEC lost a quorum of Commissioners on August 31, 2019 for about nine months, and again lost a quorum on July 3, 2020 for about five months. *See* Press Release, FEC, *Matthew Petersen to depart Federal Election Commission* (Aug. 26, 2019), https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission; Letter from Caroline Hunter, FEC Commissioner, to President Donald Trump (June 26, 2020), https://www.fec.gov/resources/cms-content/documents/Caroline_C_Hunter_Resignation_Letter_to_White_House_June_26_2020.pdf.

19. The FEC regained its quorum by December 18, 2020, *see* FEC, *Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners* (Dec. 18, 2020), https://www.fec.gov/updates/shana-broussard-sean-cooksey-allen-dickerson-sworn-commissioners, but still has not corrected its years-long failure to act on plaintiffs' administrative complaints, McAllen Decl. ¶ 7.

20. The FEC remains in default with respect to this action, and has not appeared, filed an answer, or otherwise defended in the action to date. *See id.*

21. Plaintiffs have incurred $400 in costs, as defined under 28 U.S.C. § 1920, in seeking this default judgment. *See id.* ¶ 10; ECF No. 1 (docket text showing receipt of payment for filing fee).

LEGAL STANDARD

I. Default by the Government under Rule 55.

A plaintiff may seek default judgment in a suit where the defendant fails "to plead or otherwise defend." Fed. R. Civ. P. 55(a)-(b). But "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief

by evidence that satisfies the court." Fed. R. Civ. P. 55(d). Although default against the government is disfavored, Rule 55(d) does not "'relieve the government from the duty to defend cases or obey the court's orders.'" *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *Alameda v. Sec'y of Health, Educ. and Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980)). "In determining whether the default judgment against the government is proper, a court may accept as true the plaintiff's uncontroverted evidence," *Payne*, 725 F. Supp. 2d at 116, including evidence submitted by affidavit, *see Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 684 F. Supp. 2d 34, 37 (D.D.C. 2010), and public record evidence, *Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong*, 414 F. Supp. 3d 109, 120 (D.D.C. 2019); *see also, e.g.*, Order, *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 1:19-cv-2753 (D.D.C. Apr. 9, 2020) (granting motion for default judgment where plaintiff demonstrated, "by evidence that satisfies the Court, that the FEC's failure to act on the administrative complaints . . . is contrary to law"). Where, as here, default has been entered against the government, "the quantum and quality of evidence that might satisfy a court can be less than that normally required." *Alameda*, 622 F.2d at 1048.

II. The "Contrary to Law" Standard.

A plaintiff is entitled to relief where the undisputed facts show that the FEC has acted "contrary to law" by unreasonably delaying action on the underlying administrative complaint. 52 U.S.C. § 30109(a)(8)(c). While FECA "does not require that an [enforcement action] be completed within a specific time period," *Democratic Senatorial Campaign Comm. v. FEC*, No. 95-cv-0349, 1996 WL 34301203, at *1 (D.D.C. Apr. 17, 1996) ("*DSCC*"), it does impose "an obligation to investigate complaints expeditiously," *id.* at *4. *See also Common Cause v. FEC*, 489 F. Supp.

738, 744 (D.D.C. 1980) ("Where the issue before the Court is whether the agency's failure to act is contrary to law, the Court must determine whether the Commission has acted 'expeditiously.'").

In determining whether the FEC has acted "expeditiously," the Court may look to "the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved." *Common Cause,* 489 F. Supp. at 744. In addition, the Court may consider the factors outlined in *Telecomm. Research & Action Ctr. v. F.C.C.*:

> (1) the time agencies take to make decisions must be governed by a rule of reason[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") (internal quotation marks omitted). Although the FEC's decision whether or not to investigate "is entitled to considerable deference, the failure to act in making such a determination is not." *DSCC*, 1996 WL 34301203, at *4.

ARGUMENT

Under the *Common Cause* and *TRAC* factors, the undisputed evidence demonstrates that the FEC has unlawfully failed to act on plaintiffs' administrative complaints. And, as this Court has recognized, plaintiffs have standing to sue the Commission for its failure to act. *See* ECF No. 17. Plaintiffs are therefore entitled to a default judgment against the FEC pursuant to Rule 55.

I. Plaintiffs Have Standing to Challenge the FEC's Delay.

As an initial matter, plaintiffs have standing under FECA to challenge the Commission's inaction on their administrative complaints. In denying Intervenor RTR's motion to dismiss in

part, this Court found that plaintiffs sufficiently alleged an informational injury and therefore have standing to bring their FECA claim. ECF No. 17 at 2. *See CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (per curiam) ("The law is settled that 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.").

