UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14TH St., NW, Ste. 400
Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14TH St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256

CORRECT THE RECORD
455 Massachusetts Ave., NW
Ste. 600
Washington, D.C. 20001

Defendant-Intervenors.

Civil Action No. 1:19-cv-02336-JEB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT-INTERVENORS' AMENDED MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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Hillary for America ("HFA") and Correct the Record ("CTR") (collectively, "Defendant-Intervenors"), respectfully move to dismiss the Amended Complaint, filed by Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley, with prejudice, for lack of standing under Rule 12(b)(1) of the Federal Rules of Civil Procedure and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). In support of their Motion, Defendant-Intervenors submit as follows.

INTRODUCTION

Plaintiffs seek judicial review of the Federal Election Commission's ("Commission" or "FEC") dismissal of their administrative complaint alleging that CTR made prohibited and excessive in-kind contributions in the form of coordinated communications and other coordinated expenditures to HFA. In particular, plaintiffs allege that Defendant-Intervenors violated the Federal Election Campaign Act's ("FECA" or the "Act") contribution limits, 52 U.S.C. § 30116(a)(1), its prohibition on contributions to a candidate from union or corporate funds, *id*. § 30118(a) and (b)(2), and its requirement that candidate committees and non-connected political committees report and disclose all in-kind contributions made and accepted, *id*. § 30104(b). Am. Compl., ECF No. 15, at ¶ 1.

Plaintiffs' amended complaint, however, must be dismissed for several reasons. First, plaintiffs lack Article III standing to obtain review pursuant to FECA's narrow review provision, 52 U.S.C. § 30109(a)(8). Second, even if plaintiffs had standing—which they do not—they have failed to state a claim upon which relief can be granted because FECA provides the exclusive avenue for review of the Commission's dismissal of the administrative complaint and thus precludes portions of their claims that seek relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Third, even accepting all of plaintiffs' factual allegations as true for

purposes of this motion, plaintiffs have failed to sufficiently plead that the Commission's dismissal of plaintiffs' administrative complaint was "contrary to law." To the contrary, the Commission's dismissal of plaintiffs' complaint was lawful and thoroughly supported by Commission precedent. Accordingly, Defendant-Intervenors move this Court to dismiss Plaintiffs' amended complaint for lack of subject-matter jurisdiction and/or failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

While FECA allows any person to file an administrative complaint alleging a violation of the Act, a complainant must have suffered a legally cognizable injury sufficient to meet the requirements of Article III standing in order to obtain review under 52 U.S.C. § 30109(a)(8). An informational injury stemming from the Commission's dismissal of its administrative complaint can be sufficient to confer Article III standing, but courts have explicitly made clear that a desire for information about whether FECA has been violated is inadequate to show standing, as is a desire for information that is already publicly available. Here, that is the only information plaintiffs seek. While plaintiffs complain that they were deprived of access to information "regarding the scale and scope of CTR's expenditures coordinated with the Clinton campaign," Am. Compl., ECF No. 15, at ¶¶ 30, 31, plaintiffs' own complaint for judicial review (and their administrative complaint) demonstrates that they were aware of the activities that CTR allegedly paid for in support of HFA. Am. Compl., ECF No. 15, at ¶¶ 2, 65; *see also* Admin. Compl., ECF No. 15-1, at ¶¶ 5, 10-12, 20, 21, 24, 30, 35, 43, 49, 53, 61, 64-65, 67. Plaintiffs cannot dispute that CTR's expenditures were all publicly reported or that each transaction plaintiffs allege is illegal has been publicly disclosed in some form. Plaintiffs do not seek additional facts about these transactions, but only the legal determination that these transactions constitute coordinated expenditures. This

is not a legally cognizable injury sufficient to assert Article III standing. This Court thus lacks subject-matter jurisdiction and plaintiffs' amended complaint should be dismissed.

Moreover, plaintiffs' amended complaint fails to state a claim upon which relief can be granted. First, plaintiffs' claims under the APA must be dismissed because FECA provides an adequate judicial review mechanism, as every court to consider that issue has held. Second, plaintiffs fail to sufficiently allege that the Commission's dismissal decision was contrary to law because the controlling group of Commissioners' determination that the transactions did not constitute coordinated expenditures was based on longstanding Commission precedent and supported by the plain language of the applicable regulations. Plaintiffs have thus failed to meet their significant burden of showing that this Court should disregard the Commission's decision to dismiss.

For these reasons and those detailed below, plaintiffs' amended complaint for judicial review should be dismissed.

BACKGROUND

I. Statutory and Regulatory Background

The Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 52 U.S.C. §§ 30106, 30107, 30108. The Commission is authorized to institute investigations of possible violations of FECA. *Id*. at § 30109. It may also institute a civil action for relief if it is unable to correct or prevent any violation of the Act pursuant to its administrative enforcement processes. *Id*. § 30109(a)(6)(A).

Any person who believes a violation of the Act has occurred may file a complaint with the Commission. *Id*. § 30109(a)(1). After reviewing the complaint and any response filed by the

respondent, the Commission considers whether there is "reason to believe" a violation of the Act has occurred. *Id*. § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe, [1] the FEC may investigate the alleged violation; otherwise, the FEC dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). If the Commission votes to proceed with an investigation, it must determine whether there is "probable cause to believe" a violation occurred, which also requires the affirmative vote of at least four Commissioners. *Id*. §§ 30106(c), 30109(a)(4)(A)(i). If the Commission finds probable cause, it is required to correct or prevent the violation and to attempt to enter into a conciliation agreement with the respondent. *Id*. § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, it may institute a civil enforcement action in federal district court. *Id*. § 30109(a)(6)(A).

If at any point the Commission determines that no violation has occurred or decides to dismiss a complaint, the Act authorizes limited judicial review of the Commission's dismissal decision. *See id*. § 30109(a)(8)(A). That limited review applies equally to dismissals that result from an evenly divided vote. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)]."). A complainant must file a dismissal suit "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

The scope of a district court's judicial review of the Commission's decision to dismiss is limited. Specifically, "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir.

[1] Prior to the Commission's vote, the FEC's Office of General Counsel ("OGC") recommends to the Commission in a report whether there is "reason to believe" a violation has occurred. *Id*. § 30109(a)(2).

