ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5336

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER
and CATHERINE HINCKLEY KELLEY,
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellant.

HILLARY FOR AMERICA and CORRECT THE RECORD,
Intervenors.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-02336-JEB

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
Megan P. McAllen (DC Bar No. 1020509)
Alexandra Copper*
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200

Counsel for Plaintiffs-Appellees

** Not a member of the D.C. Bar; practicing before the federal courts pursuant to D.C. App. Rule 49(c)(3)*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), plaintiffs-appellees Campaign Legal Center ("CLC") and Catherine Hinckley Kelley hereby certify as follows:

(a) Parties and *Amici*. CLC and Catherine Hinckley Kelley are plaintiffs in the district court and appellees in this Court.

Pursuant to Circuit Rule 26.1, CLC certifies that it is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest. CLC works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

The Federal Election Commission ("FEC" or "Commission") is the defendant in the district court, but did not appear below until noticing the instant appeal. The FEC is appellant in this Court.

Hillary for America and Correct the Record are intervenor-defendants in the district court but have not appeared in this appeal before this Court.

The Institute for Free Speech appeared in the district court as an *amicus curiae* and former Commissioner Goodman has appeared as an *amicus curiae* in this Court.

(b) Rulings Under Review. The FEC is appealing the December 8, 2022 order and judgment of the United States District Court for the District of Columbia

(Boasberg, J.), which granted the plaintiffs' motion for summary judgment and denied Correct the Record and Hillary for America's motion for summary judgment. The opinion is available at *Campaign Legal Center, et al. v. FEC*, No. 19-2336, 2022 WL 17496220 (D.D.C. Dec. 8, 2022).

(c) Related Cases. The ruling under review has not previously been before this Court or any other court.

This case was previously before this Court on appeal in *Campaign Legal Center, et al. v. FEC*, No. 21-5081. This Court reversed the district court's dismissal of this case, and the opinion is available as *Campaign Legal Center, et al. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022).

On January 10, 2023, following the FEC's failure to conform with the December 8, 2022 order within the statutorily-established time frame, CLC initiated a private action under 52 U.S.C. § 30109(a)(8)(C) against Hillary for America and Correct the Record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Authorities upon which appellees principally rely are marked with an asterisk

Cases: Page

Statutes:

Regulations:

Other Authorities:

GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act
CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTRODUCTION

In 2019, plaintiffs-appellees Campaign Legal Center ("CLC") and Catherine Hinckley Kelley brought suit under 52 U.S.C. § 30109(a)(8)(C) to challenge the Federal Election Commission's unlawful dismissal of their administrative complaint against the super PAC Correct the Record and Hillary Clinton's 2016 presidential campaign committee, Hillary for America, for violations of the Federal Election Campaign Act ("FECA" or "Act"), in connection with respondents' multi-million-dollar coordinated spending operation to advance Clinton's candidacy. After four years of litigation, including an appeal to confirm plaintiffs' informational standing, *CLC v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) ("*CLC III*"), the district court held that the dismissal was "contrary to law" because it rested on impermissible interpretations of FECA and Commission regulations, and was arbitrary and capricious.

Throughout these proceedings, the FEC has remained in deliberate default, ceding its own defense to the intervening administrative respondents. Only *after* the district court issued its last of five written rulings on December 8, 2022—holding the dismissal contrary to law and remanding the matter to the FEC to conform within thirty days—did the Commission finally enter an appearance in the case. Even then, the Commission presented no arguments or defenses in the district court. Nor did it take any action to conform with the court's remand order within the statutorily

prescribed deadline. Instead, the FEC noticed an immediate appeal of the December ruling, without explanation or even acknowledgement of its long absence in the case.

As plaintiffs demonstrated in their motion to dismiss this appeal, *see* Doc. #1984805, the FEC has forfeited its claims by "failing to raise [them] below." *Keepseagle v. Perdue*, 856 F.3d 1039, 1054 (D.C. Cir. 2017) (citation omitted). Its attempt to leapfrog to the Court of Appeals is transparent "gamesmanship" that should not be permitted. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 98 (D.D.C. 2011).

This appeal is also moot. The FEC chose to relinquish its enforcement jurisdiction over the administrative matter by failing to timely conform with the district court's remand order, which now has no further legal effect. After the 30-day conformance period expired, CLC exercised its right under 52 U.S.C. § 30109(a)(8)(C) to file an independent suit against respondents directly; the FEC is not a party to that action and faces no legal liability or obligation therein. *See* Compl., *CLC v. Correct the Record & Hillary for America*, No. 23-cv-75 (D.D.C. Jan. 10, 2023).

Finally, the FEC made no attempt below to defend the controlling rationale for the dismissal—and mounts no serious defense of its lawfulness here either. Indeed, the Commission's brief reads less as a vigorous defense of the controlling Commissioners' decision-making and more as a placeholder to maintain an appeal

principally intended—by the agency's own admission—to cut off CLC's duly filed private action. *See* FEC Opp'n to Pls.' Mot. to Dismiss 14-15 (Doc. #986323) (claiming chief "interest" in appeal is guarding the "exclusivity" of its "enforcement authority" by blocking any private action under § 30109(a)(8)(C)). Further evincing that its real grievance lies elsewhere, the FEC also raises a futile challenge to plaintiffs' Article III standing *here* based on arguments about the remedies CLC may have standing to seek in its private action. But that is an entirely different action—and in this one, the Court has already confirmed plaintiffs' informational standing.

Even if the FEC's merits arguments are properly before this Court, they are founded on fatal errors of both law and fact. In considering CLC's administrative complaint, the Commission had before it a record demonstrating that Correct the Record had both repeatedly announced its intention to "coordinate" with the Clinton campaign, JA187-88, and then in fact coordinated as much as $9 million in expenditures with the campaign for "opposition research, message development, surrogate training and booking, professional video production, and press outreach." JA27. The pretext for this unconstrained coordination was Correct the Record's claim that all of its spending qualified for the FEC's "internet exemption," *see* 11 C.F.R. § 100.26, a narrow rule designed to exclude unpaid internet communications from FECA's coordination regime, which otherwise treats "coordinated expenditures" as in-kind contributions, subject to limitation and disclosure, 52

U.S.C. §§ 30116(a)(7)(B)(i), 30104(b). But, as the FEC's Office of General Counsel found, *see* JA200, only a small fraction of the super PAC's budget directly paid for the dissemination of internet communications. Dismissing CLC's complaint thus required the controlling Commissioners to contort FEC regulations and disregard the administrative record: they ultimately held that almost all categories of Correct the Record's spending—from payroll to travel to polling expenses—were exempt not because they directly paid for internet communications but because they were conceivably "input costs" for internet communications, JA60.

The radical nature of this position dooms both the controlling Commissioners' opinion and the FEC's appeal. As the district court found, JA99, there is no way to reconcile this wholesale exemption of millions of dollars of openly coordinated spending with FECA's unequivocal mandate that any expenditure "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate," 52 U.S.C. § 30116(a)(7)(B)(i). So the FEC does not try. Unable to defend this interpretation of the Act, the FEC is forced to make the extraordinary argument that it need not apply its regulatory exemption in a manner consistent with FECA, but only with the "plain text" of its own regulation and "prior Commission authorities," effectively declaring itself independent of its own governing statute. FEC Br. 34.

This premise is so erroneous as to render the FEC's merits argument frivolous. The Commission's appeal should be dismissed because it is forfeited and moot, and rests on clear legal error.

STATUTES AND REGULATIONS

All applicable statutory and regulatory provisions are reproduced in the Addendum to the FEC's brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

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

The Act defines "contribution" as a "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i).

The statutory phrase "anything of value" includes "all in-kind contributions," including "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge." 11 C.F.R. § 100.52(d)(1).

FECA also provides that any expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) "*shall* be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added). Coordinated expenditures are thus deemed in-kind contributions

subject to FECA's contribution limits and source restrictions. In the 2015-16 election cycle, a candidate could lawfully "accept" only $2,700 in contributions from an individual, *id.* § 30116(a)(l); *see also* FEC, *Contribution limits for 2015-2016* (Feb. 3, 2015), https://www.fec.gov/updates/contribution-limits-for-2015-2016, or $5,000 from a multicandidate committee, 52 U.S.C. § 30116(a)(2)(A), and was prohibited from accepting any from corporations or labor unions, *id.* § 30118(a).

