IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, HILLARY FOR AMERICA and CORRECT THE RECORD, Defendant-Intervenors.	Civil Action No: 1:19-cv-02336-JEB

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Campaign Legal Center ("CLC") and Catherine Hinckley Kelley, by their undersigned counsel, and pursuant to Fed. R. Civ. P. 56, the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), respectfully move this Court for a summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that Correct the Record and Hillary for America violated FECA and the FEC's subsequent dismissal of plaintiffs' administrative complaint was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, and directing the Commission to conform with such declaration within thirty days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment; the Declaration of Brendan Fischer, ECF No. 27-1; the Declaration of Catherine Hinckley Kelley, ECF No. 27-2; and the joint appendix containing copies of those portions of the administrative record that are cited or

otherwise relied upon, to be filed no later than October 16, 2020. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated: July 24, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Regulations:

Other Materials:

TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act
CLC	Campaign Legal Center
BCRA	Bipartisan Campaign Reform Act
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FGCR	First General Counsel's Report
HFA	Hillary for America
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
SOR	Statement of Reasons

INTRODUCTION & SUMMARY OF ARGUMENT

Shortly after Hillary Clinton officially announced her candidacy in the 2016 presidential election, the super PAC Correct the Record ("CTR") formed to support her run. By its own account, CTR intended to operate as a "surrogate arm" of Clinton's campaign, Hillary for America ("HFA"), that would openly coordinate its activities with HFA while raising and spending millions of dollars outside of the contribution restrictions and disclosure requirements in the Federal Election Campaign Act ("FECA" or "the Act").

The foundation upon which this massive coordination scheme precariously rested was the novel claim that all of CTR's spending qualified for an "internet exemption" promulgated by the Federal Election Commission ("FEC" or "Commission") that carves out certain unpaid internet communications from regulation as "coordinated communications."

But that claim was wrong.

Plaintiffs Campaign Legal Center and Catherine Hinckley Kelley (collectively, "CLC") filed an administrative complaint in 2016 with the FEC alleging that CTR and HFA, respondents in the FEC proceedings and intervenors here, in fact appeared to be coordinating on a host of activities, including campaign surrogate training, opposition research and tracking, polling, and press outreach, that clearly were not exempt from FECA or FEC coordination rules—under the internet exemption or otherwise. The FEC's Office of General Counsel ("OGC") agreed and recommended finding "reason to believe" CTR and HFA violated the Act. Yet the Commission deadlocked, 2-2, on that question, and dismissed CLC's complaint.

This action challenges that dismissal on two distinct, although related, grounds: (1) the dismissal was "contrary to law" under 52 U.S.C. § 30109(a)(8)(C) because the rationale provided for it, as set forth in the two "controlling" Commissioners' Statement of Reasons ("SOR"), rested

on impermissible interpretations of FECA and Commission regulations, and was arbitrary and capricious, *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); and alternatively, (2) if the controlling Commissioners' construction of the coordination rules and internet exemption is deemed authoritative, this construction conflicts with FECA and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

This Court has already recognized that the dismissal rested on impermissible interpretations of FECA and FEC regulations, in that it hinged on a construction of the FEC's regulatory internet exemption that "vitiates the plain language of FECA," ECF No. 33 at 23, "unduly compromises the Act's purposes," *Orloski*, 795 F.2d at 164, and is "inconsistent with FEC precedent, policy, and regulations." ECF No. 33 at 21.

According to the controlling Commissioners' revisionist account of the 2006 internet rulemaking, the FEC did not just "exclude[] the vast majority of internet communications from regulation as coordinated communications, AR388; it also carved out all "input costs" that may support, even if only tangentially or in part, eventual exempt "internet communications (or other activities)." AR392. This interpretation of FEC rules runs directly counter to the Act's clear mandate that any expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . *shall* be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added).

It also turns the internet "exception" into an immense loophole. Indeed, when applied to dismiss CLC's administrative complaint, it sanctioned a presidential candidate's ability to outsource a raft of traditional campaign functions—including expenses for media relations, polling, and opposition research—to a super PAC operating "under [the campaign's] thumb," AR091, but unbound by FECA's limits, on the pretext that these expenditures were mere "input

costs" for eventual internet communications. AR391-93. Any legal theory that would permit such blatant evasion of FECA "frustrate[s] the policy that Congress sought to implement" and is "inconsistent with the statutory mandate." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). The controlling Commissioners' interpretation opens "an immense loophole that would facilitate the circumvention of the Act's contribution limits," and clearly creates "'the potential for gross abuse.'" *Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) ("*Shays II*").

Even if the dismissal did not rely on impermissible interpretations of FECA and FEC regulations, it would still fail under the second *Orloski* prong because the controlling group's analysis of CTR's *non-internet* activities was arbitrary, capricious, and contrary to the record. To find the complaint's factual allegations insufficient to support a preliminary reason-to-believe finding, the controlling Commissioners had to disregard abundant and uncontroverted evidence of coordinated efforts between CTR and HFA, including CTR's own public admissions throughout the election cycle that it would "work in coordination with the Clinton campaign." AR005 ¶ 9. Moreover, the Commissioners failed to address the clearly erroneous *legal* defenses for this activity advanced by CTR and HFA—such as their claim to the "media exemption," an argument so frivolous the controlling Commissioners just ignored it. For these reasons, too, the dismissal falls well short of the reasoned agency decision-making required under *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm*, 463 U.S. 29 (1983).

The controlling Commissioners' construction of the internet exemption and coordination regulations fails APA review for the same reasons it fails under FECA: it is an impermissible interpretation of the statutory mandate to regulate coordinated expenditures. Their interpretation "not only makes it eminently possible" that campaigns will outsource their digital media efforts to groups operating outside of the Act's limits, prohibitions, and disclosure requirements, "but also

provides a clear roadmap for doing so." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) ("*Shays III*") (citing *McConnell v. FEC*, 540 U.S. 93, 177 n. 69 (2003)). It thus effectively revives "the exact perception and possibility of corruption Congress sought to stamp out," *id.*, and ignores everything that Congress, the Supreme Court, and this Circuit have said about "lax regulation" in the context of the anti-coordination provisions: "The FEC's claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature." *Id.* at 927-28.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Coordinated expenditures are in-kind contributions subject to FECA's contribution limits and disclosure requirements.

The Act defines "contribution" as a "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i), including "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose," *id.* § 30101(8)(A)(ii).

The statutory phrase "anything of value" is understood to include "all in-kind contributions," including "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge." 11 C.F.R. § 100.52(d)(1). The Commission has applied FECA's "compensation for personal services" provision to find in-kind contributions where a law firm provides free legal services to a candidate to prepare an *amicus* brief, *see* Advisory Op. 2006-22 (Jenkens & Gilchrist), or assists a candidate committee in planning fundraising events and collecting contributions, *see* Factual & Legal Analysis at 2-3, MUR 5366 (Edwards for President) (Nov. 17, 2004), https://www.fec.gov/files/legal/murs/5366/00005473.pdf, or where an employer pays its staff to help renovate a candidate's campaign headquarters, *see* Advisory Op. 1982-04 (Apodaca) at 2-3.

FECA also provides that any expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) "*shall* be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added). Coordinated expenditures are thus subject to FECA's contribution limits and source restrictions. In the 2015-16 election cycle, a candidate could lawfully "accept" $2,700 in coordinated expenditures from an individual, *id.* § 30116(a)(l), or $5,000 from a multicandidate committee, *id*. § 30116(a)(2)(A), but could not accept any from corporations or labor unions, *id.* § 30118(a). *See also* Contribution limits for 2015-2016, FEC (Feb. 3, 2015), https://www.fec.gov/updates/contribution-limits-for-2015-2016.

Coordinated expenditures by a committee, as detailed more fully in plaintiffs' Opposition to Intervenors' Motion to Dismiss (ECF No. 27), are also subject to FECA's comprehensive disclosure requirements. For each reporting period, a candidate-authorized committee must disclose and itemize each in-kind contribution in the form of coordinated expenditures it receives, 52 U.S.C. § 30104(b)(2)(D), and report its date, value, and source, *id.* § 30104(b)(3)(B). In addition, a candidate committee must disclose any coordinated expenditure as both a contribution received and an expenditure made by the candidate. 11 C.F.R. §§ 104.13(a), 109.20(b), 109.21(b). Likewise, in each reporting period, a *non-candidate* committee must disclose and itemize each in-kind contribution in the form of coordinated expenditures it makes, and report its date, value, and the recipient's name and address. 52 U.S.C. § 30104(b)(6)(B)(i), (b)(4)(H)(i).[1]

[1] CTR is a "hybrid" political committee. Following *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the FEC created a new class of committees, "super PACs," unbound by FECA contribution limits by virtue of their independence from candidates and parties. Advisory Op. 2010-11 (Commonsense Ten). Thereafter, pursuant to the consent judgment in *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), the FEC allowed for "hybrid" committees that make both unrestricted "soft money" independent expenditures and "hard money" contributions, provided they keep these funds in segregated accounts. *See* Am. Compl. ¶¶ 56, 57.

B. FEC regulations address coordination through separate rules defining "coordinated expenditures" and, more specifically, "coordinated communications."

