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' REPLY IN FURTHER SUPPORT OF MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

In opposing plaintiffs' motion for default judgment, intervenor-defendant Right to Rise ("RTR") relies on two general arguments—neither of which defends the FEC's now nearly six-year delay on plaintiffs' administrative complaints. First, RTR rehashes the claims in its motion for reconsideration pertaining to plaintiffs' standing; second, it offers a series of unsustainable arguments asserting that default judgment is procedurally improper because it precludes RTR from presenting its "defenses" on "the merits."

The jurisdictional issue has been thoroughly litigated, and RTR's opposition adds nothing new in terms of either factual allegations or legal arguments with respect to plaintiffs' standing. As for intervenor's other arguments, it is unclear what substantive or procedural rights RTR believes it is being denied: plaintiffs awaited the Court's disposition of RTR's motion to dismiss before seeking entry of default against the FEC or moving for default judgment; they conferred with RTR before filing this motion; and RTR has now presented its arguments in response. In other words, the relevant "merits" question in this litigation *has* received the benefits of adversarial

briefing.

More fundamentally, the merits of this action for unlawful agency delay are not complex, and further motions practice would just needlessly extend the delay. Although RTR suggests otherwise, the Court need not decide whether RTR or any other administrative respondents are liable for the substantive violations alleged in plaintiffs' FEC complaints, nor must it authorize remedial action against respondents directly. Indeed, the judicial review provision in the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8), does not countenance either of those remedies. The sole, dispositive question is whether the FEC's indefensible—and undefended—five-and-a-half-year delay is contrary to law; if it is, the sole remedy FECA provides is an order declaring that the Commission's failure to act is contrary to law and ordering it to conform to such declaration within 30 days.

Indeed, given that the FEC has not appeared to provide *any* factual defense of its prolonged inaction, it is not clear what RTR proposes to gain from full "summary judgment" briefing beyond further delay. *See* RTR Opp'n to Mot. for Default J. at 8, ECF No. 24. At the risk of stating the obvious: RTR is not the FEC; does not purport to have any creditable explanation for the FEC's protracted delay beyond bare speculation about undisclosed Commission votes; and cannot claim to know how, whether, or why the Commission has acted on the complaints internally because the matters remain confidential until resolved. 52 U.S.C. § 30109(a)(12); 11 C.F.R. § 111.21; *see generally* Pls.' Opp'n to Mot. to Dismiss at 29-38, ECF No. 13.

RTR now seeks to avert the straightforward resolution of this delay case by demanding "the opportunity to defend the case on the merits," RTR Opp'n to Default at 11—not with respect to the "merits" of this delay action, but instead as to the "merits" of the administrative complaints underlying this action, which it claims the Commission has "functionally" dismissed. *Id.* at 9.

Apart from being completely hypothetical and irrelevant to this case, RTR's proposed defense of this nonexistent dismissal of Matter Under Review ("MUR") 6927 is impossible. There is no such dismissal, nor any agency rationale that could even form the basis for the Court's review of this hypothesized event; and in fact, the absence of a statement of reasons explaining a Commission dismissal would itself be contrary to law. *See Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

RTR presents no sound arguments that would justify the FEC's delay or preclude the entry of default judgment.

ARGUMENT

I. Intervenor RTR Does Not Refute Plaintiffs' Arguments that the FEC's Delay Is Contrary to Law.

RTR makes no attempt to counter plaintiffs' argument that the FEC has unlawfully failed to act on plaintiffs' administrative complaints. Instead, RTR's opposition primarily reiterates the same jurisdictional arguments already aired in two full rounds of briefing focused on plaintiffs' standing, and otherwise rests on drawing an illusory distinction between the "merits" of this action against the FEC for unlawful delay and the merits of a motion for default judgment against the FEC under Rule 55(d). The heightened standard for default against the government ensures that this is a distinction without a difference.

Indeed, notwithstanding RTR's "presence in this case as an intervening defendant," RTR Opp'n to Default at 2, there is no "irreconcilability" occasioned by granting default judgment against the FEC in a case where the sole merits question regards whether *the FEC's* unexplained almost six-year delay is contrary to law. Provided plaintiffs have proven their standing to the Court's satisfaction, the unprecedented and unexplained length of this delay is alone sufficient to warrant a contrary-to-law finding under FECA's remedy for unlawful agency delay. 52 U.S.C.

