IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS

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

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the FEC's dismissal of the administrative complaint filed by plaintiffs Campaign Legal Center and Catherine Hinckley Kelley (collectively, "CLC"), alleging that the super PAC Correct the Record ("CTR") coordinated millions of dollars in expenditures with Hillary for America ("HFA") for "opposition research, message development, surrogate training and booking, professional video production, and press outreach for the benefit of the [2016] Clinton campaign," AR003 ¶ 5—some small portion of which took the form of internet communications exempt from the FEC's regulatory coordination regime.

Defendant-Intervenors CTR and HFA ("CTR" or intervenors) devote the beginning of their summary judgment brief to a facsimile of their previous challenge to plaintiffs' standing. *See* Def.-Intervenors' MSJ & Opp'n at 6-16 (ECF No. 38-1) ("Int. MSJ"). Their reprised arguments are no more successful at this stage: "CLC has proven its standing." ECF No. 33 at 17.

Turning to the merits, intervenors primarily defend the controlling Commissioners' rationale for dismissal by arguing that the "direct production costs," "creation costs associated with production elements," and "production and dissemination" costs of exempt internet communications must also be exempted as "input costs" for such communications under the coordination rules. *See* Int. MSJ at 28, 29, 31.

These arguments entirely miss the point.

This case does not concern the "direct production costs" of CTR's internet communications. CLC's administrative complaint did not allege that CTR and HFA violated the Federal Election Campaign Act ("FECA" or "the Act") merely because CTR failed to account for its payments for the production and dissemination of coordinated internet communications, such as the costs of graphic design or website maintenance that directly and exclusively supported

exempt communications. Nor did the FEC's Office of General Counsel ("OGC") raise direct production costs in recommending a reason-to-believe finding.

Instead, the case turns on intervenors' attempt to label millions of dollars of expenditures as exempt "input costs" for internet communications, even though these expenditures *did not* represent the "direct production costs" of unpaid internet communications, and often had no nexus to internet communications at all. Indeed, most of CTR's reported disbursements did not even relate to "communications," but went toward general overhead expenses like "payroll, salary, travel, lodging, meals, rent, fundraising consulting, [and] computers" or "equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." AR089.

More precisely, CLC argues that at least three categories of CTR's expenditures were not "exempt" from the FEC's coordination rules, 11 C.F.R. §§ 100.26, 100.20 and 109.21:

> (1) Expenditures only indirectly connected to any eventual internet post, such as payments to commission a poll or fund opposition research, or that also supported, in whole or part, CTR's offline activities.
>
> (2) Expenditures for CTR's activities that, by its own admission, were not connected to any exempt internet communications, including for surrogate training, campaign tracking, and rapid response media efforts.
>
> (3) Expenditures for overhead, such as travel, rent, salaries, equipment and office maintenance—or at a minimum, such expenses after they were allocated between the exempt internet communications and non-exempt activities they supported.

Any construction of the Act or FEC regulations that would permit treating *these* expenditures as categorically exempt from the coordination rules directly contravenes FECA's mandate to treat any "expenditure" made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" as a "contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i).

And, as OGC concluded, the majority of CTR's spending fell into these categories, AR088-90. But instead of addressing this issue, intervenors resort to an alternative history of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and the two coordination rulemakings that followed its

enactment, claiming that this history, alongside "fifty years of agency experience and decisions," Int. MSJ at 21-22, supports the notion that the "direct production costs" for exempt communications are exempt from the coordination rules as well.

CTR's legislative and regulatory "history" is both irrelevant and demonstrably false. The narrative first runs aground because, again, CTR is fixated on "direct production costs"—and a footnote referencing them in public comments filed by CLC in the FEC's 2006 internet rulemaking, *see* Democracy 21, CLC & Ctr. for Responsive Politics Comments on Notice 2005-10: Internet Communications (June 3, 2005), https://sers.fec.gov/fosers/showpdf.htm?docid=36918 (attached hereto as Ex. A). But this case centers on expenditures that are *not* "direct production costs" or related to exempt communications at all. Moreover, even if CTR's false historical narrative could be credited, it would still fail to explain how the controlling Commissioners' construction of the regulations, which opens a massive loophole unmoored from the statutory text, comports with FECA's mandate to regulate coordinated expenditures as in-kind contributions. Without question, it does not.

Even when CTR finally turns, after 30-some pages of extraneous discussion, to the actual arguments made in CLC's administrative complaint, it fares no better. Midway through its brief, for example, CTR finally attempts to argue that general overhead expenses should also be exempt as "inputs" for internet communications, Int. MSJ at 20-22, but cites in support only FEC materials emerging from non-precedential tie votes or far removed from the facts in this case. It does not bother to address why such overhead expenses, even if some portions could be deemed "exempt," would not need to be allocated across CTR's exempt and non-exempt activities to comply with FECA—except to argue generally that anything but a bright-line, wholesale exemption for whatever CTR deems an "input cost" would be "complicated" and thus offend its constitutional

rights. *Id.* at 35.

Nor do intervenors have a justification for the controlling Commissioners' treatment of expenditures that had no nexus to internet communications, such as campaign surrogate trainings and public relations efforts to place op-eds or contact reporters. With respect to these non-communication-related activities, the controlling group claimed the evidence of coordination was insufficient to find reason to believe. But arriving at that conclusion required the Commissioners to arbitrarily exclude huge swaths of the record—and, most glaringly, to ignore that CTR and HFA never denied coordinating these activities, but instead claimed a regulatory "media" exemption that clearly did not apply and that the controlling Statement of Reasons ("SOR") left unaddressed.

Finally, plaintiffs are entitled to summary judgment on their claim under the Administrative Procedure Act ("APA") insofar as the controlling Commissioners' interpretation of these rules in their SOR is deemed authoritative, as intervenors insist it must be. AR391-93; Int. MSJ at 21. Thus construed, the regulations are in direct conflict with FECA's mandate to regulate coordinated expenditures as in-kind contributions, and plaintiffs seek a judgment ordering the FEC to apply its coordination regulations in a manner consistent with FECA, not only in this case, but in all future matters. This is not a remedy that FECA alone necessarily provides.

ARGUMENT

I. Plaintiffs Have Standing.

After "div[ing] into the record," reviewing exhibits and declarations, and weighing more than fifty-five pages of briefing on the issue, this Court determined four months ago what plainly remains true today: "CLC has proven its standing in this case." ECF No. 33 at 17.

In denying intervenors' motion to dismiss, the Court held that both plaintiffs suffered informational injury because their suit would reveal "new information" to which they are entitled

under FECA and it was "clear" that the information would help them. *Id.* at 6. The Court also held that CLC suffered organizational injury because the dismissal injured CLC's interests and CLC "used its resources to counteract that harm." *Id.* at 14.

Intervenors now seek a second bite at the apple, rehashing the exact same legal arguments but hoping for a different outcome due to what they characterize as CLC's "heightened burden" at summary judgment. Int. MSJ at 6-7. To be sure, a plaintiff's standing at summary judgment cannot rely on "mere allegations" and "must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken as true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up). But plaintiffs' case for standing has *never* rested on mere allegations. Even at the dismissal stage, plaintiffs supported their claims with "specific facts" from the administrative record, declarations, and other documentary evidence to prove each standing element. *See id.*; Pls.' Opp'n to Mot. to Dismiss (ECF No. 27) ("MTD Opp'n"). This evidence is sufficient to prove plaintiffs' standing at summary judgment. Indeed, these were precisely the circumstances in *CLC v. FEC*, 952 F.3d 352, 355-56 (D.C. Cir. 2020), where the D.C. Circuit rejected a renewed challenge to CLC's informational standing on appeal from summary judgment based entirely on evidence presented in CLC's opposition to dismissal. *See* ECF No. 33 at 7.

Intervenors, for their part, do not dispute any material facts. Their challenge instead focuses on whether plaintiffs have presented sufficient evidence to support their standing as a matter of law. As this Court has already found, plaintiffs clearly carry this burden.

Intervenors separately challenge plaintiffs' standing to bring their APA claim, Int. MSJ at 16, but implicitly acknowledge that it rests on the same theories of standing as the FECA claim. Because both plaintiffs have informational standing, and CLC has organizational standing, to bring their FECA claim, they also have standing under the APA. *See* ECF No. 33 at 6.

A. Plaintiffs Have Proven Informational Injury.

1. Plaintiffs have been deprived of unknown factual information that must be disclosed under FECA—not merely a legal determination.

As plaintiffs have already shown, the FEC's dismissal deprives them of important "information which must be publicly disclosed pursuant to a statute," *FEC v. Akins*, 524 U.S. 11, 21 (1998): complete, itemized disclosure by both CTR and HFA of each in-kind contribution made by CTR to HFA in the form of coordinated expenditures, including the amount, date, source, and purpose of each disbursement.

