FEDERAL ELECTION COMMISSION
Washington, DC 20463

Catherine Hinckley Kelley, Esq.
Brendan Fisher, Esq.
Campaign Legal Center
1101 14th St., N.W., Suite 400
Washington, DC 20005

OCT 0 2 2019

RE: MUR 7146
Correct the Record and Elizabeth Cohen in her official capacity as treasurer
Hillary for America and Elizabeth Jones in her official capacity as treasurer

Dear Ms. Hinckley & Mr. Fisher:

On June 17, 2019, you were notified by letter of the actions taken by the Commission regarding the complaint Campaign Legal Center filed against Correct the Record and Elizabeth Cohen in her official capacity as treasurer and Hillary for America and Elizabeth Jones in her official capacity as treasurer. Subsequently, on August 30, 2019, we mailed you a Statement of Reasons from Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter explaining their votes in this matter.

Enclosed please find an additional Statement of Reasons from Chair Ellen L. Weintraub explaining her vote. This document has been placed on the public record as part of the file in this matter.

If you have any questions, please contact me at (202) 694-1591.

Sincerely,

Dawn M. Odrowski
Attorney

Enclosure
Statement of Reasons

FEDERAL ELECTION
COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 6940, 7097, 7146, 7160,
Correct the Record, *et al.*	)	and 7193
	)	

STATEMENT OF REASONS OF CHAIR ELLEN L. WEINTRAUB

Correct the Record ("CTR") said the quiet part out loud: it publicly admitted to coordinating with Hillary Clinton's 2016 presidential campaign, Hillary for America ("HFA"). CTR's founder and director, David Brock, publicly explained his role at this purported *independent* political committee as "working on the 'coordinated' side of the Clinton campaign."[1] By all accounts, this entity's very purpose was to coordinate its activities with the Clinton campaign.[2] The Federal Election Commission—a law enforcement agency—should investigate such blatant, publicly flaunted coordination schemes. However, once again, the agency's Republican commissioners have rejected the recommendations of the FEC's Office of General Counsel ("OGC") and blocked any investigation from going forward.[3]

I. BACKGROUND

Correct the Record made no secret about its coordination with the Clinton campaign. Since its first week of existence as an "independent" entity, CTR consistently stated that all its efforts would support Clinton's candidacy, in coordination with her campaign.[4] In fact, when announcing the establishment of CTR, its president stated in its press release that CTR would "work in support of Hillary Clinton's candidacy for President, aggressively responding to false

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1 Michael Scherer, *Hillary Clinton's Bulldog Blazes New Campaign Finance Trails*, TIME (Sept. 10, 2015), http://bit.ly/2YZRODe (cited in Compl. ¶ 24, MUR 7146).

2 *See* discussion *infra* I.

3 MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record, *et al.*), Amended Commission Certification ¶ 1 (June 13, 2019) [hereinafter Amended Certification].

4 *See* Press Release, Correct the Record, *Correct the Record Launches as New Pro-Clinton SuperPAC* (May 12, 2015) ("Correct the Record, though a SuperPac, will not be engaged in paid media and thus will be allowed to coordinate with campaigns and Party Committees."); Compl., Ex. A (MUR 6940) (providing the press release); *see also* Matea Gold, *How a Super PAC Plans to Coordinate Directly with Hillary Clinton's Campaign*, WASH. POST (May 12, 2015), https://wapo.st/2ZvgTdv (provided in Compl., Ex. C, MUR 6940).

attacks and misstatements" of her record as "a strategic research and rapid response team designed to defend Hillary Clinton from right-wing baseless attacks."[5] In leading CTR's efforts, Brock reportedly said he would "talk to [Clinton], and her campaign staff about strategy, while deploying the unregulated money he raise[d] to advocating her election online, through the press, or through other means of communications distributed for free online."[6]

These representations by CTR are not the puffery of an entity acting outside the orbit of HFA. CTR leadership spoke publicly about communications with senior HFA personnel, confirming that CTR and HFA had a close relationship and worked together to benefit HFA. For example, members of the Clinton campaign and CTR tweeted identical messages, with CTR's Brad Woodhouse reportedly explaining later that they were "allowed to coordinate."[7] There were other indications of coordination, too. On a separate occasion, CTR released a "barrage of facts" about Republicans' positions on prescription drugs when Clinton announced her healthcare plan.[8] Other publicly available information not cited in the complaints, including first-person interviews and messages from Brock and HFA personnel, show multiple instances of CTR and HFA engaging in coordinated activity, including other online communications.[9]

But CTR did more than post communications online. CTR raised and spent over $9.6 million to support Hillary Clinton's presidential campaign in 2016. CTR spent some of its almost $10 million dollars on activities like travel, fundraising, general consulting, staff salary and

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5 *See* Press Release, Correct the Record, *supra* note 4.

