IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE GEORGIA and
TREAUNNA C. DENNIS

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Defendant.

Civil Action No. 1:22-cv-03067

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS

Abbreviation	Meaning
BCRA	Bipartisan Campaign Reform Act
CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
F&LA	Factual and Legal Analysis
GOTV	Get Out the Vote
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
TTV	True the Vote

INTRODUCTION & SUMMARY OF ARGUMENT

As plaintiffs explained in their opening summary judgment brief, Congress, in enacting the Federal Election Campaign Act ("FECA" or "Act"), established clear and unambiguous mandates that broadly prohibit corporations from making contributions to political party committees, and that require transparency of money spent to influence federal elections. *See* Pls.' Mem. Supp. Summ. J. ("Pls.' MSJ"), ECF No. 13 (Feb. 16, 2023). These statutory provisions, plaintiffs explained, guard against corruption and its appearance and protect voters' First Amendment rights to be informed participants in the political process. The Federal Election Commission ("FEC" or "Commission") is responsible for administering and enforcing these statutory provisions. And while the FEC may exercise its expertise to interpret FECA provisions where there is ambiguity or uncertainty, the agency has zero authority to ignore, disregard, or alter clear, unambiguous statutory requirements like those at issue in the administrative complaint underlying this lawsuit. In dismissing plaintiffs' administrative complaint based on Commissioner-invented exceptions to federal statutes, the FEC failed to fulfill its responsibility and acted contrary to law.

Plaintiffs' opening brief detailed the extensive, compounding flaws in the explanation provided by the controlling Commissioners for dismissing plaintiffs' administrative complaint. These include the Commissioners' reliance on a newly made-up, categorical exemption from FECA's provisions governing coordinated election spending for expenditures that are purportedly related to "state law compliance," as well as the Commissioners' supposed application of constitutional narrowing constructions that are inapplicable to the legal provisions at issue in plaintiffs' administrative complaint, not to mention contrary to the essential purposes of those provisions. Plaintiffs also explained how the Commissioners' insistence that respondents True the Vote ("TTV") and the Republican Party of Georgia ("Georgia GOP") did not "coordinate" any

activitites within the meaning of the Act, notwithstanding their unambiguous statements in the administrative record to the contrary, resulted from the Commissioners' application of an improperly stringent standard that is inconsistent with FECA, as well as their unexplained and unreasonable disregard of a mountain of inconvenient facts in the administrative record.

In addition to detailing these critical deficiencies in the controlling Commissioners' dismissal decision, plaintiffs also explained the serious ramifications that decision will have: it threatens to open an enormous loophole in federal campaign finance law, allowing for ready circumvention of FECA's contribution restrictions and disclosure requirements for any coordinated spending that is purportedly related to "compliance" with state election law.

The Federal Election Commission's response to these detailed arguments essentially boils down to two, fatally flawed contentions: (1) plaintiffs lack standing to pursue some—*but not all*—of the violations alleged in the underlying administrative complaint against TTV and the Georgia GOP, *see* FEC Mem. Supp. Summ. J. & Opp'n to Pls.' MSJ ("FEC Br.") at 14-19, ECF No. 14-1 (Mar. 17, 2023); and (2) the FEC is entitled to judicial deference so the Court must rule in its favor, *id.* at 1, 2, 3, 12, 19-24, 25, 27, 30, 31, 35, 36, 39, 40-41, 42 (invoking deference no fewer than fifty times).

As explained below, the first contention is unavailing, both because the FEC appears to concede, as it must, that plaintiffs have established standing to pursue their disclosure-related allegations, and because plaintiffs' coordination-related allegations are inextricably intertwined with those allegations, and are thus essential to evaluating the Commissioners' dismissal decision with respect to the alleged disclosure violations. More fundamentally, the FEC's flawed standing arguments are directly contravened by controlling decisions from the Supreme Court and D.C. Circuit—decisions that the agency conspicuously ignores.

The second contention is as extraordinary as it is wrong. Indeed, the FEC goes so far as to claim that the Court should defer to the controlling Commissioners' decision, even "to the extent there is any uncertainty as to whether it was reasonable to conclude that the Commission 'has no authority to police' the 'Georgia laws at the heart of TTV's activities.'" FEC Br. 30 (citing AR 282). The Commission's explicit request for such a grossly exaggerated application of judicial deference not only defies well-established standards for when and how to apply judicial deference to FEC dismisal decisions, but also exposes the Commission's fundamental inability to defend the controlling Commissioners' legal analyses and interpretations on their own terms as consistent with law or reasoned agency decisionmaking.

Aside from challenging plaintiffs' standing (in part) and urging judicial deference, the FEC does not present any serious defense of the Commissioners' flawed legal analysis. To be sure, the Commission's lawyers do offer some impermissible and unavailing post hoc rationalizations, discussion of inapposite court decisions, and misplaced analogies to entirely unrelated factual contexts. But the FEC provides no real explanation of how what the controlling Commissioners actually decided *here* is consistent with FECA, controlling case law, or reasoned agency decisionmaking. This is unsurprising because the dismissal comes up short in all three respects.

For the reasons below and those set forth in plaintiffs' opening brief, the Court should find that the FEC's dismissal of plaintiffs' administrative complaint was contrary to law and remand this matter to the FEC with instructions to conform to the Court's order within thirty days.

ARGUMENT

I. Plaintiffs Have Established Their Standing to Bring This Lawsuit.

Plaintiffs have proven their informational and organizational standing[1] because Common Cause Georgia and Ms. Dennis have each "suffered an injury in fact" that is "fairly traceable" to the FEC's dismissal of their complaint and "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs' injury—the deprivation of information to which they are entitled under FECA regarding the undisclosed in-kind contributions alleged in their administrative complaint—is directly traceable to the FEC's dismissal of their complaint. And the relief they seek—an order declaring the dismissal contrary to law—would unquestionably redress their injuries. *See FEC v. Akins*, 524 U.S. 11, 25 (1998).

The FEC devotes much of its brief to challenging plaintiff Common Cause Georgia's standing with respect to *certain aspects of* plaintiffs' administrative complaint concerning TTV's unlawful in-kind contributions to the Georgia GOP in the form of coordinated expenditures. But the complaint alleged both coordination *and disclosure* violations, and the FEC does not appear to contest that Ms. Dennis has standing in her capacity as an individual voter, and that both plaintiffs have informational standing generally, to challenge the FEC's dismissal of their complaint with respect to the alleged disclosure violations. Nor could it. *See* Pls.' MSJ 17-19.

And even the FEC's attempted *partial* standing challenge is critically misconceived—because it depends on the faulty premise that plaintiffs' single cause of action against the FEC here can be separated into "two basic categories of claims" against TTV and the Georgia GOP. FEC

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[1] The FEC also argues that Common Cause Georgia lacks competitor standing, *see* FEC Br. 19, but neither plaintiff asserts standing on that basis.

Br. 14-16, 19. But *this case* is brought against the FEC and it presents only a single count alleging that the dismissal of plaintiffs' administrative complaint was contrary to law.

In any event, even if the Court were to consider plaintiffs' standing based on the distinct coordination and disclosure violations alleged in their administrative complaint, the "coordination-related" claims against TTV and the Georgia GOP are inextricable from those concerning the Georgia GOP's failure to disclose in-kind contributions resulting from such coordination, and the latter unquestionably provide informational standing to both plaintiffs. Controlling decisions, including the D.C. Circuit's recent decision in *Campaign Legal Center v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) ("*CLC II*"), confirm that plaintiffs' allegations regarding coordinated expenditures are appropriately before this Court and necessary to assess the propriety of the FEC's dismissal of the alleged, related reporting violations. *Id.* at 790 ("FECA clearly gives [plaintiffs] a statutory right to information about the amounts, dates, recipients, and purposes of any coordinated expenditures and contributions.").

Plaintiff Common Cause Georgia has also demonstrated, in addition to informational standing, that it has organizational standing to pursue this lawsuit against the FEC. *See, e.g.*, Pls.' MSJ 18-19; Decl. of Treaunna C. Dennis, ECF No. 13-1 ¶¶ 10-11, 13 (Feb. 16, 2023); *cf., e.g.*, *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*"). But this separate basis for standing has no bearing on whether plaintiffs have shown informational standing, notwithstanding the FEC's attempts to conflate the two.

A. Plaintiffs have proven their informational standing.

Plaintiffs have established their informational standing. They have suffered a "quintessential informational injury," *CLC II*, 31 F.4th at 784, and thus "easily satisfy the causation

and redressability requirements of Article III standing"—"because of [the FEC's] dismissal, they lack access to FECA-required information" and "[i]f their challenge succeeds, they will gain access to that information, which will no doubt 'help them . . . evaluate candidates for public office,'" *id.* at 784, 793 (citing *Akins*, 524 U.S. at 25).[2]

The FEC concedes—as it must—that plaintiffs have suffered an informational injury sufficient to confer standing. *See* FEC Br. 16 ("Plaintiffs' purported informational injury may be sufficient to establish standing as to the disclosure allegations"); *see also id.* at 15 (noting without contesting that plaintiffs "alleg[e] informational injury to support their claims").

Indeed, "[t]he law is settled that 'a denial of access to information' qualifies as an injury in fact 'where a statue (on the claimant's reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) (citing *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016); *Ethyl Corp.*, 306 F.3d at 1148; *Akins*, 524 U.S. at 21) (internal quotation marks omitted). Moreover, "a plaintiff seeking to demonstrate that it has informational standing generally 'need not allege any *additional* harm beyond the one Congress has identified.'" *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (quoting *Spokeo, Inc.*, 578 U.S. at 342) (emphasis in original). Although the Commission attempts to muddy the waters by invoking a variety of irrelevant principles, including the requirements for standing with respect to "procedural

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[2] Plaintiff Common Cause Georgia maintains that it also has shown a distinct basis for organizational standing. *See infra* at 12-13; Pls.' MSJ 18-19. But both plaintiffs have clearly proven informational injury and that is sufficient for Article III purposes. *See, e.g.*, *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) ("Because we find informational standing exists . . . we need not reach [] remaining theories of injury and instead proceed to the merits."); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002) (same); *Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 128 (D.D.C. 2017) ("*CLC I*") (where plaintiff organizations "have already established their informational standing . . . [t]hey need not satisfy [the] requirements for organizational standing as well").

rights" violations, FEC delay cases, and private rights of action, *see* FEC Br. 14, none of those principles is applicable here.