Intervenors do not deny that this information must be disclosed publicly under FECA; instead they resurrect the same arguments this Court rejected at the motion to dismiss stage. First, they claim that the information plaintiffs seek—"the amounts and purposes of all in-kind contributions made by CTR to HFA"—amounts to a "legal determination that is insufficient for proving an informational injury." Int. MSJ at 7. Not so. The amounts and purposes of in-kind contributions are precisely the kinds of *factual* information that FECA demands from political committees, as this Court has confirmed. *See* ECF No. 33 at 2 (citing relevant FECA provisions). This information goes to the core aims of FECA's disclosure provisions: providing "the electorate with information 'as to where political campaign money comes from'" and preventing actual or perceived corruption by making transparent the amount of money candidates receive and spend. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

Next, intervenors repeat their claim that plaintiffs "already know or claim to know" the date, source, amount, and purpose of each of CTR's expenditures, including for all coordinated expenditures with HFA. Int. MSJ at 9. And they contend again that plaintiffs are suing only to change the "classification" of certain disbursements from mere expenditures to in-kind contributions by having them moved from one line in FEC reports to another. *Id.* at 11. But neither

claim is true. CTR's 2016 reports disclosed its disbursements only in general terms (*e.g.*, "salary" or "travel") and failed to itemize expenditures as required by FECA to enable a determination of which disbursements, in whole or part, were made in coordination with HFA as in-kind contributions and which were made for non-coordinated or exempt activities. In rejecting these arguments at the dismissal stage, this Court recognized that "without itemized disclosures, CLC has *no* information as to the actual amount of money that, in its view, should have been considered a contribution or expenditure under the Act." ECF No. 33 at 6 (emphasis added).

As the Court noted, it would be impossible to derive this new factual information from CTR's existing non-itemized reports, *id.*, no matter how many disbursements CTR "re-classified" or "mov[ed] . . . from one line to another," Int. MSJ at 10. Moreover, the likelihood that some unknown *portion* of CTR's expenditures were coordinated in-kind contributions is not "inconsistent with [plaintiffs'] view of the law," *id.*, which has remained constant throughout this litigation. *See infra* Part II; MTD Opp'n at 16-20; Pls.' MSJ at 26-27 (ECF No. 35).

At the dismissal stage, intervenors failed to cite a single case suggesting that concealing up to $9 million of in-kind contributions does not inflict informational injury. *See* MTD Opp'n at 20-23. The decision in *Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020), does not suggest otherwise. The plaintiffs there failed to prove informational injury because they already knew the source, amount, purpose, and date of the *single* high-profile contribution that formed the basis of their FEC complaint. The details of the transaction in question, including the fact of coordination, had also been confirmed by the Department of Justice's court filings and admission of the respondents. *Id.* at 340. Similarly, in *CREW v. FEC*, 799 F. Supp. 2d 78, 88 (D.D.C. 2011), plaintiffs lacked informational standing to challenge the FEC's failure to take enforcement action regarding an in-kind contribution in the form of a $10,243 travel expense.

Plaintiffs had all of the information they sought because the FEC had conducted a full investigation of the factual circumstances of the expense. Here, by contrast, plaintiffs are without the benefit of any FEC investigation and remain entirely in the dark about how much and what portions of a super PAC's 3,516 disbursements in 2015-16 were in-kind contributions to a major presidential campaign. "This new information will remain unavailable to plaintiffs (at least via FECA disclosure) without a favorable ruling in this case." ECF No. 33 at 6.

2. There is no reason to doubt the information would help plaintiffs.

Plaintiffs have also proven the second element of the informational injury test, which is that the undisclosed information "would help them." *Id.* (citing *CLC*, 952 F.3d at 356). The Supreme Court has held that an informational injury under FECA is "concrete and particular" when plaintiffs are deprived of "information that would help them (and others to whom they would communicate it) to evaluate candidates for public office," even though many others may share the same informational injury. *Akins*, 524 U.S. at 21.

Plaintiff Kelley has established such a concrete and particularized informational injury: she is a U.S. citizen and registered voter who cannot access information that would help her participate in the political process. Decl. of Catherine Hinckley Kelley ¶¶ 1, 8 (ECF No. 27-1). *Akins* does not require a plaintiff to determine precisely and then divulge how the relevant information factored into her private meditations in the secrecy of the voting booth. Yet this is what intervenors demand, without offering any reason to doubt that the information plaintiff Kelley seeks "is related to [her] informed participation in the political process." *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013). And even if such introspection were required, plaintiff Kelley has explained that she would use information missing from CTR's and HFA's disclosure reports to evaluate the role that CTR's funders could play in the 2020 and future elections. Kelley Decl. ¶ 7.

With respect to CLC, intervenors appear to conflate informational standing with organizational standing, which are distinct inquiries. *See Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016). To the extent intervenors challenge CLC's claim to informational standing at all, they do not deny that the missing disclosures would help CLC "carry out programmatic activities that are central to its mission," including analyzing FEC disclosure reports and communicating its research to voters. Decl. of Brendan Fischer ¶¶ 9, 14-17 (ECF No. 27-2). Indeed, the D.C. Circuit recently confirmed that CLC had informational standing based on the same activities and uses of FECA information described here. *See CLC*, 952 F.3d at 356 ("There is 'no reason to doubt' that the disclosures [CLC] seek[s] would further [its] efforts to defend and implement campaign finance reform."). On the evidence presented, plaintiffs have met their burden to prove informational standing at summary judgment.

B. Plaintiff CLC Has Proven Organizational Injury.

CLC has also proven both prongs of the test for organizational injury: first, that the FEC's dismissal "injured [CLC's] interest," and second, that CLC "used resources to counteract that harm." ECF No. 33 at 14 (citing *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)).

To demonstrate an injury to this interest, an organizational plaintiff must show "that discrete programmatic concerns are being directly and adversely affected by the defendant's actions." *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987). The declaration submitted by CLC's Director of Federal Reform describes in detail precisely the injury caused by incomplete FEC disclosures to each of its four programmatic activities: public education, Fischer Decl. ¶¶ 11-21; legislative policy, *id.* ¶¶ 22-28; regulatory practice, *id.* ¶¶ 29-32; and litigation, *id.* ¶¶ 33-37. Most crucially, complete and accurate reports are essential for CLC's efforts to analyze FEC reports and inform voters about campaign spending and the true sources and nature of candidates'

support. *Id.* ¶ 9; *see PETA*, 797 F.3d at 1094-95 (finding injury to organizational interests where an agency deprived an organization of information necessary to conduct public education efforts). Incomplete reporting also directly hinders CLC's ability effectively engage in rulemaking proceedings, and produce regulatory comments, amicus briefs, and legislative testimony because all of these activities depend on CLC's ability to analyze complete and accurate FEC disclosure reports. *See* Fischer Decl. ¶¶ 27-28, 32, 36.

CLC also has demonstrated that it "used resources to counteract the harm." *PETA*, 797 F.3d at 1094. In response to the FEC's failure to require disclosure in connection with CTR's and HFA's coordinated activity, CLC was required to "divert resources from other organizational needs"—including public education and campaign finance reform activities detailed above—to answer questions from reporters and allied groups about CTR's and HFA's incomplete disclosures. Fischer Decl. ¶ 20. These diversions are not, as intervenors suggest, "the reason CLC exists," Int. MSJ at 15-16. Responding to one-off media inquiries about incomplete disclosure reports is a distraction from activities that more directly advance CLC's mission, including public education about *complete and accurate* FECA disclosures, fact sheets, and other materials. *Id.* The FEC's actions in this case, in other words, caused CLC to divert resources from its routine, mission-furthering activities to attempt to remedy gaps in required FECA reporting.

Finally, the causation and redressability prongs of Article III standing have also been satisfied, as noted by this Court. ECF No. 33 at 6. Both plaintiffs' injuries were "caused by" the FEC's dismissal of their administrative complaint and the attendant failure to require proper disclosure from CTR and HFA, and their injuries are likely to be redressed by setting aside that dismissal and remanding the case to the FEC. *Id.* Plaintiffs have proven their standing.

II. The Dismissal Was Contrary To Law.

A. Appeals to agency deference do not excuse impermissible constructions of the Act or arbitrary and unreasoned decisionmaking.

Contrary to intervenors' assertions, principles of "agency deference" do not "demand[]" that FEC dismissals "survive challenge." Int. MSJ at 19. Dismissals based on impermissible interpretations of the Act or FEC regulations, or that are arbitrary and capricious, an abuse of discretion, or otherwise reflect unreasoned agency decisionmaking, are "contrary to law" under FECA, and should be set aside.

First, and without a trace of irony, intervenors invoke the FEC's "dominion" over campaign finance law, *id.* at 16, and suggest that the loophole opened by the controlling Commissioners is necessary to protect the agency's "institutional credibility" and avoid "partisanship" in enforcement decisions. *Id.* at 36. Meanwhile, they accuse CLC of attempting to substitute its own policy preferences for those of the expert agency tasked with implementing FECA. *E.g.*, *id.* at 19 ("[A]gency deference demands that such a rule survive challenge and that an interest group's judgment not be substituted for that of the Commissioners."). They even insinuate that plaintiffs—by bringing this action for judicial review—can "use the judiciary to force their view of the law." *Id.* at 36. That gives plaintiffs far too much credit, and this Court far too little.

In support of this gratuitous attack, intervenors concoct a revisionist "fifty year[]" history of coordination regulation and enforcement at the FEC, *id.* at 21, and suggest that asking this Court to review a dismissal based on these provisions amounts to usurping the FEC's exclusive authority to interpret and enforce the federal campaign finance laws. Plaintiffs, of course, claim no authority beyond that expressly provided by Congress: the right to file an administrative complaint alleging violations of the Act, and to seek judicial review when the FEC, in dismissing the complaint, acts "contrary to law." 52 U.S.C. § 30109(a)(8).