6 Scherer, *supra* note 1 (cited in Compl. ¶ 24, MUR 7146). Other CTR directors and high-level staffers publicly stated that they coordinated directly with Hillary for America. A CTR spokesperson indicated that anti-coordination regulations did not apply to them because their work was "posted only online." Joseph Tanfani & Seema Mehta, *Stretching the Political Rules: It's Getting Harder to Tell What Separates a Super PAC from a Candidate's Campaign*, L.A. TIMES (Oct. 12, 2015), https://lat.ms/2SmbVcd (cited in Compl. ¶ 27, MUR 7146). A CTR spokesperson asserted elsewhere that "FEC rules permit some activity – in particular activity on an organization's website, in email, and on social media – to be legally coordinated with candidates and political parties." *See* Gold *supra* note 4 (provided in Compl., Ex. C, MUR 6940).

7 *Did the Clinton Campaign Illegally Coordinate Social Media Messages?*, FOX NEWS (Sept. 28, 2015), http://bit.ly/2Z6e1PS (cited in Compl. ¶ 26, MUR 7146) ("Karen Finney, a senior adviser to the Clinton campaign, and Brad Woodhouse, head of the Super PAC Correct the Record, tweeted identical messages [about Clinton] within minutes of each other. . . . Woodhouse told [a Fox News reporter] that they [were] allowed to coordinate.").

8 Sam Frizell, *Clinton and Sanders Offer Competing Visions of Health Care*, TIME (Sept. 22, 2015), http://bit.ly/2YS08Vz (cited in Compl. ¶ 25, MUR 7146).

9 *See, e.g.*, *David Brock: Clinton Campaign Allowed Her Image "to be Destroyed"* at 31:52, POLITICO: OFF MESSAGE (Dec. 12, 2016), https://apple.co/2ZyctCB [hereinafter *Off Message Podcast*] (explaining that CTR was "basically under [HFA's] thumb, but you don't have to run everything by them"); Maggie Haberman, *Hillary Clinton Fortifies Ties and Fund-raising with Democratic Committee*, N.Y. TIMES (Dec. 3, 2015), https://nyti.ms/2YS3nMJ (citing unnamed sources within HFA that described coordination with CTR); *With All Due Respect*, BLOOMBERG TV (Jan. 19, 2016), https://bloom.bg/2YYxm5y (Brock discussing whether CTR and HFA coordinated his statement about Sen. Sanders' medical records); *see also* John Podesta (@johnpodesta), TWITTER (Jan. 16, 2016, 7:32 PM), http://bit.ly/2Z6NvWA (instructing Brock to "[c]hill out" on attacks based on Sen. Sanders' medical records); David Brock (@davidbrockdc), TWITTER (Jan. 16, 2016, 11:57 PM), http://bit.ly/2YWUxxl (publicly stating that CTR would not "attack Sen. Sanders on the issue of his medical records").

overhead that cannot be fairly described as "communications."[10] Only some of the almost $10 million dollars was used on communications on the internet placed without a fee.[11] CTR spent much of its money to create a full-fledged media machine dedicated to providing HFA with services only tangentially related to internet communications.[12] According to news reports, CTR conducted opposition research, ran a 30-person war room, sought confidential information from the Trump campaign, commissioned private polling, provided media training to surrogates,[13] oversaw an aggressive surrogate booking program,[14] and more to benefit the Clinton campaign.[15] But HFA disbursed less than $300,000 directly to CTR in exchange for "research" or "research services."[16]

CTR's activities—both exclusively online communications and those "off the internet"—were covered in detail in the news reports. Based on these reports and CTR's own press releases, the complaints alleged that CTR made impermissible in-kind contributions to HFA by coordinating CTR's activities in support of Clinton with the Clinton campaign. Some of the complaints included hacked information that was disseminated in connection with Russia's interference in the 2016 U.S. presidential election, but as explained below, the Commission did not consider—nor did it need to consider—such information.[17] Each complaint, with varying degrees of specificity, alleged widespread violations of the Act detailing CTR's expenditures for non-communication activity: activities including opposition research, strategic message development and deployment, surrogate media training and bookings, video production, fundraising, "rapid response" outreach to press, and a social media defense team. The complaints sufficiently alleged that these activities were impermissible in-kind contributions to HFA.[18]

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10 First Gen. Counsel's Rpt. at 9, 20–21 [hereinafter First GCR]

11 *See* 11 C.F.R. § 100.26 (excluding from the definition of a "public communication" "communications over the Internet, except for communications placed for a fee on another person's Web site").