1997) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). The sole remedy the district court may grant in such a case is a declaration "that the dismissal of the complaint or the failure to act is contrary to law" and an order "direct[ing] the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). In cases like this one, where there is a split vote dismissal, judicial review is based on the reasoning of the Commissioners who voted to dismiss the complaint because "those Commissioners constitute a controlling group for purposes of the [dismissal] decision" since their "rationale necessarily states the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

II. Factual Background

HFA is the principal campaign committee of former United States Secretary of State Hillary Clinton, who was the nominee of the Democratic Party for the office of President of the United States in the 2016 general election. CTR is a strategic research and rapid response team that was designed to defend Secretary Clinton from baseless attacks. CTR is a nonprofit corporation registered in Washington, D.C. and has registered with the FEC as a "hybrid" or *Carey* political action committee permitted to solicit and accept unlimited contributions into one bank account, and to maintain a separate bank account subject to statutory amount limitations and source prohibitions for making contributions to federal candidates. *See* Stipulated Order and Consent Judgment, *Carey v. Fed. Election Comm'n*, No. 11-259-RMC (D.D.C. 2011) (Dkt. No. 28); FED. ELECTION COMM'N, STATEMENT ON *CAREY V. FEC* (2011), (Oct. 6, 2011), *available at* https://www.fec.gov/updates/fec-statement-on-carey-v-fec/. Defendant-Intervenors are subject to the Act, 52 U.S.C. § 30101 *et seq.*, and FEC regulations.

Beginning in May 2015, various complainants filed administrative complaints with the FEC against Defendant-Intervenors. On October 6, 2016, Plaintiffs filed an administrative

complaint that the FEC designated as Matter Under Review ("MUR") 7146, alleging there was reason to believe that Defendant-Intervenors had violated FECA's contribution limits, 52 U.S.C. § 30116(a)(1), its prohibition on contributions to a candidate from union or corporate funds, *id.* § 30118(a) and (b)(2), and its requirement that candidate committees and non-connected political committees report and disclose all in-kind contributions made and accepted, *id.* § 30104(b). Admin. Compl., ECF. No. 15-1, at ¶ 3. Specifically, plaintiffs alleged that CTR made, and HFA accepted, millions of dollars of in-kind contributions in the form of coordinated expenditures and compensation for personal services. *Id*. In response, HFA made clear that it maintained an aggressive compliance program and at all times adhered to federal campaign finance law obligations. Ex. B, HFA Response to MUR 7146, at 1. Moreover, all of the activities that plaintiffs alleged were coordinated in-kind contributions either did not qualify as "coordinated communications" under the Act because they were for "free" digital activity or were paid for by HFA according to their fair market value. *Id*.

After reviewing the various administrative complaints against Defendant-Intervenors, the FEC's Office of General Counsel ("OGC") recommended dismissing or taking no action as to most of the allegations contained therein. Ex. C, OGC First General Counsel's Report at 2-3. However, the OGC recommended that the Commissioners should find reason to believe that CTR and the Clinton campaign violated FECA by making and accepting, respectively, "unreported excessive and prohibited in-kind contributions" in the form of coordinated expenditures, and recommended that the Commissioners authorize an investigation to determine "the extent" of the unreported in-kind contributions. *Id*. at 25-26.

However, the Commission did not adopt the OGC's recommendation. On June 4, 2019, by a deadlocked vote of 2-2, the FEC's four commissioners failed to find reason to believe and failed

to authorize any investigation into the allegations raised in plaintiffs' administrative complaint. *See* Ex. D, Amended Certification, MURs 6940, 7097, 7146, 7160, and 7193 (signed June 13, 2019). The Commission voted to dismiss the complaints filed against Defendant-Intervenors and close the file. *Id*. By letter dated June 17, 2019, the Commission notified plaintiffs that it had dismissed their complaint. On August 2, 2019, Plaintiffs filed a judicial complaint against the FEC pursuant to 52 U.S.C. § 30109(a)(8). Less than three weeks after plaintiffs filed suit, the controlling group of Commissioners issued a Statement of Reasons thoroughly explaining their reasoning for voting to dismiss plaintiffs' administrative complaint. *See* Ex. A, Statement of Reasons.

In their Statement of Reasons, Commissioners Petersen and Hunter explained that they voted against finding reason to believe that CTR or HFA violated the law because (1) CTR's "internet communications in support of HFA were not in-kind contributions even if they were coordinated with Hillary for America" because they were not "public communications"; and (2) "speculative information and materials stolen by Russian intelligence operatives and published by Wikileaks does not provide reason to believe that [CTR]'s expenditures for other activities were excessive or prohibited in-kind contributions to [HFA]." *Id*. at 2.

Defendant-Intervenors moved to intervene on October 1, 2019, and simultaneously sought to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and (6). Plaintiffs then filed an amended complaint on October 29, 2019 to address the Statement of Reasons. In response, Defendant-Intervenors supplemented their motion to intervene to move to dismiss the amended complaint. On November 15, 2019, this Court granted Defendant-Intervenors' Motion to Intervene. ECF No. 19. On January 6, 2020, the FEC filed a certified list of administrative record documents. ECF No. 25. Pursuant to this Court's November 21, 2019 Order ECF No. 22, Defendant-Intervenors now file this Amended Motion to Dismiss.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge the Dismissal of their Administrative Complaint.

A. Plaintiffs are Required to Establish Article III Standing.

Plaintiffs allege that the dismissal of their administrative complaint was arbitrary, capricious, and contrary to law, and has deprived them of "access [to] information" "regarding the scale and scope of CTR's expenditures coordinated with the Clinton campaign." Am. Compl., ECF No. 15, at ¶¶ 30, 31. However, these allegations are insufficient to demonstrate standing in this action.