Coordinated expenditures by a political committee are also subject to FECA's comprehensive disclosure requirements. For each reporting period, a candidate-authorized committee must disclose and itemize each in-kind contribution in the form of coordinated expenditures it receives, *id.* § 30104(b)(2)(D), and report its date, value, and source, *id.* § 30104(b)(3)(B). Likewise, in each reporting period, a *non-candidate* committee must disclose and itemize each in-kind contribution in the form of coordinated expenditures it makes, and report its date, value, and the recipient's name and address. *Id.* § 30104(b)(4)(H)(i), (b)(6)(B)(i).

B. Separate FEC rules define "coordinated expenditures" and "coordinated communications."

The statutory coordination provisions are implemented through a Commission regulation defining "coordination" in near-identical terms to mean an expenditure "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee." 11 C.F.R. § 109.20(a). Any expenditure "coordinated" within the meaning of this

regulation is treated as an in-kind contribution to the candidate with whom it was coordinated and must be reported as a contribution received and expenditure made by that candidate. *Id.* § 109.20(b).

A separate FEC rule addresses a subset of coordinated expenditures made for "coordinated communications." *Id.* § 109.21. To constitute a "coordinated communication," a communication must (1) be paid for by a person other than the candidate, *id.* § 109.21(a)(1); (2) satisfy one of the rule's "content standards," *id.* § 109.21(c); and (3) satisfy one of its "conduct standards," *id.* § 109.21(d). To satisfy the "content" standard, a communication must meet the regulatory definition of "public communication" as well as additional criteria indicating electoral purpose (*e.g.*, "expressly advocat[ing] . . . the election or defeat of a clearly identified candidate," *id.* § 109.21(c)). The "coordinated communication" rule thus covers only "public communications"; all other types of expenditures are governed by the general coordination regulation at 11 C.F.R. § 109.20, which by its terms applies unless the expenditure is "made for a coordinated communication under 11 C.F.R. § 109.21."

FECA defines "public communications" as communications made by "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 52 U.S.C. § 30101(22). The

statutory definition of "public communications" does not exempt internet communications, and the term is not used in the Act's coordination provisions. The FEC's regulatory definition of "public communication," however, exempts certain "internet" communications, *see* 11 C.F.R. § 100.26, and because it is incorporated into the FEC's "coordinated communications" rule, *id*. § 109.21, impacts the agency's regulation of coordinated expenditures.

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

Following passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Commission conducted successive rulemakings to implement its provisions. BCRA instructed the FEC to promulgate new coordination regulations—because Congress believed the existing coordination regulations "set too high a bar" regarding the *conduct* that would constitute "coordination" under the Act. *Shays v. FEC*, 337 F. Supp. 2d 28, 64 (D.D.C. 2004) ("*Shays I*") (quoting 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold)), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays II*").

But in its first post-BCRA coordination rulemaking in 2002-03, the FEC instead took it upon itself to formulate a new "content" standard, using BCRA's definition of "public communications" to limit the universe of communications that would be covered by its coordinated communications rule. Its regulatory definition of "public communications" largely echoed the statutory definition, but,

inexplicably, excluded "communications over the Internet." 11 C.F.R. § 100.26 (2002).

In a subsequent legal challenge, a district court struck down this "wholesale" exemption of internet-related expenditures from the "coordinated communications" regulation because it conflicted with FECA's clear terms, "severely undermine[d]" its purposes, and "create[d] the potential for gross abuse." *Shays I*, 337 F. Supp. 2d at 69-70 (citation omitted). As the court noted, BCRA was intended "to *enlarge* the concept of what constitutes 'coordination' under campaign finance law," *id.* at 64 (emphasis added), and adopting a blanket exemption for "an entire class of political communications . . . irrespective of the level of coordination," *id.* at 70, conflicted with that purpose.

The FEC did not appeal this ruling, but instead commenced another rulemaking in 2006. This time, the FEC carved out a more limited exception from its regulatory definition of "public communication"—and by extension, from the coordinated communications rule at 11 C.F.R. § 109.21—for "communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.* § 100.26; *see also* Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (Explanation & Justification). Thus, under the 2006 rule, only *unpaid* internet communications are exempted from regulation as "coordinated communications" under 11 C.F.R. § 109.21. The Commission also exempted certain internet activities

from the regulatory definitions of "contribution," 11 C.F.R. § 100.94, and "expenditure," *id.* § 100.155, but made clear that it excepted only "*uncompensated* internet activity" by individuals and groups of individuals. 71 Fed. Reg. at 18603 (emphasis added).

Notably, in its Explanation and Justification for the rules, the Commission emphasized that a political committee's disbursements to develop communications over the internet can still be "expenditures," even if the ultimate internet posts are exempt. For example, "a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election, remains an 'expenditure' by the political committee," even if the internet activities conducted on that computer may have been exempt. 71 Fed. Reg. at 18606. If the underlying expenditure is coordinated with a candidate campaign, it thus constitutes a contribution to the campaign. 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20.

Similarly, the Commission noted that "if a political committee pays a blogger to write a message and post it within his or her blog entry," then that underlying payment would be an "expenditure," 71 Fed. Reg. at 18604-05; it follows that if such an "expenditure" is coordinated with a candidate, it constitutes an in-kind contribution under 11 C.F.R. § 109.20. Thus, although the rulemaking did not address at length whether direct "production costs" connected to exempt internet communications would also qualify for exemption from the coordination

regulations, it made clear that many payments connected to exempt internet activity would still be "expenditures," indicating that the exemption was intended to be applied narrowly in this regard.

D. The statutory framework for FEC administrative complaints

Any person may file a complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the General Counsel's recommendations, the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, *id.* § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties. *Id*. § 30109(a)(4)(A), (a)(5).

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

such declaration within 30 days. *Id.* § 30109(a)(8)(C). If the Commission fails to do so, the complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.*

II. Statement of Facts

A. The administrative complaint

On October 6, 2016, plaintiffs filed an FEC administrative complaint alleging that Correct the Record made, and Hillary for America accepted, unreported in-kind contributions in the form of coordinated expenditures and compensation for personal services, in violation of FECA's reporting requirements and contribution restrictions. JA112-60.

Plaintiffs' administrative complaint, one of five raising similar concerns, documented how Correct the Record spent millions of dollars on opposition research, message development, and press outreach, for the avowed purpose of promoting Clinton's candidacy. JA115-42. From its founding, Correct the Record's staff, including its founder David Brock, repeatedly announced it was "work[ing] in coordination with the Clinton campaign," JA117, on the pretext that all of its spending would qualify for the "internet exemption," JA116-18.

In fact, Correct the Record and the campaign were coordinating on a host of activities "not fairly characterized as 'communications'" exempt from the coordination rules, JA185, including:

- Commissioning a poll during a November 2015 Democratic primary debate. JA126.

- Arranging media training for Clinton surrogates with "talking-point tutorials" and "on-camera media training," JA118-19, and, later, paying the consulting firm QRS News Media for "an aggressive surrogate booking program," JA135.

- Sending "trackers" to follow and record Clinton's Democratic primary opponents. JA119-20.

- Staffing a "30-person war room" of paid Correct the Record employees who conducted rapid response during Clinton's appearance before the House Select Committee on Benghazi. JA123-24.

- Releasing opposition research, including "more than 46 research-fueled press releases, factchecks, reports, videos and other multimedia" during Clinton's Benghazi testimony. JA138-39.

- Holding a press call to announce the launch of its "Trump Lies" project, which involved Correct the Record staff issuing research memos and collecting past Trump statements into a searchable database. JA133-34.

- Acquiring leaked text of Trump's Republican National Convention speech and sending it to reporters. JA139-40.

- Maintaining, throughout the 2016 cycle, an "around the clock" "war room" with "researchers, communications experts and digital gurus" who produced "point-by-point fact checks quickly disseminated to the news media." JA140.

On this evidence, complainants urged that the Commission find reason to believe respondents violated FECA's contribution limits, 52 U.S.C. § 30116(a), source restrictions, *id.* § 30118(a), and disclosure requirements, *id.* § 30104, and conduct an immediate investigation.

B. Commission proceedings

After reviewing the complaint and responses, the FEC's Office of General Counsel recommended that the Commission find reason to believe respondents violated FECA by making and accepting excessive and prohibited in-kind contributions in the form of coordinated expenditures and failing to report those contributions. JA185, 205.

The General Counsel's Report highlighted that respondents did not "deny or rebut the description or scope of [Correct the Record's] activities on behalf of [Hillary for America]," JA190 n.28, so few facts were in dispute. It also rejected respondents' characterization of these activities as largely subsumed by the internet exemption. Instead, it found that much of Correct the Record's approximately $9 million in spending went to a "wide array of activities" not connected to exempt internet communications, "unless that term covers almost every conceivable political activity." JA210, 224.

