IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463

Defendant,

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256

CORRECT THE RECORD
455 Massachusetts Ave., NW, Ste. 600
Washington, D.C. 20001

Defendant-Intervenors.

Civil Action No: 1:19-cv-02336-JEB

PLAINTIFFS' OPPOSITION TO CORRECT THE RECORD'S AND HILLARY FOR AMERICA'S AMENDED MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Authorities upon which plaintiffs primarily rely*

Page

Cases:

Statutes:

Regulations and Rulemaking Documents:

Administrative Record Materials (MUR 7146):

Other Materials:

TABLE OF ABBREVIATIONS

CREW	Citizens for Responsibility and Ethics in Washington
BCRA	Bipartisan Campaign Reform Act
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FGCR	First General Counsel's Report
HFA	Hillary for America
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
SOR	Statement of Reasons

INTRODUCTION

In the run-up to the 2016 elections, the super PAC Correct the Record ("CTR") declared an ambitious and unprecedented plan to spend millions of dollars on opposition research and media outreach to support then-candidate Hillary Clinton—and to do so by openly "coordinating" its spending with her campaign, Hillary for America ("HFA"). Am. Compl. ¶¶ 62-66. CTR's founder and chairman, David Brock, announced that this venture would not violate the Federal Election Campaign Act ("FECA") because CTR pledged to engage only in the types of unpaid internet communications that FEC regulations exempt from the statutory coordination regime. *Id.* ¶¶ 2, 65.

News reports quickly raised doubts about his pledge. CTR and HFA in fact appeared to be coordinating on a host of activities, including campaign surrogate training, research and polling, and media rapid-response efforts, that were "not fairly characterized as 'communications'" exempt from the coordination rules, as the FEC's General Counsel ("OGC") later found. *Id.* ¶ 75. Nevertheless, in response to plaintiffs' administrative complaint, the Commission split 2-2 on whether to find reason to believe this massive joint undertaking violated FECA's contribution limits and disclosure requirements for coordinated expenditures, and dismissed plaintiffs' complaint. The no-vote Commissioners accepted without question that virtually all of CTR's spending was tied to exempt internet postings—despite a record replete with contradictory evidence—and advanced the unsustainable theory that if an expense (e.g., payments for a poll) in some small part furthers a "free" internet communication (e.g., a tweet describing the poll), then no amount of that expense can be regulated as a coordinated expenditure. Plaintiffs here challenge the dismissal of their complaint as contrary to law, because it hinged on an impermissible interpretation of FECA that "creates the potential for gross abuse," *Orloski v. FEC*, 795 F.2d 156, 165-66 (D.C. Cir. 1986), and was arbitrary, capricious, and counter to the record.

SUMMARY OF ARGUMENT

Defendant-Intervenors CTR and HFA move to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim, respectively. *See* Mem. Supp. Int.-Defs.' Am. Mot. to Dismiss (Dkt. No. 26-1) ("Int. Br.").

Intervenors focus their attack on the informational injuries asserted by plaintiffs Campaign Legal Center ("CLC") and Catherine Kelley, pushing the false argument that plaintiffs already have all the information they are due under FECA—despite the undisputed fact that the Clinton campaign never reported receiving any in-kind contributions in the form of coordinated expenditures from CTR, and CTR never reported making such contributions. Under the Supreme Court's ruling in *FEC v. Akins*, however, a plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." 524 U.S. 11, 21 (1998). FECA provides that coordinated expenditures are in-kind contributions—and CTR should have reported them as such, including their dates, amounts, and purposes; and HFA should also have reported them, as both contributions to and expenditures by the Clinton campaign. *See* 52 U.S.C. §§ 30104(b)(2), 30116(a)(7)(B); 11 C.F.R. § 104.13(a).

As the Supreme Court has recognized, the sources of a candidate's support and the nature and amounts of the candidate's spending are the most fundamental types of information that FECA requires to be disclosed. *See Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) ("[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office.") (internal quotation marks omitted); *McConnell v. FEC*, 540 U.S. 93, 196 (2003). The information plaintiffs seek—namely, the extent to which the Clinton campaign accepted and "spent" in-kind contributions in the form of coordinated expenditures from CTR—is thus precisely the kind of

information that FECA's disclosure regime is designed to make public.