While "[a]ny person" who believes that the Act has been violated may file an administrative complaint with the FEC, 52 U.S.C. § 30109(a)(1), only complainants who have constitutional standing may seek judicial review of the FEC's actions under 52 U.S.C. § 30109(a)(8). Courts have repeatedly held that in challenges to the dismissal of an administrative complaint brought under 52 U.S.C. § 30109(a)(8), plaintiffs cannot rely on the statute alone to satisfy Article III standing requirements. *See Common Cause*, 108 F.3d at 419 ("Section [30109(a)(8)(A)] does not confer standing; it confers a right to sue upon parties who otherwise already have standing."); *see also Citizens for Responsibility & Ethics in Washington v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) ("*CREW 2011*") ("Having the right to file an administrative complaint with the FEC does not necessarily give Plaintiffs standing to seek judicial review of the disposition of that complaint in this Court . . ."); *Judicial Watch, Inc. v. FEC*, 180 F.3d 277 (D.C. Cir. 1999) (stating plaintiff's "standing to sue . . . must be based upon an injury *stemming from* the FEC's dismissal of [its] administrative complaint") (emphasis added).

To demonstrate Article III standing, a plaintiff must specifically establish that: "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or

imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The D.C. Circuit has cautioned that in cases like this one, where plaintiffs' "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to prove. *Common Cause*, 108 F.3d at 417 (quoting *Lujan*, 504 U.S. at 562). Further, a "deficiency on any one of the three prongs suffices to defeat standing." *CREW 2011*, 799 F. Supp. 2d at 85 (quoting *U.S. Ecology, Inc. v. U.S. Dept. of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000)).

An organizational plaintiff may have standing to sue on its own behalf "to vindicate whatever rights and immunities the association itself may enjoy" or, under proper conditions, to sue on behalf of its members asserting the members' individual rights. *Common Cause,* 108 F.3d at 417 (citation omitted). Where an organization is suing on its own behalf, it must establish "concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests . . . . Indeed, [t]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action." *Id*. (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).[2]

[2] To assert associational standing, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Common Cause*, 108 F.3d at 417 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Here, CLC has not alleged associational standing because it correctly does not claim to be a trade association or to have any members.

B. Plaintiffs Have Not Suffered a Legally Cognizable Injury Sufficient to Confer Article III standing.

Both Plaintiffs—CLC and Ms. Kelley—allege that they have suffered an informational injury as a result of the FEC's dismissal of plaintiffs' administrative complaint. CLC alleges that this informational injury has harmed its ability to carry out a central part of its mission, and Ms. Kelley alleges that it has harmed her informational interests as a voter. Am. Compl., ECF No. 15, ¶ 31. For the reasons stated below, both arguments are without merit.

1. Plaintiffs' Desire for a Legal Determination on Coordination is not a Legally Cognizable Injury.

A plaintiff can only claim an informational injury sufficient for standing in limited circumstances. To assert an informational injury, plaintiffs must allege that they are "directly deprived of information that must be disclosed under a statute." *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014); *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) ("For purposes of informational standing, a plaintiff 'is injured-in-fact . . . because he did not get what the statute entitled him to receive.'") (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)). But not just any information will do.

In evaluating whether a complainant has suffered an informational injury sufficient to confer standing to seek judicial review under 52 U.S.C. § 30109(a)(8), "the nature of the information allegedly withheld is critical to the [court's] standing analysis." *Common Cause*, 108 F.3d at 417. If the information allegedly withheld is already available to plaintiffs or is information as to whether a violation of the law has occurred, then plaintiffs have not suffered an injury in fact sufficient to confer standing. *Id.* Indeed, courts have repeatedly held that a plaintiff does not suffer an injury in fact to establish standing if it merely seeks a legal determination based on factual information that is already publicly available. *See Wertheimer v. FEC*, 268 F.3d 1070, 1074–75 (D.C. Cir. 2001) (no informational standing to pursue a legal determination that expenditures were

"coordinated" when all relevant expenditures had been publicly disclosed); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178–79 (D.D.C. 2013) (no informational standing to pursue legal determination that publicly reported expenditures exceeded applicable limitations); *CREW 2011*, 799 F. Supp. 2d at 88–89 (no informational standing to pursue legal determination that publicly reported expenditures were "in-kind contributions"). In other words, a plaintiff has no legally cognizable interest in learning solely "whether a violation of the law has occurred," *Common Cause*, 108 F.3d at 418, or in having the FEC "get the bad guys," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (internal quotation marks omitted). *See also Common Cause*, 108 F.3d at 418 ("Nothing in FECA requires that information concerning a violation of the Act as such be disclosed to the public. Indeed, even if FECA did require such disclosure, we doubt whether this requirement could create standing. To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do.").

The D.C. Circuit's decision in *Wertheimer v. FEC* controls this case. It exemplifies the correct analysis of standing where the facts indicate that the only information plaintiffs have been deprived of is a legal determination of whether a violation of the law has occurred. Like the plaintiffs here, the complainants in *Wertheimer* alleged that the Commission failed to identify certain expenditures made to benefit presidential candidates as impermissible coordinated expenditures. *Wertheimer*, 268 F.3d at 1071-73. The only difference between *Wertheimer* and this case is that in *Wertheimer* the alleged impermissible coordinated contributions were made by political parties, not a *Carey* committee. The D.C. Circuit held, however, that plaintiffs failed to satisfy their burden of demonstrating an injury in fact because they not only failed "to show . . . that they [we]re directly being deprived of any information," but also that "the legal ruling they

[sought] might lead to additional factual information." *Id*. at 1074. Appellants' counsel "did not dispute that all political parties currently report all disbursements or that each transaction appellants allege is illegal is reported in some form." *Id.* The only "fact" that was not disclosed was the "fact" of coordination. *Id*. at 1075. But the court held that "coordination" is a legal conclusion, and appellants "d[id] not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures." *Id*. This was insufficient to establish standing then, and it remains insufficient now.

Just as in *Wertheimer*, the plaintiffs in this case seek only a legal determination of coordination. *See* Am. Compl., ECF No. 15, at ¶ 95 (plaintiffs seek information "about which transactions CTR in fact 'coordinated' with the Clinton campaign"). In other words, plaintiffs do not currently lack factual information; they merely disagree with the Commission about the legal consequences of the information they already have. For example, plaintiffs cannot deny that every CTR expenditure they seek to have re-classified as an in-kind contribution has been publicly disclosed on CTR's FEC reports. And, plaintiffs readily admit that they knew CTR was coordinating its activities with HFA. Am. Compl., ECF No. 15, at ¶¶ 2, 65; *see also* Admin. Compl., ECF No.15-1, at ¶¶10-12, 20, 24. The only missing link here is a legal finding of coordination that could have enforcement consequences for Defendant-Intervenors before the Commission. Plaintiffs want to know which CTR expenditures were allegedly coordinated with HFA and which were not. But this is a legal determination and the type of informational injury that is expressly insufficient to confer standing.