§ 30109(a)(8).

A plaintiff in a delay case 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. *Id.* § 30109(a)(8)(C). The undisputed facts here clearly show that the FEC has unreasonably delayed in this matter and failed to satisfy its obligation to act on plaintiffs' complaints expeditiously—or to take any action on the complaints, period. *See Democratic Senatorial Campaign Comm. v. FEC*, No. 95-cv-0349, 1996 WL 34301203, at *4 (D.D.C. Apr. 17, 1996) ("*DSCC*"). And while default against the government is generally 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)).

A. Intervenor has not attempted to defend the delay under the governing standard.

In plaintiffs' motion for default judgment, they identified the *Common Cause* and *TRAC* factors as the relevant standard under which to assess their claim. *See* Pls.' Mot. for Default J. at 7-8; *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C 1980); *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984).

Plaintiffs first demonstrated that their administrative complaints credibly allege that Jeb Bush and RTR Super PAC violated FECA by presenting specific evidence that Bush had been operating as a de facto candidate "at least since January 2015," May 27, 2015 Admin. Compl., ECF No. 1-1 ¶ 5, long before formally announcing his candidacy in June 2015, without registering as a candidate or complying with FECA's comprehensive disclosure requirements for federal candidates, *see* 52 U.S.C. §§ 30102(e)(1), 30103, 30104; they further credibly alleged that Bush had illegally funded his nascent campaign through the creation, direction, and control of an

"independent" super PAC operating on Bush's behalf, in violation of FECA's soft-money prohibition, *id.* § 30125(e)(1). *See* March 31, 2015 Admin. Compl., ECF No. 1-2 ¶¶ 4, 5-13, 17-21; ECF No. 1-1 ¶¶ 3-26. Plaintiffs' administrative complaints therefore credibly allege and present substantial evidence that Bush and RTR violated FECA's comprehensive scheme of candidate contribution limits, source restrictions, and disclosure requirements.

Plaintiffs next demonstrated that the FEC's delay in acting on their administrative complaints poses a substantial and ongoing threat to the electoral system by failing to address a type of illegal activity that is likely to continue, and even intensify, without effective enforcement. *See Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, at *3 (D.D.C. Nov. 19, 1984) (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). Allowing these flagrant abuses of FECA's soft-money limits and disclosure provisions to continue damages the public's confidence in our election system and emboldens other candidates to violate campaign finance law. And these violations run directly contrary to FECA's core purposes of preventing corruption and securing comprehensive disclosure of all sources of federal candidates' 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").

The FEC's extreme, nearly six-year delay in acting on plaintiffs' administrative complaints cannot be excused by insufficient resources, competing priorities, or a lack of credible evidence. Plaintiffs supported the allegations in their administrative complaints with reliable, publicly available material drawn from Bush's own statements and abundant news reports; this was more than enough to allow the FEC to proceed expeditiously. *See Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984) (finding agency's delay unreasonable

where "[m]uch of the information in the complaint could be verified from the FEC's own records"). And the extraordinary length of this delay is unquestionably unreasonable, limiting the deference due to the agency, *see DSCC*, 1996 WL 34301203, at *5; indeed, the Commission's inexplicable paralysis in these matters indicates a clear regulatory breakdown, *id.* at *8, making judicial intervention all the more essential.

While RTR claims that the agency's extended inaction amounts to functional action—*i.e.*, a "decision" not to authorize an investigation or pursue enforcement, it provides no factual or statutory basis for that claim. *See* RTR Opp'n to Default at 1-2, 5. Nothing in FECA or D.C. Circuit precedent permits the Commission to withhold a decision on an administrative complaint in perpetuity or to "functionally" dismiss administrative complaints without publicizing its rationale or voting records: that is why Congress authorized distinct remedies for delay *and* for dismissal, and why Circuit precedent requires the FEC (or controlling blocs of FEC Commissioners) to explain dismissal decisions, even where they lack four votes. *See infra* Part III.