Even as to those activities that did have some connection to the internet, the General Counsel found that respondents had overreached by invoking the exemption for expenses, such as polling and research, that were not properly characterized as costs incurred to produce exempt internet communications. JA200. It also noted that the campaign had reported two payments to Correct the Record early in the cycle, in May and July 2015—collectively amounting to only three percent of the super

PAC's budget. JA189 (noting May 27, 2015 of $275,615 for "research" and July 17, 2015 payment of $6,346 for "research services"). Because it was unclear what activities these minimal payments covered, the General Counsel recommended investigating how they related to Correct the Record's "overall activity." JA200 n.67.

On June 4, 2019, the FEC's then-four Commissioners deadlocked 2-2 on whether to find reason to believe respondents had violated FECA, and voted 4-0 to close the file, dismissing the complaint. JA263-266. In their Statement of Reasons explaining their votes, the no-voting Commissioners took an expansive view of the internet exemption, finding that expenses for "computer equipment, office space, software, web hosting, video equipment, placing a poll online, and salaries for individuals to conduct internet activity," JA278, were exempt internet communications or "inputs" for such communications under 11 C.F.R. § 109.21. They also rejected the possibility that overhead expenses like rent or salary should be allocated between the exempt and non-exempt activities they supported, claiming that "exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption . . . and potentially chill political speech online." JA279.

As for categories of spending the Commissioners conceded were "unrelated to creating and disseminating online political communications," JA277, they argued

that plaintiffs had not alleged facts sufficient to establish coordination conclusively, "transaction-by-transaction," JA282. In so holding, the Commissioners disregarded respondents' own uncontroverted public statements, as provided in plaintiffs' complaint and otherwise incorporated into the administrative record, *see* JA116-18, 122-23, 187-88, 191-92, as well as corroborating documents posted on Wikileaks that were presented in related complaints, but not in CLC's, JA192-94.

III. Procedural History

Plaintiffs filed this action under 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act on August 2, 2019, challenging the dismissal of their FEC complaint as contrary to law.

On June 4, 2019, the FEC voted on whether to authorize the defense of the controlling Commissioners' dismissal of plaintiffs' administrative complaint, but failed to garner the requisite four votes. The FEC thus did not appear in the action below until noticing the instant appeal. Correct the Record and the campaign, however, sought and were granted the right to intervene as defendants in November 2019. *CLC v. FEC*, 334 F.R.D. 1 (D.D.C. 2019).

Intervenors thereafter moved to dismiss for lack of standing and failure to state a claim, and on June 4, 2020, the district court denied the motion, holding that plaintiffs had "proven [their] standing" and had stated a claim for relief. *CLC v. FEC*, 466 F. Supp. 3d 141, 154 (D.D.C. 2020) ("*CLC I*"). In considering plaintiffs' and

intervenors' subsequent cross-motions for summary judgment on the merits, however, the district court "reverse[d] field" on plaintiffs' Article III standing, and dismissed their FECA claim without addressing the merits. *CLC v. FEC*, 507 F. Supp. 3d 79, 82-83 (D.D.C. 2020) ("*CLC II*").

Plaintiffs timely appealed. The FEC did not seek to appear in the appeal. On April 19, 2022, this Court reversed, holding that plaintiffs had established standing by "demonstrat[ing] a quintessential informational injury," and remanded the case for "further proceedings consistent with this opinion." *CLC III*, 31 F.4th at 784, 793.

Upon remand, plaintiffs and intervenors again briefed the "merits" of the Commission's rationale for dismissal. On December 8, 2022, the district court granted summary judgment in favor of plaintiffs, holding that "[b]ecause 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." JA107. The district court remanded the matter for "the Commission to conform with this decision within 30 days." JA108.

Thirteen days later, on December 21, the FEC appeared for the first time in the district court to notice this appeal of the December 8 order, and filed a motion for stay of the district court's remand order pending appeal. JA109. The Commission did not move for reconsideration of the district court's December 8 order or present any substantive arguments or defenses in the district court.

The Commission's 30-day deadline to conform, as prescribed in the remand order and in FECA, *see* 52 U.S.C. § 30109(a)(8)(C), elapsed one day after its stay motion was fully briefed, but the FEC made no attempt to conform. Accordingly, CLC initiated a private action against Hillary for America and Correct the Record three days later, on January 10, 2023, as FECA provides it the right to do. *See id.*

On February 1, 2023, the district court denied the FEC's motion for a stay, noting that the injury upon which the FEC's motion was predicated related to its "loss of exclusive civil-enforcement jurisdiction" should it fail to timely conform—but this had "already come to pass now that CLC has initiated a private action." Mem. Op. 6, ECF No. 80 ("Stay Order").

SUMMARY OF ARGUMENT

1. The FEC has forfeited this appeal. The agency chose to default in district court, and chose not to raise any of the issues there that it now asks this Court to resolve. This appeal is also moot, because the Commission allowed the remand order to expire without taking action or extending its statutory deadline to conform; the order it seeks to appeal thus has no continuing practical or legal effect on the agency. While the Commission may resist this outcome, "to the extent that the Commission

now finds itself in a procedural tangle because of its late entry into this litigation, that is a knot of the agency's own tying." Stay Order 7.

2. The FEC seeks to escape the consequences of its default by devising a partial "jurisdictional" challenge to plaintiffs' standing. However, in attempting to navigate the shoals between its own forfeiture and plaintiffs' recognized basis for Article III standing, the FEC runs aground. As this Court has confirmed, plaintiffs have shown a "quintessential" informational injury and "easily satisf[ied] the causation and redressability requirements of Article III standing." *CLC III*, 31 F.4th at 784 (citing *FEC v. Akins*, 524 U.S. 11, 25 (1998)). The FEC's attempt to relitigate that question should be rejected.

Indeed, it is difficult to discern precisely what "jurisdictional" objections the FEC is now asserting. Insofar as it presents any standing arguments distinct from those already addressed by this Court, they appear to boil down to the baseless contention that plaintiffs are seeking relief for "claims" in their *administrative* complaint as to which they lack informational standing and that, consequently, the district court should have dismissed these "portions" of the case. *See* FEC Br. 16-26. But the FEC offers no explanation for why the judicial relief plaintiffs actually sought and received was somehow not "commensurate" with their recognized basis for standing. *Id.* at 19. Nor could it, because this lawsuit involves only a single FECA claim against the Commission challenging its dismissal of plaintiffs' administrative

complaint as contrary to law, and plaintiffs unquestionably have informational standing with respect to *that* claim.

The FEC purports to ground its jurisdictional argument in concerns about the scope of the ruling below, and by extension, "the scope of conduct the Commission could be required to address under court order." *Id.* at 25-26. But the district court did not prescribe any particular enforcement action or remedy, or indeed, compel the Commission to take any action at all. And regardless, the FEC's professed desire to limit the "scope of conduct" at issue on remand is nonsensical in the context of this case, where "address[ing]" the disclosure violations causing plaintiffs' informational harm would entail the exact same factual inquiry into respondents' coordinated expenditures as would the other FECA violations alleged in the administrative complaint.

Finally, in briefing plaintiffs' motion to dismiss, the FEC indicated that its "jurisdictional" concerns actually relate to another case entirely: CLC's suit against Correct the Record and Hillary for America under FECA's private right of action. But the FEC cannot use this case as a springboard from which to attack the potential remedies available to a plaintiff in a different suit.

3. Assuming the Court even entertains the FEC's forfeited merits arguments, they fare no better.

To say the FEC does not acknowledge the breadth and depth of the litigation record created in its absence, or appreciate the district court's careful analysis below, would risk grave understatement. Over four years of litigation, the district court thoroughly considered whether the dismissal of plaintiffs' administrative complaint was consistent with the Act and relevant FEC regulations and precedents, producing two written decisions on this question: first, in denying intervenors' motion to dismiss, *CLC I*, 466 F. Supp. 3d at 154, and second, in finding the dismissal contrary to law and granting summary judgment to plaintiffs, JA89-108.

The district court held the controlling Commissioners' rationale for dismissal contrary to law for two principal, well-founded reasons. First, the controlling Commissioners' exemption of millions of dollars of Correct the Record's spending as "inputs" for exempt internet communications relied on impermissible interpretations of law that countermanded the Act's "plain language" and purpose, and misapplied the Commission's coordination regulations. JA99. Second, the Commissioners arbitrarily "disregarded" whole swaths of the factual record in finding no reason to believe Correct the Record's "various offline activities (that undisputedly did not qualify for the internet exemption)"—such as surrogate training, candidate tracking, and press outreach—"were coordinated with the Clinton campaign." JA102.