Rather than disputing that the information at issue here is subject to FECA's disclosure requirements, intervenors assert that plaintiffs can gather all of this information from the committee reports that CTR filed with the FEC in the 2016 election cycle. That claim is false: even if CTR's or HFA's reports could theoretically "cure" their failure to disclose any coordinated spending, *these* reports do not. They do not contain sufficient information for plaintiffs to even retroactively deduce the "scale and scope of CTR's expenditures coordinated with the Clinton campaign." Am. Compl. ¶ 11. CTR's reports reveal only the broadest outlines of its disbursements, typically reporting undifferentiated "lump sums" for expenses like payroll, salary, or travel, and wholly fail to specify which disbursements (or which portions of a given disbursement) were made for coordinated versus non-coordinated activities. Indeed, without an itemization of disbursements according to their specific purposes, as FECA requires, it is impossible to discern which of CTR's expenditures, if any, qualified for the FEC's internet exemption—which is the *central and dispositive inquiry* here. The existing record thus conceals, rather than reveals, the core information that Congress sought to make public: "where political campaign money comes from and how it is spent by the candidate." *Buckley*, 424 U.S. at 66-67.

Plaintiffs have also sufficiently pleaded that the rationale for the dismissal of their complaint, as set forth in the Statement of Reasons ("SOR") of the two "controlling" FEC Commissioners,[1] rested on impermissible interpretations of FECA and FEC regulations, and was arbitrary, capricious, and otherwise contrary to law. *See Orloski*, 795 F.2d at 161; Am. Compl. ¶¶ 7, 85-98. In response to this 12(b)(6) motion, plaintiffs do not attempt to enumerate all of the

[1] The Statement of Reasons is attached to Intervenors' brief as Exhibit A (Dkt. No. 26-4). Hyperlinks to FEC administrative materials cited herein appear in the Table of Contents.

reasons the dismissal was contrary to law, which will require full briefing, but will address intervenors' two primary arguments for dismissal.

First, CTR and HFA argue that the controlling Commissioners were correct to find that virtually all of CTR's more than $9 million in expenditures funded activities that were categorically exempt from FECA and FEC coordination provisions as unpaid "communications over the Internet," 11 C.F.R. § 100.26, or more broadly still, as "input expenses" for such communications. Intervenors essentially claim that campaigns and outside groups can freely coordinate their expenditures, as long as some portion, however negligible, of those expenditures support eventual exempt internet communications. Under their standard, for example, paying private consultants to conduct a poll in coordination with a campaign is exempt if some of the poll results are posted online; the poll is nothing more than an "input cost" for the internet communication. This is so, they say, even when a particular cost, such as overhead for rent or payroll, supports *both* internet communications and non-internet, non-communication expenditures. This is plainly "contrary to law" and FECA's clear text.

It also flies in the face of *Shays v. FEC*, 337 F. Supp. 2d 28, 69-70 (D.D.C. 2004) ("*Shays I*"), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays II*"), which struck down a more capacious antecedent of the current internet exemption as contrary to Congress's clear statutory directive to regulate coordinated communications. As *Shays I* recognized, an unduly broad carve-out from the coordination rules for internet activity "severely undermines FECA's purposes," since "allow[ing] such expenditures to be made unregulated would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption." *Id.* at 70.[2] Intervenors here

[2] The FEC did not appeal the district court's decision with respect to the internet exemption, choosing instead to promulgate the narrower rule at issue here. Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (Explanation & Justification).

seek not only to reopen the "public communication" loophole that *Shays I* closed, but to expand it—so that the internet exception swallows the coordination rules entirely.