The statutory coordination provisions are implemented by an FEC regulation defining "coordination" in near-identical terms to mean an expenditure "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee." 11 C.F.R. § 109.20(a). Any expenditure "coordinated" within the meaning of this regulation is treated as an in-kind contribution to the candidate with whom it was coordinated and must be reported as a contribution received and expenditure made by that candidate. *Id.* § 109.20(b).

In addition to this general "coordination" regulation, a separate "coordinated communications" rule describes when "public communications" are deemed "coordinated expenditures." *Id.* § 109.21. To be a "coordinated communication" under this rule, a communication must (1) be paid for by a person other than the candidate, *id*. § 109.21(a)(1); (2) satisfy one of the rule's "content standards," *id*. § 109.21(c); and (3) satisfy one of its "conduct standards," *id*. § 109.21(d).

The "content" standard applies only to "public communications," which are defined in both FECA and Commission regulations as communications made by "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26. For all other types of expenditures, the relevant coordination regulation remains 11 C.F.R. § 109.20, which by its terms applies unless the expenditure is "made for a coordinated communication under 11 C.F.R. § 109.21."

C. The "internet exemption" carves out only a narrow category of unpaid internet communications and uncompensated individual internet activity from regulation.

In its 2006 internet rulemaking, the FEC carved out a narrow exception from the statutory

definition of "public communication"—and by extension, from the coordinated communications framework in section 109.21—by defining "public communications" to exclude "communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.* § 100.26. *See* Internet Communications, 71 Fed. Reg. 18589, 18613 (Apr. 12, 2006) (Explanation & Justification). In other words, unpaid internet communications are not "public communications" and therefore cannot be regulated as "coordinated communications" under 11 C.F.R. § 109.21. The Commission also exempted certain internet activities from the definitions of "contribution," 11 C.F.R. § 100.94, and "expenditure," *id.* § 100.155, but made clear that it only addressed "*uncompensated* Internet activity" by individuals and groups of individuals. 71 Fed. Reg. at 18604 (emphasis added).

In its Explanation and Justification for the rules, the Commission emphasized that a political committee's disbursements to develop communications over the internet can still be "expenditures," even if the ultimate internet posts are exempt. For example, "a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election, remains an 'expenditure' by the political committee," even if the internet activities conducted on that computer may have been exempt. 71 Fed. Reg. at 18606. If this underlying expenditure were coordinated with a candidate campaign, it would still constitute a contribution to the campaign. 52 U.S.C. 30116(a)(7)(B)(i); 11 C.F.R. § 109.20. Similarly, the Commission noted that "if a political committee pays a blogger to write a message and post it within his or her blog entry," 71 Fed. Reg. at 18604-05, then the underlying payment would be an "expenditure"; it follows that if such an "expenditure" is coordinated with a candidate, it would constitute an in-kind contribution under 11 C.F.R. § 109.20.

Thus, although the Commission did not address at length whether direct "input costs"

connected to exempt internet communications would also qualify for exemption from the coordination regulations, it made clear that many payments underlying exempt internet activity were still "expenditures," indicating that the exemption must be read narrowly in this regard.

Indeed, the exemption *had* to be drawn narrowly, because it was promulgated in the wake of a judicial ruling that the FEC's prior effort to exempt the internet from the coordination rules conflicted with FECA's clear terms, "severely undermine[d]" its purposes, and "create[d] the potential for gross abuse." *Shays v. FEC*, 337 F. Supp. 2d 28, 69-70 (D.D.C. 2004) ("*Shays I*"). In *Shays I*, this Court struck down an FEC rule providing for the internet "to be excluded wholesale from its definition of 'public communication,'" *id.* at 68—a new statutory term in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). As the Court noted, BCRA was intended "to *enlarge* the concept of what constitutes 'coordination' under campaign finance law," *id.* at 64 (emphasis added), and adopting a blanket exemption for "an entire class of political communications . . . irrespective of the level of coordination," *id.* at 70, conflicted with that purpose. *Shays I* thus recognized that an unduly broad carve-out from the coordination rules for internet activity "would permit rampant circumvention of the campaign finance laws and foster corruption." *Id.*

D. The statutory framework for FEC administrative complaints

Any person may file a complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the OGC's recommendations, the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, *id*. § 30109(a)(3), it 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 institute a civil action in federal district

court. *Id*. § 30109(a)(6)(A). All of these decisions require four affirmative votes.

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission will dismiss the complaint and the controlling group of Commissioners who voted not to proceed must issue a Statement of Reasons to serve as the basis for any judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by the dismissal of its FEC complaint may seek review in this Court to determine whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (B). If the Court finds the FEC's "dismissal of the complaint or the failure to act is contrary to law," the dismissal should be set aside and the matter remanded to the Commission to conform with such declaration within 30 days, failing which the complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

II. Statement of Facts

A. CLC's administrative complaint.

On October 6, 2016, plaintiffs filed an administrative complaint (designated Matter Under Review ("MUR") 7146), alleging that CTR made, and HFA accepted, unreported in-kind contributions in the form of coordinated expenditures and compensation for personal services, in violation of FECA's reporting requirements and contribution restrictions. AR038-49 ¶¶ 87-111.

CLC's administrative complaint, one of five raising similar concerns, documented millions of dollars that CTR spent on opposition research, message development, and press outreach, all for the avowed purpose of promoting Clinton's candidacy. AR004-31 ¶¶ 7-67. As the complaint noted, from CTR's inception in May 2015, when it relaunched as "a stand-alone 'super PAC,'"AR005 ¶ 9, it was openly "work[ing] in coordination with the Clinton campaign" on the theory that all of its spending would qualify for the "internet exemption," *id.* Senior CTR staff, including its founder and chairman, David Brock, repeatedly and publicly confirmed that this was

the committee's strategy. AR005-07 ¶¶ 9-12; AR011-13 ¶¶ 24, 26-27; AR087-88, 91-92, 96.

But numerous news reports documented that, in fact, CTR and HFA were coordinating on a host of activities "not fairly characterized as 'communications'" exempt from the coordination rules, as OGC later found. AR085. Citing published reports and CTR's own public statements, the administrative complaint described a range of activities that CTR undertook to achieve its "sole mission [of] helping Mrs. Clinton," AR006 ¶ 11, many of which had no connection to the internet, or at most, an extremely marginal one, including:

- Commissioning an outside polling firm to conduct a poll during a November 2015 Democratic primary debate. AR015 ¶ 31.
- Arranging media training for Clinton surrogates with "talking-point tutorials" and "on-camera media training," AR007-08 ¶ 15, and, later, paying the consulting firm QRS News Media for "an aggressive surrogate booking program," AR024 ¶ 51.
- Sending "trackers" to follow and record Clinton's Democratic primary opponents. AR008-09 ¶¶ 16-17.
- Staffing a "30-person war room" of paid CTR employees who conducted rapid response during Clinton's appearance before the House Select Committee on Benghazi; the effort included "flood[ing] the emails of Washington reporters with a running, blow-by-blow critique." AR012-13 ¶¶ 28-29.
- Releasing a "Complete Guide to the Benghazi Select Committee" publication that later received a gold "Pollie" award from the American Association of Political Consultants—though not in the "Internet/Digital" category. AR018-19 ¶ 38.
- Releasing related opposition research, including a 167-page book, "Committee No. 10: The True Story of the House Select Committee on Benghazi," and, as CTR described, "more than 46 research-fueled press releases, factchecks, reports, videos and other multimedia" during Clinton's testimony. AR027-28 ¶ 58.
- Placing an op-ed in *The Hill* by CTR president Brad Woodhouse defending Clinton and an op-ed in the *Detroit Free Press* by CTR special adviser Jennifer Granholm favorably comparing Clinton's economic plan to Trump's. AR027 ¶ 57; AR029-30 ¶ 62.
- Holding a press call to announce the launch of its "Trump Lies" project, which involved CTR staff issuing research memos and collecting past Trump statements into a searchable database. AR022-23 ¶¶ 46-49.

- Acquiring leaked text of Trump's Republican National Convention speech and sending it to reporters, which Brock framed as part of CTR's ongoing efforts to "develop relationships with Republicans" and "sleuth out confidential information from the Trump campaign." AR028-29 ¶ 60.

- Professionally producing pro-Clinton video projects, including a "Let's Talk Hillary" project that involved "hundreds of interviews" with Clinton associates and aimed to feature "authentic grassroots stories presented in an authentic grassroots style." AR014-15 ¶¶ 30, 32.

- Maintaining, throughout the 2016 cycle, an "around the clock" "war room" with "researchers, communications experts and digital gurus" who produced "point-by-point fact checks quickly disseminated to the news media." AR029 ¶ 61.

On the basis of this evidence, the administrative complaint urged the Commission to find "reason to believe" that CTR and HFA violated FECA by making or accepting illegal, over-the-limit in-kind contributions, 52 U.S.C. § 30116(a), and contributions from impermissible sources, *id.* § 30118(a), and by failing to report these contributions, *id.* § 30104; and requested that the Commission conduct an immediate investigation under 52 U.S.C. § 30109(a)(2). AR050 ¶ 112.