Finally, the FECA violations alleged in plaintiffs' administrative complaints are novel only in their magnitude and brazenness. The underlying legal issues, however, are unexceptional. The Commission has resolved several enforcement complaints of similar vintage involving allegations of testing-the-waters and soft-money violations by 2015-16 candidates, *see, e.g.*, First Gen. Counsel's Report at 4, 13-24, MUR 6928 (Rick Santorum) (May 12, 2017); Factual and Legal Analysis at 4, MUR 7109 (Portantino) (May 18, 2017), and has promulgated rules, issued authoritative policy statements, rendered advisory opinions, and provided extensive regulatory guidance on both topics, *see, e.g.*, 11 C.F.R. §§ 100.72, 100.131, 101.3, 104.13; FEC Advisory Op. 1985-40 at 6-9 (Republican Majority Fund); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47387, 47407 (Aug. 8, 2003); Payments Received

for Testing the Waters Activities, 50 Fed. Reg. 9992-93 (Mar. 13, 1985); FEC, *Testing the waters for possible candidacy*, https://www.fec.gov/help-candidates-and-committees/registering-candidate/testing-the-waters-possible-candidacy (last visited Apr. 16, 2021). Thus, novelty likewise cannot excuse the FEC's prolonged inaction.

B. Intervenor brings forth no new challenges to plaintiffs' standing.

RTR does not refute or even address any of these arguments, instead choosing to focus on its claim that plaintiffs lack standing. But here, too, RTR offers no new arguments. Instead, it simply repeats its assertion that plaintiffs lack a cognizable informational injury under FECA, for the same supposed reasons already outlined in its pending Motion for Reconsideration and original Motion to Dismiss. As explained in plaintiffs' briefing on those motions, and substantiated by the accompanying Declarations of Brendan Fischer and Fred Wertheimer, *see* ECF Nos. 13-1 and 13-2, plaintiffs have established cognizable informational and organizational injuries to provide standing to challenge the Commission's inaction on their administrative complaints. *See generally* Pls.' Opp'n to Mot. to Dismiss; Pls.' Opp'n to Mot. for Reconsideration, ECF No. 21.

RTR only challenges one aspect of plaintiffs' standing, focusing on the informational injury they assert with respect to Bush's unreported campaign activity preceding June 2015 while ignoring the distinct informational and organizational injuries plaintiffs suffer by virtue of the FEC delay itself. *See* Pls.' Opp'n to Mot. to Dismiss at 29-38; Pls.' Mot. for Default J. at 9-11, ECF No. 23. With respect to the former, and as plaintiffs have explained in more detail elsewhere, Bush's extensive "pre-candidacy" expenditures—whether he was "testing the waters" of a possible presidential campaign or had crossed over into active candidacy, *see* 11 C.F.R. §§ 100.72, 100.131—were subject to disclosure under FECA and FEC regulations to the same extent and in the same form as any disbursements by a federal candidate. *See, e.g.*, Pls.' Opp'n to Mot. to

Dismiss at 5-6, ECF No. 13; Pls.' Mot. for Default J. at 9-10, 15-16, ECF No. 23. Considering the "protracted period of time" between Bush's first reported testing-the-waters disbursement in May 2014 and his declaration of candidacy in June 2015, *see* 11 C.F.R. § 100.131(b)(4), and the magnitude of his known travel and campaign activity over this thirteen-month period, the Bush campaign's eventual disclosure in July 2015 of a mere 50 testing-the-waters disbursements, which according to RTR total less than $400,000, cannot possibly account for all of his reportable campaign expenditures between May 2014 and June 2015. *See* Pls.' Opp'n to Mot. to Dismiss at 20; Pls.' Opp'n to Mot. for Reconsideration at 10-11 & nn.15-19, ECF No. 21; Pls.' Mot. for Default J. at 9-10.

RTR now suggests that plaintiffs have "shift[ed] their theory," RTR Opp'n to Default at 6, because plaintiffs have again noted that Bush's reported testing-the-waters activity could not capture the universe of reportable campaign expenditures that predated June 2015. But throughout this litigation, plaintiffs have maintained that the campaign's disclosure of *some* testing-the-waters activity was only a fraction of the full extent of Bush's reportable campaign spending over this period of testing the waters and de facto candidacy. *See* Pls.' Opp'n to Mot. to Dismiss at 20 (noting that Bush campaign's single $1,089 testing-the-waters disbursement for travel "cannot possibly account for Bush's reported zigzags across the country to meet other high-profile individuals and to attend countless fundraising events"); *id.* at 20 n.6 (noting 50 total testing-the-waters disbursement entries); Pls.' Opp'n to Mot. for Reconsideration at 10-11 & nn.15-19. *Cf. Common Cause v. FEC*, 108 F. 3d 413, 418 (D.C. Cir. 1997) ("[T]he nature of the information withheld is critical to the standing analysis.").