This Court first concluded that plaintiffs, on their reading of the law, "have been deprived of over five months of information that is statutorily required to be disclosed," including all of Bush's activities during his *de facto* candidacy that began as early as January 2015, which he failed to disclose in any report. ECF No. 17 at 10-11. The Court rejected RTR's factual contention that Bush did not test the waters prior to June 2015 and instead "assume[d] that plaintiffs [were] correct that Bush was testing the waters as of January 2015." *Id.* at 11.[2]

But the Court need not assume: the public record and plaintiffs' administrative complaints both confirm that Bush was either testing the waters or operating as an undeclared candidate long before June 2015, but never fully disclosed those activities as FECA requires. Indeed, the Bush campaign reported testing-the-waters activities dating back as early as *mid-2014*. ECF No. 21 at 16 n.16. But as plaintiffs have explained, the testing-the-waters disbursements his campaign eventually disclosed—where the underlying transactions occurred primarily in 2014—cannot possibly account for all of Bush's reportable activity over his pre-candidacy period. *See id.* at 9-12. Plaintiffs' administrative complaints credibly establish, based on specific evidence from public reporting and Bush's own statements, that he was engaged in extensive travel and fundraising over

[2] Although Intervenor-Defendant RTR "strenuously denie[d] that Bush was testing the waters prior to June 2015," ECF No. 17 at 11 (citing Int.'s Mot. to Dismiss, ECF No. 13), RTR conceded in its recent motion for reconsideration that Bush was testing the waters in January 2015, *see* ECF No. 19 at 14-15.

the period he was testing the waters of candidacy—or operating as a *de facto* candidate—in the months before formally announcing his campaign in June 2015. *See infra* Part II. Plaintiffs have thus been denied complete, FECA-mandated reporting of Bush's receipts and expenditures prior to June 2015. ECF No. 17 at 10 (citing *CLC*, 952 F.3d at 335).

Additionally, there is "no reason to doubt" that the statutorily required information would help plaintiffs. *Id.* at 17 (quoting *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41). Plaintiffs rely on complete and accurate FECA disclosure information to support a wide range of activities key to their organizational missions, including public education efforts and administrative practice. *Id.* at 17-18 (citing *CLC v. FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017)); *see also* Declaration of Brendan Fischer ¶¶ 10-39, ECF No. 13-1.

Plaintiffs also have standing to sue because, as complainants under FECA, they have a statutory right to have the FEC "act on [their] complaint during the 120-day period beginning on the date the complaint is filed," 52 U.S.C. § 30109(a)(8)(A), and have suffered a concrete injury to their programmatic activities as a result of the FEC's failure to do so. As plaintiffs have explained, *see* Opp'n to Mot. to Dismiss, ECF No. 13 at 37-51, the delay itself inflicts a distinct form of informational injury, because the Commission's failure to resolve an administrative complaint means no information about the proceedings can be made publicly available, including any legal conclusions, factual findings, or vote records. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a); Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016). *See also* 5 U.S.C. § 552(a)(2), (a)(5).

Two declarations of plaintiffs' organizational representatives establish that the FEC's unlawful delay has perceptibly impaired numerous activities central to their respective organizational missions. *See* Fischer Decl., ECF No. 13-1; Declaration of Fred Wertheimer, ECF

No. 13-2; ECF No. 13 at 26-29. Plaintiffs' public education, legislative policy, and regulatory reform programs depend on access to FECA-required campaign finance disclosures *and* information about the FEC's disposition of their administrative complaints. Fischer Decl. ¶¶ 10-11; Wertheimer Decl. ¶¶ 3-10. The FEC's egregious—and unexplained—delay in this case deprives them of both.

II. Plaintiffs' Administrative Complaints Credibly Allege that Jeb Bush and Right to Rise Super PAC Violated FECA.

Plaintiffs' administrative complaints provide substantial evidence that Bush was engaging in campaign activity without registering as a candidate, that he illegally used money raised outside of federal contribution limits and source restrictions ("soft money") to do so, and that he failed to report his campaign activity, including testing-the-waters activities, as required by FECA. *See* ECF No. 1-2 ¶¶ 41-49. The administrative complaints also establish with substantial evidence that Bush and his agents "established, financed, maintained, [and] controlled" RTR, 52 U.S.C. § 30125(e)(1), which "act[ed] on his behalf" by raising and spending millions of dollars of soft money before and after the official start of his candidacy to promote his presidential campaign. *See* ECF No. 1-1 ¶¶ 37-44.