The Commission identifies no reversible error in the district court's analysis. Instead, it is the FEC's arguments that are unsustainable. In particular, two fatal errors run through all of the Commission's merits arguments.

First, the Commission misunderstands the nature of review under 52 U.S.C. § 30109(a)(8), arguing that the district court lacks authority to determine whether the FEC has applied its regulations in a manner consistent with FECA, but rather is confined to considering whether the application was "permissible" under the text of the regulations. FEC Br. 34. In so arguing, the Commission elides the most basic purpose of judicial review of administrative action: to assess whether agency action is authorized by, or at least consistent with, its governing statute. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). The FEC resorts to this argument because there is no way to reconcile the controlling Commissioners' refusal to regulate *any* of Correct the Record's coordinated spending with the Act's unequivocal language regulating any "expenditure" made "in cooperation, consultation, or concert with, or at the request or suggestion of," a federal candidate or her campaign as a contribution to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i). If fidelity to FECA cannot be demonstrated, the FEC's answer is that fidelity to the governing statute is not an appropriate subject of judicial review.

Second, the FEC mischaracterizes the basic legal and factual questions presented in the administrative proceedings. Time and time again, the FEC describes

this case as turning on whether Correct the Record's "input costs" for exempt internet communications could also reasonably be exempted under the internet exemption at 11 C.F.R. § 100.26. *See*, *e.g.*, FEC Br. 27, 30, 33, 34, 35, 37. But this only begs one of the central questions: what expenditures by a super PAC can permissibly be characterized as "inputs" for internet communications in the first place? Are disbursements for airline tickets an "input"? Salary for a staffer who conducts online *and* offline communications work? This case turns on whether any spending beyond the direct production costs of internet communications can reasonably be exempted from regulation, but the FEC pretends that these direct costs (say, video production or domain services expenses) are the only expenditures at issue—and simply ignores the millions of dollars Correct the Record spent on "payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, . . . equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." JA189.

The FEC thus devotes the entirety of its merits argument to a narrow question about the direct production costs of internet communications that has never been at issue in this case—as the FEC might have known if it had appeared or presented any arguments below. Because it did not, and because its forfeited arguments provide no basis for reversal in any event, the FEC's appeal should be rejected.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

An FEC dismissal is "contrary to law" under 52 U.S.C. § 30109(a)(8)(C) "if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion under *Orloski* is similar to the "arbitrary [or] capricious" standard applied under the Administrative Procedure Act. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 & n.6 (D.C. Cir. 1980). Under that analysis, a court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. The Appeal Should Be Dismissed as Both Forfeited and Moot.

A. The FEC has forfeited its arguments by raising them for the first time on appeal.

The FEC's appeal must fail because all of its arguments are forfeited. The FEC did not simply fail to raise its arguments below; it affirmatively chose not to defend itself at all, through years of litigation before the district court and this one. *Cf. Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1031 (D.C. Cir. 2020) (noting that "entertaining a belatedly raised" defense is inappropriate where it "implicate[s] concerns about sandbagging the district court").

The FEC concedes, as it must, that "a party forfeits a claim by failing to raise it below when the party 'knew, or should have known' that the claim could be raised." *Keepseagle*, 856 F.3d at 1054 (citation omitted); FEC Br. 45, 51. This rule "is not a mere technicality but is of substance in the administration of the business of the courts." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984) (citation omitted). Indeed, "[e]normous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below; "[s]uch a "practice" would mean "[a]lmost every case would in effect be tried twice." *Id.* (citation omitted).

As the FEC concedes, its initial failure to appear was due not to incapacity or a lack of quorum, but instead to its 2019 vote declining to authorize defense of suit.

See FEC Br. 46, 48; FEC Opp'n to Pls.' Mot. to Dismiss 9. And while the FEC insists that its "switch from default at earlier stages of the litigation was . . . a product of changed membership" and occurred "at the first decisional juncture thereafter," FEC Br. 49, it ignores entirely the multiple "decisional junctures" between June 2019 and August 2022 when new appointees joined and the Commission nevertheless failed to appear, *see* Pls.' Mot. to Dismiss 13-14 n.1. Even accepting August 2022—when the newest Commissioner joined the FEC—as a determinative "change" to the Commission's membership, it still does not explain why the FEC failed to participate in summary judgment briefing following this Court's ruling in *CLC III*, 31 F.4th 781, which entirely postdated the new Commissioner's arrival.

Moreover, a change in membership does not explain why, even after the FEC finally decided to appear on December 21, 2022—almost two weeks after plaintiffs were granted summary judgment—it still made no attempt to present arguments to the district court, file any responsive pleadings, or move for reconsideration of the district court's summary judgment order. *See Baker*, 810 F. Supp. 2d at 98 (condemning as "gamesmanship" the attempt by defaulting defendants to "sit back and wait" and then "seek[] to vacate the judgment after [] years of litigation" when it was not "to their liking").

The Commission does not attempt to excuse its de facto default in the district court—nor could it. *See* FEC Br. 47-48. Instead, the FEC argues that it has not

forfeited its arguments because the district court "plainly passed upon two of the three issues the Commission seeks to raise on appeal"—*i.e.*, whether the dismissal rested on impermissible statutory and regulatory interpretations and whether its evaluation of the record was arbitrary and capricious. *See* FEC Br. 45. But the Commission has identified no case that considered, much less permitted, an immediate appeal to this Court by a party—like the FEC—that presented no legal arguments and effectively remained in default throughout the district court proceedings. *See id.* (citing *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009); *United States v. Williams*, 504 U.S. 36, 41 (1992)); *see also* Pls.' Reply Supp. Mot. to Dismiss 3-4 (Doc. #1987330).

The Commission hangs its hat on the argument that intervenors "actively raised these issues at the district court." FEC Br. 46. But it is far from clear that the FEC and intervenors' interests are aligned such that there is identity between the parties. *See e.g.*, *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) ("[A] shared general agreement with [intervenors] that the regulations should be lawful does not necessarily ensure agreement in all particular respects about what the law requires.").

As to the FEC's third issue presented, the agency concedes it was never raised below, but claims that it concerns "subject-matter jurisdiction" and thus cannot be forfeited. *See* FEC Br. 45-46. The FEC, however, is not contesting the district court's

jurisdiction to hear *this* case—which this Court has already confirmed, *CLC III*, 31 F.4th 781—but rather the scope of the lower court's remand order as it relates to the allegations in plaintiffs' *administrative* complaint and its effect on plaintiffs' private action. *See infra* Part II. This argument is not actually "jurisdictional" at all. It is a new argument neither raised nor passed on below, and thus is forfeited. Indeed, the very nature of the argument—concerning the scope and intent of a district court order—is better, and perhaps uniquely, suited to district court consideration.

Nonetheless, the Commission attempts to wave away its obligation to first move the district court to reconsider the December 8 order by claiming that "a post-judgment motion" would have been "a fruitless exercise and a waste of resources." FEC Br. 51. But the same would presumably be true with respect to any default judgment; the district court's possible reluctance to reconsider a recent judgment cannot by itself excuse a party from first presenting its arguments to the court below. Moreover, the Commission professes doubt about the scope of the December 8 order, and requesting explanation or modification of an order is precisely the type of inquiry typically raised on a motion for reconsideration or clarification.

The Commission complains that "the natural result" of plaintiffs' argument is that no party could "appeal[] an adverse judgment after defaulting without seeking relief in the district court," FEC Br. 49—only to concede two sentences later that, while this Circuit has not addressed the issue, others demand exactly this. *Id.* All of

the cases the FEC cites to support its alternative position are either contrary to it or simply off point.[1] In cases where a default occurred through mistake or inadvertence, or where it was infeasible for the defaulting party to timely move the district court, greater solicitude might be warranted. But no such factors exist here.

B. No "exceptional circumstances" justify allowing this appeal to proceed.

The FEC has failed to show any of the "exceptional circumstances" that may, in the Court's discretion, warrant consideration of arguments not raised below. *See, e.g.*, *Air Florida*, 750 F.2d at 1085.