12 First GCR at 9 ("[T]he bulk of CTR's reported disbursements are for purposes that are not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping in addition to payments for explicitly mixed purposes such as 'video consulting and travel' and 'communication consulting and travel.'").

13 Phillip Rucker, *How Hillary Clinton's Campaign Fakes Grassroots Love*, N.Y. POST (July 8, 2015), http://bit.ly/2LrMWkL (cited in Compl. ¶¶ 5, 15, MUR 7146) (describing how CTR paid for "on-camera media training" conducted by Franklin Forum and "talking-point tutorials").

14 Compl. ¶ 5, MUR 7146 (stating that CTR incurred $48,333 in debt to a firm hired to run this program) ; *see also* Mike Allen, *Clintonites Join DNC; Sanders Loses Leverage – Trump Touts Campaign of 'Substance' – Bush 43: Unlikely Savior – B'Day: Desiree Barnes, Tory Burch, Newt Gingrich, Matt Miller*, POLITICO: PLAYBOOK (June 17, 2016), https://politi.co/2LsSpYx (cited in Compl. ¶ 5, MUR 7146).

15 First GCR at 10–11.

16 *Id.* at 9.

17 *See, e.g.*, Compl. ¶¶ 3, 13–25, MUR 7160; Compl. ¶¶ 4–11, 13 MUR 7193.

18 *See supra* notes 1, 4, 6, 8, 9, 13, 14 (identifying publicly available information that was cited in the complaints).

II. ANALYSIS

A. RTB: the Low Standard for Launching an Investigation

The legal hurdle for launching an FEC investigation is a bar set low. The Act requires only that the Commission have a "reason to believe" ("RTB") that a person has committed or is about to commit a violation of federal campaign-finance law.[19] The Commission's formal guidance indicates, that "[it] will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation."[20] The Commission should investigate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine the actuality and scope of the violation.[21] The statute does not require that complainants arrive at the Commission's doorstep having already amassed conclusive evidence, or even evidence supporting probable cause to believe a violation occurred.

To investigate potential violations of the anti-coordination statute, the Commission needs only a credible allegation that coordinated activity yielded an impermissible contribution. Coordinated activity between an outside group and a political campaign must be regulated because every dollar spent on coordinated activity has the same effect as if contributed to the campaign directly.[22]

The Act defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[23] Expenditures will be treated as a contribution when made "by any person in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate, his or her authorized political committee, or their agents.[24]

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19 52 U.S.C. § 30108.

20 Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("Initial Stage of Enforcement Policy Statement").

21 *Id.*

22 *See Buckley v. Valeo*, 424 U.S. 1, 36–37 (1976).

23 52 U.S.C. § 30101(8)(A)(1) (emphasis added).

24 52 U.S.C. § 30116(a)(7)(B). Under Commission regulations, expenditures for "coordinated communications" are addressed under a three prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to "expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee." Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J"); *see also* Advisory Opinion 2011-14 (Utah Bankers Association). Under the three-prong test for coordinated communications, a communication is coordinated and treated as an in-kind contribution when it is paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or the authorized agents of either (the "payment prong"); satisfies one of five content standards (the "content prong"); and satisfies one of five conduct standards (the "conduct prong"). 11 C.F.R. § 109.21(a); *see also* 11 C.F.R. § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); 11 C.F.R.

Based on the serious allegations, the facts available to the Commission—including CTR's own public admissions of coordination—and the Commission's low standard for launching an investigation, this case should have been a slam dunk. However, my colleagues continue to block investigations at their earliest stages, raising the bar to an unattainable level and ignoring publicly available information.