To date, the FEC has neither acted on plaintiffs' administrative complaints nor appeared, filed an answer, or otherwise defended in this action. McAllen Decl. ¶ 7, ECF No. 23-1. Its failure

to act on the administrative complaints is unlawful and unjustified when assessed under the relevant *TRAC* factors. RTR has not even attempted to rebut this conclusion, nor to offer any new arguments challenging plaintiffs' standing. Plaintiffs therefore reiterate their request, pursuant to 52 U.S.C. § 30109(a)(8)(c), that the Court declare the FEC's failure to act contrary to law and direct the FEC to conform within 30 days.

II. Plaintiffs' Claims Are Not Unredressable or Time-Barred.

RTR claims that plaintiffs have failed to justify default judgment "because the statute of limitations on Plaintiffs' remaining FECA claim has expired." RTR Opp'n to Default at 8. This is both irrelevant and untrue.

As a threshold matter, RTR again identifies the wrong statute of limitations—repeatedly—in pointing to 52 U.S.C. § 30145, which exclusively applies to *criminal* matters. *See, e.g.*, RTR Opp'n to Default at 4, 8, 9, 11. In fact, "FECA itself contains no explicit limitations period" for civil enforcement actions, as this Court has recognized, but "courts have applied the catch-all five-year limitations period set forth in 28 U.S.C § 2462" to civil cases brought by the FEC. *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 23 (D.D.C. 2019), *motion to certify appeal denied*, 415 F. Supp. 3d 143 (D.D.C. 2019).[1]

First, plaintiffs' cause of action against the FEC is not itself time-barred. The general five-

[1] 52 U.S.C. § 30145 provides, in relevant part, that "No person shall be prosecuted, tried, or punished for any violation . . . unless the indictment is found or the information is instituted within 5 years after the date of the violation." Although this provision does not govern a civil enforcement suit, it also does not support the principle for which it is cited by intervenor, *i.e.*, that it bars the FEC from proceeding with an investigation or enforcement action "unless the FEC finds through an affirmative vote of at least four Commissioners reason to believe that a respondent violated FECA *within five years of the date of the alleged violation*." RTR Opp'n to Default at 8 (citing 52 U.S.C. § 30145). FECA places no limitation on the Commission's authority to conduct an *administrative* investigation beyond five years. And in any event, any possible application of the correct five-year statute of limitations under 28 U.S.C. § 2462 would not bar equitable relief, as explained more fully below.

year statute of limitations that has been applied by some courts to the FEC's civil enforcement actions, 28 U.S.C. § 2462, does not govern plaintiffs' suit or bar the equitable relief they seek, *i.e.*, an order declaring the FEC's delay contrary to law and instructing the FEC to conform. Intervenor does not contend otherwise.

Instead, RTR argues that "the time in which the *FEC* could take any authorized action in connection with plaintiffs' administrative complaints has passed." RTR Opp'n to Default at 8 (emphasis added). But the statute of limitations is thus a defense that only possibly becomes relevant if and when the FEC takes action against RTR. It does not bear upon whether the FEC's delay in MUR 6927 is unlawful. If anything, RTR's focus on the statute of limitations underscores the extraordinary nature of the FEC's inaction here; if indeed the FEC were to delay to the point that it is time-barred from enforcing FECA, such delay would be per se unreasonable and unlawful.

