FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

November 12, 2024

VIA EMAIL

Jonathan A. Peterson, Esq.
Elias Law Group LLP
250 Massachusetts Avenue, N.W., Suite 400
Washington, DC 20001
jpeterson@elias.law

RE: MUR 7146R
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 Mr. Peterson:

This is in reference to the complaint Campaign Legal Center filed with the Federal Election Commission on October 6, 2016, regarding your clients, 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. After the U.S. District Court for the District of Columbia remanded this matter to the Commission for further action on September 12, 2024, *see Campaign Legal Center, et al. v. FEC*, 19-2336 (D.D.C.), the matter was reopened and numbered MUR 7146R. The Commission on October 10, 2024, voted to dismiss the complaint. Accordingly, the Commission voted to close the file in this matter, effective today. Documents related to the case will be placed on the public record today. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter's transmittal are enclosed.

If you have any questions, please contact, me at (202) 694-1588 or mallen@fec.gov.

Sincerely

Mark Allen

Mark Allen
Assistant General Counsel

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Correct the Record and Elizabeth Cohen in her official capacity as treasurer, *et al.*	)	MUR 7146R

STATEMENT OF REASONS OF COMMISSIONERS SHANA M. BROUSSARD, ALLEN J. DICKERSON, DARA LINDENBAUM, AND JAMES E. "TREY" TRAINOR, III

I. INTRODUCTION

The original Complaint, filed with the Commission in October 2016, alleged that Correct the Record ("CTR") made undisclosed impermissible in-kind coordinated contributions to Hillary for America ("HFA"), Hillary Clinton's authorized campaign committee for President during the 2016 election cycle. Respondents contended that, because CTR's activities were limited to communications distributed on its own websites or on free online platforms, the relevant activity was protected by Commission regulations exempting certain internet communications.[1]

Upon consideration of the original Complaint, there were an insufficient number of Commission votes to find reason to believe that CTR violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b) by making excessive and impermissible unreported in-kind contributions to Hillary for America or that Hillary for America violated 52 U.S.C. §§ 30116(f), 30118(a) and 30104(b) by knowingly accepting excessive and impermissible unreported in-kind contributions from Correct the Record. The Commission also failed to garner sufficient votes to authorize the Office of General Counsel ("OGC") to defend the agency in the event Complainants filed suit against the Commission pursuant to 52 U.S.C. § 30109(a)(8). Accordingly, the Commission closed its file in MUR 7146.[2]

[1] 11 C.F.R. § 100.26.

[2] A motion to find reason to believe failed by a vote of 2-2, with four affirmative votes being statutorily required. The vote to authorize defense of the agency failed by a vote of 3-1. Certification at 1-4 (Jun. 5, 2019). At the time, two of the six Commission seats were vacant.

In conformance with D.C. Circuit precedent, the "Controlling Commissioners" – *i.e.*, those commissioners who voted not to find reason to believe – issued a Statement of Reasons. The Controlling Commissioners concluded that expenses such as overhead, polling, and production costs that eventually resulted in a communication over the internet qualified for the internet exemption. Further, to the extent any expenses were not exempt, they found insufficient evidence that Respondents coordinated expenditures.

Complainant filed suit pursuant to section 30109(a)(8), but because the Commission failed to garner sufficient votes to authorize a defense, the Commission failed to appear. HFA and CTR subsequently intervened. After five years of litigation, the U.S. Court of Appeals for the D.C. Circuit determined that the Commission's dismissal of the administrative complaint was contrary to law. The Court of Appeals remanded the matter to the District Court, which in turn remanded it to the Commission. The Commission has, accordingly, been ordered to conform to the opinion of the Court of Appeals and "sketch the bounds of the internet exemption" while "more fully analyz[ing] the facts before it."[3]

As explained below, we dismiss this matter pursuant to *Heckler v. Chaney*.[4] Given the expired statute of limitations and the Commission-approved termination of both Respondents, further efforts at enforcement would be an inefficient, and likely futile, use of our limited agency resources. Mindful, however, of the district court's requirement that the Commission further explain the law, we voted to draft a Notice of Proposed Rulemaking to more clearly define the types of expenses covered by the internet exemption.[5]

II. FACTUAL BACKGROUND AND PROCEEDINGS BEFORE THE COMMISSION

On April 13, 2015, Hillary Clinton filed a Statement of Candidacy for the 2016 presidential election, designating HFA as her principal campaign committee.[6] On May 13, 2015, CTR registered with the Commission as a hybrid political committee with a Carey non-contribution account.[7]

The Complaint alleged that CTR spent almost $6 million in coordination with HFA, but that neither HFA nor CTR reported these funds as in-kind contributions from CTR to HFA in

[3] *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175 (D.C. Cir. 2024) (quoting *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 69 (D.D.C. 2022).

[4] Certification at 2 (Oct. 10, 2024); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

[5] Certification at 1, Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).

[6] Hillary Clinton Statement of Candidacy (Apr. 13, 2015).

[7] Statement of Organization, Correct the Record (June 5, 2015); *See* Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), *available at* https://www.fec.gov/updates/fec-statement-on-carey-fec/ (explaining the genesis and purpose of these types of committees).

violation of 52 U.S.C. §§ 30116(a), (f) and 30118(a) or as coordinated expenditures in violation of section 30104(b).[8]

CTR allegedly financed several types of activity to benefit HFA. CTR commissioned polling;[9] paid employees to conduct fact-checking and media outreach; financed opposition research; paid ordinary overhead expenses;[10] employed "trackers" to "record the public events" of other campaigns;[11] and made expenditures for producing, distributing, and promoting videos, and other content, that were published on its website and social media accounts.[12] As relevant here, the Responses argued that all of CTR's expenses resulted in or related to communications that were disseminated for free over the internet and, therefore, qualified for the internet exemption.[13]

OGC recommended that the Commission find reason to believe that HFA impermissibly coordinated expenditures with CTR resulting in undisclosed prohibited and excessive contributions.[14] As discussed above, the Commission split on OGC's recommendations,[15] and the Controlling Commissioners issued the Statement of Reasons reviewed by the courts.

III. SUBSEQUENT DEVELOPMENTS

On August 2, 2019, Complainant Campaign Legal Center ("CLC") filed suit challenging the Commission's dismissal.[16] The Commission, having failed to authorize defense, lost its quorum later that month.[17] HFA and CTR were permitted to intervene.[18] And in November 2022, while the litigation was pending, HFA and CTR were permitted to terminate.[19]

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[8] Compl. ¶ 1 (Oct. 6, 2016).

[9] *Id.* ¶ 31.

[10] *Campaign Legal Ctr.*, 106 F.4th 1175, 1191 (D.C. Cir. 2024) (citing Statement of Reasons of Charmain Matthew S. Petersen and Commissioner Caroline C. Hunter at 13 (Aug. 21, 2019)).