Intervenors' appeals to agency deference and expertise ring especially hollow given that they come not from the FEC's career litigation staff, but from partisan political operatives purporting to speak for the absent federal agency defendant, in a case where the Commissioners were so divided that they could not even muster the four votes needed to authorize defense of suit. CTR's newfound solicitude for the FEC's institutional integrity is implausible. And it wholly fails to explain how upholding an interpretation that allows for the wholesale evasion of the Act—an interpretation advanced only by a partisan minority bloc of FEC Commissioners—avoids the appearance that FEC "decisions are motivated by partisanship rather than fidelity to the law" or otherwise protects the FEC's "institutional credibility." Int. MSJ at 36.

In any event, no amount of deference can justify the dismissal here; "[e]ven under the most deferential standard, an agency cannot read statutory provisions out of existence." *BP Energy Co. v. FERC*, 828 F.3d 959, 968 (D.C. Cir. 2016).

B. The dismissal was based on interpretations of FECA and FEC regulations that were impermissible, arbitrary and capricious, and otherwise contrary to law.

1. FECA's text is unambiguous and makes clear Congress's intent to regulate the expenditures at issue here as in-kind contributions.

FECA unambiguously mandates that all "expenditures"—defined broadly as any "gift" or "payment" made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(9)(A)(i)—that are made "in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate "shall be considered to be a contribution to such candidate." *Id.* § 30116(a)(7)(B)(i). The Act defines "contributions" similarly, and specifies that they include "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose," *id.* § 30101(8)(A)(ii).

Intervenors attempt to manufacture confusion around these provisions, charging CLC with oversimplifying the law when it argues that "coordinated expenditures' constitute 'contributions'

under FECA." Int. MSJ at 20-21. But this is exactly what the Act says: "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." 52 U.S.C. § 30116(a)(7)(B)(i). This is not a "principle" open to debate, but an unambiguous statutory mandate.

Intervenors make no real effort to dispute this. Instead, they insist that applying FECA to any of their admittedly coordinated activities would raise "grave" interpretive and constitutional issues because the Act "does not speak clearly to specifically when an 'expenditure' is 'coordinated.'" Int. MSJ at 21.

First, the fact that Congress gave the FEC some modicum of discretion in implementing the Act's coordination provisions does not allow it to define those provisions out of existence.

Second, assuming *arguendo* that some cases might pose more difficult line-drawing problems, this is emphatically not such a case. CTR is a federal political committee with the avowed "sole mission" in 2015-16 of "help[ing] Mrs. Clinton," AR006 ¶ 11, and publicly touted its coordination with HFA, *see, e.g.*, AR005-07 ¶¶ 9-12; AR011-13 ¶¶ 24, 26-27; AR087-88, 91-92, 96. At least some of its "expenditures" plainly met the statutory definition of an in-kind contribution.

Perhaps for that reason, intervenors do not seriously attempt to justify their coordination scheme with respect to FECA itself; they acknowledge that CTR made "expenditures," and do not dispute that its "expenditures" were coordinated with HFA, at least according to any ordinary understanding of the statutory provisions governing "coordination." Instead, they rely on the FEC's coordination rules and internet exemption, and contend that anything short of the "bright-line rule" espoused by the controlling Commissioners here—a massive loophole that is manifestly at odds with FECA's purposes—offends the First Amendment.

2. The dismissal rested on a construction of the coordination rules that falls well outside the bounds of the FEC's interpretive discretion, frustrates the Act's purposes, and creates the potential for gross abuse.

Dismissing CLC's complaint required the controlling Commissioners to conclude that almost all of CTR's expenditures qualified for a regulatory exemption from the coordination rules—one with no textual grounding in FECA—because they constituted "input costs" for unpaid internet communications. Fatally, they arrived at that conclusion even with respect to payments that supported other activities unrelated to exempt internet communications. In so holding, they failed to apply the coordination rules as written or in a manner consonant with FECA's clear mandate to regulate and require disclosure of coordinated expenditures. Their interpretation of the "internet exemption" would instead "permit an entire class of political communications"—and non-communication expenditures—"to be completely unregulated irrespective of the level of coordination." *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004) ("*Shays I*"). An identical approach was already held contrary to FECA, *id.* at 69-70, and this Court should do the same.

First, because the internet exemption operates in an area where the Commission is already approaching the outer bounds of its arguable interpretive discretion, it must be construed narrowly. As the D.C. Circuit noted in both *Shays* decisions, the FEC has discretion to impose "content" standards in its coordination rules only by virtue of "the [statutory] expenditure definition's purposive language." *Shays v. FEC*, 414 F.3d 76, 99 (D.C. Cir. 2005) ("*Shays II*"). In construing that language, the FEC could permissibly employ *some* content standard to clarify when spending is "undertaken 'for the purpose of influencing' a federal election" (and thus qualifies as an "expenditure") while "leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign." *Id.* Otherwise, "the FEC 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).

But that is precisely what the controlling Commissioners did here. As construed in their SOR, the internet rules would exempt an entire class of campaign ads from regulation, even if they indisputably were "expenditures," 52 U.S.C. § 30101(9)(A)(i), within the meaning of the Act, and fully coordinated with a federal candidate—*i.e.*, even in the face of undisputed evidence that a third party paid for a wide range of valuable campaign services "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate "for the purpose of influencing" a federal election. And they went further still, extending the exemption to also cover general overhead expenditures supporting the full range of CTR's activities—exempt and non-exempt—and refusing to even require allocation of these mixed-purpose costs due to imagined "First Amendment" sensitivities.

FECA does not permit such an unbounded and arbitrary construction of the coordination rules and internet exemption.[1] Nor do the coordination rules and internet exemption actually mandate any particular approach to what intervenors term "input costs." Intervenors argue that the 2006 internet rulemaking and subsequent FEC precedent compelled the controlling Commissioners' treatment of "input costs"; however, their account of the rulemaking itself is pure fiction, *see infra* Part II.B.3.b, and to the extent the FEC "authorities" they cite even reflect binding agency precedent, they are readily distinguishable, *see infra* Part II.B.3.c. More importantly,

[1] Intervenors attempt to revive the novel theory raised in their administrative responses that federal campaign finance law does not regulate the coordination of certain activities they characterize as "communications," because this activity does not meet the definition of "public communication." AR064, 72. Left unexplained is why this activity, if coordinated, would escape regulation under FECA or 11 C.F.R. § 109.20, which by its terms regulates all coordinated expenditures except those for "coordinated communications under 11 C.F.R. § 109.21." Nor do they cite any statutory or regulatory definition of "communications" as they use the term, or otherwise delineate what they believe this new category of unregulable activities might include. In any event, the controlling Commissioners did not address—much less endorse—this argument.

administrative interpretations inconsistent with the governing statute "do not improve with age," *CREW v. FEC*, No. 18-5261, 2020 WL 4914080, at *12 (D.C. Cir. Aug. 21, 2020). "No amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009).

Whatever support there may be for the idea that the "*direct* production costs" for an internet communication qualify for the internet exemption, the difference between direct production expenses and the "input costs" at issue here "is one of kind and not of degree." ECF No. 33 at 22. Intervenors attempt throughout their summary judgment brief to conflate these two distinct questions: (1) whether or to what extent FECA or FEC authorities permit exempting the "direct production costs" of internet communications from the coordination regime if the ultimate communications are exempt; and (2) whether the concept of exempt "input costs" can feasibly extend to CTR's expenditures here—which went far beyond "direct production costs" and instead involved extensive, undifferentiated payments for overhead or activities unconnected to or at best indirectly connected to internet communications.

As the record confirms, the "input costs" at issue here were not "direct production costs" for communications at all, "unless that term covers almost every conceivable political activity." AR100. CTR's disquisition on the FEC's historic treatment of "direct production costs" is a diversion: the case against CTR does not rest on any finding that *direct production* costs for internet communications are non-exempt. FECA does not permit the FEC to apply its regulations in a manner that so blatantly nullifies Congress's objectives.

CTR's preoccupation with *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)—not for its articulation of the standard of review, but for its outcome, *see id.* at 28-29, 46—thus "ignores the crucial differences separating *Orloski* from this case." *Shays III*, 528 F.3d at 927. As the D.C.

Circuit noted, there are "crucial differences" between the FEC interpretation at issue in *Orloski*, which allowed "little more than insignificant, indirect donations to a candidate's political warchest" and thus did "not 'create the potential for gross abuse,'" and a rule allowing massive coordinated expenditures. *Id.* (quoting *Orloski*, 795 F.2d at 165). The controlling Commissioners' interpretation of the internet rules plainly falls into the latter camp: it "create[s] the potential for gross abuse" by inviting "attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. And the concern is not illusory: as recognized in *Shays II*, "if regulatory safe harbors permit what [FECA] bans . . . savvy campaign operators will exploit them to the hilt, reopening the very [] floodgates [FECA] aimed to close." 414 F.3d at 115. That is precisely what CTR attempted to do here.

3. Intervenors' contrived history of the coordination rules and internet exemption cannot justify an administrative interpretation manifestly at odds with FECA.

Intervenors make no attempt to anchor their interpretation of the internet exemption in the statutory text. Instead, they advance an alternative history of the FEC's regulation of coordinated spending that is as irrelevant as it is untrue, positing that the FEC has carte blanche to "create its own standards" in defining when an expenditure is "coordinated" based on the authority of BCRA, *Shays I*, and "fifty years of agency experience and decisions." Int. MSJ at 21-22.