In any event, the applicable statute of limitations does not bar the type of equitable remedy that plaintiffs ultimately seek from FEC action with respect to MUR 6927—namely, disclosure under FECA. As the D.C. Circuit has held, Section 2462 bars only actions by the government to impose "punishment," *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996), and not to actions brought for "purely remedial and preventative" relief, such as cease-and-desist orders or other equitable relief to remedy or prevent violations. *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010); *see also SEC v. Brown*, 740 F. Supp. 2d 148, 156-57 (D.D.C. 2010). Thus, district courts in the District of Columbia have held that the FEC is not barred from seeking equitable relief to remedy FECA violations even where penalties for those violations would be barred by Section 2462. *See, e.g.*, *FEC v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997) ("[S]tatutes of limitation are not controlling measures of equitable relief."); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 21 (D.D.C. 1995) ("[I]t is well settled that '[t]raditionally and

for good reasons, statutes of limitation are not controlling measures of equitable relief.'") (second alteration in original) (citation omitted). The statute of limitations thus does not impact plaintiffs' ability to have their informational injury redressed.

In another recent delay suit in which the FEC elected to appear, it notably argued that "[t]he expiration of any statute of limitations, however, would not affect Complainant's interest in obtaining the information the Commission releases at the termination of an enforcement matter. That information would be disclosed in the normal course regardless of any limitations period." Br. for the FEC at 26, *Campaign Legal Center v. FEC*, No. 20-5159 (D.C. Cir. Oct. 14, 2020). Recognizing the principle that statutes of limitation generally do not apply to equitable remedies, the FEC continued that "[t]he only possible impact that the expiration of a statute of limitations could have would be on the Commission's ability to pursue civil enforcement against the Administrative Respondents." *Id.* at 26-27. Therefore, according to the FEC's own statements, the statute of limitations does not prevent the FEC from taking action that would cure plaintiffs' informational injury after the five-year statute of limitations has expired.[2]

III. Intervenor Should Not Be Permitted to Delay Resolution of This Case by Invoking Merits Arguments That It Does Not Have the Capacity to Make.

Intervenor also argues that "[t]he Court should still wait on entering default judgment against the FEC until Right to Rise has concluded its defense of this case." RTR Opp'n to Default at 9. But the entirety of its argument supporting this proposition is based upon the same faulty premise: that RTR has a right to "defend" the merits of a putative FEC dismissal that has not occurred. The argument is not simply premature, but spurious.

[2] Moreover, the disclosure violations here are ongoing, so even to the extent that 28 U.S.C. § 2462 would apply to any potential future action by the FEC, the clock has not yet begun to run. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 236 F. Supp. 3d. 378, 392 (D.D.C. 2017).

This legal action challenges the FEC's undue delay in resolving MUR 6927 as contrary to law under 52 U.S.C. § 30109(a)(8)(A), seeking "injunctive and declaratory relief to compel defendant . . . to take action on plaintiffs' administrative complaint[s]." Compl. ¶ 2, ECF No. 1. The FEC has not dismissed the administrative complaints underlying this action; indeed, it is unclear if the FEC has taken any significant action on the complaints at all.

Insofar as RTR has a legal or factual argument germane to the "merits" of this delay case, it can and should present it to the Court. But it is clear that intervenor has no interest in such an argument, and if anything, its repeated claims that any FEC action is now time-barred is an implicit admission that the delay is unreasonable and extreme. *See supra* Part II. Instead, RTR claims a right to address the factual and legal arguments in the administrative complaints underlying this delay suit, claiming that the FEC's inaction is the "functional equivalent" of a *dismissal* of those complaints on the merits, and thus, in intervenor's mind, permits arguments that would otherwise be wholly beyond the scope of a delay suit. RTR Opp'n to Default at 9.

RTR will have the opportunity to make these arguments if and when the FEC dismisses the administrative complaints and the dismissal is challenged; or, in the unlikely event that the FEC fails to conform to an order of this Court such that a private right of action is authorized, if and when plaintiffs elect to pursue such an action. Intervenor's insistence that it *now* be permitted to raise these wholly irrelevant arguments based on its theory of "functional dismissal" is nothing but a tactic to forestall resolution of this case.

A. FEC delay with respect to an administrative complaint is distinct from its dismissal of the complaint.

At the risk of belaboring the obvious, a delay action is distinct from a dismissal action under 52 U.S.C. § 30109(a)(8)(A), as a review of the FEC's complaint process will illustrate.