B. There was Sufficient Evidence to Find RTB

The information before the Commission contains ample evidence from primary sources, in the form of press releases and public interviews with CTR officers, to support a coordination determination at the pre-RTB stage. In fact, the public information detailed above shows that CTR existed *solely* to make expenditures in cooperation, consultation or concert with, or at the request or suggestion of HFA and that it conducted its activities, as Brock phrased it, "under [HFA's] thumb."[25] Based on these facts alone, CTR's activities would plainly meet the statutory definition of a "contribution." Accordingly, I voted to find reason to believe that CTR and HFA violated the Act.[26]

CTR's lawyers made creative arguments as to why *none* of its almost *$10 million* in coordinated expenditures constitute in-kind contributions to the Clinton campaign. They argue that neither CTR nor the Clinton campaign violated the law because CTR limited its coordinated expenditures to materials that were distributed for free online.[27] Even if the Commission had accepted that argument, much of CTR's spending took place—all or at least in part—off the internet; that is, CTR engaged in activities that did not involve simply distributing

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§§ 109.21(c), (d) (describing content and conduct standards, respectively). Under Commission regulations, a communication must satisfy all three prongs to be a "coordinated communication."

25 First GCR at 17 (citing *Off Message Podcast*).

26 Amended Certification at ¶ 1–3 (moving to find reason to believe that CTR violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b) and that Hillary for America and Elizabeth Jones in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f), 30118(a) and 30104(b)).

27 CTR Resp. at 3–4; HFA Resp. at 4. Respondents argue that CTR's expenditures are not in-kind contributions because CTR limited its activities to communications that do not meet the "coordinated communication" three-pronged test. CTR argues that because none of its expenditures for communications were public communications under the content prong of the "coordinated communication" test at 11 C.F.R. § 109.21(c), which specifically exempts "communications over the Internet, except for communications placed for a fee on another person's Web site," it cannot have made "coordinated communications."

When the Commission revised these regulations in 2006, carving out an exception from the definition of ''public communication'' at 11 C.F.R. § 100.26 for online activity distributed on the internet for free, the internet was in a nascent stage. Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (stating that "the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach). My colleagues and I were concerned with ensuring that individuals were not inhibited from using a new communication technology for political speech. We were focused on carving out an exception for so-called "bloggers in their pajamas" disseminating free political messages from their basements, not multi-million dollar political committees who might want to establish a strategic research and rapid response organization with a 30-person staffed war room.

communications for free online, and therefore there was at least reason to believe that CTR and HFA violated the Act and Commission regulations based on this "off internet activity."[28]

Moreover, the Respondents objected to the complaints' reliance on facts that were disseminated in connection with Russia's interference in the 2016 U.S. presidential election. CTR and HFA urged the Commission to disregard the information contained within the hacked materials disseminated by the Russians through Wikileaks.[29] This suggestion is well taken. The Commission is not in the business of rewarding foreign adversaries that hack American campaigns and interfere with U.S. elections.[30] Regardless, the Commission does not need to rely on hacked materials to proceed with an investigation here. The complaints cited more than enough evidence outside of the Wikileaks documents for the Commission to find reason to believe that CTR and HFA engaged in impermissible coordination.[31]

The complaints credibly alleged that a significant violation of the Act may have at least occurred off the internet, citing to non-hacked, publicly available information from trustworthy sources, including CTR's own press statements and filings with the Commission. The available information, as outlined below, tends to show that CTR systematically coordinated its activities with HFA and did so "off the internet."[32] One of the complaints, citing a series of news articles, listed several examples of CTR's expenditures for "off internet" activities in support of Clinton's candidacy during the 2016 election cycle, including that CTR:

- Employed staff to: (1) conduct "opposition research,"[33] (2) run a "30-person war room" to defend Clinton during hearings before the House Select Committee on

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28 Much of CTR's almost $10 million in disbursements for activity during the 2016 election cycle would be in-kind contributions under the plain language of the Act, an application that my colleagues have yet been unwilling to consider. *See* Advisory Op. 2011-23 (Am. Crossroads) (failing to garner four votes in support of an approach that considered blatantly coordinated activity an in-kind contribution under the plain language of the Act); Statement of Comm'rs Bauerly & Weintraub at 1, Advisory Op. 2011-03 (Am. Crossroads). But, even if my colleagues continue to ignore a strict interpretation of the Act, much of this spending at least meets the definition of coordinated expenditure under 11 C.F.R. § 109.20(b). As discussed in Section II.C. *infra*, my Republican colleagues have once again acted contrary to law—ignoring extensive evidence against CTR and HFA that they at least made a coordinated expenditure with this "off the internet" activity.