First, this appeal does not present "a novel, important, and recurring question of federal law," nor was it occasioned by "an intervening change in the law" or "uncertainty in the state of the law." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). Plaintiffs brought a standard administrative review action challenging the FEC's dismissal of their complaint under 52 U.S.C. § 30109(a)(8); numerous such challenges have passed through this Circuit, governed by well-settled standards of review, *see Orloski*, 795 F.2d 156. And while the FEC

[1] *See* FEC Br. 50 FEC Br. 50 (citing *Gates v. Syrian Arab Republic*, 646 F.3d 1, 3 (D.C. Cir. 2011) (involving a defendant that sought relief from judgment in the district court under Rule 60(b)); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695 (D.C. Cir. 1994) (considering timeliness of intervention to appeal by a government agency *not* named in the original action); *Pulliam v. Pulliam*, 478 F.2d 935, 936 (D.C. Cir. 1973) (noting general rule that "the party in whose favor a default has been entered must apply for and the court grant a default judgment")).

insists that "[t]he basic question underlying this appeal" regarding the contours of the FEC's internet exemption is "one of great importance," FEC Br. 52, it never once suggests that this question arises from "an intervening change" or "uncertainty in the state of the law," *Roosevelt,* 958 F.2d at 419 n.5. Moreover, insofar as any open legal questions remain, CLC's duly filed private action against Correct the Record and Hillary for American provides a more than adequate venue in which to address them.

Second, the FEC cannot demonstrate that dismissing its appeal would work "a miscarriage of justice" or threaten "the integrity of the judicial process." *Id.* On the contrary, it is the Commission's unjustified late entry into this case that threatens the integrity of the judicial process. *See, e.g.*, *Air Florida*, 750 F.2d at 1084-85; *Baker*, 810 F. Supp. 2d at 98. Indeed, beyond decrying "the effect the district court's analysis has on the scope of the Commission's internet exemption," the FEC's only argument for why this case presents "exceptional circumstances" is that the district court's December 8 order "continues to undermine the Commission's exclusive enforcement authority." FEC Br. 53. But the Commission cannot claim to be harmed by the consequences of its own inaction, nor by its governing statute operating precisely as Congress intended.

The predictable result of the FEC waiting almost two weeks to seek a stay of the district court's December 8 remand order was that its 30-day deadline to conform expired prior to disposition of the motion and without any action by the FEC to

conform. Accordingly, plaintiff CLC availed itself of its right to bring a private civil action against Correct the Record and Hillary for America under 52 U.S.C. § 30109(a)(8)(C). But the possibility that a private right of action will accrue just as FECA expressly provides cannot work an "injury" on the FEC's enforcement prerogatives. *Cf. In re Carter-Mondale*, 642 F.2d at 543 (noting, in the context of agency delay, that § 30109(a)(8) limits the FEC's exclusive enforcement authority). Indeed, it is clear that Congress's intent in enacting § 30109(a)(8)(C) was to couple the FEC's "exclusive" enforcement authority with private citizen lawsuits in cases of agency inaction. *See CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019) (noting that Congress included the "citizen-suit provision" in FECA to "legislate[] a fix" for the fact that "partisan deadlocks were likely to result" given the Commission's divided composition), *reconsidered on other grounds*, No. 18-cv-945-CRC, 2022 WL 612655 (D.D.C. Mar. 2, 2022); *see also CLC v. Iowa Values*, No. 1:21-cv-389-RCL, 2021 WL 5416635, at *7 (D.D.C. Nov. 19, 2021) ("[T]he citizen suit provision was created in anticipation of FEC's regulatory breakdown or inaction.").

The initiation of a citizen suit thus does not deprive the FEC of any right or authority, nor compel it to take any particular action, enforcement or otherwise. Instead, the Commission's enforcement authority over an administrative complaint terminates when it dismisses the complaint and subjects itself to possible judicial

review. *See* 52 U.S.C. § 30109(a)(8)(A). Thus, the accrual of the private right of action cannot itself constitute an "exceptional circumstance" warranting consideration of the Commission's forfeited arguments.

C. The FEC's appeal is moot.

Even if the FEC had not forfeited its arguments by failing to raise them below, its appeal should be dismissed as moot. It is undisputed that the FEC chose not to conform with the district court's remand order; accordingly, the order imposes no further obligations on the Commission with respect to the administrative proceedings underlying this case.

The FEC does not directly address plaintiffs' mootness arguments. *See* Pls.' Mot. to Dismiss 14-15; Pls.' Reply Supp. Mot. to Dismiss 9-11. Instead, it simply asserts that "the district court's opinion has continuing legal effect." FEC Br. 52-53. But the FEC fails to answer the critical question: a "continuing legal effect" on *what*? During the remand period, the December 8 order had the "legal effect" of directing the Commission to conform, but the Commission declined to do so. Accordingly, upon expiration of the conformance period and the filing of CLC's citizen suit, the district court's directive to conform ceased to have any practical significance. *See Carmichael v. Blinken*, No. 19-cv-2316-RC, 2022 WL 888177, at *4 (D.D.C. Mar. 25, 2022) ("The clearest justification for denying [motions for reconsideration, interlocutory appeal, and a stay] is that the remand period concluded many months

ago, rendering this issue moot"; "reversing the remand order at this point would have no effect."); *cf. Kean for Congress Comm. v. FEC*, No. 04-cv-0007-JDB, 2006 WL 89830, at *4 (D.D.C. Jan. 13, 2006) (holding that remand order "constitutes relief that is 'concrete,' 'irreversible' and incapable of being diminished through later proceedings") (citation omitted).

And because the controlling opinion represents the position of only two Commissioners, as the FEC admits, "the underlying controlling Commissioner rationale is not binding in a later agency proceeding." FEC Br. 53. This case is thus not analogous to § 30109(a)(8) actions that resulted in the vacatur of a majority decision or an agency rule. *Compare CREW v. FEC*, 971 F.3d 340 (D.C. Cir. 2020) (allowing appeal of contrary-to-law ruling that invalidated FEC "independent expenditure" regulation). The FEC has no cognizable interest in defending a non-authoritative minority interpretation of law arising from an enforcement matter over which it has already voluntarily relinquished jurisdiction and which has no precedential force, *see* Pls.' Mot. to Dismiss 15 n.3.

Indeed, the only continuing "effect" of the remand order that the FEC conjures up is its supposed impact on the Commission's "exclusive enforcement authority" under FECA. *See* FEC Br. 53-54. But, as explained above, the remand order did not limit the Commission's authority; on the contrary, it returned to the Commission an administrative proceeding that it had closed, thus *renewing* the Commission's

authority to take further enforcement action. What ended the Commission's "enforcement authority" was its own decision not to conform with the December 8 order, at which point FECA authorized CLC to "bring . . . a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C); *see also Shays v. FEC*, 340 F. Supp. 2d 39, 49 (D.D.C. 2004) (when an agency "render[s] its decision pursuant to [a remand] order"—in this case, by choosing not to act pursuant to that order—"it would be left with nothing to appeal"); *Conservation Force v. Salazar*, 915 F. Supp. 2d 1, 6 (D.D.C. 2013) (where district court remand order "was valid when it became final," revisiting it "would undermine the finality of valid judgments, indefinitely leaving them open to challenge"). The Commission thus has no valid interest in blocking lawsuits to which it is not a party, particularly when such suits pose no conceivable future obligation or burden on the agency.

In sum, the Commission's appeal of the December 8 order—which now poses no obvious effects or burdens on the agency's prerogatives under FECA—is not only forfeited but also moot.

II. The FEC Provides No Basis to Reconsider Plaintiffs' Standing with Respect to "Portions" of the *Administrative* Complaint.

Plaintiffs have proven their informational standing. As this Court has already found, plaintiffs have shown a "quintessential informational injury," *CLC III*, 31 F.4th at 784, and "easily satisf[ied] the causation and redressability requirements" of Article III standing, *id.* at 784, 793 (citing *Akins*, 524 U.S. at 25). Nothing has

changed since that ruling. Nevertheless, despite declining to participate when these Article III standing questions were conclusively litigated, the Commission now spills much ink questioning plaintiffs' standing and the district court's jurisdiction over certain "claims" in this case. But the FEC's evolving "jurisdictional" arguments provide no basis to reconsider this Court's earlier holding.

1. First, the FEC's partial standing challenge is fundamentally misconceived, because it depends on the faulty premise that plaintiffs' cause of action against the FEC under 52 U.S.C. § 30109(a)(8) can be separated into distinct "claims" against respondents, only some of which support standing. But this case was brought against the FEC, involves only a single FECA claim challenging the dismissal of plaintiffs' administrative complaint as contrary to law, and plaintiffs unquestionably have informational standing with respect to that claim. That is sufficient for Article III purposes. *Cf., e.g., Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) ("Because we find informational standing exists . . . we need not reach [plaintiffs'] remaining theories of injury and instead proceed to the merits."); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002) (same).