[11] Compl. ¶ 17.

[12] Compl. ¶¶ 30, 35, 37, 43, 64-67.

[13] CTR Resp. at 3-4 (Dec. 5, 2016); HFA Resp. at 3-4 (Jan. 24, 2017).

[14] First Gen. Counsel's Rpt. at 27 (Oct. 16, 2018).

[15] Certification at 1-3 (Jun. 5, 2019)).

[16] Compl. at 1 (Aug. 2, 2019), *Campaign Legal Center v. FEC*, Case No. 1:19-cv-02336-JEB (D.D.C.).

[17] Press Release, Matthew Petersen to depart Federal Election Commission (Aug. 26, 2019), https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/.

[18] *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1 (D.D.C. 2019).

[19] HFA Termination Approval (Oct. 27, 2022); CTR Termination Approval (Nov. 2, 2022). Committees ordinarily are not permitted to terminate if they are in active litigation or have a pending enforcement Matter Under Review. Due to administrative oversight, the Commission inadvertently approved HFA and CTR's request to terminate.

Following several years of litigation over collateral issues such as standing,[20] on December 8, 2022, the District Court granted summary judgment in favor of CLC.[21]

Shortly thereafter, and with five new commissioners having been seated since the 2019 vote, the Commission voted to authorize OGC to defend the agency and appeal the District Court's decision.[22] On July 9, 2024, the Court of Appeals affirmed, holding that the Controlling Commissioners interpreted the internet exemption too broadly.[23]

Specifically, the Court took issue with the Controlling Commissioners' exemption of polling and overhead costs allocable to non-exempt activity.[24] The Court of Appeals further held that the Controlling Commissioners erred in dismissing the "non-internet related communications," including "research and tracking activities, surrogacy program, and contacts with reporters," due to a lack of evidence to support a finding of coordination.[25] And it concluded that CTR's public statements that it coordinated all of its activity with HFA were sufficient to establish coordination, at least at the Reason to Believe stage of the Commission's proceedings.[26]

On the other hand, the Court of Appeals did not call the internet exemption itself into question and noted that even CLC conceded that "some expenses antecedent to unpaid internet communications—including 'input costs' like 'video production or domain services expenses' for videos to be posted online—fall within the internet exemption."[27] Ultimately, the Court left it to the Commission to "'sketch the bounds of the internet exemption and . . . more fully analyze the facts before it.'"[28] On September 12, 2024, the District Court remanded the matter to the Commission to conform with the Court of Appeals' opinion within 30 days.[29]

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[20] *See, e.g., Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) (holding that HFA and CTR had standing).

[21] *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57 (D.D.C. 2022), *aff'd*, 106 F.4th 1175 (D.C. Cir. 2024).

[22] In the Matter of Appearance, Defense, and Appeal Authorization in *Campaign Legal Ctr. v. Fed. Election Comm'n*, Certification at 1 (Dec. 14, 2022).

[23] *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175 (D.C. Cir. 2024).

[24] *Id.* at 1191-92.

[25] *Id.* at 1193.

[26] *Id.* at 1191-92.

[27] *Id.* at 1190.

[28] *Id.* at 1195 (quoting *Campaign Legal Ctr.*, 646 F.Supp. 3d at 69).

[29] Minute Order (Sept. 12, 2024), *Campaign Legal Ctr. v. FEC*, Case No. 1:19-cv-02336-JEB (D.D.C.); *see also* 52 U.S.C. § 30109(a)(8)(C).

IV. THE COMMISSION DISMISSES AS AN EXERCISE OF ITS PROSECUTORIAL DISCRETION AND VOTES TO INITIATE THE RULEMAKING PROCESS

We voted to dismiss this matter in an exercise of our prosecutorial discretion.[30] Respondents have terminated with Commission approval, the Committees have considered themselves terminated since 2022 and therefore records needed to determine the extent of any expenditures or contributions, assuming they were properly maintained, may be difficult to obtain. And the statute of limitations has expired, rendering any further enforcement a drain on the agency's already limited resources. In addition, the significant budgetary constraints under which the Commission operates and the need to conserve resources for meritorious matters arising from more recent election cycles, including the current one, informed our decision to dismiss.

We are mindful, however, of the D.C. Circuit's instruction to "sketch the bounds of the internet exemption."[31] Accordingly, we have instructed the Office of General Counsel to prepare the documents required for a rulemaking addressing unanswered questions concerning allocation of expenses under the internet exemption.[32] We believe any such clarifications should be made with input from the public and the protections of the Administrative Procedure Act, and that they should apply broadly, not merely to one entity that finds itself the subject of a complaint. Moreover, we are acutely aware that, for the last four election cycles, even the most sophisticated actors, have acted under the mistaken assumption that the internet exemption was as broad as the Controlling Commissioners' Statement of Reasons stated. Accordingly, we do not believe it would be appropriate for the Commission to develop a binding interpretation of the internet exemption in the context of this enforcement matter under the gun of a thirty-day remand.[33]

V. CONCLUSION

For the foregoing reasons, the undersigned commissioners voted to dismiss this Matter pursuant to the Commission's prosecutorial discretion and instructed the Office of General Counsel to prepare documents for a formal rulemaking addressing the concerns raised by the Court of Appeals.

11/5/2024
Date

Shana M. Broussard
Commissioner

30 Certification at 2 (Oct. 10, 2024);; *Heckler v. Chaney*, 470 U.S. 821 (1985).

31 *Id.* at 1195 (quoting *Campaign Legal Ctr.*, 646 F.Supp. 3d at 69).

32 Certification at 1, Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).

33 *Cf.* 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title.").

11/5/2024
Date

Allen J. Dickerson
Commissioner

11/5/2024
Date

Dara Lindenbaum
Commissioner

11/5/2024
Date

James E. "Trey" Trainor, III
Commissioner

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7146R
Correct the Record, *et al.*	)	
	)	

STATEMENT OF REASONS OF
CHAIRMAN SEAN J. COOKSEY

This matter returns before the Commission upon a remand order from the U.S. District Court for the District of Columbia,[1] following its ruling that the Commission's 2019 dismissal of the underlying Complaint was contrary to law. That decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit, which concluded that the controlling bloc of Commissioners' Statement of Reasons impermissibly applied the Commission's regulatory exemption for unpaid internet communications to expenditures at issue in the Complaint.[2] In its opinion, the D.C. Circuit declined to articulate its own interpretation of the internet exemption, but instead held that on remand "the expert Commission should have an opportunity in the first instance to draw that line" to "decide … which expenses can be exempt from regulation as inputs to unpaid internet communications."[3]

On October 10th, 2024, the Commission voted again to dismiss this matter and close the file.[4] As explained in greater detail below, following the D.C. Circuit's opinion, I believe that an appropriate interpretation of the Commission's "internet exemption" covers the unpaid internet communications themselves, as well as inputs to those communications.[5] Therefore, while many

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1 Minute Order, *Campaign Legal Ctr. v. FEC*, No. 19-cv-02336, (D.D.C. Sept. 12, 2024).