Administrative complaints filed with the FEC are credible where they present "specific evidence" of the violations alleged. *Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, at *3 (D.D.C. Nov. 19, 1984). Plaintiffs' administrative complaints provide specific evidence that Bush had begun "testing the waters" and engaging in active campaigning months before formally announcing his candidacy, including a wealth of public reports and Bush's own statements revealing his extensive travel, fundraising efforts, meetings, and speeches across the country. ECF No. 1-2 ¶¶ 4, 7-13, 17-21; ECF No. 1-1 ¶¶ 3-10, 20-26. The complaints also provide specific evidence gleaned from public reporting that Bush and his associates were funding his

"pre-candidacy" activities through the creation, direction, and control of RTR's operations. ECF No. 1-2 ¶¶ 5-7; ECF No. 1-1 ¶¶ 11-19. Though Bush treated RTR as an arm of his campaign, RTR is in fact a super PAC, which entitled it to raise contributions outside of FECA's otherwise applicable amount limits and source restrictions *only if* it made only *independent* expenditures and neither contributed to, nor coordinated its spending with, a candidate. *See* FEC Advisory Op. 2010-11.

Plaintiffs' administrative complaints therefore credibly allege, and present substantial evidence, that Bush and RTR violated FECA's soft-money prohibition, 52 U.S.C. § 30125(e)(1), which prohibits a candidate or an entity (like RTR) that is established, financed, maintained, or controlled by the candidate from soliciting, receiving, directing, and spending contributions that do not comply with FECA's contribution limits and source restrictions. The complaints also credibly allege that Bush began testing the waters and actively campaigning long before he officially declared his candidacy, used soft money raised via RTR to do so, and thus violated the candidate registration and reporting requirements under 52 U.S.C. §§ 30102(e)(1), 30103, and 30104, and applicable candidate contribution limits under 52 U.S.C. §§ 30116(a)(1) and 30118.

III. The FEC's Delay in Acting on Plaintiffs' Administrative Complaints Poses a Substantial and Ongoing Threat to the Electoral System.

The conduct alleged in plaintiffs' administrative complaints constitutes a substantial and ongoing threat to the integrity of the election system since there is a significant likelihood that this type of illegal activity will continue, and even increase, in the absence of effective enforcement. *See Percy*, 1984 WL 6601, at *3 (finding that "[t]he significance of the threat to the integrity of the [] election" is "obvious" where there is a "likelihood" that the illegal activity will continue); *see also DSCC*, 1996 WL 34301203, at *5 ("The threat to the electoral system is highlighted not

only by the amounts of money involved and the impact upon close elections, but by the serious threat of recurrence.").

The FECA provisions at issue in this action prevent circumvention of FECA's core mandates, including its contribution limits and comprehensive disclosure regime for candidate committees. Candidate contribution limits effectuate the "Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). And "our system of representative democracy is undermined" when candidates—and *de facto* candidates—solicit large contributions in support of their campaigns via "independent" entities operating outside the Act's limits, prohibitions, and disclosure requirements. *Id.* at 26-27.

Failing to take action against the manifest violations alleged in plaintiffs' administrative complaints "not only makes it eminently possible" that other candidates will exploit the pre-candidacy period to skirt the Act's limits, "but also provides a clear roadmap for doing so." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citing *McConnell v. FEC*, 540 U.S. 93, 177 n. 69 (2003)). By holding himself out as a candidate in everything but name, Bush enjoyed all of the benefits that candidate status affords—including legitimacy in the eyes of large donors—with none of FECA's corresponding obligations or constraints. Allowing these violations to go uncorrected thus opens "an immense loophole that would facilitate the circumvention of the Act's contribution limits" and clearly creates "'the potential for gross abuse.'" *Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). Permitting such blatant evasion of FECA's candidate disclosure requirements and contribution limits is plainly "inconsistent with the statutory mandate." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

Undisclosed campaign contributions and expenditures undermine the democratic system by denying the electorate necessary information about precisely who is advocating for and against candidates for federal office; moreover, complete and accurate disclosure is critical to enforcing other aspects of FECA, including contribution limits and restrictions on coordination between candidate campaigns and outside groups. *See Buckley*, 424 U.S. at 66-68.

Furthermore, the nature of the threat to electoral integrity is substantial where, as here, the conduct alleged is contrary to and undermines the principal purposes of FECA—preventing corruption and its appearance and ensuring comprehensive disclosure of all sources of a candidate's financial support. *See DSCC*, 1996 WL 34301203, at *5 (finding that the underlying matter involved a substantial threat when it "involve[d] allegations" concerning "one of the principal purposes of FECA").