Second, even if intervenors' unbounded views of the "input costs" necessary to make an exempt communication were accepted, they still have no answer for CTR's expenditures with no conceivable nexus to internet communications, such as CTR's training of campaign surrogates and public relations efforts to place op-eds and contact reporters. With respect to this category of CTR's activities, the controlling Commissioners claimed the evidence of coordination was insufficient. Am. Compl. ¶¶ 88-91. Although intervenors now defend that conclusion, neither CTR nor HFA actually denied that these activities were coordinated in their responses to the administrative complaint. Instead, both argued that coordination of these expenditures was legally permitted—if not though the internet exception, then through the "media exemption," a legal claim so obviously wrong that the controlling Commissioners simply ignored it. *See infra* note 12.

Indeed, to maintain that the record here was in any way inadequate, the controlling Commissioners effectively had to ignore it. Abundant evidence documented coordinated efforts between CTR and HFA, including the public admissions of CTR spokespeople that the group would "work in coordination with the Clinton campaign as a stand-alone super PAC." FEC Compl. ¶ 9 (Dkt. No. 15-1 (Ex. A to Am. Compl.)). From its inception, CTR took the position that it could—and *would*—freely coordinate with the campaign, and CTR's leadership consistently affirmed this arrangement in press reports and interviews throughout the election cycle.

Finally, because both the controlling Commissioners and intervenors claim that the SOR reflects the FEC's official "longstanding" approach to the internet exemption, *see* Int. Br. at 25-26, plaintiffs also assert a claim under the APA challenging the coordination rules themselves. These regulations, at least as construed by the controlling group, are in direct conflict with FECA's

mandate to regulate coordinated expenditures as in-kind contributions. *See* Am. Compl. ¶¶ 92, 108-113. Intervenors argue that FECA provides the exclusive avenue for challenging FEC actions, but that principle only applies if "Congress has provided special *and adequate* review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (emphasis added) (internal quotation marks and citations omitted). Plaintiffs seek an order declaring the construction of these rules unlawful and invalid, and ordering the FEC to regulate coordination in a manner consistent with FECA, not just here, but in all future cases. This is not a remedy that FECA provides, so the judicial review mechanism in 52 U.S.C. § 30109(a)(8) is not adequate.

BACKGROUND

A. Statutory and Regulatory Background

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

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

All expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) are treated as in-kind contributions to that candidate. *Id.* § 30116(a)(7)(B)(i).[3] This is because coordinated expenditures function as "disguised contributions," —and failing to regulate them as such creates a risk of corruption and conceals the true sources of candidates' support. *Buckley*, 424 U.S. at 46-47.

Coordinated expenditures are thus covered by FECA's contribution limits, source

[3] "In-kind contributions" also 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).

restrictions, and disclosure requirements. 52 U.S.C. §§ 30104; 30116(a)(1)(A), (a)(7)(B)(i). For each reporting period and the calendar year, a candidate-authorized committee must disclose the total contributions received from other committees, including in-kind contributions in the form of coordinated expenditures. *Id.* § 30104(b)(2)(D). The candidate's report must also itemize all contributions received from other committees, and for each, state the contribution's date, value, and whether it was in support of the candidate's primary or general election. *Id.* § 30104(b)(3)(B); *see also Instructions for FEC Form 3P and Related Schedules* 5, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3pi.pdf. Because in-kind contributions received by a campaign are also "expenditures" of that campaign, the report must disclose a coordinated expenditure not only as a contribution received, but also as an expenditure made by the candidate. 11 C.F.R. §§ 104.13(a), 109.20(b), 109.21(b).

Likewise, for each reporting period and the election cycle, an unauthorized (*i.e.*, non-candidate) committee must disclose its total contributions to other committees, including in-kind contributions in the form of coordinated expenditures, and itemize all contributions made to other committees, stating for each the date, value, and recipient's name and address. 52 U.S.C. § 30104(b)(6)(B)(i), (H)(i). In addition, because in-kind contributions by a committee are also *expenditures* of that committee, the report must disclose the person to whom each expenditure is made and its date, amount, and purpose. *Id.* § 30104(b)(5)(A).[4]

2. The FEC exempts only a narrow category of unpaid internet activity from its coordination regulations.

The FEC defines "coordinated" expenditures as those made "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee,

[4] These disclosure requirements also apply to hybrid or "*Carey* committees" like CTR. *See* Am. Compl. ¶¶ 56-57.

or a political party committee." 11 C.F.R. § 109.20(a).