2 11 C.F.R. § 100.26; *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1195 (D.C. Cir. 2024).

3 *Campaign Legal Ctr. v. FEC*, 106 F.4th at 1192.

4 Certification ¶ 3 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *See also Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("The FEC has broad discretionary power in determining whether to investigate a claim, and how, and whether to pursue civil enforcement under the Act.").

5 The "internet exemption" broadly refers to the exemption for unpaid "communications over the internet" within the definition of "public communication" at 11 C.F.R. § 100.26, as well as the exemptions for "uncompensated Internet activity" in the regulatory definitions of "contribution" and "expenditure." *See* 11 C.F.R. §§ 100.94, 100.155 (exempting individuals' uncompensated services or use of equipment for "Internet activities" including "[s]ending or forwarding electronic messages; providing a hyperlink or other direct access to another person's website; blogging; creating, maintaining, or hosting a website; paying a nominal fee for the use of another person's website; and any other form of communication distributed over the Internet."). The Commission has

of the expenditures at issue do fall under the internet exemption, others fall outside of its scope and therefore likely constituted prohibited in-kind contributions.

Nonetheless, with respect to those in-kind contributions, dismissal is appropriate given that the five-year statute of limitations has expired for all the alleged violations, which relate to activities that took place during the 2016 election cycle. Moreover, if the Commission did proceed with enforcement now, it would necessitate disproportionate use of the agency's time and resources due to the age of the allegations and the likely difficulty of obtaining any relevant evidence at this point. Lastly, Respondents Correct the Record ("CTR") and Hillary for America ("HFA") have both ceased operations and formally terminated as political committees. For these reasons, I voted to dismiss the matter rather than moving forward with enforcement, as recommended by the Office of the General Counsel ("OGC").[6]

I. BACKGROUND & PROCEDURAL HISTORY

The events that gave rise to this matter occurred more than eight years ago, during the 2016 election cycle. As alleged in the MUR 7146 Complaint, Correct the Record—a federal "hybrid" committee created to support Hillary Clinton's 2016 presidential candidacy—made unlawful in-kind contributions of nearly $6 million to Clinton's principal campaign committee, Hillary for America. It did so by coordinating numerous expenditures directly with the Clinton campaign, including payments to produce internet communications and other online materials.[7] CTR's alleged spending for the benefit of HFA also included "salaries and compensation for its staff and contractors to conduct research, develop messaging materials, 'track' opposition candidates, 'engage in online messaging … for Secretary Clinton,'" as well as "disbursements for computer equipment and office space, software and web hosting for its multiple websites, video equipment and production for its campaign ads, commissioning private firms to conduct polls and media trainings, [and] travel for opposition 'trackers' and for staffers to conduct interviews," among other activities.[8]

Although CTR asserted that much of its coordinated activity with HFA was broadly excluded from regulation as an in-kind contribution under the "internet exemption,"[9] many of

explained that the internet exemption is a "broad exemption" intended "to remove any potential restrictions on the ability of individuals to use the Internet as a generally free or low-cost means of civic engagement and political advocacy." Internet Communications, 71 Fed. Reg. 18589, 18603 (Apr. 12, 2006). *See also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49072 (July 29, 2002) ("[T]he internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost.").

6 Supplemental Circulation to Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al*.).

7 *See* Complaint ¶ ¶1–2 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*).

8 *Id.* ¶¶ 94–95.

9 *See* Correct the Record Response at 3–4 (Dec. 5, 2016), MUR 7146 (Correct the Record, *et al.*) ("In its regulations and several Matters Under Review, the Commission has consistently held that online content—including costs associated with researching and producing that content—is not a 'public communication' unless a fee is paid to post it on another's website."). *See also* 11 C.F.R. § 100.26 ("The term general public political advertising shall not include communications over the internet, except for communications placed or promoted for a fee on another person's website, digital device, application, or advertising platform.").

CTR's disbursements were not "communication-specific," but rather were made for "mixed purposes."[10] Therefore, the Complaint argued, "even if the finished product—such as a research memo, messaging guide, or video—falls under 'communications over the Internet exception,'" CTR's "underlying expenditures for staff compensation and equipment 'are still 'expenditures'" that, if coordinated with Clinton's campaign, would constitute in-kind contributions under the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), and Commission regulations.[11] On the basis of those allegations, OGC proceeded to recommend the Commission find reason to believe that CTR made, and that HFA accepted, excessive and prohibited in-kind contributions in the form of coordinated expenditures.[12]

The Commission, however, did not adopt OGC's reason-to-believe recommendation and ultimately voted to dismiss the Complaint and close the file.[13] In a Statement of Reasons, the controlling group of Commissioners agreed with the Respondents that, since CTR had not paid to place its online communications on any third-party website, those communications could be neither "public communications" nor "coordinated communications" under the Commission's regulations.[14] Consequently, CTR's internet communications, and any "payments for 'services necessary to make an Internet communication,'" did not constitute in-kind contributions to HFA.[15]

The statement further concluded that any input cost that, in some manner, helped to produce an online communication, such as staff compensation, equipment usage, and "additional overhead," would qualify as an in-kind contribution "only when the internet communication itself is an in-kind contribution."[16] In the opinion of the controlling Commissioners, this "bright-line

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[10] *See* First General Counsel's Report at 9–10 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*) ("[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.'").

[11] Complaint ¶ 94 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*). Notably, the Complaint described how CTR had commissioned a polling firm to conduct a poll during the November 2015 Democratic debate between Hillary Clinton and Bernie Sanders; the results of the poll "declared that Clinton had won the debate," and were posted online and given to reporters. *Id.* ¶ 31.

[12] First General Counsel's Report at 25 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*).

[13] Certification ¶ 5 (June 4, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

[14] *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) ("According to the plain text of 11 C.F.R. § 109.21, which governs the meaning of coordination 'in the context of communications,' an extensive underlying rulemaking record, and subsequent Commission advisory opinions and enforcement determinations, an internet communication is not regulated as 'coordinated' unless it is placed for a fee on a third party's website."); *see also* First General Counsel's Report at 19 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*) ("CTR argues that, because none of its expenditures for communications were for electioneering communications or public communications, it cannot have made 'coordinated communications.'").