FECA's political committee disclosure provisions require comprehensive reporting of receipts and disbursements, including in-kind contributions in the form of coordinated expenditures. *See* 52 U.S.C. § 30104; 11 C.F.R. § 104.3. These reporting requirements lie at the heart of the disclosure regime prescribed by Congress and advance important constitutional values. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 121-22 (2003) (noting that disclosure serves three "important state interests": "providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions") (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)); *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) (emphasizing the "First Amendment rights of the public to know the identity of those who seek to influence their vote"). The Georgia GOP, however, defied its disclosure obligations by failing to report any in-kind contributions from TTV—despite clear evidence that TTV performed a variety of election-related services in cooperation and partnership with the political party committee and for the conceded purpose of assisting the party with specific federal elections. *See* Pls.' MSJ 38-40.

Absent FECA-required disclosure, information about these coordinated expenditures is not available to plaintiffs in any other form—as the FEC's Office of General Counsel ("OGC") recognized. *See* AR 75 (noting that "the Georgia GOP failed to disclose any contribution or expenditure information in connection with its self-described partnership with True the Vote, including the dates, amounts, and purposes of the in-kind contributions"); AR 76 (noting that "[t]he available information in this matter does not include how much money True the Vote expended" in connection with its Georgia activities). Indeed, even after reviewing the groups' administrative

filings and responses, the OGC recommended that the Commission investigate plaintiffs' claims to determine the magnitude of TTV's unreported in-kind contributions to the Georgia GOP, *see* AR 73-77—a recommendation the controlling Commissioners flouted, leaving plaintiffs in the dark about the true extent of TTV's contributions to the Georgia GOP, *see, e.g.*, *CLC I*, 245 F. Supp. 3d at 127 ("If the General Counsel did not know the whole story then, there is little reason to believe that plaintiffs know it now.").

There is no question that such FECA-required disclosure information is "useful" to both plaintiffs, and that plaintiffs' inability to access this information has directly and concretely injured their interests. Ms. Dennis considers FECA-required disclosure information "essential" to her ability to make informed choices at the ballot box, including "assess[ing] candidates for office," "evaluat[ing] the roles that True the Vote and similar outside groups play in elections," and "monitor[ing] the influence of campaign money on officeholders and public policy." Dennis Decl. ¶¶ 5-7. Plaintiff Dennis's ability to "participat[e] in the political process" is impeded when she is deprived of information about who is spending money to influence her vote. *Id.* ¶¶ 8-9. Plaintiff Common Cause Georgia likewise suffers an informational injury, as it depends on accurate and complete disclosure information "to carry out activities central to its mission, including public education and research about the true sources and scope of political campaign spending," which the organization uses to equip its members and the public with information necessary to cast informed votes. *Id.* ¶¶ 10-12. Without FECA-required disclosure information, Plaintiff Common Cause Georgia's "core activities are obstructed." *Id.* ¶ 12.

Each plaintiff has thus established a quintessential informational injury. *See, e.g.*, *Akins*, 524 U.S. at 21; *CLC II*, 31 F.4th at 783-84; *CLC & Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (per curiam).

Plaintiffs' informational injuries also "easily satisfy" Article III causation and redressability requirements, and the FEC's contrary argument that the harm at issue here is "too attenuated," *see* FEC Br. 17-18, is flatly contradicted by the Supreme Court's holding in *Akins* and the D.C. Circuit's holding in *CLC II*, a recent, controlling decision that the FEC conspicuously fails to address. Plaintiffs' informational injuries are indistinguishable from those recognized in both cases and, as such, "easily satisfy the causation and redressability requirements of Article III standing." *CLC II*, 31 F.4th at 784 (citing *Akins*, 524 U.S. at 25).

The FEC's flawed argument depends on a mischaracterization of plaintiffs' informational injury, which stems from the FEC's denial of *information* to which plaintiffs are entitled by law, not "from TTV's election-integrity efforts in the Georgia 2021 runoff election." FEC Br. 17; *compare, e.g.*, *CLC II*, 31 F.4th at 784 ("As the Supreme Court made clear in *Akins*, 'the injury in fact that Appellants have suffered consists of their inability to obtain information—including campaign-related contributions and expenditures—that on Appellants' view of the law, the statute requires [be] ma[d]e public.'") (citing *Akins*, 524 U.S. at 21) (cleaned up); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*") ("Here, as in *Akins*, Shay's injury in fact is the denial of information he believes the law entitles him to."). This informational injury is directly traceable to the dismissal of plaintiffs' administrative complaint, and is redressable by an order of this Court declaring that dismissal contrary to law.

Indeed, just last year, the D.C. Circuit directly held that a virtually identical informational injury satisfied causation and redressability requirements. As the Court of Appeals explained, the denial of information about in-kind contributions to a political committee was "fairly traceable to the Commission's decision to dismiss the [administrative] complaint." *CLC II*, 31 F.4th at 793 (citing *Akins*, 524 U.S. at 25). And "[s]hould a reviewing court find that the Commission's

determinations are contrary to law, the agency's action would be set aside and the case would likely redress Appellant's injury in fact." *Id.* (citing *Akins*, 524 U.S. at 25; *Shays III*, 528 F.3d at 923); *see also id.* at 783. In sum, "[w]here, as here, a plaintiff demonstrates on the record that additional, statutorily-required information would be exposed under plaintiff's theory of the law that would serve an interest Congress sought to protect through disclosure, the plaintiff has undoubtedly established [] informational [standing] under *Akins* and *Shays*." *Id.* at 792.

The FEC ignores this precedent, and instead seeks to resurrect an argument that the Supreme Court long ago rejected. In *Akins*, the FEC's unsuccessful standing argument likewise turned predominantly on claims about the "obstacles to redressability" for plaintiffs seeking to remedy informational injuries caused by the FEC's failure to enforce the law against a third party. Pet'r Reply Br., *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 675443, at *4 (Oct. 30, 1997); *see also id.* at *7 ("the Commission cannot itself compel [respondent] to disclose whatever relevant information may remain in its possession"). The Commission's briefing stressed that there was "no guarantee that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, would result in" any action by a third party. Br. for Pet'r, *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 523890, at *29-30 (Aug. 21, 1997); *compare with* FEC Br. 18 ("[R]edressability cannot be founded on mere speculation as to what third parties might do in response to a favorable ruling"). Notwithstanding that possibility, the Supreme Court rejected the FEC's redressability argument, explaining that "[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a trial) might later, in the exercise of its lawful discretion reach the same result for a different reason." *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

Consequently, "respondents' injury in fact' [was] 'fairly traceable' to the FEC's decision" and, "[f]or similar reasons," the courts" could "'redress'" it. *Id.*

While ignoring the controlling decisions in *Akins* and *CLC II*, the FEC points the Court to inapposite decisions in *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412 (D.C. Cir. 1994), and *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991), neither of which even involves informational injuries. In *Freedom Republicans*, for example, minority members of a political party challenged an FEC decision to provide the party with public funds, after the party allegedly engaged in a discriminatory delegate-allocation scheme. 13 F.3d at 413-14. Under those circumstances, the D.C. Circuit found that "the actions of the FEC authorizing convention funding" were not sufficiently related to, nor likely to redress "the delegate-selection practices of the Republican Party." *Id.* at 418. Similarly in *Fulani*, as the FEC itself explains, "this Circuit held that alleged harm to a presidential candidate because of that candidate's deprivation of media coverage and political legitimacy as a result of her exclusion from a debate could not be traced to the Internal Revenue Service's grant of tax-exempt status to the debate sponsor." FEC Br. 18 (citing *Fulani*, 935 F.2d at 1328-29). The injuries alleged in *Freedom Republicans* and *Fulani* are a far cry from the "quintessential informational injur[ies]" at issue here, which "easily satisfy" Article III's causation and redressability requirements, as the Supreme Court and D.C. Circuit have confirmed. *Akins*, 524 U.S. at 21; *CLC II*, 31 F.4th at 793.

In sum, plaintiffs have proven their informational standing. If plaintiffs succeed on the merits of their FECA claim, the Georgia GOP "would be obligated to disclose FECA-required factual information about the amounts of the contested coordinated, in-kind contributions. And that 'information would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office . . . and to evaluate the role that [TTV's] financial assistance

might play in a specific election." *CLC II*, 31 F.4th at 783 (quoting *Akins*, 524 U.S. at 21). This more than satisfies plaintiffs' burden under Article III.

B. Common Cause Georgia has also established a distinct organizational injury based on the direct impairment of its mission to protect Georgians' right to vote.

In addition to both plaintiffs' informational standing, plaintiff Common Cause Georgia has shown a distinct basis for organizational standing, separate and apart from its standing based on the deprivation of statutorily required disclosure information. The FEC tries to conflate the two plaintiffs in this case and its standing arguments focus almost entirely on Common Cause Georgia and its distinct organizational injury. *See* FEC Br. 14-17.

To demonstrate standing, an organization, "like an individual plaintiff," must "show 'actual or threatened injury in fact that is fairly traceably to the alleged . . . action and likely to be redressed by a favorable court decision.'" *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). A "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests" and thus suffices for standing. *Havens Realty*, 455 U.S. at 379. To determine whether an organization's injury is "concrete and demonstrable" or "simply a setback to [its] abstract social interests," courts "ask, first, whether the agency's action or omission to act 'injured the [organization's] interest' and, second, whether the organization 'used its resources to counteract that harm.'" *PETA*, 797 F.3d at 1094 (quoting *Equal Rights Ctr.*, 633 F.3d at 1140).