First, intervenors suggest that BCRA empowered the controlling Commissioners' construction of the internet exemption because Congress "specifically required the FEC to write regulations providing when a communication is 'coordinated.'" *Id.* at 31 (citing BCRA, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002)). This is grossly misleading. Congress did direct the FEC to promulgate new coordination regulations in 2002—but it did so because the prior regulations "set too high a bar" in terms of the *conduct* that would constitute "coordination" under the Act. *Shays I*, 337 F. Supp. 2d at 64 (quoting 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002)

(statement of Sen. Feingold)). This directive was thus intended to overturn the very "de-regulatory approach," Int. MSJ at 18, that intervenors now champion.

Similarly, according to the controlling Commissioners' revisionist account of the 2006 internet rulemaking, the FEC did not just "exclude[] the vast majority of internet communications from regulation as 'public communications,'" AR388; it also carved out all "input costs" that may support, even if only tangentially, eventual exempt "internet communications (or other activities)." AR392. This theory has no support in the record. The rule is silent as to "input costs," and the FEC, insofar as it even mentioned general organizational expenses such as overhead or salaries in the rulemaking, indicated that these expenditures would *not* be exempt merely because they indirectly or partially supported an exempt communication.

Apart from being false, this history still fails to explain how the regulatory interpretation at issue in this case—a massive loophole unmoored from the statutory text—remotely comports with FECA's mandate to regulate coordinated expenditures as in-kind contributions. 52 U.S.C. § 30116(a)(7)(B)(i). As *Shays III* affirmed, "[courts] must reject administrative constructions of [a] statute . . . that frustrate the policy that Congress sought to implement. While that policy may sometimes be unclear, here it is not." 528 F.3d at 925 (citations omitted). Even if CTR's alternative history of the 2002 and 2006 rulemakings were accurate (and it is not) it would not justify this dismissal, but would only create a fatal inconsistency between the FEC's coordination rules and the statutory mandate they are meant to execute.

a. BCRA's legislative history refutes CTR's reading of the coordination rules.

There is no provision in BCRA that authorizes, much less requires, the exclusion of any expenditures for internet communications from treatment as a coordinated expenditure. Nor did the FEC cite any such statutory authorization from BCRA in creating its regulatory carve-outs for

various classes of internet communication in the 2002 or 2006 coordination rulemakings.

But this Court need not wade through competing narratives about the statutory and regulatory background of the "internet exemption" at issue here, because *Shays I* already examined this history and refuted each point of CTR's counter-narrative.

As recounted in *Shays I*, the FEC's pre-BCRA "coordinated communications" regulation had required a "substantial discussion or negotiation . . . the result of which is collaboration or agreement' between the candidate and outside spender" to establish coordination. 337 F. Supp. 2d at 63-64; 11 C.F.R. § 100.23(c)(2)(iii) (2001) (repealed). Congress found this "conduct standard" overly restrictive, and accordingly, "instructed the Commission to scrap this approach." *Shays II*, 414 F.3d at 97. BCRA instead directed the FEC to promulgate new regulations on coordinated communications that "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c), 116 Stat. at 95.

Congress did not, however, prescribe any "content" requirement for the coordinated communications rule, except to direct that the revised rule cover "electioneering communications," a newly defined category of non-express advocacy communications. 52 U.S.C. § 30116(a)(7)(C). Indeed, the FEC's pre-BCRA rule had no content standard beyond its reliance on the statutory definition of "expenditure," *id.* § 30101(9)(a), and the regulatory definition of "general public communication," *id.* § 100.23(e)(1) (2001) (repealed), the term used in the coordinated communication regulation at that time, *id.* § 100.23(c)(2)(iii) (2001) (repealed); *Shays I*, 337 F. Supp. 2d at 55-56 & n.25.

Nor did Congress instruct the FEC to exempt, or even consider exempting, internet communications from regulation as coordinated expenditures. In fact, prior to BCRA, the FEC's coordination rules had explicitly *included* payments for internet communications as a regulable

form of expenditures that would be deemed coordinated if they met certain conduct requirements. *See* 11 C.F.R. § 100.23(e)(1) (2001) (repealed) (defining "general public communications" to include those made through "any electronic medium, *including the Internet or on a web site, with an intended audience of over one hundred people*") (emphasis added); *Shays I*, 337 F. Supp. 2d at 65. Thus, if anything, Congress would have presumed that expenditures for internet communications would continue to be regulated as coordinated expenditures after the FEC promulgated a new, more liberal "conduct" standard as BCRA directed; certainly, "it is difficult to argue" that "Congressional intent [was that] the Internet . . . be excluded wholesale from its definition of 'public communication.'" *Id.* at 66.

Nevertheless, in its 2002-03 coordination rulemaking to implement BCRA, the FEC took it upon itself to completely revamp its coordinated communications rule, going far beyond the directives in BCRA and formulating a novel "content" standard that used a new statutory term, "public communications,"[2] included in BCRA. But Congress defined this term to mean "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." 52 U.S.C. § 30101(22). And BCRA used this term principally in its party soft-money provisions, for instance, in defining the types of "Federal election activity," *id.* § 30101(20), that state political parties were required to fund with federal hard money; it did not reference "public communications" with respect to coordinated expenditures at all. It was the FEC, on its own initiative, that first deployed this term to define the universe of communications that would be covered by its new coordinated communications rule.

[2] This new "content standard" ensured the revised rule would apply to "electioneering communications" and various categories of "public communications," such as those containing express advocacy or falling in defined pre-election windows.

Its regulatory definition of "public communications" largely echoed the statutory definition, but, inexplicably, also stated that "the term public communications shall not include communications over the Internet." 11 C.F.R. § 100.26 (2002).

This was one of the rules invalidated in *Shays I*, which noted that the "wholesale" exclusion of the internet from the coordination rules had no support in FECA's text, "severely undermine[d]" its purposes, and "create[d] the potential for gross abuse." 337 F.3d at 69-70. *Shays I* also noted that the FEC did not defend the exclusion of the internet based on policy or constitutional concerns arising from the regulation of coordinated activity; instead, the FEC had explained that it formulated its own "public communication" definition to implement BCRA's party soft-money provisions and wished to use the same definition in its coordinated communications rule to "provide[] consistency within the regulations." *Id.* at 66.

However, as *Shays I* noted, BCRA was enacted "to *enlarge* the concept of what constitutes 'coordination' under campaign finance law," *id.* at 64 (emphasis added), and Congress had evinced no intent to exempt the internet (or any other communication medium) from such regulation, *id.* at 66. Thus, the FEC's *sua sponte* adoption of a blanket exemption for internet activity—which effectively carved out "an entire class of political communications" from FECA's contribution limits and disclosure requirements "irrespective of the level of coordination," *id.* at 70—was an impermissible interpretation of the Act. As the Court found, there was no textual authority for the FEC's categorical exclusion of the internet from its coordination rules, and it plainly conflicted with the statute's objectives and "would permit rampant circumvention of the campaign finance laws and foster corruption." *Id.*

Rather than appealing this portion of *Shays I*, the FEC opened a new rulemaking, *see* Internet Communications, 70 Fed. Reg. 16,967 (proposed Apr. 4, 2005), culminating in the "2006

internet rules" at issue here.

b. Intervenors' account of the FEC's 2006 internet rulemaking does not accurately reflect the rulemaking or CLC's participation in it.

The centerpiece of intervenors' narrative is an invented account of the 2006 internet rulemaking in which "CLC tried to convince the FEC to write a rule that would have treated the costs to produce an unpaid online communication—including for example, filming costs, staff time, and overhead costs" . . . as 'coordinated expenditures,'" and the "the FEC . . . rejected CLC's invitation." Int. MSJ at 1, 25.

Their account does not accurately reflect the rulemaking. For one thing, although prompted by *Shays I*'s invalidation of the original "wholesale" exemption of the internet from 11 C.F.R. § 100.26, the rulemaking considered a host of other internet-related issues, including disclaimers, exceptions for uncompensated individual internet activities, a revision of the "media exemption" to address its application to certain qualified online publications, and individuals' use of corporate and labor organization computers for campaign-related internet activities. *See* 70 Fed. Reg. at 16,969. The rulemaking record included more than 800 comments, as well as testimony taken at two days of public hearings. Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) (Final Rules with Explanation & Justification ("E&J")).

Tellingly, intervenors cite only two places in this voluminous record in support of their narrative about "input costs," both of which they mischaracterize. First, intervenors cite a lone footnote in CLC's joint comments for the proposition that CLC agreed that the FEC includes all of the expenses that CTR now characterizes as "inputs" in calculating the overall cost of a communication. Int. MSJ at 25. CLC did no such thing. There, CLC merely noted that the proposed coordination rules were silent with respect to the treatment of the "direct production costs" of exempt communications, and made no mention of "staff time or overhead" or any of the other

indirect or unrelated expenses at issue in this case.