In addition to this general rule implementing the statutory definition of coordination, 52 U.S.C. § 30116(a)(7)(B)(i), the FEC regulates a subset of coordinated expenditures as "coordinated communications." 11 C.F.R. § 109.21. To be a "coordinated communication" under the rule's three-part test, a communication must be paid for by a person other than the candidate, *id*. § 109.21(a)(1), and satisfy one of the content standards and one of the conduct standards set forth in sections 109.21(c) and (d), respectively. The content standards in subsection (c) only cover "public communications," which include communications made by "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." *Id.* § 100.26.

In 2006, the FEC carved out a narrow exception to this facially expansive definition, clarifying that public communications do not include "communications over the Internet" except for those "placed for a fee on another person's Web site." *Id.*; 71 Fed. Reg. 18589. This "internet exception" is necessarily narrow, as the rulemaking was initiated after a more sweeping effort to exempt internet communications was invalidated as unduly broad in *Shays I*. 337 F. Supp. 2d at 69-70. Therefore, while *unpaid* internet communications are not public communications and cannot be regulated as "coordinated communications" under 11 C.F.R. § 109.21, expenditures for *paid* internet communications are not exempt. Likewise, payments for services "rendered to" a campaign, if coordinated, are in-kind contributions, *id.* §§ 100.54, 100.94—even if the services rendered also result in exempt internet communications. *See* FEC Compl.¶¶ 81-83, 92-95, 98-99.

3. The statutory framework for FEC administrative complaints.

Any person may file a complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the OGC's recommendations, the Commission

votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, *id*. § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties. *Id*. § 30109(a)(4)(A), (5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id*. § 30109(a)(6)(A). All of these decisions require four affirmative votes.

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

B. Factual Background

On October 6, 2016, plaintiffs filed a sworn administrative complaint against CTR and HFA for failing to report CTR's in-kind contributions to HFA in the form of coordinated expenditures and for violating FECA's contribution restrictions. Am. Compl. ¶ 62. Plaintiffs' administrative complaint—one of five raising similar concerns—documented millions of dollars that CTR spent on opposition research, message development, and press outreach for the benefit of HFA. *Id.* ¶¶ 63, 72. CTR's leadership publicly admitted that its activities were coordinated with HFA, but claimed that such coordination was permitted because CTR would only engage in unpaid internet communications. *Id.* ¶¶ 65-66. This claim, however, was contradicted by unrefuted reports that CTR had spent millions of dollars on *non*-communication activities, such as paying staff to build relationships with reporters; contracting with consultants to provide "on-camera media training" for Clinton surrogates; hiring private polling firms; and paying for extensive travel. *Id.*

¶¶ 68-71.

After reviewing plaintiffs' complaint, respondents' written replies, and other available evidence, OGC recommended the Commission find reason to believe that CTR and HFA violated FECA by making and accepting excessive and prohibited in-kind contributions and failing to report those contributions. *Id.* ¶ 74. OGC rejected claims by respondents that CTR's expenditures were communications covered by the internet exception and instead found that most of the $9 million that CTR raised and spent were for a "wide array of activities, most of which are not fairly characterized as 'communications.'" *Id.* ¶ 75. OGC also noted that neither respondent disputed "the description or scope of [CTR's] activities on behalf of [HFA] as set forth in [plaintiffs' administrative complaint]." *Id.* ¶ 76. Nor did CTR and HFA dispute that their myriad non-communication activities were, in fact, coordinated. *Id.* ¶ 79.

On June 4, 2019, the FEC's four Commissioners failed to find reason to believe that CTR and/or HFA had violated any provision of FECA, deadlocking by a vote of 2-2, *id*. ¶ 82, and the Commission dismissed plaintiffs' administrative complaint. *Id.* ¶ 83.