Here, the FEC's dismissal of plaintiffs' administrative complaint concretely impaired Common Cause Georgia's efforts to "protect and expand voting rights for all eligible Georgians and to empower citizens through public education—activities central to its organizational mission of strengthening public participation in the democratic process and creating open, honest, and

accountable governments." Dennis Decl. ¶ 13; *see also id.* ¶¶ 10-11. As the record indicates, access to the Georgia GOP's network through the groups' coordination and "partnership" enabled TTV to supercharge its mass voter eligibility challenge. *See* AR 70 (noting evidence that TTV "worked with members of the Georgia GOP to recruit volunteers"); AR 71 ("[T]he available information also suggests a partnership between TTV and the Georgia GOP for the Georgia GOP to provide access to Georgia county residents willing to serve as 'challengers' and challenge the ballots identified by TTV in the counties in which the challengers resided."); *see also* AR 60-61. By allowing TTV to coordinate with the Georgia GOP on mass voter eligibility challenges—as well as signature verification training, absentee ballot drop box monitoring, and "other election integrity initiatives," *see, e.g.*, AR 3-4—the FEC empowered TTV to more effectively engage in activities that impinge on eligible Georgians' right to vote, thereby directly injuring Common Cause Georgia's organizational efforts to protect that right. And Common Cause Georgia has "used resources to counteract the harm," *PETA*, 797 F.3d at 1094, including by hiring a contractor to work on voter protection efforts, "such as disinformation monitoring and public education on the implications of voter challenges like those brought by [TTV]." Dennis Decl. ¶ 13.

The controlling Commissioners' dismissal based on a purported "state law compliance" exemption further ensures that the harm to Common Cause Georgia's organizational interests will continue, as it creates "a roadmap" for TTV and others to collaborate freely with political party committees, and tap into their deep in-state networks, when pursuing so-called "election integrity" efforts. Dennis Decl. ¶¶ 9, 13.[3]

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[3] The Commission also argues that "even if plaintiffs were to obtain a favorable ruling in this case, there is no reason to believe that would address their alleged grievance, because TTV would remain free to engage in the same ballot-integrity initiatives in the future in the absence of coordination." FEC Br. 16-17; *see also id.* at 17 ("if TTV's activities would have happened

II. The Dismissal Was Contrary to Law.

A. The FEC misconstrues the applicable standards of review.

The FEC insists—ad nauseam—that its dismissal of plaintiffs' administrative complaint must be upheld because of the deference due to agency decisionmaking. *See* FEC Br. 1, 2, 3, 12, 19-24, 25, 27, 30, 31, 35, 36, 39, 40-41, 42. But the FEC overreaches in treating the inquiry under FECA's "contrary to law" standard as merely a rubber stamp. It is not, and the Commission's overwhelming emphasis on "deference"—under *Chevron* and otherwise—only illustrates its inability to defend the controlling Commissioners' interpretations as consistent with law or reasoned agency decisionmaking.

1. Even when applicable, deferential review does not excuse impermissible constructions of the Act or arbitrary and unreasoned decisionmaking.

FECA provides for a Commission decision dismissing an administrative complaint to 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 v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Under *Orloski*'s first prong, the Court evaluates whether the FEC's interpretation of law used to justify dismissal, as set forth in the controlling Statement of Reasons, is a permissible interpretation of that law. In certain circumstances, the FEC's interpretations of FECA may warrant deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). But such deference is only called for when an agency is construing ambiguities in a statute as to which Congress has delegated it interpretive authority. *United States v. Mead Corp.*,

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anyway, then presumably any alleged diversion of resources or other response by Common Cause Georgia would have happened anyway as well"). But it is far from evident that TTV or comparable groups *could* engage in "the same" activities—on the same scale or scope—without access to access to the Georgia GOP's state network.

533 U.S. 218, 229-30 (2001). Absent a basis for *Chevron* deference, an agency's legal interpretation is due only that deference warranted by the persuasiveness of its reasoning. *See, e.g.*, *id.* at 234-35; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court should weigh the interpretation provided by the agency against the Court's independent interpretation of the law to determine whether the agency's interpretation is "[]permissible." *Orloski*, 795 F.2d at 161.

As to the second *Orloski* prong—whether the FEC's dismissal of the complaint was arbitrary, capricious, or an abuse of discretion—the Court applies a standard analytically similar to the "arbitrary [or] capricious" standard applied under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring). 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," or "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," *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also, e.g.*, *Chevron*, 467 U.S. at 842-43 (agency decision entitled to deference only when "based on a permissible construction of the statute"). While it is true that this is a "deferential inquiry," *Democracy 21*, 952 F.3d at 357, "deference does not mean carte blanche, and the Commission must at all times demonstrate the markers of 'principled and reasoned decision[making] supported by the evidentiary record.'" *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1043 (D.C. Cir. 2022) (citation omitted). The Commissioners' decision here bears none of these hallmarks.

The FEC further overreaches by characterizing the dismissal as a permissible exercise of "enforcement discretion." FEC Br. 1. In fact, the challenged dismissal decision does not purport

to rely on the agency's "discretion" at all; the controlling Commissioners relied on their incorrect legal conclusions that they lacked authority under the Constitution and "jurisdiction" under FECA to proceed. *See* AR 281-85; *see also* Pls.' MSJ 38-44. The FEC is not entitled to deference for its interpretations of the Constitution or judicial precedent. *See, e.g.*, AR 280 (arguing that the FEC's "authority is cabined both by the Act . . . and by decades of jurisprudence narrowing that legislative grant"). When the agency decision "is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002), the Court's review is "de novo," *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009). "[A] reviewing court owes no deference to the agency's pronouncement on a constitutional question." *Id.* (internal quotation marks omitted).

Accordingly, the FEC's arguments about the controlling Commissioners' "view of the Commission's limited role in our Constitutional structure" are misdirected. FEC Br. 24; *see also id.* at 25 (insisting that the Commissioners were "reasonable to note that this Circuit has instructed the FEC to construe FECA narrowly in light of First Amendment concerns"). Nothing in the Constitution generally or the First Amendment in particular excuses the FEC from lawfully administering and enforcing duly enacted laws. Nor does the Constitution permit Commissioners to read statutory provisions out of existence. *See, e.g.*, *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 516 (1983) ("[A]n agency may not ignore a relevant Act of Congress" or "simply 'close its eyes' to the existence of the statute."). And nothing whatsoever suggests that requiring disclosure here would engender some "partisan misuse," as the FEC speculates. FEC Br. 26, 30.

Nor is it true that the Commissioners' stated "views" of the agency's limited constitutional role constituted mere "prefatory language" providing "insight" into their decisionmaking or warranting greater deference to it. *Id.* at 24-25. The Commissioners' discussion of constitutional

considerations was part and parcel of the Commissioners' unqualified interpretation that the Constitution and FECA "categorically" barred enforcement here. *See, e.g.*, AR 280-81, 284, 286. The question therefore is not, as the FEC suggests, whether it was "permissible for the controlling Commissioners to cautiously employ their enforcement authority," FEC Br. 26, but whether it was permissible to determine that they could not "employ" that authority at all—a question the Court ultimately must answer based on the actual, contemporaneous rationale they gave.

2. The FEC is not entitled to the added boost of *Chevron* or *Auer* deference here.

The FEC's attempt to rescue the controlling Commissioners' flawed legal interpretations by claiming entitlement to an *even higher* level of judicial deference is woefully misguided. As plaintiffs previously explained, Pls.' MSJ 17, to qualify for either *Chevron* or *Auer* deference, an FEC decision must reflect an exercise of delegated authority to make "rules carrying the force of law," *Mead Corp.*, 533 U.S. at 227. No such exercise occurred here. For starters, neither the controlling Commissioners' "view of the Commission's limited role in our Constitutional structure," FEC Br. 24; nor their interpretation of federal court decisions construing the scope of FECA preemption, *id.* at 27; nor their speculation about abuse that might result from the Commission's proper enforcement of the law, *id.* at 26, 30, represent such delegated agency authority, *see, e.g.*, *Lieu v. FEC*, 370 F. Supp. 3d 175, 183 (D.D.C. 2019); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998); *see also CREW v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (collecting cases).

More fundamentally, the FEC's attempt to claim a heightened level of deference here is misguided because a statement of two Commissioners, even if "controlling" for purposes of judicial review of a particular enforcement decision, is not "the agency's 'authoritative' or 'official position'" *on the law*. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (quoting *Mead*, 533 U.S. at

257-59 & n.6 (Scalia, J., dissenting)); *see also Common Cause v. FEC*, 842 F.2d at 436, 449 n.32, 453 (D.C. Cir. 1988) (recognizing that three-vote Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases").[4] Indeed, the FEC appears to concede this point with respect to *Auer* deference, which, the FEC acknowledges, applies to "an agency's interpretation of its own *regulations*" —action that the FEC did not purport to undertake here. FEC Br. 22 (discussing *Kisor*'s holding regarding the scope of *Auer* deference). And with that concession, the FEC is left to make the extraordinary argument that this Court owes even greater judicial deference to the flawed *statutory* interpretations of two FEC Commissioners than it would owe to those Commissioners' interpretations of the FEC's own regulations. *See* FEC Br. 22 (purporting to distinguish *Kisor* on the basis that it "did not concern the scope of judicial deference as to an agency's interpretation of its implementing statute").

But even assuming, *arguendo*, that *Chevron* were applicable here, and, thus, that the controlling Commissioners' *reasonable* interpretations of FECA are entitled to deference, Congress's unambiguous mandate in FECA makes clear that the challenged decision would fail at *Chevron* step one. In particular, FECA explicitly and unambiguously prohibits corporations like

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[4] To the extent prior district court and Circuit precedent might have suggested non-majority decisions were due heightened deference under the *Chevron* framework, *see* FEC Br. 21-22, those cases have been abrogated by subsequent Supreme Court and Circuit precedent. The D.C. Circuit has interpreted *Mead* to hold that "the expressly non-precedential nature" of a decision "conclusively confirms" that it is not an exercise of authority "to make rules carrying the force of law" that are entitled to deference. *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014). A split vote by the FEC lacks the precedential effect essential to actions with the force of law under *Mead* and *Fogo de Chao*. The FEC cites no post-*Mead* authority from the D.C. Circuit applying *Chevron* deference to a legal interpretation announced in a split-vote FEC dismissal.