[15] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12–13 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

[16] *Id.* at 13.

rule" comported with "[t]he Commission's traditional approach to input costs," while also relieving committees and other groups of having to "allocate overhead expenses across internet communications (other activities)," which were burdensome administrative responsibilities that could "eviscerate the internet exemption" and "potentially chill political speech online."[17] As an example of how such an approach would apply in practice, the controlling Commissioners highlighted CTR's commissioning of a November 2015 poll in coordination with the Clinton campaign, the results of which were then posted online at no cost.[18] They concluded that the costs of the poll were exempt from the Act's contribution limits by virtue of being an input to the subsequent communication posted online by CTR.[19]

After the Commission dismissed the Complaint in 2019, the complainant in MUR 7146 filed suit pursuant to 52 U.S.C. § 30109(a)(8), alleging that the Commission had acted "contrary to law" by dismissing the Complaint against CTR and HFA.[20] After several years of litigation,[21] the U.S. District Court for the District of Columbia held that the Commission acted contrary to law in dismissing the Complaint.[22] On appeal, a three-judge panel of the D.C. Circuit unanimously affirmed the district court, finding that the Commission had acted contrary to law, because (1) the controlling Commissioners' broad reading of the internet exemption to include any expenditures "tangentially related" to an internet communication "rested in part on an impermissible interpretation of FECA," and (2) their disregard of the allegations related to CTR's non-internet expenditures was "arbitrary and capricious."[23]

In relevant part, the D.C. Circuit held that, "in defining exempt 'input costs' as broadly as it did," the controlling Commissioners' interpretation of the internet exemption "stretches it beyond lawful limits" and was "contrary to FECA's expansive definition of expenditures, 52 U.S.C. § 30101(9)(A)(i), and its regulation of all expenditures made 'in cooperation, consultation, or concert with, or at the request or suggestion of' a candidate or party, *id.* § 30116(a)(7)(B)."[24] Moreover, "[b]y reading FEC regulations to exempt any expenditure even remotely or tangentially related to an eventual posting on the internet," the court observed, "the controlling commissioners pave a path for the very circumvention of campaign finance laws that FECA's reporting requirement is designed to prevent."[25]

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17 *Id.*

18 *See supra* note 11.

19 Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12–13 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

20 *See Campaign Legal Ctr. v. FEC*, 466 F. Supp. 3d 141 (D.D.C. 2020).

21 Initially, the district court held that the plaintiff lacked standing to challenge the Commission's decision not to proceed with enforcement of the Complaint. *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 85 (D.D.C. 2020). However, the D.C. Circuit reversed the standing decision, 31 F.4th 781, 793 (D.C. Cir. 2022), and on remand the district court found the Commission's dismissal was contrary to law. 646 F. Supp. 3d 57, 59 (D.D.C. 2022). The Commission then appealed to the D.C. Circuit.

22 *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 59 (D.D.C. 2022).

23 *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1190 (D.C. Cir. 2024).

24 *Id.* at 1179, 1190–91.

25 *Id.* at 1191.

The D.C. Circuit also cited the poll commissioned by CTR as "an illustrative example" of how, under the controlling Commissioners' approach to input costs, "all the payments that went into conducting the poll, analyzing the data, and writing up the results" would be exempt from treatment as an in-kind contribution "so long as the Committee posts the results for free on a blog and, in so doing, delivers the commissioned poll results to the candidate."[26] The court thought that such an expansive interpretation "cannot square with FECA's plain text or purpose," which limit the Commission's discretion to exclude otherwise qualifying communications from federal law's coordination regime.[27] On remand, the Commission would have "an opportunity in the first instance" to recalibrate its understanding of the internet exemption in a manner consistent with the D.C. Circuit's decision.[28]

Following remand in September of this year, OGC again recommended that the Commission find reason to believe CTR and HFA violated the Act by making and accepting prohibited and excessive in-kind contributions, and that the Commission attempt to conciliate the violations with the Respondents.[29] On October 10th, 2024, the Commission declined to follow that recommendation and instead voted to dismiss the Complaint.[30]

II. LAW

Under the Act, any expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" is a contribution to that candidate subject to the statutory limits and source prohibitions.[31] Section 109.20 of the Commission's regulations defines "coordinated" in largely the same terms as the Act, and provides that any expenditure that is coordinated with a candidate, "but that is *not* made for a coordinated communication under 11 C.F.R. 109.21," is an in-kind contribution to the candidate with whom it was coordinated.[32]

With respect to spending for communications, 11 C.F.R. § 109.21(b)(1) states that if a communication is "coordinated" with a candidate or authorized committee, then payment for that

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26 *Id.*

27 *Id.* at 1192.

28 *Id.*

29 Supplemental Circulation to the Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al*.).

30 Certification ¶ 3 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*).

31 52 U.S.C. § 30116(a)(7)(B). A "contribution," as defined in the Act, includes "anything of value" made or given by a person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). The term "anything of value," in turn, covers "all in-kind contributions," including "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 100.52(d)(1). *See also id.* § 100.52(d)(2) ("[U]sual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.").

32 *See* 11 C.F.R. § 109.20(b) (emphasis added).

communication is an in-kind contribution to the candidate with whom it is coordinated.[33] The regulations incorporate a three-prong test–consisting of a payment prong, a content prong, and a conduct prong–to assess whether a particular communication is a "coordinated communication."[34] A communication must satisfy all three prongs to be considered a "coordinated communication" under the regulations.[35]

The content prong of the coordinated communication test provides, in relevant part, that only "electioneering communications" and certain "public communications" may qualify as coordinated communications.[36] In the Act, an "electioneering communication" is defined as a "broadcast, cable, or satellite communication" that refers to a clearly identified federal candidate, is publicly distributed within certain time periods, and is targeted to the relevant electorate.[37] The Act defines a "public communication" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."[38] Neither of these statutory definitions explicitly include internet communications.

However, the Commission's regulations make clear that a "public communication" *excludes* "communications over the internet, except for communications placed or promoted for a fee on another person's website, digital device, application, or advertising platform."[39] The Commission originally adopted the broad regulatory exemption for unpaid internet communications as part of its 2006 rulemaking on internet activity; as the Commission made clear at that time, the intention behind the exception in the "public communication" definition for unpaid internet communications, and the internet exemption more generally, was to "make plain that the vast majority of Internet communications are, and will remain, free from campaign finance regulation," in recognition of the internet's status 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."[40]

III. LEGAL ANALYSIS

The allegation before the Commission on remand is whether or to what extent CTR made, and HFA knowingly accepted, prohibited and excessive in-kind contributions through CTR's coordinated expenditures. OGC maintains that many of CTR's expenditures do qualify as in-kind

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33 11 C.F.R. § 109.21(b)(1).

34 11 C.F.R. § 109.21(a)(1)–(3).

35 *See* 11 C.F.R. § 109.21(a); Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

36 11 C.F.R. § 109.21(c).

37 52 U.S.C. § 30104(f)(3).

38 52 U.S.C. § 30101(22).

39 11 C.F.R. § 100.26.