29 First GCR at 18; *see also* U.S. DEP'T OF JUSTICE, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election* 44–49 (Mar. 2019), https://go.usa.gov/xmV6R (reporting that a Russian intelligence agency provided stolen DNC and HFA documents to Wikileaks as part of Russia's electoral interference).

30 I agreed with my Republican colleagues that it "would be inappropriate for the Commission to consider such information" and that we should "exclude[ ] from our deliberations the material stolen and disseminated by the Russian government." Statement of Reasons of Comm'rs Petersen & Hunter at 2, n.4, MUR 6940, *et al.* (Correct the Record, *et al.*) [hereinafter Republican SOR] (citing Amended Certification ¶ 2, which reflects a vote of 1-3 to approve OGC's proposed Factual and Legal Analyses that incorporated stolen information). Excluding those materials, however, does not end the analysis.

31 First GCR at 18.

32 The complaints cited both a series of CTR's own press statements and news reports about CTR's activities. *See e.g., supra* notes 1, 4, 6, 7, 8, 9, 13, and 14.

33 *See* Compl. ¶ 23, MUR 7146 (citing Jennifer Epstein, *David Brock Declines to Apologize to Bernie Sanders over Jeremy Corbyn Comparison*, BLOOMBERG (Sept. 15, 2015), https://bloom.bg/2LwNqGn); Compl. ¶ 90, MUR 7146.

Benghazi,[34] including blasting reporters with "46 research-fueled press releases, fact-checks, reports, videos and other multimedia releases during the hearing,"[35] and distributing a 140-page opposition research book to a variety of media outlets "that impugns the character of Republicans on the committee,"[36] and (3) "develop relationships with Republicans," "sleuth out confidential information from the Trump campaign," and distribute that information to reporters;[37]

- Conducted talking-point tutorials and media-training classes for Clinton surrogates led by an expert specializing in coaching people for television interviews;[38]

- Employed and deployed "trackers" to travel to states across the country to record the public events of Clinton's opponents;[39]

- Commissioned a private polling firm to conduct polls that showed Clinton winning a Democratic debate;[40] and

- Paid a consulting firm "to help oversee an aggressive surrogate booking program, connecting regional and national surrogates with radio and television news outlets across the country in support of Hillary Clinton."[41]

For example, CTR's surrogate program, which was run for the benefit of the Clinton campaign, was an expense that should have been considered by the Commission at the pre-RTB stage based on the publicly available information before us. An article cited by one of the complaints explained how CTR trained local Clinton supporters, including mayors, state representatives, and local politicos, to serve as campaign surrogates, teaching them what to say and how to talk to journalists about Clinton's candidacy through a variety of methods, including

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34 Compl. ¶ 28, MUR 7146 (citing Lisa Lerer & Ken Thomas, *Analysis: Clinton Rides Skill, Luck Into Benghazi Hearing*, ASSOCIATED PRESS (Oct. 22, 2015) (republished by the DAILY LOCAL NEWS at http://bit.ly/2QBp5Fh).

35 Compl. ¶ 58, MUR 7146 (citing Press Release, Benghazi Research Center, Correct the Record Publishes New Book on the Benghazi Committee's Witch Hunt Against Hillary Clinton (July 11, 2016).

36 Compl. ¶ 28, MUR 7146 (citing Brianna Keilar, *First on CNN: Super PAC Targets Benghazi Committee Republicans Ahead of Hillary Clinton's Testimony*, CNN (Oct. 21, 2015), https://cnn.it/2Lr591J); Compl. ¶ 90, MUR 7146.

37 Compl. ¶ 60, MUR 7146 (citing Kenneth Vogel & Julia Ioffe, *'Republican Source' Leaks Trump Speech to Dems*, POLITICO (July 21, 2016), https://politi.co/2LpGAlU); Compl. ¶ 90, MUR 7146.

38 Compl. ¶ 15, MUR 7146 (citing Rucker, *supra* note 13) ; Compl. ¶ 90, MUR 7146.

39 Compl. ¶ 17 MUR 7146 (citing Alex Seitz-Wald, *Pro-Clinton Super PAC Keeps a Close Eye on Clinton Rivals*, MSNBC (July 28, 2015), https://on.msnbc.com/2QvlCbg); Compl. ¶ 16 (citing Maggie Haberman, *Tracker Linked to Hillary Clinton is Spotted at a Martin O'Malley Event*, N.Y. Times (July 16 2015), https://nyti.ms/2QBoBPt); Compl. ¶ 90, MUR 7146.