The footnote that intervenors selectively excerpt—which contemplates only *individual* activity over the internet, and not activity by political committees like CTR—noted only that the proposal was "unclear" with respect to production costs for materials an individual "disseminates via his own Web site," and cautioned that an unduly permissive approach risked reopening "precisely the kind of loophole that the court in *Shays [I]* indicated should not be permitted":

> The Commission's proposed rule is unclear about how it would treat potentially very large sums of money spent in coordination with a candidate to create or produce campaign materials that an individual disseminates on his or her own Web site. Typically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials. Thus, the production costs of a TV ad and the costs of the air time to broadcast the ad would both constitute "expenditures." E.g. 11 C.F.R. 104.20(a)(2) (requiring the reporting of "direct costs of producing or airing electioneering communications." (emphasis added)). . . .
>
> It is important that the Commission regulations guard against schemes that could allow an individual in coordination with a candidate to spend very large sums of money outside the campaign finance laws on the production of ads, if those ads are then disseminated on the individual's own Web site. For instance, a wealthy individual could set up a Web site and then spend very large amounts of money in coordination with a candidate on the professional creation and production of campaign materials—such as campaign videos or other campaign ads—which he then disseminates via his own Web site (or by email). Because the distribution itself would not be considered a "public communication" . . . it would fall outside the coordination rules. If the production costs are also treated as outside the coordination rules, this could lead to a large loophole in the rules on coordinated campaign spending—precisely the kind of loophole that the court in *Shays* indicated should not be permitted.

Ex. A (CLC et al. comments at 20 n.10).

When the final rules were promulgated, however, the indeterminacy remained. As OGC has observed, "[n]either the [internet] regulation itself nor the Commission's accompanying [E&J] expressly address whether the regulation also exempts production costs." First Gen. Counsel's Rpt. ("FGCR") at 5-6, MUR 6729 (Checks and Balances) (Aug. 6, 2014).

Second, intervenors cite a passage from the E&J in which the FEC discussed unnamed "commenters" on a different topic—the treatment of payments by state or local party committees

for communications on their own websites—insinuating that CLC was this commenter. CLC's comments did not address this particular issue in this manner. The E&J's fleeting reference to unnamed "commenters" on an off-point topic does not mean the FEC "considered" and "rejected" the key issues here, as CTR claims. Int. MSJ at 26.

Notwithstanding intervenors' irrelevant and misleading record excerpts, they do not—and cannot—contend that either CLC or the FEC in this rulemaking "considered" the central question here—whether overhead and other general expenses that only partially or indirectly support exempt communications are exempt under the Act and regulations as "input costs." Indeed, the rules are silent even with respect to *direct production costs*, for which, as CLC's comments noted, there was at least some past precedent suggesting they were included as part of the communication's overall costs.[3] The rulemaking certainly did not purport to exempt overhead, research, or training expenses that only tangentially support internet posts.

Indeed, as CLC has already explained, *see* Pls.' MSJ at 7-8, insofar as the FEC indicated anything with respect to such "inputs" in the rulemaking, it suggested that overhead and other indirect expenses that support unpaid internet communications are *not* exempt. In particular, CLC highlighted that when the Commission exempted "*uncompensated* internet activity" by individuals and groups of individuals, 71 Fed. Reg. at 18,604, from the definitions of "contribution," 11 C.F.R. § 100.94, and "expenditure," *id.* § 100.155, it made clear 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

[3] Elsewhere, however, "production costs" were factored into a communication's overall cost, if at all, only to bring that money *within* FECA's regulatory ambit—not to *exempt* it from statutory requirements, as here. *See, e.g.*, 11 C.F.R. § 104.20. There is no rule of interpretation requiring that the FEC treat these scenarios identically given their countervailing effects on statutory objectives, and the regulations themselves certainly do not dictate such treatment.

conducted on that computer may have been exempt. 71 Fed. Reg. at 18,606. If this underlying expenditure for equipment were coordinated with a candidate campaign, it would thus constitute an in-kind contribution to the campaign. 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20.

Intervenors attempt to discount this part of the E&J, arguing that CTR does not dispute that its spending constitutes "expenditures," only that they are "coordinated expenditures." Int. MSJ at 26. This misses the point. CLC highlights this discussion to demonstrate that the FEC, insofar as it mentioned overhead or other indirect inputs in the rulemaking at all, indicated that they should not be exempted simply by virtue of their connection to an internet communication, albeit in its discussion of sections 100.94 and 100.155. This discussion also dismantles CTR's narrative that the FEC affirmatively "rejected calls to subject input costs to a coordination test." *Id.* The rule is silent in this regard, and the few references to the topic in the E&J indicate the opposite.

At any rate, whether CLC or other participants were satisfied with all aspects of the internet rulemaking in 2006 is irrelevant. Plaintiffs do not dispute that many aspects of the coordination rules have been a subject of debate among the Commissioners, regulated entities, and the public. "But that is history, not explanation," and it utterly fails to show how the particular interpretation applied by the controlling Commissioners here "comports with the governing statute and reasoned decisionmaking." *Se. Ala. Med. Ctr.*, 572 F.3d at 920.

c. FEC precedent does not support the controlling Commissioners' construction of the internet exemption.

Intervenors collect various FEC "precedents" that supposedly validate their unbounded approach to input costs, but their reliance is misplaced. For one thing, none of the supposed authorities they cite involved analogous coordination claims, or in many cases, coordination at all. Many contained important factors—such as de minimis levels of spending or activity that was not intended to influence a federal election—that heavily influenced the matters' dispositions but that

had nothing to do with production costs or the internet exemption. For example, intervenors again point to MUR 6657 (Akin for Senate), Int. MSJ at 29, but as previously explained, the outcome they tout as a vindication of their "input cost" theory related only to two particular categories of expenditure—"email list rental" and "online processing"—that are not remotely analogous to the sea of coordinated expenditures at issue here. *See* Pls.' MSJ at 27.

Intervenors also rely heavily on enforcement dispositions that failed to obtain the requisite four Commissioner votes on the relevant proposition of law. *See* Int. MSJ at 28-32. Legal interpretations advanced by fewer than four Commissioners are not binding and do not set agency precedent, *see* 52 U.S.C. § 30106(c), but CTR presents them throughout its briefing as if they reflect a settled and "consistent interpretation." Int. MSJ at 34; *See, e.g.*, MUR 6037 (Democratic Party of Oregon); MUR 6729 (Checks and Balances); MUR 7023 (Kinzler for Congress); MUR 7080 (Babeu for Congress); MUR 6908 (NRCC); MUR 6958 (McCaskill); MUR 6470/6482/6484 (Romney); MUR 6056 (Protect Colorado Jobs, Inc.); MUR 6296 (Buck for Colorado). But FECA's entire enforcement structure is structured to prevent fewer than four Commissioners from entrenching their incorrect interpretations of law. *See Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) ("[S]uch an [SOR] would not be binding legal precedent or authority for future cases. The statute clearly requires that for any official Commission decision there must be at least a 4-2 majority vote.") That intervenors must rely so heavily on non-binding statements in deadlocked matters only underscores that the interpretation underlying this dismissal was neither "consistent" nor authoritative.

MUR 6729 (Checks and Balances) is instructive. There, the Commission deadlocked 3-3 on allegations that a 501(c)(4) group had failed to report or include required disclaimers on two broadcast advertisements. Certification at 1-2, MUR 6729 (Sept. 19, 2014). But the group

countered with a sworn declaration averring that the two ads in question were disseminated only online, and the broadcast airtime was in fact used to run a third ad that did not trigger FECA disclosure obligations. There was no other information about the group's spending, nor any suggestion that its activities were coordinated with a candidate. Although OGC surmised that production costs for the ads beyond the purchase of airtime might be included under the regulatory exemption for uncompensated internet activities, 11 C.F.R. § 100.155, it indicated that the question was unsettled, and recommended dismissal on an alternative ground. FGCR at 5-7, MUR 6729.

Similarly, in MUR 7080 (Babeu for Congress), the Commission deadlocked on whether a candidate had accepted an in-kind contribution from a sheriff's office that allegedly used paid staff to coordinate Facebook posts promoting the candidate. Although OGC found that the Facebook posts themselves qualified for the internet exemption, it concluded that the campaign still "may have received an impermissible in-kind contribution from [the Sheriff's Office] in the form of free staffing" to create internet posts. FGCR at 12-13, MUR 7080 (Dec. 15, 2016). Therefore, despite ultimately recommending dismissal because the amount in violation appeared to be de minimis and uncertainties remained about the individuals behind the posts, *id*., OGC recognized that "coordinated communications" are not the entire universe of potential in-kind contributions under FECA. The Commission deadlocked, producing no binding decision on the question. Certification at 2, MUR 7080 (Oct. 24, 2017).

MUR 7023 (Kinzler for Congress) dealt even less with the "input" cost issue. There, OGC recommended dismissing the allegation in question on discretionary grounds because the costs associated with disseminating candidate campaign materials via a single tweet were presumed to be de minimis. FGCR at 16, MUR 7023 (Oct. 6, 2016). The Commission then deadlocked 2-3 on whether to accept that recommendation. Certification at 2, MUR 7023 (Apr. 27, 2017). Intervenors

quote extensively from a footnote in the resulting three-Commissioner SOR, but a statement in a deadlocked matter is not an authoritative FEC "interpretation" at all; indeed, if anything, it confirms that the construction defended here has never commanded a four-vote majority.[4]

The other decisions intervenors cite are similarly off point. *See, e.g.*, MURs 6722/6723 (House Majority PAC) (agreeing that a YouTube video featuring Members of Congress, disseminated months after the election and lacking express advocacy, was not an in-kind contribution, with three Commissioners explaining separately that they arrived at that conclusion notwithstanding the coordinated communications rule because the video was not made for the purpose of influencing an election); MUR 6522 (Lisa Wilson-Foley for Congress) (involving social media and web posts that were made by corporate entities *owned by* the candidate, referenced her candidacy incidentally, and did not involve, according to respondents, any costs, production or otherwise); MUR 6477 (Turn Right USA) (dismissing coordination allegation as to a single $5,792.12 expenditure for the creation of a YouTube video for various reasons, including because there was "no basis to conclude that TRUSA coordinated with [the candidate]"); *see also* Pls.' MSJ at 27-28; MTD Opp'n at 34-37 & nn.15-16.