Moreover, the Commission already made the decision to dismiss plaintiffs' administrative complaint because CTR's activities were not "coordinated communications" or coordinated expenditures under the Act, Commission regulations or policy, or relevant case law. Accordingly,

plaintiffs have not been deprived of any relevant information about the "scale and scope" of CTR's support of HFA. Just because plaintiffs may disagree with the Commission's legal analysis does not mean that they were deprived of information sufficient to establish a legally cognizable injury. Indeed, plaintiffs lack standing because they were not deprived of any such information.

2. The Information Plaintiffs Claim to Seek is Already Available to Them.

Well-established circuit precedent provides that plaintiffs seeking judicial review under 52 U.S.C. § 30109(a)(8) lack standing where the information they purport to seek is already available to them. *See, e.g., Judicial Watch v. FEC*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) (holding that a plaintiff who alleged reporting violations regarding his own contributions to a candidate lacked standing because he was "already aware of the facts underlying his own alleged contributions" and his judicial-review action was unlikely to produce additional facts of which the plaintiff was not already knowledgeable); *CREW 2011*, 799 F. Supp. 2d at 89 (holding that plaintiffs lacked a cognizable informational injury where they failed to "allege any specific factual information . . . that [wa]s not already publicly available"); *see also CREW v. FEC*, 475 F.3d 337, 339-40 (D.C. Cir. 2007) ("*CREW 2007*") (holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website, which contains the [sought after] list and a good deal more").

Here, plaintiffs claim that they have been deprived of information regarding the "scale and scope" of CTR's expenditures coordinated with HFA. Am. Compl., ECF No. 15, at ¶ 30.[3] But

[3] Plaintiffs also allege that they are "harmed by the FEC's failure to require CTR and [HFA] to disclose the extent of their coordinated activity" and that "the dismissal of [their] administrative complaint has deprived [them], as well as the public, of disclosure information regarding the scale and scope of CTR's expenditures coordinated with [HFA]." Am. Compl., ECF No. 15, at ¶¶ 28, 30. But this is just another way of plaintiffs alleging that they have been deprived of a legal

plaintiffs' claim of an "informational injury" is belied by the administrative record, which demonstrates that the information plaintiffs claim to seek is already available to them, and has already been used by them. In fact, plaintiffs allege in exhaustive detail that they "documented how CTR spent millions on opposition research, message development, surrogate training and booking, professional video production, and press outreach for the benefit of the Clinton campaign—and noted that, by its own admission, CTR did at least some portion of this in coordination with the Clinton campaign." *Id*. at ¶ 63. Specifically, plaintiffs alleged in their administrative complaint that the following CTR activities were done in support of and in coordination with HFA: the production of web videos; the publication of websites in support of HFA; tweeting a message about Secretary Clinton; posting positive comments about Secretary Clinton on social media platforms; the commission and distribution on its website of a poll regarding Secretary Clinton's debate performance; sending emails to supporters; contacting reporters with information supporting HFA or criticizing Secretary Clinton's opponents; providing on-camera media training to supporters of HFA and connecting those supporters to local media outlets; and hiring "trackers" to attend and film campaign events for candidates for president.[4]

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determination of coordination. Moreover, plaintiffs' alleged harms on behalf of the general public and their claim that dismissal of their complaint "undermined FECA's purposes, including [the] goal[] of preventing the corruptive impact of large 'disguised' contributions," *see id*. ¶¶ 10, 30, are not cognizable injuries. The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also CREW v. Fed. Election Comm'n*, 401 F. Supp. 2d 115, 122 (D.D.C. 2005) ("It is axiomatic that standing cannot rest on a plaintiff's alleged interest in having the law enforced . . . because such an injury is too generalized and ideological.") (citation omitted).

[4] Admin. Compl., ECF No. 15-1, at ¶¶ 5, 15-17, 19, 21, 22-23, 25, 26, 28-29, 30-32, 34, 35, 37, 43, 46-48, 49, 52, 53, 55-56, 58, 60, 61, 64-65, 66, 67.

Plaintiffs cannot now claim to be unaware of the scale and scope of CTR's work or the extent of HFA's involvement. They are not and have never been in the dark about the "true sources and scope" of Secretary Clinton's financial support as they relate to CTR. *See* Am. Compl., ECF No. 15, at ¶ 16. And plaintiff Kelley cannot claim to have been deprived of information that she would have used to evaluate Secretary Clinton's candidacy for office. All of the information about CTR's political activity has been disclosed on its FEC reports and publicly available news reports, many of which plaintiffs used to initiate the administrative complaint in this action. Plaintiffs do not seek any additional information other than a legal finding of coordination.

This court has dismissed similar claims in which plaintiffs alleged an informational injury by stating that they were deprived of information that was already available to them. *See e.g., CREW*, 401 F. Supp. 2d at 123; *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 145 (D.D.C. 2005) (concluding that "the plaintiffs lack standing because they already have the information they are seeking and therefore have not suffered an informational injury"); *Judicial Watch*, 293 F. Supp. 2d at 47 & n.9 (holding that plaintiff lacked a cognizable information injury where he was already "aware of the facts" concerning certain allegedly unreported contributions, and where the underlying administrative complaint was "unlikely" to "yield additional facts about [the] alleged reporting violations") (citing *Wertheimer*, 268 F.3d at 1074-75); *see also CREW 2007*, 475 F.3d at 339-40 (affirming dismissal and holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website"). This case compels the same result.

3. Plaintiff CLC Does Not Allege a Concrete and Demonstrable Injury to Its Activities.

Plaintiff CLC argues that the alleged informational injury discussed above should confer upon it organizational standing. Am. Compl., ECF No. 15, at ¶ 24. But CLC fails in that argument.