B. CTR and HFA's responses to the administrative complaint.

Administrative respondents CTR and HFA, represented by counsel, responded to CLC's complaint on December 5, 2016 and January 24, 2017, respectively, making similar arguments to address the allegations of widespread, undisclosed coordinated activity. Their submissions asserted two principal defenses. First, with respect to CTR's expenditures that had some connection to internet communications, such as "research and production related to, and online dissemination of web videos, websites (including one featuring poll results), [and] social media posts," respondents argued that "[a]ll of these communications qualify as Internet activities under the regulation's inclusive and non-exhaustive definition and the Commission's subsequent enforcement actions." AR075; *see also* AR064-65. Second, with respect to CTR's activities that had little or no connection to the internet—such as reporter outreach, the distribution of books or memos, and the placement of op-eds—respondents claimed these activities either were entirely

unregulated under FECA and FEC regulations because they were not "public communications,"[2] or qualified for the media exemption at 11 C.F.R. § 100.73. AR065-66, 75-76.

Respondents did not deny the nature or scope of CTR's activities on behalf of HFA as alleged in CLC's complaint, AR090 n.28, or dispute that they were coordinated; their defense was based entirely on their own legal interpretations of FEC regulations and guidance.

HFA did acknowledge making some payments for CTR's work on "research and tracking," claiming to have paid "fair market value" for these services. AR076-77. But the only two reported transactions were a May 27, 2015 payment of $275,615 for "research" and a July 17, 2015 payment of $6,346 for "research services," AR089, which together amounted to no more than three percent of CTR's overall budget. AR088. Neither mentioned "tracking."

C. The FEC's Office of General Counsel recommends finding reason to believe.

After reviewing CLC's complaint together with the four others, respondents' written replies, and other available evidence, OGC recommended the Commission find reason to believe that CTR and HFA violated FECA by making and accepting excessive and prohibited in-kind contributions and failing to report those contributions. AR085, 105. OGC highlighted that respondents did not "deny or rebut the description or scope of [CTR's] activities on behalf of [HFA]," AR090 n. 28, and noted that "[f]rom its first week of existence as a 'separate' entity . . . CTR has consistently stated that the entirety of its work would be made for the purpose of benefiting Clinton and in coordination with her campaign." AR120.

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[2] Respondents asserted the novel theory that federal campaign finance law does not regulate the coordination of certain activities they characterized as "communications," such as reporter outreach or the offline distribution of research, because this activity does not meet the definition of "public communication" and thus is not covered by 11 C.F.R. § 109.21. AR064, 72. Left unexplained was why this activity, if coordinated, would escape regulation under FECA or the FEC's default rule, 11 C.F.R. § 109.20. *See infra* Part III.B.2. The controlling Commissioners did not discuss or endorse this argument in the SOR.

OGC rejected respondents' characterization of their activities as largely subsumed by the internet exemption. Instead, it found that most of the $9 million CTR spent went to a "wide array of activities," and most "*cannot fairly be described as 'communications,*' public or otherwise, unless that term covers almost every conceivable political activity," AR110, 124 (emphasis added), including the "costs for staff to 'develop relationships with Republicans' or for 'trackers' to travel across the country," AR125. OGC also rejected respondents' legal theory that CTR's activities that were not "public communications" were wholly unregulated, noting that under FEC precedent, this spending should be analyzed "under the 'coordinated expenditure' provision [§ 109.20], rather than the 'coordinated communication' provision [§ 109.21]." AR101.

Even as to CTR's activities that did have some connection to the internet, OGC found that respondents had overreached by trying to claim the exemption for expenses that were not properly characterized as costs incurred to produce exempt internet communications (or, in the controlling Commissioners' coinage, "input costs"). As OGC explained regarding CTR's expenditures for polling, while "costs for the online placement of [] poll results on its own website would not be a cost for a 'public communication," the payment for "the underlying polling, made in coordination with HFA . . . would be a coordinated expenditure under 11 C.F.R. § 109.20(b) and, thus, an in-kind contribution." AR100.

D. The Commission deadlocks 2-2 and dismisses the complaint.

On June 4, 2019, the FEC's then-four Commissioners deadlocked 2-2 on whether to find reason to believe that CTR and/or HFA had violated any provision of FECA, and dismissed the administrative complaint. AR372-75. They also deadlocked, 3-1, on whether to authorize defense of any suit by the complainants challenging the dismissal. AR374. On August 21, 2019, eighteen days after the expiration of the 60-day statutory period for seeking judicial review of the dismissal, the two controlling Commissioners issued their SOR. AR380-97; *see also* Am. Compl. ¶ 85.

The controlling Commissioners drew the opposite conclusion from OGC, largely because they excluded wide swaths of the available record and disregarded the legal authorities cited by OGC. With respect to CTR's expenditures that the controlling Commissioners believed related to internet communications—"for example, computer equipment, office space, software, web hosting, video equipment, placing a poll online, and salaries for individuals to conduct internet activity," AR391—the Commissioners determined they were exempt internet communications, or "inputs" for such communications, under 11 C.F.R. § 109.21. Their theory was that an expenditure cannot be deemed "coordinated" if it in any way supports, or can be retrospectively "associated" with, an internet communication exempted from the definition of "public communication" in 11 C.F.R. § 100.26. They also rejected the possibility that overhead expenditures should be allocated between the exempt and non-exempt activities they supported, claiming that "exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption . . . and potentially chill political speech online." AR392.

As for the universe of CTR's spending that even the controlling Commissioners conceded was "unrelated to creating and disseminating online political communications," AR390, they argued that plaintiffs had not alleged facts sufficient to establish coordination conclusively, "transaction-by-transaction," and had "fail[ed] to meet their burden." AR395. In so holding, the Commissioners chose to disregard public statements by CTR, as provided in CLC's complaint and otherwise obtained by OGC, *see* AR005-7 ¶¶ 9-12; AR011-13 ¶¶ 24, 26-27; AR087-88, 91-92, as well as corroborating documents posted on Wikileaks that were presented in related complaints, but not in CLC's, AR092-94. They also reached this conclusion without any mention that, as noted by OGC, neither respondent had disputed that many of these activities had in fact been coordinated. Finally, the controlling Commissioners failed to address the respondents' legal arguments

pertaining to the media exemption and the applicability of 11 C.F.R. § 109.20 to coordinated activity that did not constitute "public communications."

On September 20, 2019, then-Chair Ellen Weintraub issued a dissenting SOR explaining why she voted in favor of OGC's recommendation. AR400-10. Noting the substantial evidence even apart from any materials obtained from Wikileaks, such as CTR's own public statements, and emphasizing that "much of CTR's spending took place—all or at least in part—off the internet," she concluded that the complaints presented the FEC with "ample evidence . . . to support a coordination determination at the pre-[reason to believe] stage." AR404-07.

III. Procedural History

Plaintiffs filed this action on August 2, 2019, challenging the dismissal of their complaint as contrary to law. Compl. (ECF No. 1). On August 21, 2019, seventy-eight days after the dismissal, the controlling Commissioners issued their SOR, and plaintiffs amended their complaint on October 29, 2019 to address its belated issuance. Am. Compl. (ECF No. 15). The FEC has not appeared to defend this action, but CTR and HFA have intervened to do so in the agency's place.

On February 4, 2020, Defendant-Intervenors moved to dismiss, arguing that CLC lacked standing and had failed to state a claim upon which relief could be granted. On June 4, 2020, this Court denied the motion, holding that CLC had "proven its standing" and "present[ed] significant and largely uncontroverted evidence that the Commission's dismissal of its administrative complaint was 'contrary to law.'" ECF No. 33 at 17, 28 (reported at *CLC v. FEC*, --F. Supp. 3d---, 2020 WL 2996592 (D.D.C. June 4, 2020)).

ARGUMENT

I. Jurisdiction

This action arises under federal law—specifically FECA, 52 U.S.C. § 30101 *et seq.*, and the APA, 5 U.S.C. §§ 551-706—and the Court has federal subject-matter jurisdiction over CLC's

FECA and APA claims pursuant to 52 U.S.C. § 30109 and 28 U.S.C. § 1331. Moreover, as this Court has already recognized, "CLC has proven its standing to bring this case." ECF No. 33 at 17.

Plaintiffs have established Article III standing by showing that they (1) "suffered an injury in fact," (2) "fairly traceable to the challenged conduct of the defendant," and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

First, "a denial of access to information qualifies as an injury in fact . . . where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020). In denying intervenors' Motion to Dismiss, the Court "d[o]ve into the record" and found that plaintiffs' suit, if successful, would reveal information that is currently unavailable. *See* ECF No. 33 at 11-13. And it is "clear" that access to this missing information would help plaintiffs. *Id.* at 11. "CLC depends on accurate and complete reporting of campaign finance information under FECA to carry out programmatic activities that are central to its mission," Decl. of Brendan Fischer ¶ 9 (ECF No. 27-2); and Ms. Kelley uses FECA disclosure information "to assess candidates for elective office, to evaluate the range of political messages that [she] hear[s] from various speakers, and to monitor the influence of campaign money on officeholders and public policy." Decl. of Catherine Hinckley Kelley ¶ 5 (ECF No. 27-1).

CLC has also proven its organizational injury because the dismissal injured CLC's interest and CLC has "used its resources to counteract that harm," ECF No. 33 at 14 (citing *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). *See, e.g.*, Fischer Decl. ¶¶ 9, 20; ECF No. 33 at 17.

Finally, plaintiffs meet the causation and redressability elements of standing. The FEC caused plaintiffs' injury by dismissing their complaint and thereby depriving them of FECA-required disclosure information from CTR and HFA, and that injury is likely to be redressed if this

Court remands the matter to the FEC for a new determination under the proper legal standards.