Moreover, whether or not these proceedings might have been analogous to "formal adjudications," FEC Br. 24, they were not formal in the sense identified in *Fogo de Chao*. The fact that there was a formal complaint filed, and a formal response, does not mean the non-majority legal standard has the force of law or bears the hallmarks of a formal rulemaking process.

TTV from providing a political party like the Georgia GOP "anything of value . . . in connection with any election." 52 U.S.C. § 30118(a), (b)(2). The controlling Commissioners' legal analysis is contrary to the plain meaning of this statutory language and thus fails the *Chevron* analysis right at the start. *See, e.g.*, *CREW v. FEC*, 316 F. Supp. 3d 349, 396 (D.D.C. 2018) ("To 'avoid a literal interpretation at *Chevron* step one,' a party 'must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.'") (citation omitted), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020). Indeed, while the FEC briefly acknowledges that "FECA generally prohibits corporations from making contributions to federal political committees," FEC Br. 6 (citing 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)), it conspicuously avoids discussing the statutory language establishing the breadth of this prohibition.

And if this did not settle the question, under *Chevron* step two courts still "must reject administrative constructions of [a] statute . . . that frustrate the policy that Congress sought to implement. While that policy may sometimes be unclear, here it is not: 'BCRA's fundamental purpose [is] prohibiting soft money from being used in connection with federal elections.'" *Shays III*, 528 F.3d at 925 (cleaned up). The Commissioners' interpretation unquestionably "compromise[s]" that purpose, "create[s] the potential for gross abuse," *Orloski*, 795 F.2d at 165, and must be set aside.

B. The dismissal rested on an invented and impermissible exemption from FECA for "state law compliance" that lacks any basis in law and is fundamentally irrational.

As plaintiffs previously explained, Pls.' MSJ 24-28, the controlling Commissioners' invention of a "categorical" exemption for spending connected to what they characterize as "state law compliance" activities—irrespective of the spender's federal election-related purpose or degree of coordination with federal candidates and parties—is impossible to reconcile with FECA.

The Commissioners reached this conclusion based on a non-preemption theory that they plucked out of thin air, although this case implicates no questions about the scope, validity, or application of any state law.

The FEC purports to defend this theory by summoning straw men, engaging in post hoc rationalization, and citing inapposite case law—before finally conceding that there could be "uncertainty" about the Commissioners' non-preemption rationale, while invoking agency deference as a justification to uphold it anyway. *See* FEC Br. 30 (allowing that there may be "uncertainty as to whether it was unreasonable to conclude that the Commission 'has no authority to police' the 'Georgia law at the heart of TTV's activities'") (quoting AR 282). Its arguments fail to rescue the Commissioners' unlawful and fundamentally irrational decisionmaking.

1. Neither FECA nor FEC regulations authorize the FEC to grant a categorical enforcement exemption for electoral contributions related to "state law compliance."

The Commission acted contrary to law by dismissing plaintiffs' complaint pursuant to a baseless legal theory of non-preemption that has no grounding in FECA and no relevance to the violations alleged here. *See Orloski*, 795 F.2d at 161. The idea that disbursements related to supposed "state law compliance" must be categorically exempted from the Act's regulation of contributions—even when coordinated with a political party in connection with a federal election, and without regard to other indicia of federal electoral purpose—is flatly contrary to FECA, "unduly compromises the Act's purposes," and clearly "create[s] the potential for gross abuse." *Id.* at 164, 165.

It is also incoherent. The Commissioners' exclusion of "state law compliance" from the Act rested on a fanciful and unsupported theory of non-preemption—despite there being no question of preemption posed in this case and no question that FECA *would* preempt a conflicting state law if there were. *See, e.g.*, U.S. Const. art. 1, § 4, cl. 1; 52 U.S.C. § 30143(a) (preempting

"any provision of State law with respect to election to Federal office"); 11 C.F.R. § 108.7(b) (providing that "Federal law supersedes State law" regarding "[d]isclosure of receipts and expenditures by" and "[l]imitation[s] on contributions and expenditures regarding" federal candidates and political committees). Worse still, the Commissioners' uncalled-for application of the FEC's preemption rule, 11 C.F.R. § 108.7, led them to introduce a direct conflict between it and the FEC's regulations on corporate contributions, *see id.* § 114.1 *et seq.* Despite asserting that the FEC's "regulations are explicit" that FECA's contribution limits cannot reach any payments for activities related to "voter registration," AR 281-82 (citing 11 C.F.R. § 108.7(c)(3), (4)), the corporate contribution rules—which, unlike the rule about the scope of preemption under FECA, *are* actually relevant to this case—confirm that a corporation makes a prohibited contribution when it coordinates with a political party regarding, *inter alia*: the distribution of voter registration or get-out-the-vote ("GOTV") communications to the general public, 11 C.F.R. § 114.4(c)(2)(i), (ii)(B); the distribution of registration or voting information produced by official election administrators, *id.* § 114.4(c)(3)(i), (iv)(B); or voter registration or GOTV drives, *id.* § 114.4(a), (d)(1). The Commissioners offered no explanation or justification for this discrepancy, and neither does the FEC here.

"Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). The Commissioners' "non-preemption" theory falls short on both counts.

2. The FEC fails to justify the Commissioners' improper and arbitrary reliance on a non-preemption theory that has no relevance to this case and vitiates the Act.

The FEC fails to offer any rational explanation for this incoherent approach, let alone one that is consistent with FECA. Instead, the FEC variously resorts to straw man arguments, post hoc

rationalization, and generic demands for deference. None of its arguments can excuse the Commissioners' arbitrary and unlawful reliance on an invented non-preemption theory that has no application to this case and threatens to open a massive loophole in the Act.

a. The FEC accuses plaintiffs of supposedly "exaggerat[ing] the scope of what the Commissioners concluded" with regard to non-preemption, FEC Br. 29, but it is the FEC—not plaintiffs—taking liberties with the Commissioners' Statement of Reasons. The Commissioners' "categorical[]" exception of what they termed "state law compliance" activities from FECA was not equivocal or couched. AR 281. In the single paragraph of their Statement setting forth this theory, the Commissioners opined:

> First, state law compliance is categorically excluded from the Commission's enforcement jurisdiction. Our regulations are explicit that "[t]he Act does not supersede State laws which provide for," among other things, "[v]oter registration" and the "[p]rohibition of false registration, voting fraud, theft of ballots, and similar offenses." Because TTV's activities targeted compliance with valid Georgia laws governing signature-verification, ballot-curing, ballot drop boxes, and residence requirements, they fall squarely within this exemption. Accordingly, TTV's activities fall outside of the ambit of FECA. In other words, because Congress has declined to preempt the Georgia laws at the heart of TTV's activities, the Commission has no authority to police those activities.

AR 281-82 (citations omitted). This language, which provides the sum total of the Commissioners' analysis, does not admit ambiguity. Nor does it require any "exaggerat[ion]" to appreciate its breadth. FEC Br. 29. Nevertheless, the FEC faults plaintiffs for failing to intuit a different rationale—one that the Commissioners themselves did not offer—based on the possible "chilling effect" that might occur "if the Commission were to interpret such activities as presumptively having a partisan impact in federal elections and thus constituting in-kind contributions." *Id.* at 29-30. But this charge fails in numerous respects.

For one thing, it is improper because this "presumptively partisan" explanation is nowhere to be found in the controlling Commissioners' Statement, and it is a "foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (citation and internal quotation marks omitted). The FEC's litigators cannot defend the dismissal by offering up "post hoc justifications" for the decision that the Commission itself did not provide. *See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 536 n.11 (D.C. Cir. 2018). Instead, "[i]t is axiomatic" that the validity of agency action must be assessed "based only on reasoning that is fairly stated by the agency in the order under review," and cannot consider "'post hoc rationalizations by agency counsel." *Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) (citations omitted); *accord N. Air. Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012) (courts must look to agency's "contemporaneous justification" for the decision, not "post hoc explanation[s] of counsel"); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

And here, the controlling Commissioners did not purport to justify their "non-preemption" theory by claiming to have "foresee[n] a chilling effect" on "state law compliance" activities. FEC Br. 29. Nor did they cite any desire to narrowly "interpret[] their authority so as to avoid" a theoretical "conflict" between federal and state law. *Id.* at 30. The Commissioners instead determined, "categorically," that the Act cannot extend to any disbursements arguably relating to "compliance" with a state law that FECA does not explicitly preempt—without regard to whether the payments would otherwise meet FECA's statutory definition of a contribution or coordinated expenditure, as TTV's here clearly do. *See* AR 281-82; *see also* Pls.' MSJ 21-23. Whether their

novel "non-preemption" theory is permissible or even coherent must be evaluated according to the contemporaneous reasons they gave, not the post hoc arguments of agency counsel.

The FEC's post hoc explanation is unsupportable in any event. The purported need to proceed "cautiously" for fear that applying FECA would create a presumption of "partisan impact," FEC Br. 25, 30, ignores the key feature of this case that obviates any such concern: the "activities" here were undertaken in the immediate weeks before the 2021 Georgia runoff election at the direct request of the Georgia GOP, a political party committee whose entire *raison d'être* at that time was to help its two Republican Senate candidates win their runoff elections. *See* AR 72-73, 134; *see also* AR 59-60, 67-68. FECA, on its face, unambiguously regulates a corporation's provision of "anything of value" to a political party "in connection with any election," 52 U.S.C. § 30118(a), (b)(2), as a contribution—including where, as here, the "thing of value" involves the provision of federal election-related services at a political party's express "request or suggestion," *see id.* § 30116(a)(7)(B)(ii).

Moreover, even if the Commissioners had actually based their decision on implicit concerns about "chilling" "constitutionally protected activity" or "interfer[ing] with" state election laws, FEC Br. 30, the rationale would still be untenable. The FEC is not empowered to "rewrite clear statutory terms" or engage in this kind of roving constitutional reinterpretation of the Act "to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). That is all the more true when its interpretation is contrary to the clearly expressed mandate and objectives of Congress. *See, e.g.*, *McConnell*, 540 U.S. at 165-66 (noting congressional purpose in the Bipartisan Campaign Reform Act of 2002 ("BCRA") of "[p]reventing corrupting activity from shifting wholesale to state [party] committees and thereby eviscerating FECA"); *Shays III*, 528 F.3d at 925 ("[B]y allowing soft money a continuing role in the form of

coordinated expenditures, the FEC's . . . rule would lead to the exact perception and possibility of corruption Congress sought to stamp out"); *Shays v. FEC*, 414 F.3d 76, 112 (D.C. Cir. 2005) ("*Shays II*") (invalidating post-BCRA rule involving state and local parties' financing of certain "[f]ederal election activity" because the FEC had unreasonably "construed a BCRA provision sweeping *state* activities within FECA as an excuse to punt *federal* activities outside it") (emphasis in original).