40 Compl. ¶ 31 MUR 7146 (citing Emilie Teresa Stigliani, *Sanders Camp Questions Poll Showing Clinton Won Debate*, BURLINGTON FREE PRESS (Nov. 15, 2015), http://bit.ly/2Lws4c0); Compl. ¶ 90, MUR 7146.

41 *See, e.g.*, Compl. ¶ 51, MUR 7146 (citing Allen, *supra* note 14); Compl. ¶ 90, MUR 7146. CTR did not, in its response, deny or rebut the description of its coordinated activities contained in the MUR 7146 Complaint.

on-camera media training.[42] CTR's own communication director explained that "[w]e are holding sessions with top communicators across the country where we talk about the best ways to discuss Secretary Clinton's strong record of accomplishments, how to articulate Secretary Clinton's positions most effectively and how to correct Republican operatives' distortions of the facts."[43] These trainings prepared local surrogates to respond to phone calls from local reporters so that they would "parrot Correct the Record's talking points about Clinton having been a fighter for the middle class—from improving rural health care as first lady of Arkansas to raising the minimum wage as a New York senator."[44] The media training was unrelated to online communications and may run afoul of the Act's anti-coordination statute.[45]

While one article explains that "the campaign played no role in the training sessions,"[46] the public pronouncements of coordination between CTR and HFA, and their carefully worded denials,[47] do not foreclose an inference that the training itself was done in coordination, consultation or concert with, or at the request or suggestion of HFA. Even if both the training paid for by CTR and the activities conducted by those surrogates could arguably be considered "communications," neither activity took place solely on the internet.

C. The Failure to Find RTB was Contrary to Law

But despite the extensive evidence against CTR and HFA, my Republican colleagues have once again declined to enforce the law against prohibited coordinated activity. In fact, the Commission has not once entered into pre-probable cause conciliation or found probable cause to believe that a respondent violated the coordination regulations since the 2010 decision in *Citizens United*.[48]

In striking down limits on independent expenditures as unconstitutional, the Supreme Court in *Buckley v. Valeo* relied on the "absence of prearrangement and coordination of an

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42 MUR 7146 Compl. ¶¶ 5–6, 15 (*citing* Rucker, *supra* note 13) ("Presidential campaigns have for decades fed talking points to surrogates who appear on national TV or introduce candidates on the stump. But the effort to script and train local supporters is unusually ambitious and illustrates the extent to which the Clinton campaign and its web of sanctioned, allied super PACs are leaving nothing to chance.").

43 Rucker, *supra* note 13 (cited in MUR 7146 Compl. ¶¶ 5, 15).

44 *Id.* Another article cited by the Complaint, outlined how CTR ran an "aggressive surrogate booking program . . . in support of Hillary Clinton." MUR 7146 Compl. ¶¶ 5, 15 (citing Allen, *supra* note 14). This program reconnected "regional and national surrogates with radio and television news outlets across the country in support of Hillary Clinton." *Id.*

45 *See* 52 U.S.C. § 30116(f).

46 Rucker, *supra* note 13 (cited in MUR 7146 Compl. ¶ 15).

47 Correct the Record Resp. at 5, MUR 7146 (stating it did not "solicit or accept any suggestions from HFA regarding which individuals should attend the sessions" or "otherwise permit HFA to direct individuals to the sessions"); HFA Resp. at 4, MUR 7146 (stating it did not participate in the training or provide any suggestions or direction to CTR with respect to those activities).

48 *See* Statement of Reasons of Chair Ellen L. Weintraub, MUR 6908 (NRCC, *et al.*), https://go.usa.gov/xymPh.

expenditure with the candidate or his agent" to alleviate the danger of *quid pro quo* corruption.[49] The Court cannot possibly have imagined that this level of coordination between a candidate and a spender would ever be considered independent.

My colleagues have yet again turned a blind eye to the available facts before us that are outside of the complaint, feigning concerns about OGC's "unilateral augmentation of the record to support allegations in enforcement actions."[50] This is a consistent strategy that my colleagues have undertaken throughout their time on the Commission, a strategy which has conveniently allowed them to avoid investigating serious allegations.

However, my colleagues *have* in fact issued decisions based on public information.[51] Despite the courts having consistently instructed the Commission to take into consideration "all available information" in evaluating the merits of a complaint,[52] my colleagues continue to pick

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49 *Buckley v. Valeo,* 424 U.S. 1, 47 (1976).