40 Internet Communications, 71 Fed. Reg. 18589, 18589, 18590 (Apr. 12, 2006).

contributions, and it has recommended that the Commission find reason to believe a violation occurred and proceed with enforcement. But as explained below, I disagree.[41]

First, following the directions in the D.C. Circuit's opinion and reapplying the internet exemption correctly, I am convinced that many of CTR's expenditures are properly covered by the internet exemption because they are input costs to unpaid internet communications. Further, for those expenses that do not fall under the internet exemption but that would otherwise constitute coordinated expenditures under the Act and regulations, it is appropriate for the Commission to exercise its prosecutorial discretion to decline further enforcement at this time.

A. Correct the Record's Internet-Exempted Expenditures

In accordance with the D.C. Circuit's directive, the Commission should now reconsider the extent to which CTR's various expenditures for coordinated activities with HFA constituted exempt inputs for unpaid internet communications, or instead were prohibited in-kind contributions. In doing so, it must heed the D.C. Circuit's conclusion that the controlling group of Commissioners in MUR 7146 misconstrued the regulatory exemption and take "an opportunity in the first instance to draw that line" appropriately.[42] The Commission must also consider the full body of law and agency precedent surrounding the internet exemption, including its own decisions and interpretive guidance that post-date the Commission's original dismissal in this matter.

Properly interpreted, the internet exemption provides that unpaid internet communications, as well as the input costs of producing and disseminating those communications, are not public communications or coordinated expenditures. On the other hand, costs that are "only tangentially related" to an internet communication fall beyond the internet exemption's boundaries. This reading of the exemption's application to input costs, I believe, closely adheres to both the text and purpose of the Act, while continuing the Commission's longstanding recognition that the internet is "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."[43]

This framework may be readily applied to the types of cost inputs at issue in MUR 7146. For example, in the case of payments made for polling that is then placed online at no charge, like the CTR poll concerning Hillary Clinton's debate performance,[44] the costs associated with "conducting the poll, analyzing the data, and writing up the results" are too attenuated to the subsequent online communication to be considered necessary to the creation of that communication;[45] therefore those costs are not within the internet exemption's scope, even though the free online posting of the poll results is.

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41 *See* Supplemental Circulation to the Commission at 6 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al*.).

42 *See Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1192 (D.C. Cir. 2024).

43 Internet Communications, 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006).

44 *See* First General Counsel's Report at 20 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*).

45 *Campaign Legal Ctr. v. FEC*, 106 F.4th at 1191.

With respect to compensation to staff and vendors for their work relating to internet communications, the Commission clarified, in its recent revisions to the rules for internet communications, that internet communications, including "staffing, technology, or design costs" incurred to create such communications, generally are not in-kind contributions, even if coordinated with a candidate, unless there is a payment made to place or promote the communications on a third party's site.[46] That rationale is consistent with our interpretation of input costs here.

Similarly, in Advisory Opinion 2024-01 (Texas Majority PAC), the Commission determined that the payment of vendors to produce literature specifically for a paid canvass that would be coordinated with federal candidates was not an in-kind contribution where the canvass itself did not meet the definition of "coordinated communication," and the production costs for the literature were "limited to payments to the vendor to design and produce these specific communications, which will not be used outside of the Paid Canvass."[47] In other words, the direct inputs for the exempt communication—payments to vendors for the purpose of creating literature specifically for that canvass—were also exempted. The production costs for Texas Majority PAC's canvassing literature stands in contrast with CTR's allocation of staff costs to travel to opposing candidates' events, engage in private communications with reporters, and "develop relationships with Republicans," among other activities, as "communication" costs, since these expenses are too far removed from any internet communications to qualify as sufficiently direct inputs to them, even if they do inform subsequent internet communications in some way.[48]

When it comes to the internet exemption, I believe the Commission should employ the same general framework: costs that are direct inputs of exempted internet communications are also exempt from treatment as coordinated expenditures. What is relevant is not the kind of expense, but its proximity as an input to the ultimate communication. Input costs may be simple, low-level expenses—such as the cost of an internet service in order to disseminate the communications—or may be more substantial—such as consultants, graphic designers, videographers, actors, and other specialists necessary to produce the communications. But all costs should be exempt insofar as they are used as inputs to exempt communications—otherwise, the exemption itself becomes meaningless.

For equipment or services used for mixed purposes, costs should be reasonably allocated proportionally based on use.[49] While this may sometimes pose administrative challenges for organizations, like CTR, that engage in many varieties of political activities, it is consistent with the Commission's general approach to the issue of mixed-purpose activities subject to multiple regulations or exemptions, which allows committees sufficient flexibility to determine allocation

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46 *See* Technological Modernization, 89 Fed. Reg. 196, 211 (Jan. 2, 2024).

47 Advisory Op. 2024-01 (Texas Majority PAC) at 7.

48 First General Counsel's Report at 21, 23 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*).

49 Factual and Legal Analysis at 3, 7–8 (July 17, 2012), MUR 6477 (Turn Right USA, *et al.*) (finding no coordinated communication because the video uploaded to internet for free was not a "public communication," despite costing almost $5,800 to produce).

appropriately.[50] Often, the value of the proportional use of equipment or services for internet communications compared to other activities will be minimal or virtually impossible to quantify with any precision,[51] and I expect the Commission will continue to exercise discretion in deciding whether a committee or other organization has appropriately allocated its costs between unpaid internet communications and other activities in those circumstances.[52]

Under this framework, most of the CTR expenses that the controlling group of Commissioners previously found to be exempt in this matter remain so because they were for made unpaid internet communications or direct inputs thereof. For instance, CTR's sending emails to supporters or journalists, creating its own websites and social media accounts, and posting content to its various platforms all fall within the internet exemption's scope.[53] The same is true of input costs for those activities, including but not limited to the purchase of necessary software and equipment, fees to third-party vendors such as internet and website-hosting service providers, and the staff work necessary to produce and disseminate the communications. I therefore declined to find reason to believe that any of those expenses constituted prohibited or excessive in-kind contributions from CTR to HFA.[54]

B. Correct the Record's Other Expenditures

At the same time, applying the foregoing framework, it follows that a number of CTR's expenditures do *not* qualify under the internet exemption as unpaid internet communications or input costs thereof—either because they were unconnected with any unpaid internet communications or because they were for mixed purposes and were not appropriately allocated.

In the former category, the earlier bloc of controlling Commissioners correctly identified many expenditures as falling outside the internet exemption, such as CTR's training of media surrogates, its opposition research and tracking, and its costs in making contacts with reporters.[55] Furthermore, as D.C. Circuit concluded, the polling at issue in the Complaint was also too

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[50] *See*, *e.g.*, Advisory Op. 2024-14 (DSCC and Rosen for Nevada) (allowing an allocation of costs in hybrid television advertisements); Advisory Op. 2022-21 (DSCC, *et al.*) (allowing reasonable cost allocation as part of television advertisements soliciting funds for a party committee's legal proceedings fund). *See also* 11 C.F.R. § 106.3 (requiring allocation of expenses between campaign and non-campaign related travel); *id.* § 106.4 (requiring allocation of polling expenses).