None of these matters actually address the key issue here, and as OGC noted, there is also precedent cutting against intervenors' "input cost" theory. *See, e.g.*, AR101-03 (explaining that MUR 5564 (Alaska Democratic Party) found reason to believe a party committee made coordinated expenditures in the form of payments to employees even though the payments related

[4] Intervenors acknowledge that such decisions lack binding force at the FEC, but only to fault CLC for citing "a rejected OGC report"—the OGC report *in this case*—"as if it is authoritative." Int. MSJ at 20. Of course, the OGC report here is no more binding than the many two- or three-Commissioner SORs intervenors present as FEC precedent. *See supra* at 26 (collecting cases). The only difference is that this OGC report is *part of the certified administrative record in this case*, and properly considered insofar as it illuminates the agency's decisionmaking.

to "a voter canvassing effort, an activity involving a communicative element" but not meeting the "public communications" definition). At most, past cases indicate that the FEC has confined the internet exemption to the very situations contemplated in the 2006 rulemaking: incidental online communications created and disseminated by individuals at marginal cost. *See, e.g.*, 71 Fed. Reg. at 18,594 (emphasizing that "[t]he cost of placing a particular piece of political commentary on the Web is generally insignificant" and is "often only the time and energy that is devoted by an individual to share his or her views and opinions with the rest of the Internet community").

Intervenors thus strain to elevate off point and non-precedential dispositions into "a decade and a half of consistent interpretations," Int. MSJ at 34, but they labor in vain. And regardless, the radical approach to the internet exemption supposedly advanced in these matters would still reflect an impermissible interpretation of FECA and need to be set aside. No amount of FEC precedent permits it to continue down an interpretive path contrary to FECA's plain text and purposes. "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). All the more so when the agency arbitrarily extends that interpretation to swallow as "input costs" whole swaths of spending that Congress clearly intended to regulate as coordinated expenditures.

Indeed, it was contrary to any standard of reasoned decisionmaking to enlarge the internet exemption *now*, almost fifteen years after its adoption and after its original justifications and factual assumptions have been severely eroded. The conceit that the internet is an "inexpensive" place to spend campaign dollars and that such activities are conducted by individuals unconnected to political committees—the core premise of the 2006 rulemaking—bears no resemblance to the world today or the facts of this case. The 2006 rulemaking was "concerned with ensuring that individuals were not inhibited from using a new communication technology for political speech,"

not protecting "multi-million dollar political committees who might want to establish a strategic research and rapid response organization with a 30-person staffed war room." AR404 n.27.

4. Intervenors' constitutional arguments are unavailing.

Finally, intervenors resort to misplaced First Amendment arguments that supposedly permit the FEC to adopt a "de-regulatory" posture in order to "avoid[] chilling speech," Int. MSJ at 18-19. But they provide no tenable argument for why the First Amendment even comes into play here. The fact that the FEC operates in an area of "First Amendment sensitivity" does not allow it to nullify provisions of FECA or frustrate its purposes.

First, the dismissal itself did not hinge on a constitutional avoidance rationale, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Instead, these constitutional arguments amount almost entirely to post hoc rationalizations by *intervenors'* counsel, not the controlling Commissioners—making them doubly inappropriate here, given that the agency is not present to articulate its own views or protect its enforcement prerogatives.

But intervenors' First Amendment arguments fail on their own terms. CTR could have conducted all of its activities *independently* of the Clinton campaign—and had it chosen this course, it would not have been subject to any of the contribution restrictions or disclosure requirements enumerated in CLC's administrative complaint. As the Supreme Court recognized in *McConnell v. FEC*, "the rationale for affording special protection to wholly independent expenditures" does not extend to coordinated expenditures, because "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" 540 U.S. 93, 221 (2003).

Further, there is no dispute that CTR's activities and communications are "expenditures"—*i.e.*, "payments" made "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)—as intervenors concede. Int. MSJ at 26 ("[W]hether [CTR's] costs constitute

'expenditures' is not in dispute."). And "[e]ver since [the Supreme Court's] decision in *Buckley*, it has been settled that expenditures by a noncandidate that are "controlled by or coordinated with the candidate and his campaign" may be treated as indirect contributions subject to FECA's source and amount limitations." *McConnell*, 540 U.S. at 219 (quoting *Buckley*, 424 U.S. at 46).

Insofar as there is an area of First Amendment concern with respect to the regulation of coordinated spending, it concerns the possibility that regulation may be overbroad and extend beyond election-related speech to reach issue advocacy—*i.e.*, if the regulation fails to "separate[] election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays II*, 414 F.3d at 102. But here, no one contests that CTR's "expenditures" constitute "election-related advocacy." Moreover, CTR is a registered federal political committee—whose activities are "assumed to fall within the core area sought to be addressed by Congress." *Buckley*, 424 U. S. at 79. "They are, by definition, campaign related." *Id.*

Indeed, there is no First Amendment impetus to exempt coordinated "expenditures" for internet communications from regulation at all. It is simply an act of administrative grace—and one founded on concerns noted in the 2006 internet rulemaking that FECA might otherwise apply to individual citizens and bloggers who incidentally communicate about a candidate online, or to communicative activity where only very de minimis amounts were at play. *See supra* Part II.B.3.c. These considerations have no relevance to a "full-fledged media machine," AR402, run by a $9 million super PAC, whose operations exclusively support a single federal candidate.

For more than 30 years, FECA has had no "content standard" for the regulation of coordinated expenditures beyond the statutory definition of "expenditure" and the purposive language incorporated therein. 52 U.S.C. § 30101(9)(A)(i). *See also FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 77 n.50 (D.D.C. 1999) (noting *Buckley* found that "the First Amendment did not

require a narrowing understanding of 'expenditure'" in the context of coordinated expenditures). The FEC's pre-BCRA "coordinated communication" regulation expressly *included* internet communications within its ambit. 11 C.F.R. § 100.23(e)(1) (2001) (repealed). It is untenable to claim that the First Amendment itself now compels the exemption of any of CTR's expenditures for internet election advocacy from regulation as coordinated expenditures. And it is that much more absurd to claim, as CTR does, that the First Amendment justifies exempting the *entirety* of its coordinated operation simply because some of its activities involved internet communications. The FEC tried—and failed—to defend various impermissible content standards in the *Shays* cases on similar First Amendment grounds and was twice rebuffed by the D.C. Circuit. *Shays III*, 528 F.3d at 925-26 ("We applaud the Commission's sensitivity to First Amendment values, but as we said in *Shays II*, 'regulating nothing at all' would achieve the same purpose, 'and that would hardly comport with the statute.'") (citing 414 F.3d at 101).

The dismissal here rests on a similarly impermissible coordination standard. The controlling Commissioners construed the "internet exemption" to immunize from regulation not only "production" costs, but *any* costs incurred by an entity that makes "unpaid" internet communications—however unrelated such costs are to the internet communication. And they arrived at that interpretation entirely without regard to their statutory obligation to regulate coordinated expenditures in a manner that "rationally separate[s] election-related advocacy from other activity falling outside FECA's expenditure definition." *Id.* The dismissal is contrary to law for that reason alone.

Nor can CTR justify an interpretation that compromises the Act's core purposes with generalized constitutional concerns about vagueness or due process.

In defending the SOR's treatment of "input costs," CTR contends primarily that "bright-

line tests are virtually mandated" in this area to provide "fair notice" and "allow the FEC to maintain the confidence of the public." Int. MSJ at 36 (citing *Orloski*, 795 F.3d at 197). But "[t]he first of these bromides provides no independent basis for the rule: a bright line can be drawn in the wrong place." *Shays II*, 414 F.3d at 101. The question is not whether *any* bright-line test would be permissible; it is whether *this one* is. And regardless of any constitutional considerations, the FEC still must exercise its interpretive authority to define the statutory line between "coordinated" and independent expenditures "in a manner 'commensurate with Congress's regulatory aims.'" *Shays I*, 337 F. Supp. 2d at 79 (citation omitted).