II. Standard of Review

A. Dismissals "contrary to law" under FECA

The Commission's decision to dismiss an administrative complaint will be set aside if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning the dismissal (1) rests on an impermissible interpretation of law, or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion under *Orloski* is similar to the "arbitrary [or] capricious" standard applied under the APA. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 & n.6 (D.C. Cir. 1980); *see also Shays II*, 414 F.3d at 96 ("[W]hether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable."). Under that analysis, a court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

FEC dismissals are subject to judicial review under the contrary-to-law standard regardless of whether they spring from a majority vote or a deadlock. However, although the Court's review under FECA is deferential, the controlling Commissioners' rationale does not receive the added boost of *Chevron* or *Auer* deference because it does not reflect an exercise of delegated authority to make "rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). To qualify for either form of deference, an FEC interpretation of FECA or Commission regulations

"must be one actually made by the agency," meaning "it must be the agency's 'authoritative' or 'official position.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (citing *Mead*, 533 U.S. at 257-59 & n. 6 (Scalia, J., dissenting)). A legal interpretation announced by fewer than four FEC Commissioners is neither. *Common Cause*, 842 F.2d at 449 n.32 & 453 (recognizing that Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases").

B. APA challenge to regulations

If the regulatory construction applied to dismiss CLC's complaint is deemed authoritative—*i.e.*, if it reflects a binding Commission interpretation of FECA's coordination provisions promulgated in exercise of its delegated authority to construe the Act, *see Mead*, 533 U.S. at 229-30—this Court should apply "the two-step analysis" set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to determine whether the coordination regulations and internet exception, as construed, are valid interpretations of FECA. *Shays II*, 414 F.3d at 96. At the first step, the Court asks whether the statute is ambiguous. If it is, the Court proceeds to the second step and asks "whether the agency's interpretation is reasonable." *Id.* The agency's interpretation can be reasonable only if it is "consistent with the statutory purpose and legislative history." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

III. The Dismissal Was Contrary to Law.

In considering whether to find "reason to believe" that CTR and HFA violated the Act, the Commission had before it a record showing that a substantial amount of CTR's nearly $10 million in expenditures was not connected to exempt internet communications, but instead funded activities like opposition research, surrogate training, and "rapid response" press outreach—and at least some portion of this offline activity, by CTR's own admission, was conducted in coordination

with the Clinton campaign. *See, e.g.*, AR041 ¶ 91. Nevertheless, the controlling Commissioners found that not one dollar spent by this massive joint operation constituted an in-kind contribution.

The dismissal of CLC's complaint fails under both *Orloski* prongs: first, because the controlling Commissioners grounded their votes to dismiss on impermissible interpretations of FECA and FEC regulations that radically narrow the scope of the Act's coordination provisions by radically *expanding* the regulatory internet exemption; and second, because they arbitrarily disregarded whole swaths of the factual record and "entirely failed to consider [] important aspects" of the matter to reach that result. *State Farm*, 463 U.S. at 43.

A. The dismissal rested on impermissible interpretations of FECA and FEC regulations.

In applying the internet exemption to dismiss the substantial majority of CLC's allegations against CTR and HFA, the controlling Commissioners committed at least two fundamental errors of law: (1) they defied FECA's unambiguous mandate to regulate all "expenditures" made "in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate as in-kind contributions to that candidate, 52 U.S.C. §§ 30101(8)(a); 30116(a)(7)(B)(i); and (2) relied on a radically expanded version of the internet exemption that compromises FECA's purposes and is unsustainable under the Commission's own rules and precedent.

1. FECA unambiguously mandates that coordinated expenditures be regulated as in-kind contributions.

Since *Buckley*, the Supreme Court has recognized that "the primary interest served by [FECA's contribution] limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption." 424 U.S. at 25. FECA's candidate contribution limits are thus essential to FECA's core anticorruption purposes. Failing to regulate coordinated expenditures, as the Court has likewise made clear, fatally undermines the contribution limits and compromises the Act's purposes, because "expenditures controlled by or coordinated with the

candidate . . . might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse." *Id.* at 46. *See also McConnell*, 540 U.S. at 221-22 ("[E]xpenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'").

Accordingly, "Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated," *id.*, and the Supreme Court has consistently affirmed that "coordinated expenditures are treated as contributions rather than expenditures . . . [to] prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 46-47.

To this end, "contributions" and "expenditures" are defined broadly as any "gift" or "payment" made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). Further, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall be considered to be a contribution to such candidate*." *Id.* § 30116(a)(7)(B)(i) (emphasis added).

In statutory interpretation, "the best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Here, as FECA's statutory text makes clear and four decades of Supreme Court precedent confirmsd, Congress intended that any "expenditure" coordinated with a candidate "shall" be considered a contribution to such candidate. 52 U.S.C. § 30116(a)(7)(B)(i). That both statutory definitions encompass "anything of value" contributed or expended to influence "any election for federal office," *id.* § 30101(8)(a)(i), (9)(a)(i), and contributions specifically include compensation for personal services "rendered to a political committee without charge *for any purpose*," *id.* § 30101(8)(a)(ii) (emphasis added), further shows Congress's intent to regulate broadly. Paired with the mandatory language in section

30116(a)(7)(B)(i), the congressional directive is plain on the Act's face.

The controlling Commissioners ignored this unambiguous mandate and expanded a regulatory exemption to "permit an entire class of political communications"—and *non-communication* expenditures "to be completely unregulated irrespective of the level of coordination." *Shays I*, 337 F. Supp. 2d at 70. An near-identical approach was previously invalidated by *Shays I* as contrary Congress's clear directive to regulate coordinated expenditures, *id.* at 69-70, and this Court should do the same. Even if the relevant statutory terms *were* ambiguous, courts "must reject administrative constructions . . . that frustrate the policy that Congress sought to implement." *Shays III*, 528 F.3d at 919.

2. The dismissal hinged on a radical expansion of the regulatory "internet exemption" that frustrates the Act's purposes and will lead to gross abuse.

FECA's text and history make clear that its comprehensive scheme of contribution limits, source restrictions, and disclosure requirements demands vigilant regulation of the line between expenditures that are "*totally* independent" from candidates and those *coordinated* with candidates. *Buckley*, 424 U.S. at 47 (emphasis added).

The FEC has implemented this broad mandate through two regulations relevant here. The first, 11 C.F.R. § 109.20, mirrors the statutory language and applies to coordinated expenditures generally, except for those "made for a coordinated communication" under 11 C.F.R. § 109.21. The more specific regulation, 11 C.F.R. § 109.21, applies only to "coordinated communications," which are expenditures for "public communications" that meet specified content, conduct, and payment prongs. *Id.* § 109.21(a), (c)-(d). As detailed above, *see supra* at 6-8 (Stmt. of Case I.B), the FEC's internet rulemaking carved out only a narrow exception to the "public communication" definition upon which section 109.21 relies, *i.e.*, for "communications over the Internet" that were not "placed for a fee on another person's Web site." *Id.* § 100.26; 71 Fed. Reg. 18589. The

dismissal here was primarily based on an application of this exemption.

As this Court has recognized, the controlling group's unbounded interpretation of the internet exemption, and the "input costs" to which the exemption supposedly extends, "creates a loophole that effectively vitiates the plain language of FECA." ECF No. 33 at 23. According to the controlling Commissioners, the internet exemption not only exempts internet communications not "placed for a fee" from the coordination rules, but also encompasses without limitation all "input costs" "incurred by a speaker to produce [exempt] internet communication[s]." AR391. To illustrate this concept, the controlling group discusses the input costs that might be associated with producing a notice of a candidate endorsement, which, they say, includes, *at a minimum*, "staff time, computer usage, and electricity," but also possibly "additional overhead and other expenses, such as for travel and the services of consultants, graphic designers, videographers, actors, and other specialists." AR392.

In applying their "input costs" rule, however, the controlling Commissioners stretch the internet exemption beyond recognition. Not only do they treat any cost "associated" with an unpaid internet communication as an "input" cost, but they include in such "input costs" general overhead disbursements only *partly* attributable (at most) to such exempt internet communications. *Id*. Under their approach, one dollar of internet-related spending operates to immunize an otherwise regulable expense from regulation in its entirety, regardless of whether or to what degree it also supports coordinated activities that occur entirely offline.

A regulatory construction that opens a loophole of this magnitude self-evidently "create[s] the potential for gross abuse," *Orloski*, 795 F.2d at 165, in that it purports to allow precisely what FECA proscribes. The circumvention concern is not illusory. As the Supreme Court recognized with respect to party-coordinated expenditures in *FEC v. Colorado Republican Federal Campaign*

Committee, if a candidate could "arrange for a [super PAC] to foot his bills" or coordinate "spending on virtually identical items as his own campaign funds," the risk that "contribution limits would be eroded" was "beyond serious doubt." 533 U.S. 431, 457, 460 (2001). So too here. "If suddenly every dollar of spending could be coordinated" with federal candidates but escape regulation through the simple expedient of posting some product of that spending online, "the inducement to circumvent would almost certainly intensify." *Id.* at 460. This is why, as the Supreme Court has acknowledged, FECA and its regulations must be construed to minimize available "channels for circumventing contribution and coordinated spending limits." *Id.* at 432, 455. The controlling Commissioners failed to heed this instruction.