The FEC complains that the district court "insufficiently parsed" plaintiffs' standing "to challenge violations of the contribution limits and source restrictions in FECA," FEC Br. 15, but this misapprehends the nature of plaintiffs' claim and injury. Plaintiffs in this judicial review action are not "challeng[ing] violations of

the contribution limits and source restrictions," *id.*; they are challenging the FEC's action dismissing their complaint as "contrary to law" under FECA § 30109(a)(8). "It is true that a litigant cannot, 'by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him.' Here, however, appellees seek to challenge the *one* Government action that causes their harm." *FEC v. Cruz*, 142 S. Ct. 1638, 1650 (2022) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, n.5 (2006)). The number of counts in the administrative complaint is thus immaterial because, as the *legal* complaint makes clear, plaintiffs "seek only one type of relief relevant here"—a finding that the dismissal was contrary to law—and "simply advance several arguments in support of that claim." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 n.3 (D.C. Cir. 2013) (citations omitted); *cf. Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996) ("[T]here are no 'separate claims' but only separate arguments in support of the same claim.").

Even assuming it were necessary to evaluate plaintiffs' standing with respect to each "claim" in the *administrative* complaint, the FEC never specifies how the decision below actually offended that principle. It is correct that plaintiffs' administrative complaint alleged violations of multiple FECA provisions, including both disclosure requirements and contribution limits, and that their judicial complaint referenced those allegations. But, as the FEC conspicuously fails to

acknowledge, all of these alleged FECA violations arose from the same underlying conduct—namely, the coordination scheme causing Correct the Record to make, and Hillary for America to receive, in-kind contributions subject to the Act's disclosure requirements, amount limits, and source restrictions. The FEC suggests that the ruling below threatens to allow "savvy" FECA complainants to "evade the standing rule . . . through artful pleading of disparate violations," FEC Br. 25, but it does not explain why those concerns are implicated *here*, where the bases for the relevant disclosure and contribution violations are not "disparate" but coterminous.

All of the allegations in the administrative complaint turn on a common inquiry under the same facts: whether, and to what extent, respondents' coordination scheme resulted in "contributions" as defined in the Act. That inquiry could—and in this case, clearly would—support a range of statutory consequences, because a finding of coordination can lead to both a determination that FECA's contribution restrictions were violated *and* prompt statutory disclosure obligations. But pointing this out does not negate plaintiffs' informational standing; Article III does not constrain the arguments a complainant can present at the agency level, *cf. Koniag, Inc. v. Andrus*, 580 F.2d 601, 606 (D.C. Cir. 1978), or in support of a judicial claim for which they indisputably have standing, *see CLC III*, 31 F.4th at 790.

2. Nor did the district court err by failing to "tailor" its contrary-to-law ruling and remand order to specify which counts in plaintiffs' administrative complaint it addressed. FEC Br. 14.

The FEC posits that the district court was obliged to "address [plaintiffs'] standing to challenge violations of the contribution limits and source restrictions in FECA as it ordered a remand to the FEC," FEC Br. 14, citing the possibility that plaintiffs are seeking to "compel the FEC to enforce a contribution limit or source restriction against a committee," *id.* at 22. Beyond misrepresenting plaintiffs' arguments and the record in this case, this claim ignores the circumscribed nature of the relief available in a § 30109(a)(8) action. In most circumstances it would be inappropriate for a district court to "compel" a particular enforcement action or otherwise constrain the FEC's discretion on remand. Instead, the court's task is to review the agency's explanation of its dismissal for legal error and, if error is found, declare the dismissal contrary to law and direct the Commission to take action in conformance with the court's analysis. The district court followed these steps to the letter. What transpired on remand was for the FEC to decide—and here, of course, it decided to do nothing at all.

Moreover, in this case, the district court's contrary-to-law analysis—*i.e.*, its analysis of whether the controlling Commissioners' theory of "input costs" was consistent with FECA and FEC regulations—pertained equally to all "counts" in

plaintiffs' administrative complaint. The FEC appears to imagine that excluding particular counts from the contrary-to-law inquiry would have some transformative effect on its scope or outcome, but in reality, it would have no effect at all. The disclosure-related counts in plaintiffs' administrative complaint rest on the same factual and legal inquiry as do the attendant contribution-related counts. The "practical import of this standing dispute," FEC Br. 25, therefore, appears to be nil.

3. Finally, the FEC has complained that the district court "lacked jurisdiction to authorize a private suit based on allegations of violations of FECA's contribution limits," FEC Opp'n to Mot. to Dismiss 4, 6, but this is the wrong case in which to lodge an objection to CLC's private action against Correct the Record and Hillary for America. Furthermore, the district court's remand order did not "authorize" that suit, which accrued by operation of statute upon the Commission's failure to conform with the December 8 order within thirty days. *See* 52 U.S.C. § 30109(a)(8)(C) (providing that a court "may declare that the [FEC's] dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint"). The remand order did not "authorize" a private action, and if the FEC wishes to complain about the scope of *that* action it should do so there, not in this case.

III. The District Court Correctly Held that the Controlling Rationale for Dismissal Was Contrary to Law.

A. The FEC subverts the standard of review in its attempt to shield the dismissal from judicial scrutiny.

The FEC's dismissal of an administrative complaint will be set aside if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning the dismissal (1) rests on an "impermissible interpretation of the Act," or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161; *accord End Citizens United PAC v. FEC*, No. 22-5176, 2023 WL 3909350, at *1 (D.C. Cir. June 9, 2023).

The FEC does not contest the applicability of *Orloski*. Instead, the FEC inexplicably faults the district court for focusing on *Orloski*'s first prong—namely, whether the controlling Commissioners' application of FEC coordination regulations was consistent with FECA—and not on whether the application found "textual support" in the regulations itself. *See* FEC Br. 33. The district court erred, the FEC asserts, because it considered whether the dismissal decision "contravenes FECA's plain language" and "the explanation underlying the adoption of the internet exemption," but should have focused instead on whether "the text of the FEC regulations" "perm[itted]" the controlling Commissioners' reasoning. *Id*. at 39-40 (citing JA99-101).

It is difficult to conceive of a more extraordinary misstatement of administrative law. The FEC is arguing that its actions are "bounded" only by the

"text" of its own regulations, not the text or purpose of FECA, and that a reviewing court's consideration of the latter "improperly usurp[s] the agency role." *Id.* at 33. But courts "are the final authorities on issues of statutory construction": "They must reject administrative constructions of [FECA], whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

If an agency's application of its regulations flouts the unambiguous language of its governing statute, it is per se unreasonable, and any purported consistency with the regulatory text or past agency guidance is irrelevant. A regulation, "no matter how it is interpreted," cannot "override" statutory requirements. *Texas v. E.P.A.*, 726 F.3d 180, 195 (D.C. Cir. 2013); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (rejecting agency interpretation of regulation that was "flatly inconsistent" with governing statute). An agency cannot "simply 'close its eyes' to the existence of the statute," *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 516 (1983), or "rely on one of its own regulations to trump the plain meaning of a statute," *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002).

The FEC has elsewhere suggested that, absent a facial challenge to the regulation itself, application of the regulation to dismiss an administrative complaint cannot be challenged under 52 U.S.C. § 30109(a)(8)(A) as contrary to FECA. FEC

Stay Mot. 8, ECF No. 73. It appears to have abandoned this argument—for good reason, because it is black letter law that the FEC cannot interpret its regulations in a manner contrary to the Act. *Orloski*, 795 F.2d at 165. And plaintiffs had no cause to challenge the relevant regulations on their face. *See* 11 C.F.R. §§ 100.26, 109.20, 109.21. Their quarrel was not with the regulatory internet exemption itself, but its capacious application here to encompass virtually every expenditure made by a super PAC openly coordinating with a federal candidate, even expenditures without any nexus to an exempt internet communication.

The FEC's argument is also absurd in this case because there is effectively no regulatory "text" to interpret. *See* 11 C.F.R. § 100.26 (defining public communications to exclude "communications over the Internet, except for communications placed for a fee on another person's Web site"). The regulation is silent as to whether or to what extent a committee's general expenses can be exempted as "input costs" for unpaid internet communications, as the FEC's General Counsel has acknowledged, *see infra* Part III.B.2. And the FEC does not contend that the regulatory text in fact "compel[led]" the controlling Commissioners' wholesale exemption of Correct the Record's spending. FEC Br. 34.

This untenable approach is echoed by the FEC's amicus curiae, whose brief is principally devoted to a revisionist history of the Commission's 2006 rulemaking and subsequent application of the coordination regulations promulgated therein. *See*

Goodman Br. 4-13 (Doc. #2001488). Even if this account were accurate—and it is not—it has no bearing on whether the FEC action challenged here comported with the text and purpose of the *Act*. Like the Commission, its amicus scarcely mentions FECA, and appears to imagine the FEC can create policy independently of its authorizing statute. But one former Commissioner's opinion that the 2006 rulemaking reflected a "thoughtful" and "careful" deregulatory approach to the internet, Goodman Br. 12, does not controvert the unlawfulness of the dismissal here: it is the statute that guides and constrains FEC action, not the Commissioners' ideological preferences.