Plaintiffs filed this action on August 2, 2019, challenging the dismissal of their complaint as contrary to law. Compl. (Dkt. No. 1). On August 21, 2019, seventy-eight days after the dismissal and eighteen days after plaintiffs' statutory deadline to file suit, the controlling Commissioners issued their SOR. Am. Compl. ¶¶ 85-86. Plaintiffs amended their complaint on October 29, 2019 to address the belated issuance of the controlling SOR. Am. Compl. (Dkt. No. 15).

LEGAL STANDARD

To demonstrate Article III standing, plaintiffs must establish three elements: (1) "injury in fact"; (2) causation; and (3) redressability. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). While plaintiffs bear the burden of proving that the Court has subject matter

jurisdiction to hear their claims, on a motion to dismiss, plaintiffs "need only 'state[] a plausible claim' that each element of standing is satisfied." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). For purposes of the Rule 12(b)(1) motion, the Court "may consider materials outside the pleadings." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Similarly, "[t]o survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citation omitted). The Court "must take all of the factual allegations in the complaint as true," *id.*, and "construe[] the complaint liberally in the plaintiff's favor." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). For a Rule 12(b)(6) motion, the Court may only "consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Id.*

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

A. Plaintiffs Have Established Informational Injury.

"The law is settled that 'a denial of access to information' qualifies as an injury in fact 'where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them.'" *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) (internal citations omitted).

Here, the dismissal has injured plaintiffs by depriving them of important information that FECA requires to be disclosed. Under plaintiffs' reading of FECA and FEC coordination regulations—an reading shared by the Commission's OGC—CTR's activities on behalf of HFA likely gave rise to millions of dollars in undisclosed in-kind contributions to the campaign, a

possibility the FEC has not even investigated, much less confirmed. The resulting in-kind contributions should have been reported by CTR, and more importantly, by HFA, as both contributions to and expenditures by the Clinton campaign. *See* 52 U.S.C. §§ 30104(b)(2)-(5), 30116(a)(7)(B); 11 C.F.R. §§ 104.13, 109.20. Plaintiffs' informational injury also extends beyond this particular matter, because the controlling group's construction of the coordination regulations and internet exemption allows similar schemes to go unregulated and unreported, *see infra* Part III, thereby "illegally den[ying] [plaintiffs] information about who is funding presidential candidates' campaigns." *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*").

1. Plaintiffs have been deprived of information that FECA requires to be disclosed.

"[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute," *Akins*, 524 U.S. at 21. In *Akins*, the Supreme Court held that the plaintiffs had suffered an injury in fact because they had been unable "to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on [the plaintiffs'] view of the law, the statute requires that AIPAC make public." *Id*. Because the plaintiffs had been deprived of that information and there was "no reason to doubt" that the concealed information would be helpful for evaluating candidates and their relationships with AIPAC, the plaintiffs' injury was sufficient to give them standing. *Id*.

Consistent with *Akins*, the D.C. Circuit and this Court have recognized that plaintiffs are injured when an alleged FECA violation causes the concealment of information that the Act requires disclosed, including information about coordinated expenditures. For example, in *Shays III*, the D.C. Circuit held that the plaintiff had standing to sue the FEC for promulgating an unlawfully narrow definition of "coordinated communications" under the Bipartisan Campaign Reform Act ("BCRA"), which would result in presidential candidates failing to "report as contributions many expenditures that [the plaintiff] believe[d] BCRA requires them to report." 528

F.3d at 923. *See also Ctr. for Ind'l Freedom v. Van Hollen*, 694 F.3d 108, 109 (D.C. Cir. 2012) (per curiam); *CREW v. FEC*, 243 F. Supp. 3d 91, 101-02 (D.D.C. 2017) ("*CREW 2017*").