Moreover, the controlling Commissioners' fixation on viewing almost all of CTR's activity through the lens of the internet exemption and coordinated communications framework effectively turns 11 C.F.R. § 109.20(b)—and the statutory authority upon which it rests—into a superfluity. Their SOR provides no basis for refusing to look beyond section 109.21 and the "public communication" definition, when section 109.20, by its terms, applies to expenditures that are not "made for a coordinated communication under 11 C.F.R. § 109.21." AR102 (CTR's non-internet activity is "properly analyzed as in-kind contributions to HFA under the coordinated expenditure provision of 11 C.F.R. § 109.20(b) rather than the coordinated communication provision of 11 C.F.R. § 109.21"). The Commission cannot "simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (rejecting interpretation that would render regulation "redundant"); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting statutes cannot be read to make text "superfluous, void, or insignificant").

3. The controlling Commissioners provide no rationale for their exclusion of certain "input costs" from regulation as "coordinated expenditures."

The controlling Commissioners' treatment of two specific categories of CTR's expenditures warrants particular attention: (1) CTR's payments for polling and (2) its general overhead expenses supporting multiple organization functions. As to both categories, the rote application of the internet exemption exposes the fundamental unlawfulness of their approach.

First, with respect to CTR's expenditures to commission a private polling firm to conduct polls benefitting the campaign, AR392, it is well established that payments for polling, if coordinated with a candidate or her agents, qualify as in-kind contributions to the candidate. Like opposition research or a mailing list[3], a poll is a "thing of value" and expressly addressed as such in FEC regulations, and coordinated expenditures associated with polling are regulated accordingly. *See* 52 U.S.C. §§ 30101(8)(A)(i), 30116(a)(7)(B)(i); 11 C.F.R. § 106.4 (providing that "[t]he purchase of opinion poll results by a political committee or other person not authorized by a candidate to make expenditures and the subsequent acceptance of the poll results by a candidate . . . is a contribution in-kind by the purchaser to the candidate"); *see also* FEC, *Campaign Guidance: Nonconnected Committees* 25 (2008), https://www.fec.gov/resources/cms-content/documents/nongui.pdf. Notwithstanding this authority, the controlling Commissioners concluded summarily that CTR's payments for polling were covered by the internet exception. On their view, as soon as CTR posted the poll on its website, its expenditures to commission the poll transformed into "input expenses" that were "necessary to make" an exempt internet communication, "and the inputs would not be in-kind contributions because the resulting internet

[3] Indeed, CTR recognized that at least some of its expenditures in these categories would constitute in-kind contributions to HFA; for instance, CTR accepted payment for "research" and "research services" from HFA, AR089, even though this research also presumably supported exempt online activity. It is unclear why CTR thought polling would be treated differently.

communication would not be in-kind contributions." AR392.

As OGC emphasized, however, even if CTR's "costs for the online placement of the poll results on its own website would not be a cost for a 'public communication' under 11 C.F.R. § 100.26," that cannot end the analysis:

> CTR's payment for the underlying polling, made in coordination with HFA as it appears all CTR activity was, would be a coordinated expenditure under 11 C.F.R. § 109.20(b), and, thus, an in-kind contribution. The fact that the polling results were subsequently transmitted over the internet does not retroactively render the costs of the polling a "communication" cost.

AR100. The controlling Commissioners' pliable view of "input costs" all but invites political committees to convert any coordinated expenditure into an unregulable "input cost" through the simple expedient of "posting a message on Facebook that purports to use some advantage conferred by the expenditure." ECF No. 33 at 23-24.

Second, when paired with their expansive view of the "input costs" that qualify for the internet exemption, the controlling group's refusal to require allocation of multi-purpose expenditures only compounds the defects of their approach. As OGC highlighted, most of CTR's nearly $10 million in spending went toward "purposes that [were] not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." AR089. These significant overhead expenses supported the full range of CTR's activities, including both internet communications *and* offline activities that even the controlling Commissioners did not claim were exempt—*e.g.*, strategic press outreach, research, tracking, and surrogacy trainings.

Instead of requiring allocation, the controlling group excluded CTR's general overhead expenditures entirely, on the ground that "[r]equiring speakers to further allocate overhead expenses across internet communications (or other activities) and then exempting only those

component fees deemed essential for the internet communication's placement would eviscerate the internet exemption." AR392. Here, however, CTR's operating costs are not direct or indirect input expenses for exempt expenditures—or, in many instances, related to exempt activity at all.

At a minimum, the controlling group did not "articulate a satisfactory explanation," "including a rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43, for the conclusion that CTR's payments for general overhead expenses supporting multiple activities were "input costs" for covered internet communications, and thus were entirely exempt from treatment as in-kind contributions. AR392-93.

4. The dismissal was based on an impermissible and unsupported construction of the coordination regulations and internet exemption.

The controlling Commissioners' myopic focus on 11 C.F.R. § 109.21 and the "public communication" definition—and their extreme expansion of the internet exception to those rules—also conflicts with the FEC's own rules and finds no support in agency precedent.

a. The 2006 Internet Rulemaking did not purport to adopt a categorical exception for all "input costs" associated with internet communications.

The controlling Commissioners' assertion that the internet exemption has always comprehensively embraced all conceivable "input costs" ignores what the FEC actually did in its 2006 internet rulemaking. As OGC has observed, "[n]either the [internet] regulation itself nor the Commission's accompanying explanation and justification expressly address whether the regulation also exempts production costs that are incurred unrelated to the advertisement's dissemination over the internet." First Gen. Counsel's Rpt. ("FGCR") at 6, MUR 6729 (Checks and Balances) (Aug. 6, 2014), https://www.fec.gov/files/legal/murs/6729/14044363781.pdf. But even if the rulemaking record were silent on this point, that would be no justification for an interpretation that dismantles the entire statutory scheme.

Far from supporting a blanket exemption for input costs, however, the rulemaking record

suggests that the exemption was far narrower. *See supra* at 7-8 (Stmt. of Case I.C). In promulgating the rules, for example, the FEC confirmed that computer purchases and payments to bloggers can be "expenditures" *even if* some of the final products, such as the blogs themselves, fall under the internet exemption. AR043-45 ¶¶ 94-95 (citing 71 Fed. Reg. at 18604-06). The rulemaking record makes clear the exception was addressed primarily to uncompensated activities by individuals and non-committees—and not intended to exempt every possible expense incurred by single-candidate super PACs like CTR that happen to engage in some internet activity. *Cf.* Advisory Op. 2018-13 (OsiaNetwork) at 6 (noting "the Commission did not intend the definition [of internet activities] to be so broad as to encompass every activity that might make incidental use of the internet").

b. Commission precedent did not justify radically expanding the internet exemption.

FEC precedent likewise did not justify dramatically expanding the exemption. The controlling SOR relies heavily on MUR 6657 (Akin for Senate), which bears no resemblance to this case. First, as OGC explained in justifying its recommendation not to proceed there, "the alleged prospective coordinated communications . . . *never occurred*." FGCR at 2, MUR 6657 (May 6, 2013), https://www.fec.gov/files/legal/murs/6657/13044343282.pdf (emphasis added). Second, the only question OGC was examining with respect to "input costs" was whether expenditures for "'Email List Rental' or 'Online Processing,'" *id*. at 6, alone were sufficient to cause the group's internet communications to be "placed for a fee," thereby rendering the internet exemption *entirely* inapplicable. *Id*. at 6-7. The question was not whether a broader category of disbursements not tied to online communications, such as CTR's overhead expenses here, should be exempt as "input costs."

The other FEC precedents cited in the SOR also do not validate their unbounded approach to input costs. None of these authorities involved a remotely comparable coordination scheme, or

indeed, coordinated activity at all. *See, e.g.*, AR390 (citing Advisory Op. 2011-14 (Utah Bankers Ass'n) (approving corporate PAC's request to operate an email list soliciting contributions to particular candidates, where the PAC appended a detailed policy confirming that it was structured to operate independently of candidates); Advisory Op. 2008-10 (VoterVoter.com) (permitting nonpartisan commercial vendor to operate online marketplace facilitating the purchase and sale of political ads, where unpaid ad creators and broadcast buyers were transacting at arm's length and not coordinating with candidates or each other)).

Nor was the interpretation permissible because it avoids "chill[ing] political speech online." AR392. "[S]o would regulating nothing at all, and that would hardly comport with the statute." *Shays II*, 414 F.3d at 101. Besides, "the rationale for affording special protection to *wholly independent* expenditures" does not extend to *coordinated* expenditures. *McConnell*, 540 U.S. at 221 (emphasis added). Likewise, the First Amendment concerns noted in the rulemaking were reserved for individual citizens and bloggers who might incidentally communicate about a candidate online; they do not extend to a "full-fledged media machine dedicated to providing HFA with services only tangentially related to internet communications." AR402.

B. The dismissal was arbitrary and capricious because it was wholly contrary to the administrative record and the legal standard applicable to FEC reason-to-believe determinations.

The agency action at issue here is not a final determination, based on a full evidentiary review, of whether CTR and HFA violated FECA. Instead, plaintiffs challenge the controlling Commissioners' failure to find there was even *reason to believe* a violation occurred. At this stage, the Court need not decide whether CTR and HFA actually violated FECA, but must rule for plaintiffs if it concludes that the controlling Commissioners' rationale for finding no reason to believe is inconsistent with the administrative record, or otherwise arbitrary or capricious or contrary to law. *State Farm*, 463 U.S. at 43.