B. The dismissal was based on impermissible interpretations of the Act.

As the district court properly found, the controlling Commissioners' application of the internet exemption to shield the substantial majority of Correct the Record's spending from regulation was "contrary to law" in two principal respects: (1) it defied FECA's unambiguous mandate to regulate all "expenditures" made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate as in-kind contributions to that candidate, 52 U.S.C. § 30116(a)(7)(B)(i); and (2) it depended on a radically expanded interpretation of the internet exemption that is unsustainable even under the FEC's own rules and precedents.

1. FECA's text is unambiguous and confirms Congress's intent to regulate the coordinated expenditures here as in-kind contributions.

The Act prescribes that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i). Congress has thus "always treated expenditures made 'at the request or suggestion of' a candidate" as contributions rather than expenditures, to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (per curiam).

The controlling Commissioners ignored this unambiguous directive and expanded the internet exemption to allow a super PAC's spending "to be completely unregulated irrespective of the level of coordination." *Shays I*, 337 F. Supp. 2d at 70. As the General Counsel found, Correct the Record's more than $9 million in expenditures mostly paid for "payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, . . . equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." JA189. The Commissioners nevertheless exempted *all* of these expenditures from regulation on the pretext that they indirectly—or even just theoretically—supported exempt internet communications.

As the district court noted, the controlling Commissioners "all but conced[ed]" the extreme effect of this "bright line." JA99. Under their reading, the

internet exemption not only exempts internet communications, but also encompasses all conceivable expenses "incurred by a speaker to produce [exempt] internet communication[s]," JA278, including, *at a minimum*, "staff time, computer usage, and electricity," and also "travel and the services of consultants, graphic designers, videographers, actors, and other specialists." JA279. And fatally, these Commissioners also refused to allocate Correct the Record's general-purpose overhead between its exempt and non-exempt activities, even as they conceded that such overhead had no direct nexus to internet activity and would necessarily also support its offline activities such as press outreach, tracking, and surrogate training. JA279.

As the district court held, this unbounded interpretation of the internet exemption "contravenes FECA's plain language," JA99, which defines "expenditures" to include "anything of value," 52 U.S.C. § 30101(9)(A)(i), and treats any "expenditure" made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," without exception, as a regulable coordinated expenditure, *id.* § 30116(a)(7)(B)(i). Were this not so, the court recognized, "political committees could avoid reporting (and therefore limiting) almost any coordinated expenditure merely by posting a message on Facebook that purports to rely on that expenditure as an 'input cost' to the post." JA99.

The district court also held that the Commissioners' approach undermined the purpose of the Act, creating a "loophole in the internet exemption through which a truck could drive." JA98. Indeed, as massive as this coordination scheme was, it is but the tip of the iceberg of potential abuses that the controlling opinion would allow. And unlike Correct the Record, the average group intent on skirting the Act's requirements is unlikely to organize as a federal political committee and publicly trumpet its coordination with candidates, compounding the risk that future abuses will escape both detection and regulation.

The FEC makes no real attempt to reconcile the controlling Commissioners' position with the Act, stating only as an aside that FECA's coordination provisions do not address whether "internet communications and the costs to create them" should be exempt. FEC Br. 40. But the Act does make this clear: *no expenditure is exempt*. If the internet exemption comports with the Act, it is only insofar as it exempts unpaid internet activities that arguably would not constitute "expenditures" because they do not entail the "payment" or "purchase" of "anything of value" to influence federal elections. 52 U.S.C. § 30101(9)(A)(i). But FECA provides, without exception, that all "expenditures made by any person in cooperation, consultation, or concert" with a candidate "shall be considered to be a *contribution*." *Id.* § 30116(a)(7)(B)(i) (emphasis added).

Finally, the Commission ignores the admonishment in *Shays I* that an expansive exemption of internet activity from the Act's coordination provisions was contrary to "the plain terms of the statute" and would "severely undermine[] FECA's purposes," 337 F. Supp. 2d at 69-70. The Commission attempts to contort the *Shays* litigation to stand for the opposite proposition—that not "all Internet communications" should "fall within" the definition of public communication. FEC Br. 31-32 (quoting *Shays I*, 337 F. Supp. 2d at 67). But as this Court explained in *Shays II*, in discussing the FEC's coordination regulations, the Commission's only statutory authority to delineate the regulation of coordinated spending lay in determining what spending was an "expenditure" in the first place. *See* 414 F.3d at 99; *see also* 52 U.S.C. § 30101(9)(A)(i) (defining "expenditures" as "payments" made "for the purpose of influencing any election for Federal office"). In construing "the expenditure definition's purposive language," the FEC might permissibly employ some content standard to clarify when spending is "undertaken 'for the purpose of influencing' a federal election." *Shays II*, 414 F.3d at 99. Otherwise, however, it "lacks discretion to exclude [communications intended to influence federal elections] from its coordinated communication rule." *Shays v. FEC*, 528 F.3d 914, 927 (D.C. Cir. 2008) ("*Shays III*") (alteration in original) (citing *Shays II*, 414 F.3d at 99).

The controlling Commissioners flouted this directive. They did not purport to interpret "expenditure" to protect spending unconnected to electoral campaigns from regulation—they exempted broad categories of spending indisputably "for the purpose of influencing" a federal election. Correct the Record is a registered political committee whose activities are "assumed to fall within the core area sought to be addressed by Congress," *Buckley*, 424 U.S. at 79, and the super PAC itself conceded that its "costs constitute 'expenditures,'" Mem. Supp. Def.-Intervenors' Cross-Mot. for Summ. J. 26, ECF No. 38-1. Thus, as the district court recognized, the controlling Commissioners engaged in precisely the unlawful action that *Shays* proscribed: they excluded spending that indisputably constituted "expenditures" from regulation as coordinated spending. *See* JA99. Indeed, given that the Commissioners exempted not only internet-related expenditures, but nearly every other category of Correct the Record's spending, their application of the "internet exemption" was even more extreme than the rule invalidated by *Shays I*.

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

Rather than justify the controlling rationale under FECA, the Commission principally argues that it was consistent with the "text" of relevant regulations, FEC Br. 39, the "expressed purposes" of the rulemaking, *id*. at 35, and past FEC guidance applying these regulations, *id*. at 37-38. As discussed above, this attempt to defend agency action only with respect to FEC regulations and internal precedent—

independent of its governing statute—is inherently unlawful. "Even an agency's consistent and longstanding interpretation, if contrary to statute, can be overruled." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 349 (D.C. Cir. 2019). And this defense fails regardless. As the FEC's own General Counsel found, characterizing "most of Correct the Record's activity as communications is inconsistent with . . . the Commission's approach to coordinated expenditures." JA248. The district court appropriately drew the same conclusion: "the controlling Commissioners' anything-goes approach is inconsistent with Commission precedent." JA100.

First, although the FEC faults the district court for supposedly failing to consider the "regulatory text" of 11 C.F.R. §100.26, *see* FEC Br. 35, this short regulation in no way suggests that any "input costs" for internet communications—much less the full range of super PAC disbursements the Commissioners jam under that label—should be exempt.

Second, the 2006 rulemaking did not purport to exempt political committee expenses that only tangentially or notionally support internet posts. Insofar as the rulemaking addressed the concept of "inputs" at all, it was to suggest that expenses indirectly supporting unpaid internet communications are *not* exempt. *See, e.g.*, 71 Fed. Reg. at 18606 (confirming that "a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election remains an 'expenditure' by the political committee" even if the

internet activities conducted on that computer were exempt). Thus, even if the costs of "placing poll results on Correct the Record's own website" is exempt, its "payment for the underlying polling" is not. JA101 (quoting JA91).

Lacking any agency authorities to challenge this understanding, the FEC asserts that *CLC's comments* in the 2006 rulemaking somehow "anticipated" that the resulting rule would be applied to exempt the vast range of expenditures here as inputs for internet communications. FEC Br. 36. While CLC appreciates being credited with such exceptional foresight, its comments made no such suggestion; they merely noted that the proposed rules were silent regarding the "direct production costs" of exempt communications, and cautioned that an unduly permissive approach risked reopening "precisely the kind of loophole that the court in *Shays* indicated should not be permitted." Comment on Notice 2005-10 (Internet Communications) by Democracy 21, CLC, and Center for Responsive Politics at 12 n.10 (June 3, 2005), https://sers.fec.gov/fosers/%20showpdf.htm?docid=36918. But this case does not involve the "direct production costs" of internet communications—and even as to that narrower category, the rulemaking was largely silent. *See* First Gen. Counsel's Report at 5-6, MUR 6729 (Checks and Balances) (Aug. 6, 2014), https://www.fec.gov/files/legal/murs/6729/14044363781.pdf (noting that neither the rule nor its explanation "expressly address whether the

regulation also exempts production costs that are incurred unrelated to the advertisement's dissemination over the internet").