To be sure, *Akins* standing is unavailable when plaintiffs seek only a legal determination about what FECA prohibits, *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001), but that principle has no bearing here. Plaintiffs' injury is not merely an abstract "interest in having the Executive Branch act in a lawful manner." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). Instead, plaintiffs have been denied a statutory right to obtain information about the expenditures CTR made in coordination with HFA, and the amounts and purposes of these expenditures. 52 U.S.C. § 30104(b)(3)-(5). And for purposes of the pending motion, plaintiffs' allegations that at least some of these expenditures do not qualify for FEC's limited regulatory exemption for unpaid online communications must be taken as true. *See infra* Part II. In addition, through their APA claim, plaintiffs allege that the construction of FECA and its regulations sanctions potentially widespread failures to "report as contributions many expenditures that [they] believe[] [FECA] requires them to report," 528 F.3d at 923, depriving plaintiffs of information not only in this matter, but in any case concerning "coordinated communications" activity.

FECA treats all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" as "contribution[s] to such candidate." 52 U.S.C. § 30116(a)(7)(B). As in-kind contributions, coordinated expenditures trigger unique reporting obligations; most importantly, candidate committees must itemize in-kind contributions on their financial reports as both receipts to and *disbursements* by the campaign. *See* 11 C.F.R. § 104.13(a). Similarly, an unauthorized committee (for example, CTR) must itemize each in-kind contribution it makes to another committee, 52 U.S.C. § 30104(b)(4)(H)(i), and disaggregate its in-kind contributions from other types of

spending that are subject to different reporting. *See id.* § 30104(b)(4)(H)(i)-(v). Each in-kind contribution made by a political committee counts as an operating expense of that committee, and thus the contributing committee must also disclose the payment's recipient, "date, amount, and purpose." *Id.* § 30104(b)(5)(A). *See also supra* at 6-7 (Statutory Background).

In short, FECA requires complete, itemized disclosure of a political committee's expenditures made in coordination with a candidate—by both the committee and the candidate—and intervenors do not dispute this. Thus, if a committee made $50,000 in aggregate disbursements on "travel" in a reporting period, and some amount of that total was connected to activities "coordinated" with a candidate, it is not sufficient under FECA to simply report the $50,000 as a lump sum disbursement on travel. *See infra* Part I.A.2.b. Instead, the committee is obligated to itemize those particular expenses from the $50,000 total that constituted "coordinated expenditures" and report them as in-kind contributions—not simply lump them in with the committee's undifferentiated spending on the line item of "travel." This reporting enables the public to understand what goods or services of value the committee has provided to the candidate.[5]

The FEC's failure to require this disclosure from CTR and HFA deprives plaintiffs of crucial information FECA requires to be disclosed both in this matter and future cases.

2. The factual information plaintiffs seek is not already available to them.

Intervenors do not even attempt to claim that CTR or HFA reported any in-kind contributions in the form of coordinated expenditures. Instead, they offer up various arguments for

[5] To the extent that CTR and HFA argue that the internet exemption permits them to conceal *all* of their alleged coordinated spending, no matter how attenuated from internet postings, *see* Int. Br. at 24-30, that is a disputed legal argument, and does not bear on whether plaintiffs have stated a plausible claim of informational injury. *See Akins*, 524 U.S. at 21 (plaintiffs-respondents had standing because they were denied "information . . . that, *on respondents' view of the law*, the statute requires that AIPAC make public") (emphasis added).

why the information plaintiffs seek is "already available to them," Int. Br. at 13, and plaintiffs thus have not suffered informational injury.[6] But the FEC reports CTR and HFA filed in the 2016 elections are not a functional substitute for proper disclosure of the coordinated spending alleged, because they lack the *factual* information to which plaintiffs are entitled. CTR's 2016 reports disclosed its disbursements only in general terms (*e.g.*, as "salary" or "rent"), and failed to provide information that would allow a determination of which disbursements, in whole or part, were made in coordination with HFA and which were made for non-coordinated or exempt activities.

a. CTR's and HFA's failure to report leaves plaintiffs without access to the information they are owed under FECA.