That conclusion is inescapable here. Uncontroverted evidence in the record showed that (1) CTR systematically coordinated its activities with HFA, and (2) CTR spent millions of dollars on types of expenditures that, when coordinated with a candidate, constitute in-kind contributions. Together, these facts make it all but impossible that CTR could *not* have made excessive in-kind contributions to HFA. Therefore, "[t]he Commissioners' conclusion that there was no 'reason to believe' that 'Correct the Record's expenditures for other activities' than those they claimed under the internet exception were 'in-kind contributions to Hillary for America' runs contrary to uncontested evidence." ECF No. 33 at 25-26.

1. Abundant record evidence showed that CTR was systematically coordinating with HFA while making large, non-exempt expenditures.

The controlling SOR claims that CLC's administrative complaint "fail[ed] to provide the Commission with information showing . . . that expenditures were made 'in cooperation, consultation, or concert, with, or at the request or suggestion of' [HFA]." AR393. But the record shows that CTR was created specifically to coordinate its activities with HFA and adhered to that mission throughout the 2016 election cycle. Even assuming that hacked information published by Wikileaks is ignored—and this information was raised only in the four FEC complaints *not* filed by CLC—the record was more than sufficient to provide reason to believe that CTR and HFA coordinated systematically. "In fact, the non-Wikileaks information shows that CTR existed *solely* to make expenditures in cooperation, consultation or concert with, or at the request or suggestion of Clinton and HFA and that it conducted its activities, as Brock phrased it, under HFA's thumb." AR098. An investigation was warranted to uncover the full extent of that coordination.

Most obviously, CTR and its agents repeatedly and publicly announced their coordination with HFA. For example, the press release announcing CTR's establishment stated that it would "be allowed to coordinate with campaigns." AR359. Similarly, Brock was quoted in a September

2015 *Time* magazine profile as saying he worked on "the 'coordinated' side of the Clinton campaign." AR011 ¶ 24. According to the profile, CTR "raises unlimited funds outside the regulated campaign finance system. But since it does not pay for advertising advocating her election, he says he can continue under current rules to talk to her, and her campaign staff about strategy, while deploying the unregulated money he raises to advocating her election online, through the press, or through other means of non-paid communications." *Id*. As then-Chair Weintraub noted, "[t]hese representations by CTR are not the puffery of an entity acting outside the orbit of HFA. CTR leadership spoke publicly about communications with senior HFA personnel, confirming that CTR and HFA worked closely together to benefit HFA." AR401.

After the election, in December 2016, Brock sat for a podcast interview and discussed CTR. As the controlling Commissioners noted, Brock's comments in this interview "reinforce what we already know from [other] information in the record." AR386. Brock explained that "the coordinated status was, you're basically under their thumb but you don't have to run everything by them." AR091. Brock "acknowledged that he would pick up the phone and talk to Clinton campaign manager Robbie Mook and occasionally campaign chairman John Podesta." *Id.*

The controlling SOR grasps at straws to downplay the significance of Brock's admissions. According to the controlling Commissioners, the fact that Brock made any public statements without HFA's prior authorization suggests that CTR's activities were not "fully coordinated," and CTR's compliance with Mook's request to "chill out" is not by itself an example of coordinated spending. AR386. These quibbles miss the point: the examples Brock recounted in the podcast interview illustrate that CTR was ultimately "under [HFA's] thumb" and took HFA's directions on how to allocate its budget. AR091. That HFA did not specifically pre-approve every CTR action does not mean that CTR was not making many expenditures in "cooperation, consultation or

concert with, or at the request or suggestion of" HFA. And in requesting that CTR *not* make certain expenditures, HFA was "coordinating"—by orchestrating CTR's overall program and conserving CTR resources so that more could be spent on activities that HFA *did* support.

Beyond CTR's own direct admissions, another type of evidence confirming coordination was apparent synchronization in the timing and content of CTR and HFA messaging. *See, e.g.*, AR009-10 ¶ 20 (noting CTR email to supporters highlighting Clinton's campaign finance plan); AR011-12 ¶ 26 (*Fox News* noting that a senior Clinton campaign staffer and CTR President Brad Woodhouse had tweeted identical messages about Clinton around the same time). CTR had advance, inside knowledge of strategic decisions by HFA, and provided comments to journalists based on this knowledge. *See* AR299 (*New York Times* article quoting Brock on Clinton campaign strategy and noting that CTR "coordinates with the campaign"). Not surprisingly, journalists and observers widely understood that CTR was an agent or collaborator of HFA. *See id.*; AR178 (*Washington Post* noting in July 2015 that "Clinton's campaign is working hand-in-glove with Correct the Record"); AR215 (*Washington Post* noting that CTR "works with Clinton's official campaign on communications strategy"); AR302-03 (referring to "[a] constellation of groups in [Clinton's] political orbit," including CTR).

All this evidence is more than sufficient to show that HFA and CTR systematically coordinated. Internal HFA documents published by Wikileaks only corroborate what the rest of the record already makes clear. *See* ECF No. 33 at 26-27. An internal HFA memorandum proposed disseminating campaign messages "through work of CTR and other allies," and stated that HFA will "[w]ork with CTR and [the Democratic National Committee] to publicize specific GOP candidate vulnerabilities on issues of transparency, ethics, and donor favoritism." AR092. In another internal memorandum, HFA's Chief Administrative Officer noted that if former Michigan

Governor Jennifer Granholm worked at CTR, HFA "could at least make sure her speaking and media opportunities met our needs/requests." AR093.

In this context of systematic coordination with HFA, CTR spent millions of dollars on the types of activities that FECA treats as in-kind contributions when they are coordinated with candidates. OGC expressly found, based on CTR's own FEC disclosures, that "the bulk of" CTR's spending, which totaled $9.61 million, AR088, was "for purposes that are not communication-specific . . . in addition to payments for explicitly mixed purposes such as 'video consulting and travel' and 'communication consulting and travel.'" AR089-90. That CTR made these enormous non-communication expenditures while systematically coordinating its operation with HFA all but conclusively proves large-scale in-kind contributions. The controlling Commissioners' refusal to even find *reason to believe* a FECA violation occurred thus "runs counter to the evidence before the agency" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

2. The controlling Commissioners have provided no rationale for declining to find coordination as to certain activities they concede are not legally exempt.

Even if the Court were to accept the controlling Commissioners' legal arguments for exempting some of the non-communication-specific expenses identified by OGC—which it should not—the record *still* contains more than enough evidence to compel a reason to believe finding. As the controlling SOR acknowledges, "the record suggests" that CTR engaged in activities that "do not relate directly to [its] internet communications," including CTR's "surrogacy program, research and tracking, and contacts with reporters." AR393. Spending on these activities would therefore count as in-kind contributions, insofar as they were coordinated with HFA. Because of CTR's and HFA's deficient reporting, it is impossible at this pre-investigation stage to definitively calculate CTR's spending on these activities, but the record indicates that its offline activities

together constituted a large part, if not the majority, of CTR's $9 million program.

CTR's surrogate program, for example, was a large and expensive operation that likely resulted in substantial coordinated expenditures with HFA. The uncontested record shows that, as early as the summer of 2015, CTR was carrying out an "unusually ambitious" training program for local Clinton surrogates, including "on-camera media training" to prepare surrogates for television appearances. AR174-75. CTR openly acknowledged it was "holding sessions with top communicators *across the country*" to train them on talking points and interview techniques. AR175 (emphasis added). For the on-camera training aspect of its surrogate program, CTR hired the communications firm Franklin Forum, *id.*, and ultimately paid that firm approximately $469,145 over 2015 and 2016. *See* Ex. A attached hereto. Similarly, according to an uncontested news report in the record, CTR hired QRS News Media in 2016 "to help oversee an aggressive surrogate booking program, connecting regional and national surrogates with radio and television news outlets across the country in support of Hillary Clinton." AR024 ¶ 51. CTR paid $106,320 to QRS News Media in 2016 for "booking consulting." *See* Ex. B attached hereto. While the controlling Commissioners claimed to see no direct evidence of coordination on CTR's surrogate program in particular, AR394, this ignores the extensive evidence that CTR's very purpose—and consistent practice—was to coordinate its activities with HFA. Nothing in the record suggests that CTR departed from its modus operandi in the area of surrogacy.

The record also makes clear that CTR invested heavily in contacting and developing relationships with journalists, as well as placing op-eds by Clinton supporters. As described in detail above, *see supra* at 10-11 (Stmt. of Case II.A), these activities included assigning thirty employees to a "war room" that conducted extensive rapid response and reporter contacts during the Benghazi hearing, AR209, pitching reporters with negative stories about Clinton's primary

opponent, AR225, and providing reporters with voluminous opposition research materials that CTR had produced. *See* AR209 (CNN obtained copy of CTR's 140-page opposition research book); AR189 (CTR provided report to media on Clinton email use); AR303 (Brock wrote memo about Trump campaign for distribution to media); AR315-16 (CTR obtained and leaked draft of Trump's convention speech). Similarly, senior CTR officials wrote pro-Clinton op-eds and placed them with newspapers. AR319-20.