IV. The FEC's Failure to Act on Plaintiffs' Administrative Complaints Is Not Excused by Lack of Resources, Competing Priorities, or Lack of Information.

Because the FEC has failed to appear in this action, it has put forward no evidence that its failure to act is the result of lack of resources, competing priorities, or lack of information. *Cf. Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. Indeed, the evidence provided in plaintiffs' administrative complaints, which relies on Bush's own statements and information available from public reporting, is more than sufficient to allow the FEC to proceed expeditiously. *See Percy*, 1984 WL 6601, at *4 (finding agency's delay unreasonable where "[m]uch of the information in the complaint could be verified from the FEC's own records"). The FEC has thus failed to carry its burden of showing that its delay in acting on plaintiffs' administrative complaints is reasonable. *See id.* (placing the burden of showing lack of resources on the FEC because "knowledge as to the limits of [agency] resources is exclusively within control of the Commission").

Moreover, "[w]hatever deference an agency is due in resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period." *DSCC*, 1996 WL 34301203, at *5. Here, the FEC has failed to take any action on plaintiffs' complaints for over five and half years—a delay that is unquestionably unreasonable.

Finally, even if the FEC's failure to act were due to the press of other business, a ruling for plaintiffs could provide the Commission an opportunity to relieve its burden rather than add to it. Congress included an alternative enforcement mechanism in FECA, authorizing private actions against administrative respondents when the FEC does not or cannot act. *See* 52 U.S.C. § 30109(a)(8)(C) (authorizing private right of action in federal court against administrative respondent should the FEC fail to conform to the court's judgment within thirty days). If the FEC fails to conform within 30 days to this Court's order to act, whether due to the agency's prioritization of other matters or for any other reason, FECA authorizes plaintiffs to file suit directly against Bush and RTR. Notably, that outcome would ease the Commission's enforcement burden and would avoid any concern about "the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80.

V. Plaintiffs' Administrative Complaints Do Not Raise Novel Issues.

Although the magnitude of Bush's and RTR's violations are particularly significant, the issues raised in plaintiffs' administrative complaints are not novel. The candidate and political committee registration requirements of 52 U.S.C. §§ 30102(e)(1) and 30103, the definition of "candidate" in 52 U.S.C. § 30101(2), and the comprehensive disclosure regime of 52 U.S.C. § 30104 have been in effect since the mid-1970's. And the soft-money prohibition of 52 U.S.C. § 30125(e)(1) was added to FECA nearly 20 years ago as a key reform of the Bipartisan Campaign Reform Act of 2002.

Moreover, in enforcement, advisory opinion, rulemaking, and public education contexts, the FEC has repeatedly explained and engaged in analyses to determine whether a candidate has properly and timely registered an authorized committee, exceeded applicable contribution limits, or properly disclosed testing-the-waters activities, as well as whether a candidate and/or an outside group has violated the "soft money" prohibitions.[3]

Accordingly, the FEC is familiar with the relevant law and analysis regarding each of the individual violations of 52 U.S.C. §§ 30102, 30103, 30104, 30116, 30118, and 30125 alleged in plaintiffs' administrative complaints, and the issues raised are not novel.

VI. The FEC's Delay Violates the "Rule of Reason" and Runs Contrary to Congressional Intent that the Commission Act Expeditiously.

The FEC's delay in acting on plaintiffs' administrative complaints is unreasonable. Although "Congress did not impose specific time constraints upon the Commission to complete

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[3] *See, e.g.*, First Gen. Counsel's Report at 4, 13-24, MUR 6928 (Rick Santorum) (May 12, 2017), https://www.fec.gov/files/legal/murs/6928/19044457439.pdf (recommending reason to believe that a 2016 Republican presidential candidate violated testing-the-waters regulations and that a corporation and the corporation's PAC violated the soft-money prohibition by funding some of those activities); Factual and Legal Analysis at 4, MUR 7109 (Portantino) (May 18, 2017), https://www.fec.gov/files/legal/murs/7109/17044415976.pdf (enforcing soft-money prohibition and noting that the provision is "designed to prevent the use of funds that are outside the limitations and prohibitions of the Act in federal elections, and to ensure that all funds used in federal elections are reported"); FEC Advisory Op. 1985-40 at 6-9 (Republican Majority Fund), https://www.fec.gov/files/legal/aos/1985-40/1985-40.pdf (concluding that a prospective presidential candidate's payments for, *inter alia*, attending state and regional party meetings, traveling to early primary states, and establishing steering committees in Iowa and New Hampshire were testing-the-waters expenses); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47387, 47407 (Aug. 8, 2003) (noting that the testing-the-water provisions, together with those regulating publicly funded presidential candidates, "were designed to address situations where unauthorized political committees closely associated with a particular individual planning to run for President defray costs that are properly treated as in-kind contributions unless reimbursed by the Presidential campaign"); Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992-93 (Mar. 13, 1985) (explaining the scope of testing-the-waters activities); FEC, *Testing the waters for possible candidacy*, https://www.fec.gov/help-candidates-and-committees/registering-candidate/testing-the-waters-possible-candidacy (last visited Mar. 25, 2021) (featuring detailed guidance for potential candidates about testing-the-waters requirements).