For similar reasons, CTR's indistinct "due process" concerns also fail. These arguments hinge on the claim that the controlling Commissioners' construction of the internet exemption reflected the FEC's "consistent" and authoritative interpretation of the rule, so enforcement would have offended their due process rights. *See, e.g.*, Int. MSJ at 34. But whether intervenors would be entitled to claim FECA's safe harbor for good-faith reliance on that regulatory construction—assuming *arguendo* it is actually authoritative—is a separate question from whether the construction itself is unlawful.[5]

Insofar as CTR's due process concerns would even theoretically come into play, they would still fail. The only aspect of CTR's "input costs" theory that is remotely addressed in prior decisions involves the treatment of *bona fide* production costs that directly and exclusively support unpaid internet communications—but that can fairly describe only a fraction of CTR's expenditures, and even then, the authorities are equivocal. *See supra* Part II.B.3.c. However one

[5] The controlling Commissioners did not ground their decision on a fair notice rationale, and there is no way to know whether they would have done so if their analysis had been conducted under the proper legal standard. Accordingly, even if the Court were to accept intervenors' claims about the "consistency" of this regulatory construction, it should still declare it contrary to law.

reads the FEC's prior treatment of the direct production costs associated with unpaid internet communications, it still would give CTR no basis to conclude that *all* of its activity would qualify as an exempt "production cost" for unpaid internet communications. And, as written, the coordination rules are silent as to even the "production costs" of internet communications. In essence, then, CTR is arguing not that the rules or FEC guidance clearly exempted its full range of coordinated expenditures, but that they did not clearly *bar* their exemption. This turns fair notice on its head: CTR cannot claim it was misled simply because the coordination regulations did not explicitly prohibit what their terms never permitted in the first place.

Perhaps most importantly, the FEC's regulatory coordination regime purports to implement FECA provisions that require no elucidation as applied *here*, to CTR's openly and admittedly coordinated expenditures that extended far beyond internet activity. This case is not a difficult one. The 2006 rulemaking record confirms that the exemption was never understood to reach overt coordination schemes involving a political committee like CTR engaged in significant amounts of non-internet activities. *See supra* Part II.B.3.

If the case is remanded to the FEC for reconsideration under the proper standards, and the Commission then finds reason to believe and opens an investigation, intervenors may then attempt to invoke FECA's safe-harbor provision—but only to the extent it actually applies. Otherwise, their preemptive and unfounded invocation of "due process" concerns and the First Amendment cannot convert this dismissal into a lawful one.

C. The controlling Commissioners' conclusion that there was insufficient evidence of coordination was arbitrary, capricious, and wholly contrary to the record.

Neither intervenors nor the controlling Commissioners disputes that a significant measure of CTR's activities did not "relate directly to internet communications," even under their capacious view of that concept. *See, e.g.*, AR393; Int. MSJ at 36-37. And in the administrative proceedings,

CTR and HFA largely did not deny that this category of non-communication expenditures was "coordinated with the Clinton campaign," AR046 ¶ 100, AR090 n.28; the evidence confirming as much was overwhelming and substantively uncontroverted. They instead relied on meritless legal arguments, such as the media exemption, to defend their operations.

In other words, this should have been an easy call.

To instead conclude that the administrative complaint failed to provide reason to believe CTR's admittedly coordinated activity was indeed "coordinated" required the controlling Commissioners to ignore voluminous evidence of systemic coordinated efforts between CTR and the Clinton campaign, as well as CTR's repeated statements that it existed for a singular purpose: to raise and spend unregulated funds to advocate Clinton's election online. This is precisely the arbitrary and capricious decisionmaking that judicial review is meant to prevent.

1. Intervenors mischaracterize the relevant legal standards and record evidence necessary to support a preliminary reason-to-believe finding.

CTR's characterization of the reason-to-believe standard is contrary to the structure of section 30109(a)(8) and the Commission's duly promulgated statement of policy regarding Commission matters at the preliminary stages of the enforcement process.

Intervenors actually concede that the controlling Commissioners required "proof of coordination," Int. MSJ at 3, before they would proceed past the preliminary reason-to-believe stage. But they provide no authority for their claim that FEC complainants must provide such conclusive proof of a FECA violation to support a reason-to-believe finding. They rely instead, almost exclusively, on non-binding statements by declining-to-enforce Commissioners—again elevating these Commissioners' idiosyncratic views in a manner FECA's bipartisan enforcement structure explicitly guards against. *See, e.g.*, *id.* at 37-38 (citing SORs).

Their fabricated "four-corners" pleading requirement is likewise indefensible and contrary

to agency policy. They had no justification in law or fact to constrict the record by contriving a rule that would limit OGC's analysis to facts and documents contained within the four corners of the administrative complaint, even when other compelling evidence is publicly available and in fact was compiled by OGC, like Brock's post-election podcast interview. AR385-86. This practice is contrary to the FEC's stated enforcement policy, which makes clear that it considers "the available evidence," including information in the complaint and "any publicly available information." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545-46 (Mar. 16, 2007).

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

Intervenors' unfounded invocations of First Amendment "chill" cannot transform an unreasoned decision into a reasonable one. And their concerns that any lesser standard of proof at the reason-to-believe stage would raise the specter of unwarranted FEC investigations are particularly inapposite here, where many of their relevant internal materials are already public (albeit by virtue of a malign state actor) and, at any rate, intervenors were well aware that their

scheme to skirt FECA contribution limits was legally novel, unprecedented in scope, and in significant tension with CTR's avowed "independence" from candidates.

2. The controlling Commissioners ignored record evidence showing CTR and HFA coordinated extensively on non-exempt activities.

The SOR's dismissal of CLC's complaint rested primarily on one central finding: that "[t]he information in the record indicates that [CTR] limited its interactions with [HFA] to the very communications that the Commission has previously decided not to regulate." AR395. The question before this Court is whether the record supports that finding. It does not.

As detailed in CLC's opening brief, Pls.' MSJ at 29-32, the record contains abundant and largely unrefuted affirmative evidence that demonstrates that CTR both engaged in a significant amount of non-communication-related activities, and that CTR and HFA did not "limit" their coordination to internet activities.

First, it is undisputed that many of CTR's expenditures were not connected to exempt internet communications. As OGC confirmed, CTR spent $9.61 million in support of HFA, and "the bulk of" these expenditures were "for purposes that are not communication-specific." AR088-90. Even if this Court accepts that some of these costs should be treated as exempt input costs, it is also uncontested, and the controlling Commissioners acknowledged, that a range of CTR's other activities, including its "surrogacy program, research and tracking, and contacts with reporters," are not exempt as either unpaid internet communications or associated production costs. AR393.

The undisputed record not only shows that non-exempt activities accounted for a large portion of CTR's operations, but also that HFA compensated CTR for almost none of that work. Over the duration of the campaign, HFA paid CTR for its services in just two payments, both "near the time that CTR split from American Bridge," a May 27, 2015 payment of $275,615 for "research" and a July 17, 2015 payment of $6,346 for "research services." AR089. These payments

together account for only three percent of CTR's overall operating budget.

Second, there is ample affirmative evidence in the record showing that CTR and HFA did not limit their coordination to internet activities.

As already detailed at length, CTR from its inception made clear—and announced publicly—that broad, systematic coordination with the Clinton campaign was its *raison d'être*. *See* Pls.' MSJ at 29-32. CTR's novel effort to avoid regulation was not only reported widely at the time it launched, AR005-07 ¶¶ 9-11, 14 (citing several articles discussing the launch of CTR), it was also noted in CTR's own press release, AR359 (asserting CTR would "be allowed to coordinate with campaigns and Party Committees"), and reasserted by CTR in its first response to CLC's complaint, AR062. *See also* Pls.' MSJ at 29-31.

The controlling Commissioners committed error in discounting the voluminous record evidence showing that CTR and HFA were collaborating across the full range of CTR's activities, and instead demanding conclusive evidence on "a transaction-by-transaction" basis to "determine whether specific conduct occurred with respect to particular expenditures." AR395.

Even if the controlling Commissioners' demand for transaction-by-transaction proof were appropriate at the reason-to-believe stage, finding that standard unsatisfied here required mischaracterizing the record and arbitrarily excluding probative and uncontested evidence from their analysis. For example, with respect to CTR's outreach to reporters, the Commissioners found that "the complaints do not present facts to show that particular efforts were even 'coordinated.'" AR395. But CLC presented, among other things, a TIME profile of CTR founder and chairman David Brock in which he is quoted as saying he believes he can coordinate with HFA while "deploying the unregulated money he raises to advocating her election online, *through the press*, or through other means of non-paid communications." AR401 (emphasis added).

CTR offers a similarly strained analysis with respect to its payments for polling. Intervenors now contend that the polling cannot be considered a contribution unless the candidate receives "cross-tabs, questions asked, and methodology," and because "'[t]op line' results, without more, do not constitute a contribution"—a standard once again derived exclusively from non-binding two- or three-Commissioner SORs. Int. MSJ at 41-42. As CTR acknowledges, these arguments were not even adopted by the controlling Commissioners, who treated CTR's polling expenses as exempt "input costs" because the poll was eventually posted online. AR392; *see* Pls.' MSJ at 34-35. CTR nevertheless presumes to know what their reasoning *would* have been under 11 C.F.R. § 106.4, and on that basis concludes that the "outcome would have been the same." Int. MSJ at 42. CTR's gloss on the proper application of 11 C.F.R. § 106.4 is wrong, but it fails regardless. CLC not only alleged that CTR posted "data from the poll on the Internet," *id.*, but also provided evidence showing CTR engaged a consultant to write up a report including detailed polling data, methodology, questions asked, and margins of error, which was posted on the consultant's website and distributed to press, AR220; AR015 ¶ 31.