Providing valuable election-related services to a political party committee in the immediate weeks before a hotly contested federal election, at the party's request and with an avowed goal of assisting the party in that election, cannot be carved out of FECA merely because the activity also purports to advance other valid "state law" goals. Nothing in the Act—and certainly not its general preemption of state law respecting elections for federal office, *see* 52 U.S.C. § 30143(a)—empowers the Commission to adopt sweeping "jurisdictional" limitations on these core statutory provisions based on inchoate First Amendment or federalism principles. Even had the controlling Commissioners expressed or relied on such concerns, their personal disagreements with the scope of the statute would not authorize them to depart from it. The invented notion that FECA's expansive statutory preemption provision *precluded* the Commission from enforcing the federal contribution limits and disclosure requirements at issue here is backwards and untenable.

b. The FEC's alternative argument—that, even if the controlling Commissioners' non-preemption rationale appears unreasonable, "the Court should defer" to their interpretation "as to the scope of preemption of state law" FEC Br. 30 (citation and emphasis omitted)—is even more problematic. This case does not involve preemption; indeed, it does not even theoretically implicate the validity of any state law, much less raise the specter of a possible conflict between FECA and a particular state law. The Court cannot accord deference to the Commissioners'

interpretation of a FECA provision with no bearing on this case. Nor, to be sure, is any deference due to the Commissioners' introduction of an enormous loophole in FECA's core provisions based on a theory of implicit non-preemption that the Commissioners invented out of whole cloth.

The theory that FECA does not preempt certain state election laws is immaterial to whether TTV provided valuable services to (and in coordination with) the Georgia GOP "in connection with," and "for the purpose of influencing," federal elections. Regarding *that* question, FECA's plain text mandates the conclusion that TTV made, and the Georgia GOP accepted and failed to report, in-kind contributions amounting to the fair market value of those services. But rather than answering this question by looking to the text of the relevant substantive FECA provisions, *see* 52 U.S.C. §§ 30101(8)(A), (9)(A); 30116(a)(7)(B)(ii); 30118 (defining when a corporation's "indirect payment" or coordinated expenditure is an in-kind contribution), the Commissioners turned to the Act's general preemption provision and answered a completely different question: whether Congress' decision not to expressly preempt certain State laws also implicitly carved out all disbursements that purportedly target "compliance" with such laws from FECA's core regulation of federal campaign contributions.

But Congress's broad preemption of "any provision of State law with respect to election for Federal office" did not silently open a massive loophole in the Act's core campaign finance provisions. 52 U.S.C. § 30143(a). The FEC's own regulations confirm as much. *See* 11 C.F.R. § 108.7(b) (providing that "Federal law supersedes State law" regarding "[d]isclosure of receipts and expenditures by" and "[l]imitation[s] on contributions and expenditures regarding" federal candidates and political committees). And the potential abuse this "enormous loophole" allows is manifest. *Shays III*, 528 F.3d at 928. This interpretation would allow any person to evade FECA's contribution limits and disclosure requirements so long as their coordinated expenditures relate in

some way to "compliance" with state election law—an option sure to be frequently available given the States' role in election administration. Indeed, under the Commissioners' theory, a political party could ask a corporation to conduct its entire field operation. Activities such as collecting signatures to get on the ballot, obtaining and updating voter files, and even maintaining unemployment insurance for employees are governed by state law. So under the Commissioners' strange understanding of the law, a corporation could gift all of those services to a party (or campaign), and because they necessarily entail state-law compliance, the corporation's spending on the party's behalf would not be a contribution—indeed, would not even be publicly reported.

The FEC has no answer to this. It cites the same inapposite case law interpreting the scope of the Act's preemption of state law as the controlling Commissioners did in their Statement of Reasons—and it too fails to explain how these decisions are remotely on point. *See* FEC Br. 27, 30; *see also Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996) (finding Georgia statute limiting campaign contributions to federal candidates preempted by FECA); *Priorities USA v. Nessel*, 978 F.3d 976, 978 (6th Cir. 2020) (declining to enjoin Michigan from enforcing a state statute restricting voter transportation based on FECA preemption); *Weber v. Heaney*, 793 F. Supp. 1438, 1456 (D. Minn. 1992) (invalidating state law expenditure limit based upon finding that FECA "occupied the field as to federal election financing"), *aff'd*, 995 F.2d 872 (8th Cir. 1993).[5]

[5] Indeed, in one of the cases the FEC points to as reason to "defer to the controlling Commissioners' interpretation here," FEC Br. 30, the FEC interpretation at issue was its conclusion that FECA's preemption clause was "intended to have broad scope" and that "federal law occupied the field as to federal election financing." *Weber*, 793 F. Supp. at 1456; *see also* FEC Advisory Op. 1989-25 at 3 (N.H. Republican State Comm.) ("The report of the House committee that drafted the preemption clause explains its intent in sweeping terms. Federal law is to be 'construed to occupy the field with respect to elections to Federal office' and is to be 'the sole authority under which such elections will be regulated.'") (citing H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)). The FEC's characterization that the Commissioners' *non*-preemption theory properly reflected "the agency's limited role," FEC Br. 30, ignores that the FEC has previously maintained that FECA's preemptive scope is to be interpreted expansively.

Even if there were any occasion to apply preemption analysis in a matter involving no application of state law and no conflict between FECA and state law, "[p]reemption of any type 'fundamentally is a question of congressional intent.'" *Teper*, 82 F.3d at 993 (citation omitted). And providing valuable services to a political party committee "in connection with" and "for the purpose of influencing" a federal election is unquestionably not a category of activity "outside the ambit of FECA" that "Congress has declined to preempt." AR 282. It is campaign-related spending going to the heart of Congress' efforts to prevent corruption and its appearance in the financing of campaigns for federal office—which for fifty years has included "prevent[ing] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 67. The FEC's appeals to deference do not justify the Commissioners' decision to disregard this clear mandate in service of a contrived and unreasonable non-preemption argument.

In short, the Commissioners' interpretation of FECA to "categorically" exclude coordinated expenditures like TTV's here ignores the relevant statutory text, Congress's clear purposes in enacting BCRA, and any pretense of reasoned decisionmaking. It cannot be sustained.

C. The FEC fails to show any reason the Commissioners' "issue advocacy" rationale is consistent with law or reasoned decisionmaking.

The FEC's attempt to defend the Commissioners' "issue advocacy" rationale is just as flawed. As plaintiffs have explained, the Commissioners acted contrary to law by applying a constitutional narrowing construction of the term "expenditure" that the Supreme Court has specifically recognized has no application in the context of *contributions*, including in-kind contributions and coordinated expenditures. *See* Pls.' MSJ 28-33. The FEC does not even mention this deficiency of the Commissioners' reasoning, much less attempt to justify it. Instead, its brief generally reiterates the Commissioners' conclusory assertion that TTV's activities here

"reflect[ed] issue advocacy" and, as such, were constitutionally beyond regulation based on the "foundational premise" of *Buckley*. FEC Br. 31. But this supposed "premise," given that it relies on *Buckley*'s narrowing construction of the statutory term "expenditure," is foreclosed by Supreme Court precedent rejecting any such limitation with respect to FECA's regulation of contributions—a point the FEC wholly fails to address and, therefore, concedes.

The FEC's alternative attempts to defend the Commissioners' flawed "issue advocacy" rationale are a continued resort to "deference" combined with a refusal to address TTV's specific conduct, generic hypotheticals about other groups that may engage in similar "core programmatic activities," and citations to inapposite enforcement matters that distract from—*but do not explain*—the Commissioners' failure to reasonably support or even explain the dismissal decision challenged *here*.

1. FECA and Supreme Court precedent foreclosed treating TTV's in-kind contributions as constitutionally unregulable "issue advocacy."

Rather than attempt to justify the Commissioners' "issue advocacy" rationale in light of contrary Supreme Court precedent, the FEC resorts to the same inapposite hypotheticals and fallacious reasoning as the Commissioners did in their Statement—once again improperly recasting the Commissioners' expansive and unqualified "jurisdictional" rationale as one grounded in administrative modesty or constitutional avoidance. *See* FEC Br. 33. But it offers no serious defense of the Commissioners' determination that TTV's services "fall outside [the FEC's] jurisdiction" because, "[u]nder *Buckley*'s narrowing construction of the phrase 'for the purpose of influencing,'" TTV's activities were required to be treated as "issue advocacy" and constitutionally excluded from regulation. AR 283. Indeed, the FEC's vague handwringing about "constitutionally fraught" cases or potentially difficult line-drawing, *see* FEC Br. 33, only illustrates why, consistent

with *Buckley* and other Supreme Court precedent involving *contributions* and *coordinated* expenditures, this case implicates no such concerns.

While the Supreme Court in *Buckley* narrowly construed the statutory term "expenditure" to alleviate potential vagueness in the context of independent spending, 424 U.S. at 79, it also specifically addressed and *rejected* the argument that FECA's definition of "contribution" was impermissibly vague, even though it relies on the same "for the purpose of influencing" language, *see* 52 U.S.C. § 30101(8)(A) (defining "contribution"); *id.* § 30101(9)(A) (defining "expenditure"); *Buckley*, 424 U.S. at 23 n.24, 78. The Court's concerns about possible vagueness were thus specific to "expenditures" by *independent* actors—spenders that were neither "political committees" nor coordinating with candidates—because use of the phrase "for the purpose of influencing" in that context potentially "encompass[ed] both issue discussion and advocacy of a political result." 424 U.S. at 79.