As discussed above, the type of informational injury that CLC alleges to have suffered is insufficient to confer standing. But even if it were, CLC has not demonstrated that the alleged lack of information sufficiently injured its organizational interests. The extent of CLC's vague claim to organizational standing is captured in one paragraph of plaintiffs' complaint: "When inadequate disclosure of federal campaign finance activity makes it difficult to ascertain the origin and magnitude of a candidate's financial support, as occurs when a candidate's fundraising and media operations are illegally outsourced to an 'independent' super PAC without disclosure, reporters often contact CLC for guidance as to whether or where they find the campaign finance information that is not being properly reported. This work requires CLC to divert resources and funds from other organizational needs." Am. Compl., ECF No. 15, at ¶ 24.

Again, CLC's standing allegations are belied by other allegations in plaintiffs' amended complaint. *First*, as a factual matter, all of CTR's and HFA's political activities were publicly disclosed, so the assertion that HFA's operations were outsourced to a Super PAC *without disclosure* is fundamentally inaccurate. *Second*, to the extent that reporters were contacting CLC for guidance about HFA's and CTR's activity, CLC could have easily pointed them to the organizations' FEC reports or to any of the many press reports about CTR and HFA that plaintiffs cited in their administrative complaint before the Commission. The idea that CLC was injured by having to provide such information to reporters is erroneous. *Finally,* as a legal matter, the asserted injury claimed by CLC is simply not sufficient to meet the requirements for organizational standing. CLC's amended complaint does not allege that its resources have been depleted. Nor does CLC allege concrete and direct harm to its programmatic activities. *See Common Cause*, 108 F.3d at 417.

CLC makes the general assertion that it uses information obtained from campaign finance reports in preparing testimony or public comment for Congress or for state and local legislatures and agencies, as well as to produce in-depth research reports and publications, op-eds, blog posts, and other commentary. Am. Compl., ECF No. 15, at ¶ 21. These allegations amount to little more than general information about the way CLC does its work, without offering any specific information as to how any particular scheduled testimony or activity was hampered by the alleged inadequate disclosure of Defendant-Intervenors. Indeed, plaintiffs in this case lack organizational standing for the same reasons the plaintiffs in *CREW* failed to establish standing: they have not suffered any direct or concrete injury to their programmatic activities. *CREW*, 401 F. Supp. 2d 115. In *CREW*, the district court found that the plaintiff non-profit organization had not sufficiently identified any programmatic activities adversely affected by the Commission's dismissal of its administrative complaint, nor could it since the organization already possessed the information it sought. *Id*. at 121. Similarly, here, plaintiffs have not "specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions," nor have they articulated a "particular plan" for using any information they might gain access to if they prevailed in this action. *Id*. at 122-23. Furthermore, while the court in *CREW* acknowledged "that it may be difficult to detail how information will be used when a plaintiff does not yet possess that information," here, as in *CREW*, "such hardship is not implicated [because plaintiffs are] already privy to the information that [they could] seek[]." *Id*. Plaintiffs lack any injury in fact sufficient to confer organizational standing.[5]

[5] Plaintiffs have also failed to meet the causation and redressability requirements for Article III standing. "When plaintiffs' claim hinges on the failure of the government to prevent another party's injurious behavior, the 'fairly traceable' and redressability inquiries appear to merge." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994). Both causation and

II. Plaintiffs' Claims Brought under the Administrative Procedure Act Should be Dismissed Because FECA Provides an Adequate Judicial Review Mechanism.

Plaintiffs also claim that the Commission's dismissal of their administrative complaint and its longstanding interpretation of regulations regarding internet communications under 11 C.F.R. §§ 100.26, 109.20, and 109.21 violate the APA. Am. Compl., ECF No. 15, ¶¶ 106, 111–12 (citing 5 U.S.C.§ 706). Because it is well-established that FECA provides an adequate remedy for claims that a Commission dismissal or interpretation of a regulation is contrary to law, however, the APA provides no distinct cause of action in this situation, and plaintiffs' claims under the APA should be dismissed.

Judicial review under the APA is available only for agency action "made reviewable by statute" and for "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704. As such, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (internal quotation marks omitted). Where alternative review procedures exist, "Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the [separate statutory] review provision and the APA." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (internal quotation marks omitted) (alterations omitted). "When considering whether an alternative remedy is 'adequate' and therefore preclusive of APA review, [courts] look for 'clear

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redressability focus on the causal connection between the plaintiffs' injury and the defendant's allegedly unlawful act. *See id*. Causation "turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief." *Id*. (citing *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). Here, plaintiffs cannot demonstrate how the Commission's dismissal of their administrative complaint is "fairly traceable" to any deprivation of information. Further, as discussed above, the judicial relief requested by plaintiffs will not lead to the disclosure of any additional information.

and convincing evidence' of 'legislative intent' to create a special, alternative remedy and thereby bar APA review." *CREW v. U.S. Dep't of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017) (quoting *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009)). In particular, the D.C. Circuit has identified that intent "where Congress has provided 'an independent cause of action or an alternative review procedure.'" *Id.* at 1245.

FECA's detailed provisions for judicial review of Commission enforcement dismissals provide the clear and convincing evidence of legislative intent necessary to preclude APA review. *See* 52 U.S.C. § 30109(a)(8). FECA permits complainants aggrieved by a Commission dismissal to file a petition for judicial review in this district within 60 days of the dismissal. 52 U.S.C. § 30109(a)(8)(A)-(B). On review, the district court may "declare that the dismissal of the complaint is . . . contrary to law" and "direct the Commission to conform with such declaration within 30 days." *Id.* § 30109(a)(8)(C). Should the Commission fail to conform with the Court's declaration, FECA grants the original complainant the right to bring "a civil action to remedy the violation involved in the original complaint." *Id.* Because FECA contains this explicit and detailed review provision, there is clearly an "adequate remedy" as described in the APA, 5 U.S.C. § 704.

Further, FECA's overall structure and legislative history confirm Congress's intent to limit the scope of judicial review of matters within the FEC's area of responsibility. FECA grants the Commission "exclusive jurisdiction with respect to the civil enforcement" of the statute. 52 U.S.C. § 30106(b)(1). As the D.C. Circuit has explained, section 30109(a)(8) is "as specific a mandate as one can imagine." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). And it establishes a specific system of judicial review that "funnels all challenges to the FEC's handling of complaints through the U.S. District Court for the District of Columbia." *CREW v. FEC*, 164 F. Supp. 3d 113, 119 (D.D.C. 2015) ("*CREW 2015*") (citing 52 U.S.C. § 30109(a)(8)(A)). "The

legislative history of [FECA] confirms that '[t]he delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.'" *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998) (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)).