Intervenors' first theory is that plaintiffs have not suffered informational injury because the news reports and other sources cited in the administrative complaint already provided considerable information about CTR's apparent coordination with HFA. Int. Br. at 12-13. But plaintiffs have made clear that without an FEC investigation, they do not know which activities were in fact coordinated between HFA and CTR, nor the extent to which any given disbursement by CTR constituted in whole or part an in-kind contribution to HFA. Am. Compl. ¶ 11, 30, 95. Indeed, even after reviewing the existing factual record, which comprised plaintiffs' administrative complaint, intervenors' responses thereto, and other publicly available material, the OGC determined that an investigation was necessary because "the extent" of illegal coordination between CTR and HFA was unknown. *Id.* ¶ 4. A similar challenge to a plaintiff's informational

[6] As a threshold matter, this argument bears only upon plaintiffs' access to disclosure from CTR and HFA; it does not address the broader informational injury that arises from the controlling group's purportedly authoritative construction of the coordination regulations and internet exemption that plaintiffs challenge under the APA. *See infra* Part III. The latter injury is consistent with the general deprivation of information that was found to sustain standing in *Shays III*—"[s]pecifically, under the FEC's definition of coordinated communications, presidential candidates need not report as contributions many expenditures that [plaintiffs] believe[] BCRA requires them to report." 528 F.3d at 923.

standing based upon the purported adequacy of news reporting was recently rejected where "the [FEC's] General Counsel did not believe it knew the entire story about the contributions." *CLC v. FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017). As that Court found, "[i]f the General Counsel did not know the whole story then, there is little reason to believe that plaintiffs know it now." *Id.*

Moreover, although the public record makes clear that CTR and HFA coordinated *some* activities that qualified as reportable in-kind contributions, plaintiffs know only the broadest contours of that spending, and the little additional information they have is based on news reports. This evidence, while more than sufficient to support a finding of reason to believe that CTR and HFA violated FECA, *see infra* Part II, is not the type of information, certified as correct and provided in disclosure reports filed under penalty of law, 52 U.S.C. § 30109, that FECA demands. Nor was this information disclosed by virtue of an FEC investigation,[7] unlike many of the standing decisions that intervenors cite. *See infra* Part I.A.2.c. Plaintiffs need not settle for incomplete second-hand information in lieu of the comprehensive verified disclosure they are owed under FECA. *See* 52 U.S.C. § 30104.

b. CTR's and HFA's disclosure reports do not contain the information plaintiffs need to determine the amounts and purposes of CTR's in-kind contributions.

Intervenors next argue that CTR's committee disclosure reports from the 2015-16 cycle disclose "every CTR expenditure" at issue in this case, and thus plaintiffs are suing merely to have those expenditures "re-classified as an in-kind contribution." Int. Br. at 12. But this argument is based on the false premise that CTR's reports actually disclose specific, itemized expenditures that *could* be "re-classified" as coordinated or non-coordinated expenditures. Instead of disclosing such

[7] OGC recommended "[a]uthorizing the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas and deposition subpoenas." First Gen. Counsel's Report ("FGCR") at 27 ("OGC Rept."), cited in Am. Compl. ¶ 4 and attached hereto as Exhibit C.

information, CTR has simply reported undifferentiated "lump sums" for expenses like payroll, salary, or travel, without identifying whether or the extent to which these disbursements were connected to coordinated activities. And this case, in particular, turns on the *purpose* of CTR's expenditures—namely, whether they funded exempt internet communications. Without an itemization of disbursements according to their specific purposes, it is impossible to answer this central inquiry. Plaintiffs are thus suing for access to new factual information crucial to understanding which CTR disbursements served as in-kind contributions—not for a mere reclassification of information already in the public domain.

During the 2015-16 election cycle, CTR filed periodic reports with the FEC disclosing $9,617,828 in disbursements. CTR reported no contributions to HFA.[8] In reporting its "independent" disbursements, CTR typically described the purpose of each line item in terms that were "not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." OGC Rept. at 9. These generic descriptions leave plaintiffs with more questions than answers regarding the information to which they are entitled: How much of the spending on this line item (if any) was coordinated with HFA? If some portion of this disbursement was indeed "coordinated," which specific coordinated activities were funded, and were they exempt as unpaid internet communications?