However, as the *Buckley* Court also found, FECA's definition of *contribution* did not raise the same concerns and required no commensurate narrowing limitation. *Id.* at 23 n.24 (observing that the phrase "presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution"); *see also id.* at 78 (construing "contribution" broadly to include coordinated expenditures). Moreover, since *Buckley*, and contrary to the Commissioners' unsupported claim that FECA cannot be constitutionally applied in this case based on TTV's supposed status as an "issue advocacy group," *see* AR 282-84, the Supreme Court has flatly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," *McConnell*, 540 U.S. at 194; *see also id.* at 203 ("*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress's power to regulate federal

elections," and there was "no reason why Congress may not treat coordinated disbursements . . . in the same way it treats all other coordinated expenditures.").

Buckley's narrowing of the phrase "for the purpose of influencing" with respect to expenditures thus has no application to this case involving *contributions* and, specifically, corporate contributions and expenditures placed in coordination with a political party. Instead, as the Supreme Court has recognized, the Act "pre-empts a possible claim" that *Buckley*'s narrowing construction of expenditures applies to contributions or that the definition of *coordinated* expenditures must be "similarly limited, such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions." *Id.* at 202.

In the face of this clear, controlling authority, the FEC offers no justification for the Commissioners' application of that narrowing construction to the FECA provisions at issue here. *See* 52 U.S.C. § 30118(a), (b)(2) (providing that a "contribution or expenditure" for purposes of the corporate contribution ban includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" to any political party "in connection with any election" to federal office); *id.* § 30116(a)(7)(B)(ii) ("[E]xpenditures made by any person . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a . . . political party, shall be considered to be contributions made to such party committee"). The Commissioners had no authority to read these statutory terms out of existence or to manufacture ambiguity when there was none. Where the congressional mandate and purpose is clear, as it is here, the Commission may not elect to sidestep it—based on Commissioners' subjective constitutional concerns or otherwise. *Cf. United States v. Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.") (citation omitted); *Springsteen-Abbott v. SEC*, 989 F.3d 4, 8 (D.C. Cir.

2021) ("[R]egulatory agencies are not free to declare an act of Congress unconstitutional.") (quoting *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987)).

2. The Commissioners' assessment that TTV lacked any federal electoral purpose was arbitrary and capricious because they failed to articulate any legally or logically sound basis for it.

The FEC fails to provide any reason the Commissioners' "issue advocacy" rationale is consistent with law or reasoned decisionmaking. Courts cannot reflexively uphold or "defer to" conclusory and counterfactual agency decisionmaking like the Commissioners' decision here with respect to TTV's electoral purpose—however many times the FEC invokes the word "deference." Nor can the Commissioners' discursions into generic hypotheticals about other groups or citation of inapposite enforcement matters excuse their failure to reasonably support, or even coherently explain, their conclusions about *this* case. "[D]eference does not mean carte blanche, and the Commission must at all times demonstrate the markers of 'principled and reasoned decision[making] supported by the evidentiary record.'" *Constellation Mystic*, 45 F.4th at 1043 (citation omitted). The Commissioners failed in this task here.

In explaining their decision that pursuing the FECA violations alleged here fell "outside [the FEC's] jurisdiction," AR 282, the controlling Commissioners asserted, in conclusory fashion, that "TTV's activities"—including the election-related services it undertook in the 2021 Senate run-off elections, at the Georgia GOP's express request and in the immediate weeks before Election Day—lacked any federal electoral purpose because TTV engages in "the sort of issue advocacy" that cannot be constitutionally subject to regulation under the Act, AR 283. But the Commissioners offered no intelligible explanation of how they arrived at that characterization of TTV's specific conduct *here*. Indeed, the Commissioners simply ignored whether their assessment of TTV's electoral purpose was compatible with the undisputed record showing that its Georgia activities were undertaken "at the request of" and in "partnership" with a political party committee

in connection with specific federal elections. Their conclusion was ultimately "nothing more than [an] unsupported assumption[]" bereft of cogent factual justifications or reasoned analysis, and thus cannot be credited. *Nat'l Gypsum Co. v. EPA*, 968 F.2d 40, 43 (D.C. Cir. 1992).

In lieu of the requisite reasoned analysis, the Commissioners posited that TTV's *general* focus on so-called "election integrity" issues makes it similar to other groups whose "core programmatic activities" involve "activism" around "provocative issues," AR 283—insinuating that a spender's self-described organizational mission is somehow dispositive of whether it can ever be regulated under FECA. AR 283. But a group's overarching purpose and overall activities do not negate its ability to make federal campaign contributions.

Indeed, the Commissioners' invention of a "foundational distinction" between "trying to influence how elections are administered" and making federal campaign contributions or expenditures under FECA simply begs the question. AR 282. The statutory standard they were purporting to apply does not look to the spender's general organizational purpose or turn on whether its activities could incidentally impact the outcome of federal elections, *see* AR 282-84; under FECA, the operative question is whether the person made contributions or expenditures "in connection with" and "for the purpose of influencing" an election for federal office, *see* 52 U.S.C. §§ 30101(8)(A), (9)(A)(i); 30118. And what brings TTV's activities within FECA's ambit here was not the group's purported general focus on "election integrity," but its self-described "partnership" with the Georgia GOP—a political party committee "whose fundamental purpose is to help Republicans win elections in Georgia," AR 72—and coordination with respect to particular election-related services that TTV provided at the party's "request" and with the avowed aim of assisting with the party's efforts in the 2021 Senate run-off elections.

Nevertheless, the FEC suggests that whether "election integrity is a core programmatic activity of TTV" somehow controls any assessment of whether TTV's *particular* expenditures are covered by FECA. *See* FEC Br. 31.[6] But that conclusion does not follow. Regardless of how TTV (or the FEC) characterizes the group's "programmatic activity" as a general matter, the FEC's focus on whether TTV's usual organizational activities might or "*could*" influence federal elections fails to answer whether its specific activities *here* were undertaken for that purpose. And the Commissioners' conclusory assertions and hypotheticals about other groups and fact patterns do nothing to elucidate the basis for their decision with respect to TTV. The issue was not whether some group's theoretical activities "*could* influence" or "impact" a federal election, or incidentally "benefit" a candidate, AR 283, 284, but whether *TTV's* disbursements at the Georgia GOP's express "request" had that purpose. Because the FEC's "explanation for its determination . . . lacks any coherence, the court owes no deference" to it. *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014) (citation and internal quotation marks omitted).

The FEC further contends that the controlling Commissioners' issue advocacy rationale was ultimately "reasonable" because they cited past FEC non-enforcement decisions assertedly involving "programmatic activity with the potential to influence the outcome of a federal election" and "provided multiple examples of a wide variety of organizations engaged in issue advocacy directly impacting the administration (and potentially the outcome) of federal elections." FEC Br.

[6] The FEC also falsely asserts that plaintiffs "do not appear to contest" that TTV's "efforts at issue here were undertaken at least in part to advance the policy goals of the organization as to election administration and ballot integrity." FEC Br. 31. Plaintiffs have made no such allowance. Plaintiffs have consistently maintained that TTV—while it *described* its services as generally targeting "election integrity"—in fact undertook them for the purpose of influencing the Senate run-off elections, specifically, by providing them in avowed "partnership" with and "at the request of" the Georgia GOP to help its candidates "'win by eliminating votes and changing the count.'" AR 73.

31. But the Commissioners' non sequiturs about other "issue advocacy" groups and hypotheticals based on dissimilar facts in no way support or explain their decision that TTV is categorically exempt from the Act's requirements. The truism that "trying to influence how elections are administered, as a policy matter, is different from acting 'for the purpose of influencing' a federal election," AR 282, is no substitute for a coherent exposition of their reasoning and conclusions *here*.

Nor is any of the FEC "precedent" cited by the Commissioners in their Statement of Reasons or by the FEC in its motion remotely supportive of the decision. *See* FEC Br. 32-35. For instance, the FEC places extraordinary weight on Matter Under Review ("MUR") 7024 (Van Hollen for Senate). *See* FEC Br. 32-33; AR 284. But its own description of that matter only echoes plaintiffs' central point here: "[T]he fact that services rendered may benefit a campaign does not answer the question of whether such services were provided for the purpose of influencing a federal election." FEC Br. 32-33; *see also* Pls.' MSJ 38 n.7. In MUR 7024, the Commission found that *pro bono* legal services to an elected federal official were not provided "for the purpose of influencing" a federal election, where the representation focused solely on challenging specific FEC regulations through an administrative rulemaking petition and subsequent, related litigation. *See* Factual & Legal Analysis ("F&LA") at 4-6, MUR 7024 (May 31, 2017). But in MUR 7024, unlike here, the record contained no "objective or subjective indication" whatsoever that the services in question were provided "for the purpose of influencing an election." *Id.* at 4; *see also id.* at 8 ("[I]nformation in the record indicate[d] that [the administrative respondents] Wilmer Hale, Democracy 21, and CLC provided the legal services at issue here to Van Hollen and not to a political committee, for the purpose of challenging a rule of general application, not to influence a particular election."); *id.* at 4-5 (noting respondents' "sole purpose" in representing Van Hollen

was "'challeng[ing] the relevant FEC regulation in Court'" and, specifically, "to guarantee standing under D.C. Circuit law" in pursuit of that challenge).

The FEC also cites the Commissioners' reliance on "longstanding Commission precedent" under which "actions taken for *bona fide* commercial reasons are not 'for the purpose of influencing an election' even 'if a candidate benefitted from the commercial activity.'" FEC Br. 33 (quoting AR 284); *see also* AR 284-85. But this principle has no bearing here, as plaintiffs have explained. *See* Pls.' MSJ 32 n.8. TTV has never alleged that its activities were undertaken for a commercial purpose. *See generally* AR 33-50. And the enforcement decisions and advisory opinions that the FEC cites are manifestly off point. All involved practices undertaken by large technology companies in the ordinary course of business solely to "improve the user experience and protect advertising revenue," "protect [corporate] brand reputation," and otherwise safeguard the companies' positions in the commercial marketplace—for example, Google's use of "technologies for filtering content on the Internet to provide a more attractive service to users," F&LA at 8, MUR 7870 (Google LLC, *et al.*) (Mar. 28, 2022); Microsoft's commercially reasonable efforts "to protect [its] brand reputation" by providing election-sensitive customers with free account security services, FEC Advisory Op. 2018-11 (Microsoft Corp.); or Twitter's "decision not to verify" a federal candidate "predicated on pre-candidacy violations of Twitter's rules and terms of service and made in accordance with corporate policies implemented to protect and maximize profits," Statement of Reasons of Chair Broussard, Vice Chair Dickerson, & Comm'rs Trainor, Walther, & Weintraub at 1, MUR 7832 (Twitter, Inc.) (Oct. 26, 2021). And none involved any evidence of a countervailing electoral purpose or coordination. *See, e.g.*, F&LA at 8, 11, MUR 7870 (noting complaint's "vague and speculative" allegations provided "no

indication" of coordination and failed to support any inference that Google's actions were "motivated by something other than a commercial interest").