When evaluating potential APA review of the Commission's administrative enforcement and interpretation of regulations, this Court has accordingly found the judicial-review procedures in 52 U.S.C. § 30109(a)(8) to be exclusive and has dismissed parallel claims brought under the APA. *See CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) ("Undertaking judicial review under the APA would enable administrative complainants to make an end run around the scheme established by Congress . . . ."); *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) ("*CREW 2017*") (FECA provides an adequate remedy so there is no parallel claim for relief under the APA); *CREW 2015*, 164 F. Supp. 3d at 115, 120 ("This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA," including when the decision "resulted in the announcement of a new principle or interpretation" of a regulation). The Fifth Circuit similarly found "substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]" in section 30109(a)(8). *Stockman*, 138 F.3d at 156.

Because 52 U.S.C. § 30109(a)(8) provides the exclusive mechanism for challenging the Commission's dismissal of plaintiffs' administrative complaint and limits the scope of relief available to plaintiffs in this action, the portion of plaintiffs' claims that purports to rely on the APA are thus precluded as a matter of law and should be dismissed. *See CREW 2017*, 243 F. Supp. 3d at 104-05 (dismissing "the portions" of two counts "seeking relief under the APA").

III. Plaintiffs Cannot Show that the Commission's Dismissal of the Complaint in MUR 7146 was Contrary to Law, Arbitrary, or Capricious.

Lastly, plaintiffs ask this Court to declare that the Commission's decision to dismiss their administrative complaint was "arbitrary, capricious, and contrary to law" under 52 U.S.C. § 30109(a)(8)(A). But plaintiffs have not alleged any reasons sufficient to meet their heavy burden. Despite plaintiffs' disagreement with the Commission's legal analysis, the fact remains that the Commission's dismissal of plaintiffs' administrative complaint is supported by Commission precedent, well-reasoned, and lawful.

A. Standard of Review Under 52 U.S.C. § 30109(a)(8)(A)

When reviewing the Commission's dismissal of an administrative complaint under 52 U.S.C. § 30109(a)(8)(A), "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the [FECA] . . . or was arbitrary or capricious, or an abuse of discretion." *Common Cause*, 108 F.3d at 415 (internal citation omitted); *see also Akins v. FEC,* 736 F. Supp. 2d 9, 19 (D.D.C. 2010); *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005); *FEC v. DSCC*, 454 U.S. 27, 37 (1981). The "arbitrary and capricious" standard of review is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). Reversal is permitted only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment. *Hagelin*, 411 F.3d at 242. Similarly, the court gives "'substantial deference' to an agency's interpretation of its own regulation, and [it] will accept the agency's view unless it is 'plainly erroneous or inconsistent with the regulation.'" *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 506 (D.C. Cir. 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013)).

The Supreme Court has held that the Commission is "precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. Congress vested the Commission with "primary and substantial responsibility for administering and enforcing the Act," providing the agency with "extensive rulemaking and adjudicative powers," and the authority to "formulate general policy with respect to the administration of [the] Act." *Buckley v. Valeo*, 424 U.S. 1, 109, 110, 111, n.153 (1976). Accordingly, when determining whether the Commission's decision to dismiss was "contrary to law," the task for a court is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citations omitted). Under this highly deferential standard of review, plaintiffs cannot meet their burden and the amended complaint should be dismissed.

B. The Commission's Dismissal of Plaintiffs' Administrative Complaint Was Not Contrary to Law, Arbitrary, or Capricious.

Plaintiffs fail to reasonably allege that the Commissioners' decision to dismiss their administrative complaint was arbitrary, capricious, or contrary to law. Plaintiffs allege that the controlling group of Commissioners' interpretation of the exemption of certain internet communications under 11 C.F.R. § 100.26 is "unprecedented." Am. Compl., ECF No. 15, ¶ 90. However, despite plaintiff's allegations to the contrary, the Statement of Reasons is legally and factually sound, and based in large part on Commission precedent.[6] As Commissioners Hunter and

[6] Plaintiffs' speculative allegation that the controlling group of Commissioners issued the Statement of Reasons as "post hoc rationalization" of its dismissal decision is irrelevant and does not support a finding that the dismissal was arbitrary, capricious, or contrary to law. Am. Compl., ECF No. 15, ¶ 103. Moreover, plaintiffs' argument that certain of CTR's spending was "retrospectively" associated with an internet communication is at odds with their allegations that CTR set out to spend money on activities that can be legally coordinated with a campaign, such as social media. *Id*. ¶¶ 65, 66.

Petersen explained at the outset of their Statement, they "approached [the] matters deliberately and with caution." Ex. A, Statement of Reasons at 1. They were "[m]indful that every action the Commission takes implicates core constitutionally protected activity," and thus "chose to rely on precedent whenever possible rather than adopt aggressive or novel legal theories." *Id*. Moreover, the Commission "thoroughly analyzed the information presented in the complaints in light of the Commission's precedent" and found that the legal issues presented "lend themselves to consideration under the Commission's traditional coordination framework." *Id* at 17.

The controlling group agreed with Defendant-Intervenors that their activities were not prohibited by the Act or Commission regulations. "Specifically, (1) Correct the Record's internet communications in support of Hillary for America do not appear to be in-kind contributions to Hillary for America even if coordinated with Hillary for America and (2) speculative information and materials stolen by Russian intelligence operatives and published by WikiLeaks does not provide reason to believe that Correct the Record's expenditures were excessive or prohibited in-kind contributions to Hillary for America"[7] *Id*. at 2. The controlling group divided their analysis into two main parts, each of which is addressed in turn below: (1) whether CTR's expenditures for online communications were coordinated; and (2) whether CTR's expenditures for other activities—its surrogacy program, research and tracking, and contacts with reporters—were coordinated.

[7] Contrary to the plaintiffs' allegations, the Commissioners did not find that the OGC's reliance on this stolen information was "dispositive" of dismissal of the administrative complaint. Am. Compl., ECF No. 15, ¶ 96. Rather, the Commissioners excluded the information from its analysis, and, notably, Commission Chair Ellen Weintraub agreed. Ex. A, Statement of Reasons, at 2 n.4; Am. Compl., ECF No. 15, ¶ 100.