[51] Internet Communications, 71 Fed. Reg. 18589, 18596 (Apr. 12, 2006) (observing that "there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients").

[52] *See* Factual and Legal Analysis at 12, 13 (July 20, 2022), MUR 7930 (Minocqua Brewing Company SuperPAC, *et al.*) (dismissing allegations that respondent failed to report independent expenditures in connection with emails and other digital content when "incidental" costs of sending the exempt internet communications, such as "cost of [ ] time spent to draft and send the email and the value of the use of the email list," had "relatively low dollar value"); Factual and Legal Analysis at 10 (May 31, 2022), MURs 7838, 7849, 7852, 7856 (Expensify, Inc., *et al.*) (dismissing allegation that corporation failed to report independent expenditures in connection with costs of sending emails in part because any "direct costs associated with preparing or sending the email" were "minimal").

[53] *See, e.g.*, Complaint ¶¶ 20, 30, 67 (Oct. 6, 2016), MUR 7146 (Correct the Record, *et al.*).

[54] Certification ¶¶ 1, 2 (Oct. 10, 2024), MUR 7146R (Correct the Record, *et al.*).

[55] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 14 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*).

attenuated from any exempt internet communication to itself quality as an input cost, and it was therefore likely a coordinated expenditure, despite the earlier controlling Commissioners' determination to the contrary.[56]

Along with these expenses, CTR made other expenditures for overhead that evidently facilitated both internet and non-internet activities and that could not be covered entirely as exempt input costs to unpaid internet communications. These include costs like office rentals, utilities, and various staff salaries and expenses, among other things. As a result, assuming the requisite conduct occurred,[57] because these are non-communication expenditures that CTR likely coordinated with HFA, they are not protected by the internet exemption and may have constituted prohibited and excessive in-kind contributions under 11 C.F.R. § 109.20(b).

C. Dismissal as an Exercise of Prosecutorial Discretion

Notwithstanding the foregoing analysis, however, prudential considerations counsel against proceeding with enforcement against any part of the Complaint at this stage, and instead they call for the Commission to exercise its prosecutorial discretion to dismiss the alleged violations.[58] The legal and practical barriers in front of the Commission, including expiration of the statute of limitations, the age of the allegations and the termination of CTR and HFA as political committees, and related difficulties in investigating the claims and gathering evidence at this time, make further enforcement an imprudent use of Commission resources. I therefore voted to dismiss those allegations as an exercise of prosecutorial discretion.

First, the statute of limitations on all the relevant activity, which dates to 2015 or 2016, has long since lapsed.[59] Thus, if we did move forward with enforcement against CTR and HFA as recommended by OGC, the Commission would be unable to assess any civil penalty and would be limited to pursuing equitable remedies against organizations that have formally ceased to

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[56] *See Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1191 (D.C. Cir. 2024). The expenses for polling may have otherwise been exempted from regulation under a different rule specific to polling. Under 11 C.F.R. § 106.4(c), "[t]he acceptance of any part of a poll's results which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordinated by the candidate-recipient . . . shall not be treated as a contribution in-kind [or] expenditure under . . . this section." At the very least, the existence of the separate regulation for polling expenses indicates that the correct analysis of CTR's polling may be under another section of the Commission's regulations.

[57] For the reasons that follow, I do not delve into the legal and factual issues of whether or to what extent sufficient coordinating conduct took place between CTR and HFA. Suffice it to say that I share the previous group of controlling Commissioners' doubts whether other necessary elements of a coordinated communication or coordinated expenditure are met. Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 16 (Aug. 21, 2019), MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) ("Finding coordination requires more than considering the general relationship between entities—it requires a transaction-by-transaction assessment to determine whether specific conduct occurred with respect to particular expenditures. The information in the record indicates that Correct the Record limited its interactions with Hillary for America to the very communications that the Commission has previously decided not to regulate.").

[58] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

[59] *See* First General Counsel's Report at 2 (Oct. 16, 2018), MURs 6940, 7097,7146, 7160, 7193 (Correct the Record, *et al.*) (statute of limitations for alleged violations in MUR 7146 expiring between May 12, 2020, and November 8, 2021).

operate.[60] Indeed, the Commission has repeatedly chosen to exercise its prosecutorial discretion and dismiss enforcement matters where the statute of limitations on the alleged violations had previously expired.[61]

In addition, the significant passage of time since the relevant events in this case now makes any factual investigation practically difficult, if not impossible. Obtaining the relevant documents and witness testimony more than eight years after the activities at issue took place would likely prove a substantial challenge for the Commission and strain the agency's resources. The public also has limited interest in enforcement in a mature matter that dates back five election cycles. And, as former FEC-registered political committees, CTR's and HFA's public reports can still be reviewed by any interested person on the Commission's website, and therefore the public record is substantially complete already.[62]

Third, both Respondent committees have since ceased operations and are no longer active organizations. CTR and HFA terminated as political committees, with the Commission's approval, in 2022.[63] As terminated committees, they are no longer able to file amendments to their prior reports disclosing new or revised information. The extinction of these organizations not only imposes hurdles to any factual investigation, but it negates the reasonable possibility that the Commission could successfully conciliate any violation, collect any penalty, or require any other form of compliance from these Respondents.[64]

Finally, I must consider how to allocate the agency's limited enforcement resources and whether this matter warrants its attention relative to other, more pressing priorities. I am certain that it does not. In deciding how to direct the Commission's limited enforcement staff, I believe

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60 *See* Supplemental Circulation to the Commission at 3–4 (Aug. 20, 2024), MUR 7146R (Correct the Record, *et al*.).

61 *See, e.g.*, Certification ¶ 2 (July 13, 2021), MUR 7125 (Debbie Wasserman Schultz for Congress, *et al.*) (dismissing allegations as to all respondents pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985)); Statement of Reasons of Vice Chair Allen J. Dickerson and Commissioner James E. "Trey," Trainor, III, at 3 n.11 (Aug. 31, 2021), MUR 6992 (Donald J. Trump, *et al.*) ("We have voted in the past to invoke the *Heckler* doctrine when faced with, *inter alia*, a 'lapsed statute of limitations,' and an OGC recommendation that the availability of equitable relief entitled us to enforce against a Respondent." (quoting Statement of Reasons of Vice Chair Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III at 4 (Mar. 18, 2021), MUR 7181 (Independent Women's Voice)).

62 *See* 2015-2016 Committee filings, Correct the Record, https://www.fec.gov/data/committee/C00578997/?cycle=2016&tab=filings (last visited Nov. 5, 2024); 2015-2016 Committee filings, Hillary for America, https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016 (last visited Nov. 5, 2024).