final action . . . it did expect that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter." *DSCC*, 1996 WL 34301203, at *7. While courts have declined to find that the FEC must act on every complaint within 120 days or within an election cycle, *see FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986), this "is not the equivalent of unfettered FEC discretion to determine its own time line," *DSCC*, 1996 WL 34301203, at *8. Indeed, the multitude of "short deadlines governing the speed with which such complaints must be handled," *Rose v. FEC*, 608 F. Supp. 1, 11 (D.D.C. 1984), itself demonstrates that Congress expected enforcement actions to advance expeditiously. This is because "[t]he deterrent value of the Act's enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame." *DSCC*, 1996 WL 34301203, at *8; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding that an agency's unreasonable delay "signals the breakdown of regulatory processes") (internal quotation marks omitted).

The FEC's failure to take any action on plaintiffs' administrative complaints for over five and a half years signals a clear regulatory breakdown. Indeed, as RTR's invocation of FECA's statute of limitations suggests, *see* Int.'s Mot. to Dismiss, ECF No. 11 at 13, this case is closer to agency failure to act than it is to mere delay. While the reasonableness of *some* FEC enforcement delays may present a closer case, it is hard to conceive of any justification for an over *five-year* delay that would not eviscerate the statutorily prescribed enforcement process that gave rise to this action. *See* 52 U.S.C. § 30109(a), (a)(8)(A).

Even before the Commission lost a quorum in 2019, it had over four years in which to act on plaintiffs' complaints. *See supra* Statement of Facts ¶ 18. And in the three months since last regaining its quorum, the FEC has made no indication whatsoever that it is going to act. *Id.* ¶¶ 19-

20. At this time, it appears that the only mechanism for ensuring the allegations in plaintiffs' administrative complaints will be investigated and adjudicated in a reasonable time frame is an order from this Court requiring the FEC to conform, the failure of which would allow plaintiffs to avail themselves of FECA's private right of action. *See* 52 U.S.C. § 30109(a)(8)(C).

VII. The FEC's Delay Prejudices Plaintiffs and the Public.

The FEC's failure to take action on plaintiffs' administrative complaints damages the public's confidence in our election system by allowing manifest and significant violations of FECA to go uninvestigated and unredressed. Likewise, the lack of enforcement and legal consequences for breaking federal campaign finance law emboldens other candidates and committees who might seek to emulate Bush and RTR to flout FECA's requirements, and to do so openly without any expectation of regulatory scrutiny. *See DSCC*, 1996 WL 34301203, at *8 ("[T]hreats to the health of our electoral processes [] require timely attention . . . [and] should not be encouraged by FEC lethargy."). Because the FEC has failed to act on CLC's administrative complaints, plaintiffs and the electorate at large will continue to suffer harm as a result of being denied critical information, to which they are statutorily entitled, regarding the sources and amounts of a presidential candidate's campaign spending.

The particularly egregious nature of this delay also prejudices plaintiffs by denying them information about how the FEC is interpreting key FECA provisions. If the FEC is permitted to withhold a decision on this matter *ad infinitum*, plaintiffs will never learn "the basis" of its inaction, *see* 11 C.F.R. § 111.20(a), and indeed, have no way to ensure that their administrative complaints are being processed even-handedly and consistent with the law. It is hard to imagine a more meritorious application of FECA's remedy for unlawful delay.

CONCLUSION

Plaintiffs' uncontested evidence establishes that Defendant FEC has acted contrary to law

in failing to take action on the underlying administrative complaints. Plaintiffs have standing to bring this claim and are entitled to an entry of default judgment against the Defendant. Thus, plaintiffs respectfully request that the Court:

(1) Enter judgment that the FEC's failure to act on plaintiffs' administrative complaints is contrary to law under 52 U.S.C. § 30109(a)(8)(A);

(2) Order the FEC to conform to the judgment within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C); and

(3) Award plaintiffs their costs of $400 incurred in this action pursuant to 28 U.S.C. § 1920.

Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I caused a true and correct copy of the foregoing document 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.

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