Third, the Commissioners' sweeping deregulation of a political committee's coordinated expenditures has no basis in agency precedent. The FEC rustles up only a handful of past decisions to support the controlling Comissioners, and two do not even involve coordinated activity. *See, e.g.*, Advisory Op. 2008-10 (VoterVoter.com) (permitting nonpartisan commercial vendor to operate online marketplace facilitating the purchase and sale of political ads, where unpaid ad creators and broadcast buyers were transacting at arm's length and not coordinating with candidates or each other); Factual & Legal Analysis 12, MUR 6414 (Russ Carnahan) (July 17, 2012) (involving a candidate that *disapproved* of a third party's independently created website attacking his opponent).

Of the matters the FEC cites that actually involved coordinated internet-related communications, all considered only the direct production costs of such communications, not the unbounded range of committee disbursements the Commission attempts subsume under the label "inputs" here. *See* FEC Br. 37-38. And one was so inapposite, MUR 6657 (Akin for Senate), that both plaintiffs and the district court raised it to *support* a contrary-to-law finding. *See* JA102; Pls' 2d Mot. Summ. J. 17-18, ECF No. 62. That the FEC must analogize Correct the Record's entire range of organizational expenditures to cases involving, *e.g.*, a

single, uncoordinated $5,792.12 expenditure, MUR 6477 (Turn Right USA), or discrete payments for "online processing" fees, MUR 6657 (Akin for Senate), emphasizes exactly how unsupported its arguments are.

Finally, the FEC completely fails to address the exemption of Correct the Record's general overhead expenses, likely one of the largest category of committee expenditures. However capaciously the FEC attempts to conceive of "input costs," there is no FEC precedent suggesting that overhead for rent, office supplies and equipment, and general payroll is an "input" for an internet communication. Indeed, the controlling Commissioners did not even make this claim. They simply refused to allocate overhead costs across online and offline coordinated spending, asserting, without explanation, "that "[r]equiring speakers to further allocate overhead expenses across internet communications (or other activities)" would "eviscerate the internet exemption" and "chill speech." JA279. The Commission here barely acknowledges this finding and musters no defense of it.

C. The district court did not err in finding that the Commissioners arbitrarily disregarded record evidence of coordination as to non-exempt, offline activities.

In addition to online activities such as social media posting and operating its own website, Correct the Record engaged in numerous offline activities on Clinton's behalf, including media relations, campaign surrogate training, and opposition research and tracking. JA279. The controlling Commissioners acknowledged this,

conceding that Correct the Record engaged in activities that "do not relate directly to internet communications." JA280.

What they disputed was whether there was "reason to believe" these offline activities were "coordinated" under FECA. But in the administrative proceedings, as the district court highlighted, the "General Counsel documented substantial evidence . . . of systematic coordination" with respect to these activities. JA103. Perhaps most significantly, the controlling Commissioners also disregarded that respondents did not deny that they engaged in systematic coordination—with respect to either exempt or non-exempt activities. JA114-15, 157, 190.

The district court therefore concluded that the controlling Commissioners' conclusion with respect to Correct the Record's *offline* activities depended on "largely (and unreasonably) ignor[ing]" the evidence of respondents' systematic coordination, as well as Correct the Record's repeated public statements that it existed for the singular purpose of promoting Clinton's election. JA103. The court then summarized the record evidence that the Commissioners categorically disregarded, including: leaked internal campaign memos (one described the super PAC's structure as allowing it to "coordinate directly and strategically with the Hillary campaign"); multiple public statements and releases by Correct the Record itself averring that it was "allowed to coordinate with campaigns"; and interviews in which its founder characterized Correct the Record as "a surrogate arm of the

campaign" that "obeyed" its direction. *Id.* The court finally noted that the Commissioners' "blinkered view" of the record was "all the more arbitrary" given that it occurred at the threshold reason-to-believe stage of enforcement, where the standard for initiating an investigation is relatively "low" and does not require "conclusive evidence." *Id.*

The FEC asserts that this painstaking analysis was insufficiently deferential. But the district court undertook the deferential review contemplated in *Orloski*, 795 F.2d at 161, and *State Farm*, 463 U.S. at 43, for arbitrary and unreasonable agency decision-making, and the FEC does not dispute that these cases supply the correct standard. In fact, it does not pinpoint any defect in the lower court's analysis whatsoever—except, of course, for the court's ultimate conclusion.

And in its futile attempt to challenge that conclusion, the FEC itself commits error, revealing its unfamiliarity with the record in this case. For instance, the FEC charges the district court with failing to assess whether the Commissioners rested their decision on a finding that Correct the Record's offline "expenses may have been reimbursed" by the campaign. FEC Br. 42. But the Commissioners drew no such conclusion, and it is a "foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (citation and internal quotation marks omitted). Regardless, the

two payments to which the FEC refers—a May 27, 2015 payment of $275,615 for "research" and a July 17, 2015 payment of $6,346 for "research services," JA224 n.59—did not purport to cover anything beyond research expenses, which represented only a fraction of Correct the Record's offline activities. Nor could these payments even *theoretically* account for respondents' coordinated activity during the fifteen months of the election cycle that postdated them. The Commissioners did not—and could not—hold that these payments obviated a coordination finding with respect to Correct the Record's offline activities.

The FEC next asserts that the occasional appearance of "if-then" statements in plaintiffs' administrative complaint indicates that its factual allegations were speculative. FEC Br. 42 (citing JA102). But the relevance of the complaint's passing use of the conditional tense to the adequacy of the overall factual record generated by CLC, four other complainants, respondents, and the General Counsel is left unexplained—by both the controlling Commissioners and the FEC here. This resort to syntactical game-playing underscores that the Commissioners had no reasonable explanations to offer.

The FEC also posits that the refusal to find coordination was reasonable as to Correct the Record's surrogate training program because the Commissioners grounded this decision on a single news article and a "denial" by respondents. FEC Br. 42-43. In fact, rather than a denial, Correct the Record offered a carefully worded

statement that is entirely consistent with the conclusion that it initiated these training sessions at the campaign's request. JA168 (stating only that the trainings "did not include any official Clinton campaign surrogates" or "permit [the campaign] to direct individuals to the sessions"). The FEC's own General Counsel found that this denial was contrary to "available information" showing the campaign attempted to "make sure" the super PAC's surrogates "met our needs/requests." JA202. The district court was correct to question the Commissioners' selective review of the record on this point.

All of these arguments, however defective on their own terms, also reveal the larger defect in the controlling Commissioners' "nitpicked" analysis, JA105. The Commissioners—and the FEC here—strain to highlight one or two documents in the record they claim are inconclusive while disregarding the voluminous, uncontested record that respondents "systematically coordinated." JA220, 241. They likewise simply ignore huge areas of Correct the Record's offline operation—in particular, its press outreach, reporter contacts, and "rapid response" media efforts—which it did not deny coordinating, but instead defended on the indisputably erroneous grounds that it qualified for the media exemption. As both the General Counsel and the district court recognized, "the media exemption . . . is for the media," and any defense made in reliance on it would be a "seemingly clear . . . violation" of FECA. *CLC I*, 466 F. Supp. 3d at 160; *see also* JA203 n.78.

This willfully blinkered approach to the record reaches its nadir when the FEC insists that the controlling Commissioners were reasonable in faulting complainants for not providing "transaction by transaction" evidence of coordination. While an enforcement action may ultimately necessitate such an inquiry to determine the scale of the FECA violation, it does not follow that an administrative complaint must specify hundreds of committee expenditures to adequately show that some of them were coordinated. The error in this approach is plain on its face.

CONCLUSION

This appeal should be dismissed, or alternatively, the district court's decision should be affirmed.

Dated: June 23, 2023

Respectfully submitted,

/s/ Tara Malloy
Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
Megan P. McAllen (DC Bar No. 1020509)
Alexandra Copper*
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005
(202) 736-2200

Attorneys for Plaintiffs-Appellees

** Not a member of the D.C. Bar; practicing before the federal courts pursuant to D.C. App. Rule 49(c)(3)*

CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Tara Malloy
Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, I electronically filed this motion with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Tara Malloy
Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005