63 Correct the Record, Approval of Termination, Letter from Scott Bennett, Senior Campaign Finance Analyst, Reports Analysis Division, to Elizabeth Cohen, Treasurer, Correct the Record (Nov. 2, 2022); Hillary for America, Approval of Termination, Letter from Ryan Furman, Senior Campaign Finance & Reviewing Analyst, Reports Analysis Division, to Elizabeth Jones, Treasurer, Hillary for America (Oct. 27, 2022).

64 *See* Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III at 10 (Mar. 7, 2022), MUR 7465 (Freedom Vote, Inc.) ("[Respondent] is apparently defunct and bankrupt, and it is unclear to us that there would be anyone to engage in either conciliation or litigation had the Commission pursued it. For the same reasons, we have no basis to believe that enforcement action would deter future violations of the Act.").

there is a greater public interest in focusing efforts on more current complaints and investigations, including those that allege more serious violations and in which there is a greater probability of reaching meaningful enforcement outcomes and collecting penalties.[65]

* * *

The Commission's internet exemption remains in force as a robust safeguard for free political expression online. Having considered the matter again following remand, I remain convinced that the internet exemption still broadly applies to much of the activity at issue in this matter. For any violations that did occur, the particular facts and circumstances of the case at this stage warrant the exercise of prosecutorial discretion. Therefore, I voted to dismiss the Complaint and close out the file.

Sean J. Cooksey
Chairman

November 6, 2024
Date

[65] *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024) (Commission may exercise "its prosecutorial discretion under *Heckler* v. *Chaney,* 470 U.S. 821 (1985) to dismiss Matters that do not merit the additional expenditure of Commission resources.").

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Correct the Record and Elizabeth Cohen in her official capacity as treasurer, *et al.*	)	MUR 7146R
	)	
	)	

STATEMENT OF REASONS OF VICE CHAIR ELLEN L. WEINTRAUB

Eight years. That is how long it has taken to conclude this matter – involving an alleged illegal coordination project in the 2016 election – from the date the complaint was filed, through four judicial opinions, to ultimate dismissal. A dismissal in spite of a D.C. Circuit Court of Appeals decision that found the Commission's original 2019 dismissal to be "arbitrary and capricious," based on "an impermissible interpretation of the Act" that "pave[d] a path for the very circumvention of campaign finance laws that FECA's[1] reporting requirement is designed to prevent," an interpretation "[t]hat cannot square with FECA's plain text and purpose" and created "a FECA-swallowing loophole" that "unmistakably conflicts with the statutory text and purpose" and "runs counter to the information before the agency."[2]

The Court directed a "remand to the expert Commission to 'sketch the bounds of the internet exemption and . . . more fully analyze the facts before it.'"[3] In commencing a rulemaking process,[4] the Commission will hopefully comply with the first part of the Court's direction, and I look forward to working with my colleagues toward that end. But in dismissing this specific matter, the Commission has declined to "analyze the facts before it." And the respondents, who engaged in conduct that the courts found to be inconsistent with the law, paid no penalty and never, ironically, corrected the public record as to their coordinated spending.

Along the way, this matter has gone on a winding and frustrating path. On October 6, 2016, the Campaign Legal Center filed a complaint alleging that Correct the Record impermissibly coordinated with Hillary Clinton's 2016 presidential campaign.[5] As more fully

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[1] Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 ("FECA") *(footnote added)*.
[2] *Campaign L. Ctr. v. Fed. Election Comm'n*, 106 F.4th 1175, 1190-1192, 1194-1195 (D.C. Cir. 2024) ("*CLC* Cir. Op.").
[3] *Id.* at 1195 (citing *Campaign Legal Ctr. v. Fed. Election Comm'n*, 646 F. Supp. 3d 57, 69 (D.D.C. 2022), *aff'd*, 106 F.4th 1175 (D.C. Cir. 2024)) ("*CLC* Dist. Op.").
[4] Cert. at 1, Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).
[5] Compl. MUR 7146 (Oct. 6, 2016).

explained in the Complaint, the First General Counsel's Report ("FGCR") of the Commission's nonpartisan Office of General Counsel ("OGC"),[6] and my 2019 Statement of Reasons,[7] Correct the Record's acknowledged purpose was to coordinate its activities with the Clinton campaign, and they justified that activity with a wildly expansive interpretation of the "internet exemption" in Commission regulations.[8] The FGCR provided the Commission with a fulsome basis for finding reason to believe ("RTB") that the law had been violated, and I voted to do so.[9] But as has too often happened, particularly with respect to matters alleging coordination, the Commission failed to garner the requisite four votes to find RTB and instead closed the file.[10] Two months later, the Campaign Legal Center filed suit in federal court challenging the dismissal of the Complaint.[11]

The matter spent years in litigation. In 2022, after a decision and an appeal on standing, a federal district court for the District of Columbia addressed the merits and found the dismissal to be contrary to law.[12] Although none of the commissioners serving in 2022 had voted for the original dismissal (most had not been serving on the Commission at the time), the Commission nonetheless immediately appealed the district court ruling. As has generally been the case, once a matter has been dismissed, even on a split vote, even after the commissioners who took that vote have left, the Commission will doggedly defend the dismissal. On July 9, 2024, the D.C. Circuit Court of Appeals, in an opinion that gave short shrift to the rationale the Commission continued

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[6] First General Counsel Report, MURs 6940, 7097, 7146, 7160, & 7193 (Correct the Record, *et al*.) (Sept. 20, 2019).
[7] Stmt. of Reasons of Chair Ellen L. Weintraub, MURs 6940, 7097, 7146, 7160, & 7193 (Correct the Record, *et al*.) (Sept. 20, 2019), appended hereto as Attachment A.
[8] In 2016, the internet exemption provided: "The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26 (2016), *available at* https://www.govinfo.gov/content/pkg/CFR-2016-title11-vol1/pdf/CFR-2016-title11-vol1.pdf.
[9] The "reason to believe" finding is the threshold determination that the Commission must make to initiate an enforcement action. 52 U.S.C. § 30109(a)(2). "The Commission will find 'reason to believe' 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." Statement of Policy Regarding Commission Action in Matters at the Initial State in the Enforcement Process, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024). "'[T]he reason-to-believe' standard sets a 'low bar.'" *Common Cause Georgia v. Fed. Election Comm'n*, No. 22-cv-3067, at *6 (D.D.C.) (Sept. 29, 2023) (citing *CLC* Dist. Op. at 67). As the district court observed in this matter, the Commission's "approach was all the more arbitrary given what a low bar the reason-to-believe standard represents," and that the "Commission's blinkered view of the record is thus particularly erroneous given the very low evidentiary bar that CLC needed to clear, rendering its analysis arbitrary and capricious." *CLC* Dist. Op. at 67.
[10] Cert. ¶1, 5, MUR 6940, 7097, 7146, 7160 and 7193 (Correct the Record, *et al.*) (June 13, 2019).
[11] *See* Compl., *Campaign L. Ctr. v. Fed. Election Comm'n*, Case 1:19-cv-02336 (D.D.C. Aug. 2, 2019), *available at* https://campaignlegal.org/sites/default/files/2019-08/CTR_Complaint_AS%20FILED.pdf.
[12] *CLC* Dist. Op. at 69 ("Because the Commission's decision was based on an impermissible interpretation of the Act and was otherwise arbitrary and capricious, its dismissal of Plaintiffs' complaint was contrary to law.").