1. CTR's Expenses for Online Communications are Properly Exempt from the Definition of "Contribution."

With respect to CTR's expenses for online communications, plaintiffs fail to sufficiently allege that the Commissioners' interpretation of the applicable regulations is arbitrary, capricious, or contrary to law. Indeed, the Statement of Reasons belie plaintiffs' allegations that their interpretation is "unbounded," "unprecedented," or "inconsistent with the plain language of FECA." Am. Compl., ECF No. 15, ¶¶ 90-92. To the contrary, the controlling Commissioners' Statement of Reasons is based on the plain text of 11 C.F.R. § 109.21, which makes clear that coordination is not prohibited on communications other than "public communications." Ex. A, Statement of Reasons at 12. The controlling group recognized that the definition of "public communication" excludes all internet communications "except for communications placed for a fee on another persons' Web site." 11 C.F.R. § 100.26. Consequently, an internet communication will not be regulated as a "public communication" unless the speaker posts it on a third party's online platform and pays a fee to do so. Ex. A, Statement of Reasons at 9. In general, in order for a communication to be "coordinated" under the three-part test for determining whether a communication is coordinated, the communication must meet the definition of "public communication." Because unpaid internet communications are not "public communications," they are generally excluded from being treated as coordinated communications (and thus in-kind contributions). The controlling group noted that this exclusion is deliberate; in the Commission's 2006 rulemaking, which was focused on internet communications, the Commission recognized the internet as a "unique and evolving mode of mass communication and political speech that is distinct from other media" and "warrants a restrained regulatory approach." *Id*. at 9. The Commission agreed with Defendant-Intervenors that CTR's internet communications, which were not placed for a fee on a third party's website, were not "coordinated communications." And

contrary to plaintiffs' allegations, the controlling group relied on the plain text of 11 C.F.R. § 109.21, an extensive underlying rulemaking record, and subsequent Commission advisory opinions and enforcement actions in making this determination. *Id*. at 12.

Plaintiffs' chief gripe is that the controlling Commissioners allegedly "expanded" the internet exemption to encompass expenses incurred by a speaker to produce an internet communication. Am. Compl., ECF No. 15, ¶ 91. But as the controlling Commissioners made clear, they were relying on the Commission's repeated interpretations of the internet exemption to arrive at this conclusion. Far from treading new ground, the Commission noted that it was following its "traditional approach" for assessing input costs, which "operates as a bright-line rule and recognizes that a speaker will almost always incur expenses to produce an internet communication even if the speaker does not incur a cost to post the communication online." Ex. A, Statement of Reasons at 12-13.

Indeed, the Commission has been exempting input costs from the definition of "contribution" for a decade and a half. Beginning with the 2006 Internet Communication rulemaking, the Commission evidenced a clear and deliberate intent to include input costs within the scope of the Internet exception. Plaintiff CLC is well aware of this fact because during the rulemaking process, CLC submitted a comment on the proposed rule noting that it was standard to exempt input costs: "[t]ypically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials." Democracy 21, Campaign Legal Center & Center for Responsive Politics, Comment on Notice of 2004-12: Internet Communications (Shays I) at 12 n.10 (June 3, 2005). The commenters then cautioned the Commission that the proposed Internet Communication rule, which did not alter the default approach, would permit the following fact pattern, which is essentially what happened here:

> an individual in coordination with a candidate [will be able] to spend very large sums of money outside the campaign finance laws on the production of ads, if those ads are then disseminated on the individual's own Web site. For instance, a wealthy individual could set up a Web site and then spend very large amounts of money in coordination with a candidate on the professional creation and production of campaign materials—such as campaign videos or other campaign ads—which he then disseminates via his own Web site (or by email). Because the distribution itself would not be considered a "public communication," (*i.e.*, it would not be distribution "for a fee on another person's or entity's Web site"), it would fall outside the coordination rules.

Id.

But the Commission did not change the final Internet Communication rule to alter the longstanding approach that production costs are treated the same as distribution costs. *See generally* Explanation and Justification, Internet Communications, 71 Fed. Reg. 18589, 18590-91 (April 12, 2006). The Commission made a conscious choice to exempt the production or input costs of free Internet communications from the coordination regulations and the definition of "contribution."

Since the time of the Internet Communications rulemaking, the Commission has affirmed its approach to exempting input costs time and time again.[8] For example, in FEC Advisory Opinion 2008-10 (VoterVoter.com), the Commission stated that "[t]he costs incurred by an individual in creating an ad will be covered by the Internet exemption from the definition of 'expenditure' as long as the creator is not also purchasing TV airtime for the ad." Advisory Op. 2008-10 at 7. This statement garnered majority support from the Commissioners, and it even appeared in the FEC's publicly distributed guidance document, the Corporate/Labor Guide Supplement, from 2008 to 2011, when the Commission stopped publishing the document.[9] In another advisory opinion

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[9] *See, e.g.*, FED. ELECTION COMM'N, CORPORATE/LABOR GUIDE SUPPLEMENT 37 (Aug. 2011), https://web.archive.org/web/20111010191221/http://fec.gov/pdf/corp_supp.pdf; FED. ELECTION COMM'N, CORPORATE/LABOR GUIDE SUPPLEMENT 22 (Dec. 2008),

published shortly thereafter, the Commission unanimously held that a political committee could pay expenses incurred in forwarding emails that solicited contributions on behalf of candidates, without making contributions to those candidates, implicitly concluding that the production costs incurred when individuals forwarded the emails to their contacts were not contributions, either. *Id.* at 4-5. *See* Advisory Op. 2011-14 (Utah Bankers Association) at 3, 5.