Even the FEC's own description of these matters confirms that they have no relevance to this case and the Commissioners' reliance on them was arbitrary. *See* FEC Br. 34. Here, there was ample reason to believe that TTV's services—provided at the "request" of the Georgia GOP in furtherance of the groups' self-described "partnership," *see, e.g.*, AR 3-4—were directed at influencing the 2021 Senate runoff elections in Georgia. The record abounds with "objective and subjective indication[s]" of that purpose, F&LA at 4, MUR 7024. TTV itself explained that it was motivated by "what happened in November" to join forces with the Georgia GOP and to "assist with the Senate runoff election process," AR 60; the record also contained statements by TTV that "illegal votes" occur "in Democrat counties," AR 73, as well as communications reflecting that the purpose of TTV's activities was to "'win by eliminating votes and changing the count.'" AR 73 (citation omitted). Moreover, beyond the undisputed fact that TTV responded to a "request" from the Georgia GOP by "partnering" with it to provide these services in the immediate weeks before the Senate runoff elections, *see* AR 3-4, 35, 43, 47, 59-60, 67-68, available information also indicated ongoing and "active cooperation between the two groups beyond their initial discussions," AR 70-71.

Summoning fanciful hypotheticals and inapposite enforcement cases is no justification for the Commissioners' irrational and counterfactual assessment that they lacked "jurisdiction" to pursue the violations alleged here—all the more so given that their analysis ignores FECA's express text and relies on a constitutional line between express and issue advocacy that the Supreme Court has rejected. The Commissioners' "issue advocacy" argument was utterly unsupported, unreasonable, and thus contrary to law.

D. The dismissal rested on an impermissible coordination standard.

In attempting to defend the Commissioners' impermissibly constrained coordination analysis, the FEC—again falling back on reflexive appeals to agency deference—suggests that plaintiffs challenged only "the *weight* to be given to the evidence of coordination," and not the substantive legal standards the Commissioners employed. *See* FEC Br. 36 (emphasis added). The FEC's gloss on plaintiffs' arguments is demonstrably incorrect. *See generally* Pls.' MSJ 33-37. And in limiting its motion to countering what it falsely describes as plaintiffs' "simple disagreement over the significance of evidence in the record," FEC Br. 39, the FEC effectively concedes the point: the Commissioners' coordination analysis was afflicted by fatal errors of law.

1. The Commissioners unreasonably disregarded the Georgia GOP's explicit "*request*" for help. AR 286 (emphasis added). Their failure to assess the significance of—or even acknowledge—the Georgia GOP's undisputed "request" defies Congress's unambiguous textual mandate to treat "anything of value" provided "at the request or suggestion of" a political party as an in-kind contribution. *See* 52 U.S.C. § 30116(a)(7)(B)(ii). It is a "cardinal canon" of statutory interpretation to "presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Congress here unequivocally directed that all "expenditures made by any person . . . in cooperation, consultation, or concert with, or at the *request* or suggestion of, a national, State, or local committee of a political party[] shall" be regulated as in-kind contributions. 52 U.S.C. § 30116(a)(7)(B)(ii) (emphasis added). A standard that wholly ignores the relevant statutory text cannot be consistent with law.

The FEC makes no attempt to justify this lapse. Instead, it focuses on the Commissioners' inexplicable—and unexplained—conclusion that the groups' own characterization of their efforts as a "partnership" was not "legal[ly] significan[t]." AR 286. But "[s]tating that a factor was

considered . . . is not a substitute for considering it." *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (citation omitted). The FEC again attempts to backfill with post hoc justifications for the Commissioners' nonexistent analysis, but its "arguments come too late and from the wrong source." *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.6 (D.C. Cir. 1987); *see also, e.g.*, *Regents of the Univ. of Cal.*, 140 S. Ct. at 1934 (courts must "assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation*") (emphasis in original). Regardless, the FEC's emphasis on whether the Commissioners "were entitled to credit TTV's explanation in the record for its use of the term 'partnership'"—putting aside that, as the FEC itself concedes, "the controlling Commissioners' [Statement] did not cite that explanation," FEC Br. 37—still fails to show how this "explanation" comports with the Act. And it does not. As plaintiffs have highlighted, *see* Pls.' MSJ 34, Congress specifically directed that the Commission "shall not require agreement or formal collaboration to establish coordination," BCRA § 214(c), 116 Stat. at 95. Congress instead, recognizing that "[i]nformal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration . . . . expect[ed] the FEC to cover 'coordination' whenever it occurs." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Commission regulations likewise do not require a formalized agreement or official partnership to find coordination. *See, e.g.*, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 440 (Jan. 3, 2003) ("[C]oordination . . . does not require a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication," and "[i]n *the case of a request or suggestion* . . . agreement is not required at all.") (emphasis added); 11 C.F.R. § 109.21(e) (providing that "agreement"—meaning "a mutual understanding or meeting of the minds on all or

any part of the material aspects of the communication or its dissemination"—"is not required for a communication to be . . . coordinated").[7]

Even putting aside the evident deficiencies in the Commissioners' rationale that use of the term "partnership" had no "legal significance," AR 286, the FEC still does not account for their complete and unjustifiable failure to address the other, statutorily directed indicium of coordination present here: an express "request" from a political party committee. Whether TTV's reference to its "partnership" with the Georgia GOP was meant "colloquially" or to denote a more formalized relationship was not license for the Commissioners to disregard that, "in [TTV]'s own words, [TTV]'s activity followed a consultation with and then a *request* from a political party committee, and [TTV] agreed to 'assist' that political party committee." AR 67-68 (emphasis added). This failure was clear legal error, and the FEC cannot excuse it by ascribing it to a "simple disagreement" about the evidence. FEC Br. 39. The Commissioners' approach of ignoring the presence of an explicit "request" while demanding proof of a formal agreement or official partnership was flatly contrary to FECA, inconsistent with the FEC's own rules, and clearly unsustainable under any standard.

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[7] Nor was it permissible to treat TTV's contention that it would have pursued similar activities regardless of its "partnership" with the Georgia GOP as effectively dispositive of whether the groups in fact coordinated, given that TTV *did* meet with the Georgia GOP and *did* undertake its activities in "partnership" with and at the party's "request." *See, e.g.*, AR 67-68, 70. An activity may be subject to regulation under FECA when done in coordination with a political party, and not when done independently, but engagement in the latter does not transform a group's *coordinated* conduct into something else. Moreover, FECA's plain language and Commission regulations broadly define coordination and impose no requirement that the spender experience a "loss of autonomy" for coordination to occur. *See* AR 70 (citing 11 C.F.R. § 109.20(a)); *see also* 52 U.S.C. § 30101(9)(A)(i) (defining expenditures to include "anything of value"); *id.* § 30116(a)(7)(B)(ii) (regulating as contributions all "expenditures made by any person . . . in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party").

2. The Commissioners also fabricated new and impermissible exceptions to FECA for in-kind contributions that are purportedly made available to both parties or placed in the public domain. Neither exception has any basis in the Act. *See* Pls.' MSJ 35-36. Reading a free-floating "bipartisanship" exception into FECA's regulation of corporate contributions and coordinated expenditures, as plaintiffs have explained, *see id.* at 35, is manifestly at odds with the policy Congress sought to enact in BCRA, "unduly compromise[s] the Act's purposes," and "create[s] the potential for gross abuse," *Orloski*, 795 F.2d at 165—as vividly illustrated by the copious and "troubling" evidence in the BCRA record that most soft-money donors deployed largesse on both sides of the aisle, *McConnell*, 540 U.S. at 148 & n.7. The FEC counters by faulting plaintiffs for assertedly failing "to credit" TTV's claims of bipartisanship. *See* FEC Br. 37 (noting claims that TTV's services "were pursued in a non-partisan manner" by virtue of its delayed "offer of assistance to the Democratic Party of Georgia") (citing AR 47-49). But this misses the point. The broader or "bipartisan" availability of TTV's services is simply not germane to whether it coordinated any of them with the Georgia GOP. An agency action that "relied on factors which Congress has not intended it to consider" must be set aside, *State Farm*, 463 U.S. at 43—especially when, as here, its action affords such a readily exploitable loophole in the Act's regulation of coordinated expenditures.

Likewise, the Commissioners' focus on the supposed public availability of certain TTV "election integrity" materials was erroneous and improper. TTV's provision of valuable services to members of the public, whether for free or at a charge, does not change the fact that TTV coordinated with the Georgia GOP when it agreed to provide the party some of the same services at no charge. *Cf.* 11 C.F.R. § 100.52(d)(1) ("anything of value" includes the "provision of . . . services without charge"). A rule that treats a corporation's provision of valuable services at the

request of a political party as presumptively unregulable if the services are also offered in some form to other parties, candidates, or members of the public is patently susceptible to abuse, and cannot be sustained. *See Shays II*, 414 F.3d at 115 (admonishing that "if regulatory safe harbors permit what [FECA] bans . . . savvy campaign operators will exploit them to the hilt"); *cf. FEC v. Beaumont*, 539 U.S. 146, 160 (2003) (recognizing that corporations are "susceptible . . . to misuse as conduits for circumventing" FECA).