to defend, affirmed the district court decision.[13] The federal courts remanded the matter back to the Commission.[14]

Directing the Commission to conform with the decision finding the Commission's determinations contrary to law, the district court noted: "To state the obvious: the Commission's opinion would create a loophole in the internet exemption through which a truck could drive."[15] The D.C. Circuit Court of Appeals observed that the impermissibly broad interpretation of the scope of the internet exemption "unmistakably conflicts with the statutory text and purpose"[16] and while discounting inconvenient evidence in the complaint and the public record, the blocking commissioners' "failed to explain how [they] concluded . . . [they] had no grounds for investigation."[17]

Without question, the standard five-year statute of limitations has now passed, but that need not be the end of the story. As the district court noted, the statute of limitations in 28 U.S.C. § 2462 does not preclude equitable relief. Such equitable relief could have included "producing reports of undisclosed in-kind contributions."[18] The Commission has previously conciliated with committees when the activity was beyond the statute of limitations.[19] While both Correct the Record and Hillary for America are no longer actively filing reports with the Commission,[20] their terminations would not have prevented the Commission from pursing this equitable relief. They are legally obligated to maintain their records for three years from the date of termination, that is, until November 2 and October 27, 2025, respectively. As the district court observed, "there is no reason to think that an FEC investigation could not recover at least *some* of the sought

[13] *CLC* Cir. Op. at 1190 ("Because the Commission's dismissal rested in part on an impermissible interpretation of [the Federal Election Campaign Act] and, to the extent it did not, was arbitrary and capricious, we affirm the decision of the district court that the dismissal was contrary to law.").
[14] *Id.* at 1195 ("For the foregoing reasons, the judgment of the district court is affirmed. The matter is remanded to the district court with instructions to remand to the FEC consistent with 52 U.S.C. § 30109(a)(8)(C) and the discussion herein."); *CLC* Dist. Op. at 69 ("For the foregoing reasons, the Court will grant CLC's Motion for Summary Judgment, deny CTR's, and direct the Commission to conform with this decision within 30 days. *See* 52 U.S.C. § 30109(a)(8)(C).").
[15] *CLC* Dist. Op. at 64.
[16] *CLC* Cir. Op. at 1192.
[17] *Id.* at 1194.
[18] *CLC* Dist. Op. at 68.
[19] *See, e.g.,* Conciliation Agreement, MUR 6538 (Americans for Job Security) (addressing equitable remedies).
[20] Due to an administrative oversight, the committees were permitted to terminate. Correct the Record, Approval of Termination, Letter from Scott Bennett, Senior Campaign Finance Analyst, Reports Analysis Division ("RAD"), Elizabeth Cohen, Treasurer, Correct the Record (Nov. 2, 2022); Hillary for America, Approval of Termination, Letter from Ryan Furman, Senior Campaign Finance & Reviewing Analyst, RAD, to Elizabeth Jones, Treasurer, Hillary for America (Oct. 27, 2022).

information."[21] The Commission has previously conciliated with terminated parties.[22] We could have, at long last, tried to supplement the public record.

Yet, 2,926 days after the Campaign Legal Center filed this complaint, after repeated judicial determinations that the Commission failed to explain how it lacked grounds for investigating, the Commission voted again to dismiss the matter without investigating.[23] During our final consideration of this matter, I did not support the dismissal motion, but instead supported motions that would have found reason to believe violations occurred. These motions, which I believe would have allowed the Commission to fully respond to the Court's direction, did not garner the necessary four votes to be adopted.[24] Rather, the Commission invoked prosecutorial discretion in its dismissal, rendering this final determination unreviewable.[25]

So here we are, at the end of a long road. When the Commission receives a remand eight years after the original administrative complaint was filed, the Commission is not going to have a lot of good options. The Commission should not have dismissed this matter the first time, should not have appealed when that dismissal was overturned, and should not have dismissed the matter the second time, in the process giving respondents an unreviewable free pass. This result incentivizes intransigence. These respondents asserted a legal theory that the courts found impermissible, arbitrary, capricious, and contrary to law. Yet, they got away with it because the Commission in the beginning was too credulous and in the end decided too much time had passed.

The relevant election is long over. And the public is still in the dark about millions of dollars in coordinated spending.

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[21] *CLC* Dist. Op. at 69 (emphasis in original).
[22] *See* Cert. ¶ 4.a (Apr. 1, 2021), MUR 7577 (AnderPAC (Terminated), *et al*.); *see also* Memorandum from Lisa J. Stevenson, Acting General Counsel, & Charles Kitcher, Associate General Counsel for Enforcement, to the Commission, *Recommendation to Accepted Signed Conciliation Agreement* (MUR 7577 (Ander PAC, *et al*.)) (Aug., 31, 2021), *available at* https://www.fec.gov/files/legal/murs/7577/7577_12.pdf.
[23] Cert. ¶ 3, MUR 7146R (Correct the Record, *et al.*) (Oct. 10, 2024).
[24] The Commission considered two separate motions to find reason to believe violations occurred. *Id.* ¶1-2. Both motions would have found reason to believe that Correct the Record and Elizabeth Cohen in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b) by making excessive and impermissible unreported in-kind contributions to Hillary for America, and would have found reason to believe 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) by knowingly accepting excessive and impermissible unreported in-kind contributions from Correct the Record. Both motions directed OGC to draft a Factual and Legal Analysis to reflect the reason to believe findings. *Id.* ¶1-2. One motion directed OGC to draft conciliation agreements, *id.* ¶1, and the other took no further action against the respondents. *Id.* ¶2.
[25] *See* Stmt. of Reasons of Comm'r Ellen L. Weintraub at 3, n.15, MUR 7609R (Donald Trump, *et al*.) (Dec. 5, 2023) (citing *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n* ("Commission on Hope, Growth & Opportunity"), 892 F.3d 434 (D.C. Cir. 2018); *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n* ("New Models"), 993 F.3d 880, 882 (D.C. Cir. 2021). *See* Stmt. of Ellen L. Weintraub on District Court Decision in CREW v. FEC (New Models) (April 5, 2019), https://www.fec.gov/resources/cms-content/documents/2019-04-05_ELW_Statement_-_DDC_decision_in_New_Models.pdf.

11/7/2024
Date

Ellen L. Weintraub
Vice Chair

Attachment A

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

§§ 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.