50 *See* Republican SOR at 12, n.79 (citing MUR 6929 (Rick Santorum, *et al.*)). Frequently when OGC has sought to rely on public information, my colleagues insist that such materials be sent to respondents. Yet here they excoriate OGC for following a procedure for which they themselves have expressed support. *See, e.g.*, Statement of Reasons of Comm'rs Petersen, Hunter, & McGahn, MUR 6056 (Protect Colorado Jobs) ("[I]f we assume *arguendo* that certain limited reviews of publicly available materials are permissibly undertaken . . . then any unearthed facts or allegations that OGC uses to support RTB recommendations should be provided to respondents so that they may have a full and fair opportunity to challenge them before the Commission votes on those recommendations.").

51 *E.g.*, Factual & Legal Analysis at 8–9, MUR 6330 (Johnson) ("In addition to the documents submitted by Respondents, the Commission also reviewed publicly available information such as news articles, social network sites, and website articles . . . ."); *see also, e.g.*, MUR 6238 (MyCongressmanIsNuts.com) (no RTB based on review of respondent's website and Facebook page); MUR 6224 (Fiorina) (no RTB based in part on review of public news reports); MUR 6084 (John Kennedy for U.S. Senate) (dismissal based on review of ad on YouTube); MUR 5666 (MZM, Inc.) (RTB based partly on review of public news reports); MUR 5581 (Wark) (RTB based in part on review of public news reports); MUR 5562 (Sinclair Broadcast Group, Inc.) (no RTB based in part on review of public news reports); MUR 5542 (Texans for Truth) (RTB based in part on review of public news report and statements from respondent's website); MUR 5421 (Kerry for President) (RTB based in part on review of public news reports); MUR 5408 (Sharpton) (RTB based in part on review of public news reports); MUR 5380 (DeLay Congressional Committee) (RTB based in part on "due diligence review of the public record," including news reports); MUR 5328 (PAC to the Future) (RTB based in part on review of public news reports); MUR 5279 (Bill Bradley for President, Inc.) (RTB based in part on review of public news reports); MUR 5248 (Ralph Reed) (no RTB based in part on review of public news reports); MUR 5035 (Schrock) (no RTB based in part on review of public news reports); MUR 5025 (Roukema) (no RTB based in part on public news reports); MUR 5020 (Trump Hotels & Casinos) (RTB based in part on review of public news reports and business website); MUR 4650 (Enid '94/Enid '96) (RTB based in part on review of public news reports); MUR 4568 (Triad Mgmt. Servs., Inc.) (RTB based in part on review of public news reports).

52 For example, in a 1979 case affirming the Commission's decision declining to find reason to believe and investigate a complaint, the U.S. District Court for the District of Columbia stated:

> [I]t seems clear that the Commission *must take into consideration all available information concerning the alleged wrongdoing*. In other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to the Commission gathered either through similar sworn complaints or through its own work the facts may merit a complete investigation. By the same turn, a persuasive and strong complaint may not merit an investigation because the Commission possesses reliable evidence indicating that no violation has occurred. Thus, *it is*

and choose when to look at all available information—not just that information explicitly presented in the complaint. Here, the publicly available information provided in the complaints included the Respondents' own tweets and other public statements that are impossible to ignore. As I have pointed out before, [53] if the Commission ignores public information that is relevant to the decision at the pre-RTB stage, there is a risk that a court will find that that the Commission's decision was not backed by "substantial evidence." Indeed it is gross negligence for an agency charged with enforcing the law to ignore information readily available to the general public.[54]

III. CONCLUSION

Despite my colleagues blatant disregard for the facts and the missed opportunity to pursue an enforcement action in this matter,[55] this case is still an opportunity to make clear to the

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> *clear that a consideration of all available material is vital to a rational review of Commission decisions.*

In re FECA Litigation, 474 F. Supp. 1044, 1046 (D.D.C. 1979) (emphasis added). *See also Antosh v. FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984) (overturning the Commission's dismissal of a complaint because the Commission had failed, at the pre-RTB stage, to adequately consider facts contained in a previously filed, publicly available report).

53 *See, e.g.*, Statement of Reasons of Comm'rs Weintraub & Walther, MUR 6928 (Rick Santorum, *et al.*).