Upon receipt of an administrative complaint, the Commission follows a statutorily

mandated pathway of possible agency action. After review of respondents' responses and the recommendations of the FEC's Office of General Counsel ("OGC"), the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. *Id.* § 30109(a)(2). Following any such investigation, the Commission votes on whether to find probable cause to believe a FECA violation occurred, *id.* § 30109(a)(3), and if so, seeks a conciliation agreement with the respondent, which may include civil penalties, *id.* § 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may vote to file a civil action in federal district court. *Id.* § 30109(a)(6)(A).

If the FEC fails to timely take such actions or to otherwise resolve an administrative complaint "during the 120-day period beginning on the date the complaint is filed," the administrative complainant may avail itself of FECA's judicial remedy for unlawful delay, *id.* § 30109(a)(8)(A), to compel FEC action. That is the cause of action pursued here.

If the Commission cannot muster the four votes necessary to proceed at any of these decision-making junctures, it typically votes to dismiss the complaint. Even at the reason-to-believe stage, a dismissal can take many possible forms: it may result from a unanimous agreement among Commissioners that the reason-to-believe threshold was not crossed or that discretionary considerations counseled dismissal; but, alternatively, it might have resulted from a deadlocked vote in which the Commissioners reached conflicting conclusions or disagreed with OGC's recommendations. *See* FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007). Upon dismissal, if the "controlling" Commissioners who voted not to proceed diverged from OGC's recommended action, they must issue a "statement of reasons" to provide a basis for any subsequent judicial

review. *Common Cause*, 842 F.2d at 449; *Democratic Cong. Campaign Comm. ("DCCC") v. FEC*, 831 F.2d 1131, 1135 & n.5 (D.C. Cir. 1987). FECA also provides that upon dismissal, the complainant may seek review of the Commission's decision under a contrary to law standard. 52 U.S.C. § 30109(a)(8)(A).

Section 30109(a)(8)(A) thus provides two distinct causes of action: one to challenge the FEC's failure to act on an administrative complaint, and one to challenge the FEC's dismissal of an administrative complaint. Intervenor attempts to conflate these two actions, and further delay resolution of this delay case, on the ground that it wishes to argue the merits of what it characterizes as the FEC's "effective" or "functional dismissal" of MUR 6927. RTR Opp'n to Default at 2, 9, 11. But the two actions implicate different legal standards, with delay suits assessed under the *TRAC* factors related to the reasonableness of the delay, *see TRAC*, 750 F.2d at 80, and dismissal cases turning on factors such as "the thoroughness, validity, and consistency of [the FEC's] agency's reasoning," *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). The actions are brought at different (and mutually exclusive) stages of the FECA enforcement process—delay suits only when the FEC has failed to take action, and dismissal suits only after the FEC has made a final determination. *See* 52 U.S.C. § 30109(a). And, perhaps most importantly, the actions turn on completely different records: delay suits review the Commission's submissions documenting its actions to address the administrative complaint; a dismissal suit exclusively reviews the Commission's rationale for dismissal, *i.e.*, the controlling statement of reasons, for whether it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Compare Common Cause*, 489 F. Supp. at 744, *with Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

There is thus no such thing as a "functional dismissal"—and certainly intervenor should

not be permitted to defend its self-serving and unfounded "presumption" that "[fewer] than four Commissioners have reason to believe that Right to Rise or the other respondents violated FECA." RTR Opp'n to Default at 10. Indeed, even if FEC inaction *could* be characterized as a constructive dismissal, the Commission's failure to provide a rationale for such dismissal—or release the MUR file underlying it—would itself be contrary to law. *See Common Cause*, 842 F.2d at 449; *DCCC*, 831 F.2d at 1135 & n.5; 11 C.F.R. § 111.20(a). RTR's attempt to characterize even a gross FEC delay as the "functional equivalent" of a dismissal does not transform this delay case into a dismissal case such that the "merits" of a hypothetical dismissal are relevant to this case's resolution.

B. Right to Rise's presence in the case is no reason to delay the entry of default judgment.

Much of RTR's argument boils down to the proposition that it is improper to dispose of this case by entering a default judgment when intervenors remain willing to defend the "merits" of the case in place of the absent defendant.[3] But this confuses a right to intervene with a "right" to present defenses not relevant to the legal action being adjudicated.