The controlling Commissioners also wrongly discounted a podcast in which Brock described CTR "as a 'surrogate arm of the campaign' and 'under [HFA's] thumb,'" because CTR and HFA had not had an opportunity to respond to the podcast so considering it would be unfair. AR385. But this interview occurred *after* CLC's complaint was filed. In that way, Brock's comments can be themselves construed as a response to CLC's complaint. The podcast was also published more than a month before HFA submitted its administrative response. AR091; AR069. The alternative rationale that the podcast actually proved a *lack* of coordination is unsustainable; this Court need not accept "'meekly administrative pronouncements clearly at variance with established facts.'" *Antosh v. FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984) (citation omitted).

Finally, documents disclosed in the WikiLeaks hacks—though not cited in CLC's complaint—further corroborate that HFA and CTR coordinated systematically on a broad range of non-exempt activities, from their surrogacy program to their press outreach. AR116-18. The WikiLeaks evidence, in CLC's view, is unnecessary to support a reason-to-believe finding; even without it, as OGC noted, "the record contains ample evidence, in the form of press releases and public interviews with CTR officers . . . to support a coordination determination" and, moreover, to show "that CTR existed *solely* to make expenditures in cooperation, consultation or concert with, or at the request or suggestion of Clinton and HFA and that it conducted its activities, as Brock phrased it, under HFA's thumb." AR122. But this evidence does further corroborate that CTR's non-communication-related activity was also coordinated with HFA, and importantly, gives lie to the controlling Commissioners' rationale for dismissing these charges, namely, that finding reason to believe was unwarranted simply because the *factual* record was insufficient.

But the record was beyond sufficient. The unrefuted evidence shows CTR's purpose—and consistent practice—was the systematic coordination of its operations with HFA.

3. The controlling Commissioners' rationale was arbitrary and capricious because it disregarded CTR's and HFA's responses to the administrative complaint.

On the other side of the ledger, there is virtually no evidence in the record indicating CTR and HFA limited their coordination to activity exempt under the internet exception. Most significantly, in the administrative proceedings below, respondents did not deny that they engaged in systematic coordination—with respect to either their exempt or non-exempt activities. AR090 n.28 (noting CTR did not "deny or rebut" the allegation that it "spen[t] millions on opposition research, message development, surrogate training and booking, professional video production, and press outreach for the Clinton campaign"). Indeed, "*by its own admission*, CTR [undertook such activities] in full coordination with the Clinton campaign." AR003 (emphasis added).

Instead of contesting the facts, CTR offered purely legal arguments to support its claim that it had "limited its activities to communications activities that would not qualify as a contribution to HFA that would violate the Act's source and amount restrictions." AR062. The controlling Commissioners did not even acknowledge, much less address, respondents' tacit concession of coordination, nor the legal arguments they actually did offer. This omission, by definition, is arbitrary and capricious. *See Antosh*, 599 F. Supp. at 855-56 (finding FEC dismissal arbitrary and capricious where it ignored "persuasive, indeed undisputed, evidence in the record").

While never denying systematic coordination, CTR does attempt to contest two specific allegations relating to its non-exempt activities, namely that: (1) HFA did not fully compensate CTR for its research and tracking efforts, *see* AR394; and (2) CTR and HFA coordinated on "a set of media training sessions that CTR held for grassroots supporters of Hillary Clinton," *see* AR066.

The evidence they offer on these points, however, is not only contested, it is facially insufficient to rebut the coordination alleged. First, the SOR asserts there is no evidence indicating that HFA failed to compensate CTR fully for its research and tracking activities. AR394. But, as discussed at length in CLC's summary judgment brief, *see* Pls.' MSJ at 43-45, the record clearly establishes that research and tracking were central to CTR's operations. These activities—which required cross-country travel and dozens of employees—were expensive and continued throughout the campaign. *See id.* at 22; 42-45; *see also, e.g.*, AR214 (showing CTR created a memo for press in October 2015); AR317 (describing CTR's researchers as working "[v]irtually around the clock" in July 2016). It strains credulity to imagine that two payments early in the cycle that amounted to less than three percent of CTR's operating budget were sufficient to compensate CTR for the breadth of its research and tracking activities.

With respect to surrogate training, intervenors now highlight that their administrative

responses included a carefully worded denial that this activity was coordinated. Int. MSJ at 39-40; *see* AR102 (noting that CTR responded only by claiming the trainings did not include "official Clinton surrogates (as identified by HFA) or HFA staff" but did "not explain a legal basis for this distinction"). Even if taken at face value, however, this response does not deny that CTR and HFA coordinated in other aspects in the surrogate training, for instance, by agreeing on the content of the training or a broader media strategy. Moreover, this single, limited denial—offered only in the form of an unsworn statement by their counsel, AR066—brings into sharp relief the absence of any other denials in the record.[6] Especially in the face of the abundant evidence detailing millions of dollars of expenditures on a broad range of non-exempt activities, it is significant that intervenors can find *only one* instance where CTR and HFA made any type of assertion that there was no coordination.

Intervenors also mischaracterize CLC's argument about the controlling Commissioners' failure to analyze respondents' "media exception" defense. CLC is not asserting that the Commissioners need to "discuss every argument raised before them when they have already reached a decision based on alternative grounds." Int. MSJ at 49. But here, this legal argument was the only defense CTR and HFA raised with respect to certain allegations of coordination. And the fact that respondents provided only *legal* arguments on certain points, instead of denying coordination, is a tacit concession that respondents coordinated many non-exempt expenditures. The controlling Commissioners' error was not merely the failure to assess these arguments on the merits; it was the failure to recognize and take into account CTR's effective admission that it had

[6] There is reason to doubt the credibility of this carefully phrased denial, or at least question the limits of its reach. The Wikileaks materials confirm that CTR coordinated with HFA on its surrogacy program. AR138.

coordinated to place op-eds, conduct press outreach, and engage in a broad spectrum of activities that were not related to internet communications or exempt from the coordination regulations.[7]

III. The Regulatory Construction Applied to Dismiss CLC's Complaint Fails APA Review.

In addition to their FECA claim, plaintiffs also assert a claim under the APA challenging the coordination rules themselves, 11 C.F.R. §§ 100.26, 109.20, and 109.21, as construed, because they conflict with FECA's mandate to regulate coordinated expenditures. *See* 52 U.S.C. §§ 30101(8)(A)(i)-(ii), 30116(a)(7)(B)(i). Plaintiffs are entitled to summary judgment on the FECA claim for the reasons detailed above.

But if the controlling Commissioners' construction of the internet exemption represents "the Commission's traditional coordination framework," AR396—and CTR strenuously argues that it does, *see, e.g.*, Int. MSJ at 2, 17, 26-31—the Court should proceed to Count Two of plaintiffs' amended complaint and hold that regulatory framework invalid under the APA. Insofar as the relevant regulations are read to encompass all direct and indirect "input costs" for an eventual covered internet communication, even general overhead expenses supporting multiple functions, that construction conflicts with FECA and should be declared invalid.

In their summary judgment brief, intervenors insist even more strongly that the controlling Commissioners' interpretation of the internet exemption reflects the FEC consistent position in "fifty years of rulemaking, advisory opinions and enforcement actions." Int. MSJ at 25; *see also id.* at 26-31. As already explained, this is demonstrably false. *See supra* Part II.B.3.

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[7] Although CLC disagrees with the constitutional arguments advanced by amicus Institute for Free Speech ("IFS") with respect to the scope of the media exemption, CLC agrees that the FEC has interpreted this exemption to apply only to the "media industry." IFS Amicus Br. at 3 (ECF No. 41). Thus, given that respondents offered no defense to certain coordination allegations save the media exemption—which all concede has not been applied to non-media communications—the controlling Commissioners' failure to address this "defense" meant that they "entirely failed to consider an important aspect" of the matter. *State Farm*, 463 U.S. at 43.

However, if the controlling Commissioners' position is deemed the authoritative regulatory construction of the exemption, such that any coordinated activity conducted by a group engaged in some amount of exempt internet communication, however insignificant, is exempt under the coordination rules, CTR and HFA could seek to avoid accountability for their FECA violations by invoking the Act's safe-harbor provision, 52 U.S.C. § 30111(e). When an FEC complaint is dismissed based on an invalid regulation, the relief available under FECA "hardly appears adequate"—"given that reliance on that regulation would afford a defense to 'any sanction,' the court might well uphold FEC non-enforcement without ever reaching the regulation's validity." *Shays II*, 414 F.3d at 96 (citing 52 U.S.C. § 30111(e)).

Therefore, if the controlling Commissioners' and intervenors' alternative narrative is accepted, then plaintiffs' injury extends beyond this matter—as does the remedy needed to redress it. The coordination regulations, as construed, will undermine FECA's comprehensive regime for regulating and requiring disclosure of coordinated expenditures in *any* coordination case involving internet activity. This construction permits exactly what the Act forbids: the provision of paid campaign services and other things of value to candidates by groups operating outside of FECA's contribution limits and disclosure requirements. *See supra* Part II.B.1-3. In this scenario, FECA's judicial review mechanism is not adequate, so the Court should formulate a broader remedy under the APA.

Plaintiffs thus seek an order declaring the construction of these rules unlawful and invalid, and ordering the FEC to apply the Act's coordination provisions in the manner that Congress prescribed here and in all future cases.

CONCLUSION

For these reasons, plaintiffs respectfully urge the Court to grant CLC's motion for summary judgment and deny intervenors' cross-motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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