Moreover, the record shows that CTR spent vast resources on opposition research and tracking, including by sending trackers to monitor Clinton's primary opponents, producing voluminous opposition research books, and obtaining a copy of Trump's convention speech. *E.g.*, AR180 (CTR sent tracker to monitor primary opponent Martin O'Malley); AR194-95 (Brock characterized CTR's attack on Bernie Sanders as "standard opposition research"). The record shows that HFA may have *partially* reimbursed CTR for these services, but it is not plausible that these minimal payments, amounting to under three percent of CTR's total receipts for the election cycle, fully covered the value of CTR's research and tracking activities. CTR's contemporaneous disclosure reports indicate that these payments went to "research," and make no mention of "tracking." *See supra* at 12. At the very least, OGC was correct that an investigation is necessary "to determine how [the payments] relate to CTR's overall activity." AR100 n. 67.

Remarkably, the record evidence of coordination was largely uncontested in the administrative proceedings. Apart from their implausible claim that HFA fully reimbursed CTR's research and tracking expenses, AR067, respondents did not attempt to deny that the "offline" activities alleged in CLC's complaint were coordinated and on CTR's dime. Instead, they offered legal defenses, claiming that some of their coordinated activities, such as calling reporters and training local surrogates, were exempt from the coordination rules because they were

"communications" but not "public," AR065-66, 76; and that others, particularly op-eds by CTR officials and CTR's contacts with reporters, were covered by the media exemption under 11 C.F.R. § 100.73, AR065-67, 75-76.[4]

While the controlling Commissioners largely embraced respondents' internet-exemption argument—erroneously, *see supra* Part III.A—they did not bother to engage in any meaningful way with respondents' other legal arguments. If they had done so, they would have had to acknowledge the obvious: those arguments were meritless distractions from the undisputed reality that CTR and HFA coordinated on activities going far beyond internet communications. As OGC noted, CTR's observation that some of its activities were not "public communications" is unavailing; CTR engaged in a "wide array of activities," and most "*cannot fairly be described as 'communications,'* public or otherwise, unless that term covers almost every conceivable political activity." AR110, 124 (emphasis added). Such non-communication activities—including, for example, CTR's surrogate trainings—are plainly subject to the FEC's general coordination rule, 11 C.F.R. § 109.20. *See supra* at 6 (Stmt. of Case I.B).

Respondents' reliance on the media exemption fares no better. As this Court has recognized, "the media exemption . . . is for the media," and any action respondents took in reliance on it would be a "seemingly clear . . . violation" of FECA. ECF No. 33 at 26. By deflecting with meritless legal arguments while failing to dispute the alleged facts, respondents effectively conceded that they coordinated massive expenditures. The failure to find reason to believe on this

[4] As to the training sessions for local Clinton surrogates, CTR claimed it "did not include any official Clinton campaign surrogates (as identified by HFA) or HFA staff in the trainings. CTR did not solicit or accept any suggestions from HFA regarding which individuals should attend the sessions or otherwise permit HFA to direct individuals to the sessions." AR066. This is not a denial of coordination. It is entirely consistent with a conclusion that CTR initiated these training sessions at the "request or suggestion" of HFA. 52 U.S.C. § 30116(a)(7)(B)(i).

voluminous, uncontested record of coordinated activity "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

3. The controlling Commissioners committed multiple errors of law in excluding key record evidence from consideration.

To avoid the obvious conclusion that there was reason to believe respondents violated FECA, the controlling Commissioners ignored huge swaths of the record, invented nonsensical rules of evidence to exclude facts, and imposed an improperly high standard of proof at the pre-investigation stage. These errors led to a decision that cannot be reconciled with the record.

First, the controlling Commissioners simply misstated the record. They suggested that the evidence supporting the conclusion that CTR "systematically coordinated with" the Clinton campaign amounted only to CTR's "May 2015 press release, information not included in the complaints or responses, and information stolen and disseminated by Russian intelligence officers." AR385. This ignores the extensive and unrefuted evidence of coordination in CLC's complaint, which cited numerous reliable public sources other than CTR's 2015 press release, and in no way relied on materials "disseminated" by the Russian government. *See, e.g.*, AR011 ¶ 24 (citing *Time* profile reporting that Brock worked on what he called "the 'coordinated' side of the Clinton campaign" and claimed he could "continue under current rules to talk to her, and her campaign staff about strategy, while deploying the unregulated money"); AR009-10 ¶ 20 (noting CTR email featuring a video produced by HFA); AR011-12 ¶ 26 (noting HFA and CTR officials tweeted identical messages about Clinton around the same time); AR007 ¶ 14 (citing report that "Clinton's campaign is working hand-in-glove with Correct the Record").

Second, the controlling Commissioners chose to ignore many of CTR's coordinated activities on the erroneous legal premise that those activities were exempt from treatment as in-kind contributions under FECA and its implementing regulations. As already discussed, *see supra*

Part III.A, these legal arguments conflict with FECA and its implementing regulations. By excluding much of the record from consideration based on legal errors, the controlling Commissioners failed to "examine the relevant data and articulate a . . . rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted).

Third, the controlling Commissioners further constricted the record by fabricating a rule that would limit OGC's analysis to facts and documents contained within the four corners of the administrative complaint, even when other compelling evidence is publicly available and in fact was compiled by OGC. On this basis, they refused to consider Brock's post-election podcast interview. AR385-86. This strict four-corners rule flatly contradicts a 2007 FEC statement of policy, which provides that the Commission will consider "the available evidence," including information in the complaint and "any publicly available information." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-46 (Mar. 16, 2007).

In any event, categorically excluding all evidence from outside the administrative complaint is irrational. As this Court has explained, the controlling Commissioners could not reasonably justify the exclusion of important evidence just by deriding OGC's research as "selective Google searches." ECF No. 33 at 28. Indeed, as then-Chair Weintraub observed, "it is gross negligence for an agency charged with enforcing the law to ignore information readily available to the general public." AR409. Courts have therefore recognized that the FEC must not ignore publicly available evidence in making a reason-to-believe determination. *See In re FECA Litig.*, 474 F. Supp. 1044, 1046 (D.D.C. 1979) ("[The Commission] must take into consideration all available information concerning the alleged wrongdoing. In other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to

investigate."). The controlling Commissioners' failure to do so was arbitrary and capricious.[5]

Fourth, the controlling Commissioners suggested repeatedly that CLC's complaint "concede[s] the speculative nature of its coordination allegations" because it phrased certain clauses in the "conditional tense." AR393, 395 n.80. This claim is not just wrong, but frivolous. As their leading example, the controlling Commissioners quote the complaint out of context: "If any of these expenditures were coordinated with the Clinton campaign, they would constitute in-kind contributions to the campaign." AR393 (quoting AR045 ¶ 95). This quotation is from the "Causes of Action" section of the complaint—not from any of the sixty numbered paragraphs of facts that plaintiffs alleged unconditionally. That the controlling Commissioners must resort to this syntactical game-playing shows they had no reasonable arguments to make.

Fifth, and finally, having arbitrarily excluded or discounted most of the record, the controlling Commissioners declared that the remaining evidence was insufficient to establish reason to believe because it failed to establish coordination conclusively, "transaction-by-transaction." AR395. That demand sets an unreasonably high bar that contravenes FECA and agency policies and precedent regarding the standard at the "reason to believe" stage.

Section 30109(a) of FECA makes clear that "reason to believe" is a lower standard than what is required to find liability or even probable cause—because a reason-to-believe finding is a necessary precursor and precondition for a subsequent "probable cause" determination or civil enforcement action. *See* 52 U.S.C. § 30109(a)(2) ("reason to believe" finding authorizes investigation); *id.* § 30109(a)(4)(A) (probable cause finding). Therefore, the Commission has long

[5] The controlling Commissioners suggested that the four-corners rule is necessary to give respondents fair notice of the claims they must respond to in administrative proceedings. AR386 n. 30. But CTR could hardly lack notice of *its own* public admissions, such as the podcast interview in which Brock extensively discussed CTR's coordination with HFA.

recognized that "[a] 'reason to believe' finding is not a finding that the respondent *violated* the Act, but instead simply means that the Commission believes a violation *may* have occurred." *FEC Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf (emphasis added). For instance, in its 2007 statement of enforcement policy, the FEC stressed that "reason to believe" findings are not "definitive determinations that a respondent violated the Act," but instead, "indicate only that the Commission found sufficient legal justification to open an investigation to determine *whether* a violation of the Act has occurred." 72 Fed. Reg. at 12545 (emphasis added). In contrast, a finding of *no* reason to believe is appropriate only where "evidence convincingly demonstrates that no violation has occurred," or when a complaint is "not credible," "so vague that an investigation would be effectively impossible," or "fails to describe a violation of the Act." *Id*.

The controlling Commissioners argued, without authority, that the administrative complaint must be dismissed because "[f]inding coordination requires . . . a transaction-by-transaction assessment to determine whether specific conduct occurred with respect to particular expenditures," rather than an assessment of "the general relationship between entities." AR395. Precisely because the ultimate adjudication may turn on a "transaction-by-transaction" analysis, FECA authorizes investigations to obtain the information needed for such an analysis. 52 U.S.C. § 30109(a)(2) (requiring investigation upon finding "reason to believe"). To demand that all these facts be presented within the four corners of the administrative complaint, before any investigation, puts the cart before the horse. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Imposing an unduly heightened pleading standard at the pre-investigation stage also creates perverse incentives for regulated parties, and "savvy campaign operators will exploit them to the hilt." *Shays II*, 414 F.3d at 115. If no one can complain to the FEC without conclusive evidence of

a violation, then candidates and donors may openly engage in schemes to violate FECA without fear of repercussion, so long as they keep the most granular details of their conduct under wraps. This risk is not hypothetical. Since the Supreme Court legalized unlimited independent election spending by any U.S. entity in *Citizens United v. FEC*, 558 U.S. 310 (2010), the FEC has *never* acted to enforce the ban on coordinating such spending with a candidate. AR407. The controlling Commissioners' adherence to an impossible pleading standard has contributed to this inaction. *See* AR404 (then-Chair Weintraub noting that her "colleagues continue to block investigations at their earliest stages, raising the bar to an unattainable level").