RTR does not suggest that it wishes to provide information or evidence to justify the nearly six-year delay here. Nor could it—all material information about what internal actions the FEC has taken in MUR 6927 (if any) or possible excuses for its extraordinary delay are uniquely within

[3] RTR provides no legal basis for its proposed rule that a default judgment should not be entered against one defendant in "a matter involving multiple defendants" where merely "inconsistent results will arise from entry of a default judgment." RTR Opp'n to Default at 9. The case RTR cites for this proposition, *Whelan v. Abell*, 953 F.2d 663 (D.C. Cir. 1992), vacated an order setting aside the entry of default judgment against a single defendant in a multi-defendant case; it further held that such judgments should not be set aside except in rare circumstances where the defendants' "liability is truly joint—that is, when the theory of recovery requires that all defendants be found liable if any one of them is liable—and when the relief sought can only be effective if judgment is granted against all." *Id.* at 674-75. This is not the case here, and well illustrates the oddity of permitting intervention under these circumstances.

the agency defendant's knowledge, and barred from public release until the Commission closes the MUR file. Intervenor does not even purport to be able to provide this information.

Nor is it possible for RTR to defend a hypothetical "dismissal" that has not occurred, and may well never occur. *See supra* Part III.A. Neither party here has any knowledge of the FEC's views on the substantive allegations in plaintiffs' administrative complaints, which will remain entirely unknown to plaintiffs and the public until the Commission takes final action and releases the MUR file. And, of course, no statement of reasons has been issued. Intervenor speculates that "the 'four vote' requirement and the five year statute of limitations" would be "among the legal defenses the FEC would make had four Commissioners voted in the affirmative to defend this case." RTR Opp'n to Default at 11. But this is sheer supposition. The posture of this case and the FEC's default ensures that there is no administrative record or agency argument that could form the basis of the Court's review of a "functional dismissal."

The decision in *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1 (D.D.C. 2019), does not counsel otherwise. *See* RTR Opp'n to Default at 10. There the question was whether the respondents to an administrative complaint could intervene in a case challenging the complaint's *dismissal*, where the Commission had affirmatively voted not to defend that dismissal in court. It did not suggest that an intervenor-defendant was somehow equivalent to the FEC for the purposes of defending against an unlawful FEC *delay*. And it certainly does not support RTR's extraordinary assertion that it has a right to defend a delay case by arguing the merits of a nonexistent dismissal.

Nor does RTR's invocation of FECA's private right of action justify its asserted interest in arguing the merits here. RTR complains that a "default judgment may deprive Right to Rise of the FEC's effective dismissal of MUR 6927 before Right to Rise has had an opportunity to defend the case on the merits." RTR Opp'n to Default at 9. But apart from being entirely conjectural, the

possibility of a private right of action does not make a "defense of the case on the merits" somehow responsive to a dismissal action; such a "merits" defense is both counterfactual and impossible, as discussed above. Nor does such a hypothetical outcome mean that the "FEC process will be disrupted" or the "four vote" requirement for Commission action somehow circumvented, *id.* at 11—FECA's private right of action was created precisely for situations in which agency gridlock renders it unable to carry out its statutory mandate. *See Am. Action Network*, 410 F. Supp. 3d at 6 (noting that Congress "legislated a fix" in case of "partisan deadlocks" by including a private right of action in FECA). And FECA's citizen-suit provision in no way "deprives" RTR of an opportunity to argue the merits of the substantive FECA allegations in MUR 6927, which would be central to any private action and subject to the requirements and protections of the federal rules of civil procedure. Finally, of course, RTR has had the opportunity to respond to the administrative complaints and argue the "merits" to the FEC directly, although plaintiffs can only guess as to its arguments given that the MUR file remains open and unresolved.

As a final note, insofar as RTR is objecting to the *type* of motion that plaintiffs have filed—a motion for default judgment—because of its intervention in this case, it would make no difference to plaintiffs if the motion were redesignated to be a motion for judgment on the pleadings or for summary judgment. The material facts are the same either way: the FEC has failed to act on plaintiffs' complaints for an inexcusable length of time, is not here to explain itself, and cannot be defended by the idle speculation of an intervening defendant.

CONCLUSION

For these reasons, this Court should 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) and order the FEC to conform to the judgment within 30 days.

Dated: April 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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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