54 The Commission's longstanding internal rules indicate that it is appropriate for OGC attorneys to consult information in the public domain prior to the Commission finding RTB. First, as my colleagues have acknowledged, Commission Directive 6, approved in April of 1978, provides that the Commission may initiate a MUR based solely on a news article, and that it is appropriate for OGC to recommend that the Commission do so. *See* Statement of Reasons of Comm'rs McGahn & Hunter at 2–3, MUR 6540 (Rick Santorum for President); Statement of Reasons of Comm'r Petersen at 1, MUR 6540 (Rick Santorum for President) (concurring with the Statement of Reasons of Comm'rs McGahn and Hunter). Second, the Commission's 2007 statement of policy concerning the initial stage of the enforcement process specifically reaffirms that, in making RTB determinations, the Commission will consider "the available evidence," which has been understood for decades to include information identified by OGC from the public domain. Initial Stage of Enforcement Policy Statement, 72 Fed. Reg. at 12545. Throughout the history of the Commission, Commissioners on both sides of the aisle have approved recommendations based on such information. *See, e.g.*, MUR 6238 (MyCongressmanIsNuts.com) (no RTB based on review of respondent's website and Facebook page); MUR 6224 (Fiorina) (no RTB based in part on review of public news reports); MUR 6084 (John Kennedy for U.S. Senate) (dismissal based on review of ad on YouTube); MUR 5666 (MZM, Inc.) (RTB based partly on review of public news reports); MUR 5581 (Wark) (RTB based in part on review of public news reports); MUR 5562 (Sinclair Broadcast Group, Inc.) (no RTB based in part on review of public news reports); MUR 5542 (Texans for Truth) (RTB based in part on review of public news report and statements from respondent's website); MUR 5421 (Kerry for President) (RTB based in part on review of public news reports); MUR 5408 (Sharpton) (RTB based in part on review of public news reports); MUR 5380 (DeLay Congressional Committee) (RTB based in part on "due diligence review of the public record," including news reports); MUR 5328 (PAC to the Future) (RTB based in part on review of public news reports); MUR 5279 (Bill Bradley for President, Inc.) (RTB based in part on review of public news reports); MUR 5248 (Ralph Reed) (no RTB based in part on review of public news reports); MUR 5035 (Schrock) (no RTB based in part on review of public news reports); MUR 5025 (Roukema) (no RTB based in part on public news reports); MUR 5020 (Trump Hotels & Casinos) (RTB based in part on review of public news reports and business website); MUR 4650 (Enid '94/Enid '96) (RTB based in part on review of public news reports); MUR 4568 (Triad Management Services, Inc.) (RTB based in part on review of public news reports).

55 My colleagues accuse me of "gamesmanship" by moving to dismiss all of the complaints pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and then voting against my own motion. They claim to prefer that their statement explain their votes. Republican SOR at 17, n.82. But this protest exposes the shoot-first-aim-later approach they take to dismissing enforcement matters. Judicial review of whether a Commission dismissal is

public and regulated community that political actors—corporations and political committees alike—may not engage in coordinated activity just because their communications end up on the internet. My colleagues sent a clear, albeit buried warning, within their Statement of Reasons in this matter:

> A word of caution: [the] conclusion here should not be read as sanctioning close working relationships between SuperPACs and the candidates the support. To the contrary, such relationships might well trigger the Act's coordination provision or violate other provisions of the Act, such as the soft money prohibition at 52 U.S.C. § 30125(e).[56]

It seems that there is agreement in principle that the internet exception does not swallow the coordination rules. Apparently, even my colleagues recognize that. The ever-expanding online political landscape and its related offline activity is not an unregulated haven for limitless coordinated spending. In practice, however, my colleagues have never seen a case of coordination that they were willing to pursue.

September 20, 2019
Date

Ellen L. Weintraub
Chair

contrary to law depends on Commissioners' states of mind at the moment they vote on a matter, as documented by their Statements of Reasons. *DCCC v. FEC,* 831 F.2d 1131, 1132 (D.C.Cir.1987) (When "the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why. Absent an explanation by the Commissioners for the FEC's stance, we cannot intelligently determine whether the Commission is acting 'contrary to law.'"). Commissioners must be held accountable for their views at the time of their vote. If my colleagues are unable to articulate why they are dismissing a matter at the time they vote to do so, it suggests that they chose their preferred result first (to decline to investigate) and come up with a rationale later. My colleagues' Statements of Reasons are then precisely the type of post-hoc rationale the law disfavors. Perhaps the D.C. Circuit should reconsider whether my colleagues' post-hoc statements are reliably accurate representations of the reasons the Commission dismisses matters.

56 Republican SOR at 17, n.83.