The Commission has come to the same result in numerous enforcement actions. *See*, *e.g.*, Factual & Legal Analysis ("F&LA") at 3, 7-8, MUR 6477 (Turn Right USA) (July 17, 2012) (holding in a unanimous decision that an advertisement created by an independent expenditure-only committee and posted to its website and YouTube was not a coordinated communication because it was not placed for a fee on another's website (and therefore was not a public communication), despite the fact that the PAC had paid almost $6,000 to a vendor to create the ad); F&LA at 5, 6, MUR 6657 (Akin for Senate) (Sept. 17, 2013) (stating bluntly that the FEC "has narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication," and concluding unanimously that payments made by a political committee to rent email lists and process contributions for a candidate it supported with free online communications were not contributions to the candidate); Statement of Reasons at 2-4, MUR 6729 (Aug. 6, 2014) ("[i]n light of Checks and Balances' uncontroverted sworn statements that its videos appeared solely on the Internet, and because there was no evidence the videos were posted to YouTube or any other website for a fee, we agreed with OGC that the communications (including any associated production costs) were exempt from FEC regulation."); FGCR at 2, 12-

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https://web.archive.org/web/20090118045249/http://fec.gov/pdf/corp_supp.pdf; *see also* Statement of Reasons ("SOR") of Comm'rs Goodman, Hunter & Petersen, MUR 6729 (Checks and Balances for Economic Growth) at 4 n.21 (Oct. 24, 2014).

13, MUR 7080 (Babeu for Congress) (December 15, 2016), F&LA at 1 n.1, *id.* (Oct. 30, 2017) (noting that the controlling block found that unpaid Facebook posts were not coordinated communications because they were unpaid Internet activity even though there was value in the time the staff of the Sheriff's Office spent creating the posts; SOR of Comm'rs Hunter, Goodman & Petersen at 5 n.21, MUR 7023 (Kinzler for Congress) (Jan. 23, 2018) (stating that the Commissioners had already "considered whether to regulate production costs in the Internet Communication rulemaking" and "clarified that production costs are not regulated unless a communication is disseminated for a fee on another person's website.").

The Commission's treatment of input costs as exempt from the definition of "contribution" pursuant to the Internet exemption is a sensible interpretation of the plain language of the regulation that provides that unpaid communications placed on the internet are exempt from the definition of "public communication" under 11 C.F.R. § 109.21. If the Commission required speakers to allocate overhead expenses across internet communications (or other activities) and then exempted only those component fees deemed essential for the internet communication's placement, the Commission "would eviscerate the internet exemption and the deliberate policy decisions behind it, and potentially chill political speech online." Statement of Reasons at 13. And as the Commission recognized, the Commission has never required speakers to allocate costs in that way. Accordingly, it is plaintiffs' view of the way input costs should be treated that is contrary to law, not the Commission's.

Further, even though plaintiffs allege that the controlling Commissioners have expanded the internet exemption to encompass reported disbursements that are not "communication-specific" such as staff time, computers, software, and other items, Am. Compl., ECF No. 15, ¶ 90, they fail to acknowledge that the Commission squarely addressed precisely these types of expenses

as "input costs" that are directly related with the costs of producing an internet communication: "For example, an organization that has decided to endorse a particular candidate and wishes to post a simple notice of the endorsement on its own website will likely incur, *at a minimum*, costs in the form of staff time, computer usage, and electricity. More ambitious forms of notice could necessitate *additional overhead and other expenses, such as for the travel and the services of consultants, graphic designers, videographers, actors, and other specialists.*" Ex. A, Statement of Reasons at 13 (emphasis added). The law does not provide that only "essential" input costs should be exempt under the internet exemption. But even if it did, the costs incurred by CTR to produce the communications at issue here were not remote or incidental to the unpaid internet communications; in many cases, they were costs that CTR would not have incurred but for its creation and production of the internet communications.

2. CTR's Other Expenses Were Either Not Coordinated or were Paid For by HFA.

Plaintiffs' argument about the Commission's alleged "expansion" of the internet exemption would lead one to believe that the controlling Commissioners found that all of CTR's expenses in support of HFA were not coordinated communications pursuant to the internet exemption. Quite the contrary. In fact, the Commission addressed specific expenses that were not related to CTR's online communications, namely its surrogacy program, research and tracking, and contacts with reporters. *First*, with regard to CTR's surrogacy program, the Commission found that plaintiffs' complaint did not sufficiently allege that the program was coordinated with HFA. *Id*. at 14-15. Far from requiring plaintiffs to prove coordination on a transaction-by-transaction basis, the controlling Commissioners found that the information plaintiffs put forth to support their allegation that the surrogacy program was coordinated actually suggested a lack of coordination. *Id*. at 15 (referencing a news article stating that HFA played "no role" in CTR's training sessions

and acknowledging that HFA had its own surrogate operation). *Second*, with respect to research and tracking, the Commission noted that CTR's publicly disclosed FEC reports show receipts of $275,615.43 from HFA for "research," and an additional $6,346 from HFA for "research services." *Id*. at 15. CTR and HFA asserted that these payments from HFA fully compensated CTR for any tracking and research services it provided to HFA. *Id*. The Commission found that there was nothing in the record to indicate otherwise; accordingly, CTR's research and tracking services could not constitute an in-kind contribution because they were fully paid for by HFA. *Id*. Plaintiffs' amended complaint does not acknowledge that these expenses were paid for by HFA. *Finally*, the Commission concluded that CTR's payments to staff to engage in private communications with reporters related to HFA did not appear to be "public communications" covered by 11 C.F.R. § 109.21. *Id*. at 16. But even if they were, plaintiffs did not present facts to show that these efforts were coordinated with HFA. *Id*. The Commission's reasoning for dismissal is hardly "plainly erroneous" or "inconsistent" with its regulations. *See Pursuing Am.'s Greatness*, 831 F.3d at 506.

As explained in its Statement of Reasons, the Commission's decision to dismiss plaintiffs' complaint was thoughtful, well-reasoned, and based on Commission precedent. It was far from being arbitrary, capricious, or contrary to law. Accordingly, plaintiffs have not met their burden of stating a claim upon which relief can be granted, and the amended complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court dismiss the Amended Complaint in this matter.

February 4, 2020

Respectfully submitted,

PERKINS COIE LLP

By: /s/ *Marc Erik Elias*

Marc Erik Elias, Bar No. 442007
Aria C. Branch, Bar No. 1014541
MElias@perkinscoie.com
ABranch@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Attorneys for Defendant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2020, that 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.

By: /s/ *Marc Erik Elias*

Marc Erik Elias
Aria C. Branch
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
Email: MElias@perkinscoie.com
Email: ABranch@perkinscoie.com