The various matters cited in the Commissioners' Statement—which plaintiffs stand accused of failing to "engage with" to the FEC's satisfaction, FEC Br. 39—bear not even a passing resemblance to this case. For example, in MUR 7119 (Donald J. Trump, *et al.*), the Commission rejected a finding of coordination based on the "mere appearance" of a person allegedly associated with a candidate campaign committee at an event organized by a super PAC, because there was "no evidence that the [campaign] requested or suggested that [the super PAC] sponsored the event" or that the two were "acting in cooperation, consultation, or concert" with regard to the event—nor even that the individual in question was an actual staffer or agent of the campaign. F&LA at 4, 5, MUR 7119; *see* AR 286 (citing F&LA at 5, MUR 7119). Here, in contrast, the FEC's attempt to recast TTV's self-described "partnership" with the Georgia GOP as merely TTV hosting public events attended by the Georgia GOP, *see* FEC Br. 38, is belied by record evidence of both a request for assistance from the Georgia GOP, and subsequent, sustained coordination between the groups. *See, e.g.*, AR 67-68.[8]

[8] The other cited matters are equally inapposite. In MUR 7797 (Sara Gideon for Maine, *et al.*), the Commission found no coordination between a candidate committee and a super PAC, where the super PAC was alleged to have published ads in response to "coded words" in a tweet from the candidate's communications director and "there was no indication that private communications had occurred beyond the public notice." *See* F&LA at 1, 8, MUR 7797. Similarly, in MUR 7700 (Vote Vets *et al.*), the FEC rejected allegations that a single "tweet by a senior official for the

E. The dismissal rested on conclusions that were arbitrary, unreasonable, and wholly contrary to the record.

The dismissal was contrary to law because the Commissioners, in concluding that there was "nothing in the record" showing that TTV coordinated with the Georgia GOP, arbitrarily ignored key facts, including statutorily prescribed indicia of coordination; imposed an improperly heightened standard of proof; and, overall, failed to exercise reasoned agency decisionmaking. The FEC counters that the Commissioners' imposition of an unduly strict standard of proof and arbitrary and capricious disregard for the record is justified because of the deference owed to agency decisionmaking. FEC Br. 40. In particular, the FEC suggests that their explanation "met the standard for deference" because it was set forth in a "ten-page, single-spaced" Statement of Reasons with "65 supporting footnotes." *Id.*[9] But the length of their Statement hardly suffices to show that the reasoning contained therein was cogent or consistent with the record. It was neither.

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candidate's committee constituted a request or suggestion that brought later advertising by the super PAC under the Commission's coordination regulations." Statement of Reasons of Chairman Dickerson & Comm'rs Cooksey, Trainor, & Weintraub at 1, MUR 7700 (Apr. 29, 2022). Here, in stark contrast, TTV's president submitted a declaration explicitly acknowledging that the group "met with the Georgia GOP and discussed its operations in Georgia, and that the Georgia GOP indicated to [TTV] that it should continue with its activities." AR 71.

MUR 7510 (Katie Arrington for Congress, *et al.*) is even less help. In that matter, OGC *agreed* that coordination had occurred where a candidate had "participated in a videotaped interview" with a corporation that then "used the footage to create" a campaign ad, but recommended dismissing as an exercise of prosecutorial discretion because the corporation immediately canceled its media buy "before the advertisement ever aired," and never "authorize[d] or pa[id] for placement of the ad." *See* First Gen. Counsel's Report at 1-2, 13-14, MUR 7510 (Oct. 15, 2019). The FEC cites a two-Commissioner Statement rejecting the OGC's coordination finding while agreeing with its dismissal recommendation, but even setting aside the obvious factual dissimilarities between the cases, that Statement did not garner majority support and thus cannot serve as precedent here. *See* Certification, MUR 7510 (Nov. 9, 2021); *Common Cause*, 842 F.2d at 449 n.32.

[9] Of course, the first four pages of the Statement just provide a selective recitation of the facts in the administrative complaint and responses. The Commissioners' actual analysis is squeezed into the remaining pages, and the large majority of it consists of extraneous hypotheticals and bland statements about the law. Similarly, a significant share of the space occupied by the "65 footnotes"

As plaintiffs have stressed, *see* Pls.' MSJ 38-41, the respondents' own statements refuted the Commissioners' conclusory pronouncement that "nothing in the record" indicated coordination between the two groups, AR 286, and the record was replete with corroborating evidence from other sources showing the same. *See generally* Pls.' MSJ 38-41. The decision "evidences a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

But perhaps most glaringly, neither the Commissioners in their Statement of Reasons nor the FEC in defense of it have attempted to offer any explanation for why it was reasonable for the Commissioners to discount the unrebutted evidence showing that TTV provided its services at the Georgia GOP's "*request*" to assist with the Senate runoff elections. *See, e.g.*, AR 3-4, 57-58. It was not reasonable. The Commissioners flagrantly disregarded conduct falling squarely within the plain terms of the statute, *i.e.*, FECA's definitional language providing that all expenditures made "*at the request or suggestion of* . . . a political party" "*shall* be considered to be contributions." 52 U.S.C. § 30116(a)(7)(B)(ii) (emphasis added). This failure to "examine the relevant data and articulate a . . . rational connection between the facts found and the choice made" confirms that the Commissioners' conclusions were unreasonable, arbitrary, and merit no deference. *State Farm*, 463 U.S. at 43 (citation omitted); *cf. Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) ("Even when an agency 'has significant discretion in deciding how much weight to accord each statutory factor,' that does not mean it is 'free to ignore any individual factor entirely.'") (quoting *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)).

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the FEC highlights is taken up by long string citations of materials that are demonstrably off point. *See, e.g.*, AR 281 n.36, 283-84 nn.46-49.

Compounding their errors of law and reasoning, the Commissioners imposed a heightened standard of proof that has no place at the threshold, pre-investigatory stage of FEC enforcement matters. A reason-to-believe finding requires "only a credible allegation" of wrongdoing, and "does not require 'conclusive evidence' that a violation occurred or even 'evidence supporting probable cause' for finding a violation." *CLC v. FEC*, No. 19-cv-2336-JEB, 2022 WL 17496220, at *8 (D.D.C. Dec. 8, 2022); *see also* FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007) ("The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation."). Although the FEC concedes that "the evidentiary standard at issue is of course relevant to the Court's determination as to the reasonableness of the dismissal," its main response on this point is that the FEC's evidentiary assessments are entitled to "extreme" or "fundamental deference." FEC Br. 41. "But for all of the discretion the [agency] enjoys, it must nonetheless demonstrate that it exercised its judgment in a reasoned way." *United States Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016). The Commissioners here did not.

The FEC's gloss on plaintiffs' arguments as reflecting "mere disagreements" with the Commissioners' ultimate conclusions requires ignoring every legal error and lapse of reasoning that plaintiffs have identified. *See* FEC Br. 41. For similar reasons, the FEC's reliance on *Nader v. FEC*, 854 F. Supp. 2d 30 (D.D.C. 2012), is misplaced. The plaintiff there was faulting not the FEC but the district court, which he claimed had imposed "an 'improper evidentiary burden' on him by requiring 'actual proof' of FECA violations." *Id.* at 33. And the supposed error the plaintiff identified—that the Court had improperly required him to "establish" coordination—derived from the plaintiff's own insertion of that language into the Court's decision. *Id.* at 34 ("The Court didn't

say that the FEC reasonably determined that [plaintiff]'s supporting facts failed to 'establish' coordination . . . . The Court's use of the word 'suggest'—rather than 'establish'—is consistent with the statutory requirement that the FEC determine whether there is 'reason to believe' a violation of the Act occurred."). Here, in contrast, plaintiffs have explained that the Commissioners' decisionmaking was afflicted by numerous errors of judgment and law, failed to address crucial facts without saying why, and ultimately rested on the conclusory and indefensible statement that "nothing in the record indicate[d] that TTV, in fact, undertook any of its activities 'in cooperation, consultation, or concert with, or at the request or suggestion of' the Georgia GOP." AR 286.

However, the Commissioners' inexplicable conclusions about the record are less surprising, though no less wrong, when considered alongside their description of what level of evidence they *would* have deemed satisfactory: a respondent's sworn admission, in a Non-Prosecution Agreement with the Department of Justice, "specif[ying]" that it made federal campaign contributions. *See* AR 285 (citing, in describing the coordination standard they applied, F&LA, MURs 7324, 7332, & 7366 (A360 Media, LLC f/k/a American Media, Inc., *et al.*)). Indeed, in the cited matter, the same Commissioners confirmed in an accompanying Statement of Reasons that their reason-to-believe finding was predicated on the availability of "a sworn statement admitting the elements of a campaign-finance violation" and thus "obviat[ing] the need for further investigation." Statement of Reasons of Vice Chair Allen Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor, III, MURs 7324, 7332, 7364, & 7366 (June 28, 2021).

In applying their constrained test to reach the extraordinary and unsupported conclusion that "*nothing* in the record" indicated coordination between TTV and the Georgia GOP, *see* AR 286 (emphasis added), the Commissioners made no attempt to explain their reasoning based on

facts in the record. Nor could they have, because the record in this case clearly compelled the opposite conclusion: it showed, *inter alia*, that TTV responded to the Georgia GOP's "request" for assistance by "partnering" with the party to provide various election-related services and resources—not all of which were publicly available or "open to all comers," *see, e.g.*, AR 3-4, 35, 47, 57-58, 61-63, 67-68; TTV continued to collaborate with the Georgia GOP following the groups' initial discussions on voter challenges and other election-related endeavors, *see* AR 70-71; and it undertook these activities "for the purpose of influencing" the Senate runoff elections, *see* AR 3-4, 46, 72-73, 111-12, 134.

In sum, not only did the Commissioners apply an improperly exacting standard of proof, they did so while also failing to address statutorily prescribed factors evincing coordination and unreasonably ignoring contradictory facts in the record. This in no way comports with reasoned decisionmaking, and the FEC's arguments fail to justify it.

CONCLUSION

For all the foregoing reasons, the Court should grant plaintiffs' motion for summary judgment, deny the FEC's cross-motion for summary judgment, and enter an order declaring the dismissal of plaintiffs' administrative complaint contrary to law and remanding this matter with instructions to conform to the Court's order within thirty days.

Dated: April 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2023, 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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