The controlling Commissioners' unwillingness to consider hacked internal documents—while perhaps not unreasonable on its own—underscores the irrationality of their demand for conclusive proof of coordination at the "reason to believe" stage. As a rule, campaigns and super PACs do not voluntarily publish their embarrassing internal emails that might reveal illegal coordination. And in many cases of potential FECA violations, it is impossible to deduce coordination on a transaction-by-transaction basis by combing through committee disclosures, *precisely because* the FECA violations concealed material information from disclosure. That is exactly what happened here. *See* ECF No. 33 at 13 (noting that information "will remain unavailable to Plaintiffs" "without a favorable ruling in this case."). Despite all this, the controlling Commissioners demanded that plaintiffs produce a smoking gun. But when presented with the only type of information that could possibly meet their standard of proof—internal documents corroborating plaintiffs' allegations—the controlling Commissioners refused to credit it. This Catch-22 reasoning cannot justify the controlling Commissioners' failure to draw the obvious conclusion that there was reason to believe CTR and HFA violated FECA.

IV. The FEC's Coordination Rules Are Invalid as Construed.

A. If the regulatory construction applied to dismiss CLC's complaint is deemed authoritative, it should be invalidated under the APA.

In addition to their FECA claim, plaintiffs also assert a claim under the APA challenging the coordination rules themselves, 11 C.F.R. §§ 100.26, 109.20, and 109.21, as construed, because they conflict with FECA's mandate to regulate coordinated expenditures. *See* 52 U.S.C. §§ 30101(8)(A)(i)-(ii), 30116(a)(7)(B)(i). In Count One of their Amended Complaint, plaintiffs challenge the controlling Commissioners' application of the coordination rules to find that none of the activities described in CLC's administrative complaint qualified as "coordinated expenditures" under FECA, and to dismiss the complaint on that basis. Am. Compl. ¶¶ 106-107. Plaintiffs are entitled to summary judgment on the FECA claim for the reasons detailed in Part III.

But if the controlling Commissioners' construction of the internet exemption is deemed authoritative under "the Commission's traditional coordination framework," AR396—as these Commissioners insist it was, AR391-93—the Court should proceed to Count Two of plaintiffs' amended complaint and hold that regulatory framework invalid under the APA. Insofar as the relevant regulations can be read to encompass all direct and indirect "input costs" for an eventual covered internet communication, even general overhead expenses supporting multiple functions, that construction conflicts with FECA and should be declared invalid.

In dismissing CLC's complaint, the controlling Commissioners characterized their interpretation of the internet exemption as authoritative and longstanding. As already explained, *see supra* Part III.A, there is scant support for it in the 2006 rulemaking record or subsequent FEC precedent, and the regulatory language in no way suggests it. Nevertheless, the controlling Commissioners (and intervenors here) maintain that CTR and HFA "properly understood" the "plain text" of 11 C.F.R. § 109.21 and FEC precedent with regard to the scope of the internet

exemption, AR391-93, because the "Commission has *never* required speakers" to "allocate overhead expenses across internet communications (or other activities)." AR392.

Plaintiffs disagree with this characterization of relevant FEC precedent. But if it accurately describes an authoritative regulatory construction of the exemption, such that any coordinated activity with a notional connection to an exempt internet communication has been consistently understood as also exempt, CTR and HFA could seek to avoid accountability for their FECA violations by invoking the Act's safe-harbor provision. 52 U.S.C. § 30111(e) ("[A]ny person who relies upon any rule or regulation prescribed by the Commission . . . and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act.").[6] Indeed, the controlling SOR all but invites them to do so. *See* AR393 n.66 (citing 52 U.S.C. § 30111(e) and suggesting that voting to find "reason to believe" would amount to a "retroactive policy reversal[]" depriving respondents of fair notice). As the D.C. Circuit observed in *Shays II*, when an FEC complaint is dismissed based on an invalid regulation, the relief available under FECA "hardly appears adequate"—"given that reliance on that regulation would afford a defense to 'any sanction,' the court might well uphold FEC non-enforcement without ever reaching the regulation's validity." 414 F.3d at 96 (citing 52 U.S.C. § 30111(e)).

Therefore, if the controlling Commissioners' alternative narrative is accepted, and this construction deemed authoritative, then plaintiffs' injury extends beyond this matter—as does the remedy needed to redress it. The coordination regulations, as construed, will undermine FECA's comprehensive regime for regulating and requiring disclosure of coordinated expenditures in *any*

[6] FECA's safe-harbor provision does not bar equitable relief; even if it ultimately precluded the assessment of civil penalties here, CTR and HFA could still be required to provide disclosure, which is not a "sanction" under the Act. *Cf. Larouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994) (disgorgement of funds was "not a sanction" under FECA, so safe-harbor provision did not bar it).

coordination case involving internet activity. In this scenario, FECA's judicial review mechanism is not adequate, so the Court should conduct its review under the APA. *CREW v. FEC*, 243 F. Supp. 3d 91, 105 (D.D.C. 2017) (reviewing APA claim alongside FECA claim).

B. FECA does not permit a "bright-line" exception to its coordination provisions that exempts all activities notionally supporting internet communications.

The controlling Commissioners' construction of the coordination rules and internet exemption is impermissible irrespective of whether the analysis proceeds under FECA or the APA. If the Court agrees with plaintiffs that neither FECA nor FEC rules support this radical expansion of the internet exception, it should find the dismissal of CLC's complaint contrary to law under 52 U.S.C. § 30109(a)(8)(C). If, however, the Court agrees with intervenors that the "bright-line" rule applied by the controlling Commissioners reflects the FEC's "traditional approach" to the coordination rules, AR392, it should also declare the regulatory construction invalid under the APA because the damage it inflicts on the statutory system potentially extends beyond this case.

Either way, the controlling Commissioners' approach cannot withstand even the most deferential review. "Under *Auer*, as under *Chevron*, an agency's reading must fall 'within the bounds of reasonable interpretation'" to be sustained—and "[t]hat is a requirement an agency can fail." *Kisor*, 139 S. Ct. at 2416 (2019) (citing *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

The internet exception, as construed, fails under the APA for the same reasons it fails under section 30109(a)(8): because it directly conflicts with FECA's unambiguous mandate to regulate coordinated expenditures, arbitrarily narrows the scope of regulable coordination under the Act, and is manifestly at odds with the statute's purposes. *See supra* Part III.A. In other words, the regulatory construction applied here would be unsustainable even if it were consistent with "the Commission's traditional coordination framework," AR396, because it permits exactly what FECA forbids: the provision of paid campaign services and other things of value to candidates by

groups operating outside of the contribution limits and disclosure requirements of the Act.

The controlling group defended this construction on the ground that it "operates as a bright-line rule and recognizes that a speaker will almost always incur expenses to produce an internet communication," AR392—but as *Shays II* recognized, "a bright line can be drawn in the wrong place." 414 F.3d at 101. There was no basis to create a per se exception of this magnitude, which takes a narrow carve-out originally justified as a way to avoid unduly restraining the speech of "bloggers in their pajamas," AR404 n.27, and turns it into a vehicle for the wholesale "evasion of campaign finance restrictions through unregulated collaboration." *Shays II*, 414 F.3d at 102.

Indeed, the abuses sanctioned by this construction of the rules go far beyond even the massive scheme alleged here. It would also appear to allow similar coordination efforts to occur between candidates and nonprofits, such as the 501(c)(4) "dark money" groups increasingly active in federal elections but not generally subject to FECA disclosure.[7] Under the controlling Commissioners' construction, if a non-disclosing nonprofit avoided express advocacy communications, nothing would prevent it from accepting unlimited contributions from any source, including foreign nationals,[8] and spending these funds in full coordination with a candidate—provided some small portion of the effort appeared online. None of this would even necessarily be subject to disclosure or public scrutiny. Plaintiffs thus seek an order declaring the construction of these rules unlawful and invalid, and ordering the FEC to apply the Act's

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[7] These 501(c)(4) and other "dark money" groups have reported spending nearly $1 billion on federal elections since 2010. Anna Massoglia, *'Dark money' in politics skyrocketed in the wake of Citizens United*, Ctr. for Responsive Politics (Jan. 27, 2020), https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united.

[8] *Bluman v. FEC*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (three-judge ct.), *aff'd mem.*, 565 U.S. 1104 (2012) (interpreting 52 U.S.C. § 30121 to permit foreign nationals to make expenditures for issue advocacy—i.e., "speech that does not expressly advocate the election or defeat of a specific candidate").

coordination provisions in the manner that Congress prescribed here and in all future cases.

CONCLUSION

For these reasons, plaintiffs respectfully urge the Court to grant CLC's motion for summary judgment; declare that the FEC's dismissal of plaintiffs' administrative complaint is contrary to law, and arbitrary and capricious; and direct the FEC to conform with such declaration within 30 days consistent with the Court's judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, 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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