For example, CTR reported making 36 distinct salary payments to David Brock, totaling over $168,500.[9] One typical paycheck was the $4,521.56 that Brock received on July 28, 2016.

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[8] *See* Correct the Record Financial Summary (2015-16), FEC, https://www.fec.gov/data/committee/C00578997/?cycle=2016.

[9] *See* Disbursements: Correct the Record to David Brock (2015-16), FEC, https://www.fec.gov/data/disbursements/?committee_id=C00578997&two_year_transaction_period=2016&recipient_name=BROCK%2C+DAVID&data_type=processed (attached hereto as Ex. D).

Like the typical salary payment CTR made, this payment was reported simply as "Salary: Non-Contribution Account." *Id.* This method of paying and reporting Brock's salary would be accurate and complete only if *all* of Brock's work during that pay period was either uncoordinated with HFA or focused exclusively on online communications (assuming *arguendo* that paid staff time devoted to exempt internet activity is a "direct" production cost and exempt on that basis).

However, there is reason to believe that Brock's salary payments compensated him for a broader range of work, including work in coordination with HFA on matters other than online communications. As OGC found, "[t]he available information shows that CTR systematically coordinated with HFA on its activities." OGC Rept. at 16. Brock's own statements provided much of the key evidence for this conclusion, including a podcast interview in which he described CTR as "under [HFA's] thumb" and gave "several examples of how HFA would 'make sure' that CTR activity met HFA's needs." *Id.* at 17-18. Given Brock's apparently extensive personal involvement in coordinating CTR's activities with HFA, there is reason to believe that some portion of his paycheck functioned as a disguised contribution to the campaign.

But the actual mix of coordinated and non-coordinated (or exempt) work that Brock performed in any given pay period remains a mystery. To take just one plausible scenario, suppose that in the period covered by his July 28 paycheck of $4,521.56[10] Brock's work consisted of preparing surrogates for television interviews at HFA's suggestion (40 percent) and reviewing Facebook posts and tweets for CTR to post at HFA's suggestion (60 percent). In that case, 40 percent of Brock's paycheck, or $1,808, represented non-exempt, coordinated spending and CTR should have reported that amount as an in-kind contribution to HFA, with a descriptive memo such

[10] *See* CTR Report of Receipts and Disbursements (FEC Form 3X) at 55, October 2016 Quarterly Report (amended Dec. 7, 2016), https://docquery.fec.gov/pdf/477/201612089040486477/201612089040486477.pdf (page reference attached hereto as Ex. E).

as "In-Kind Contribution: Media Training for Surrogates." FECA entitles plaintiffs to know about this type of coordinated transaction. But CTR's apparent practice was to treat the entirety of every salary payment as a non-contribution disbursement no matter what work it paid for, violating FECA and leaving plaintiffs in the dark.

Another example of CTR's unlawful reporting is its treatment of travel expenses. CTR disclosed more than $589,000 in disbursements for "travel" in the 2015-16 election cycle. OGC Rept. at 21. A disbursement for "travel" is not an expense for an unpaid online communication—or a communications expense at all—so it must be treated as an in-kind contribution to the extent it was connected to coordinated activity. Given the abundant evidence that "CTR systematically coordinated with HFA on its activities," *id.* at 16, there is at least reason to believe that some of CTR's travel spending funded coordinated activities unconnected to the internet, and thus should have been allocated between contribution and non-contribution components.

HFA's public reports provide even less information than CTR's about the spending coordinated between the two committees. HFA did not report receiving any contributions from CTR. Am. Compl. ¶ 63. The only reported transactions between HFA and CTR were the two payments that HFA made to CTR in 2015: $275,615 for "research, non-contribution account," and $6,346 for "research services." OGC Rept. at 9. Intervenors argue that these payments "fully compensated CTR for any tracking and research services it provided to HFA." Int. Br. at 30. However, as OGC found, it is actually "not clear" whether these payments covered the value of any non-public information CTR shared with HFA, OGC Rept. at 9, and an investigation is necessary "to determine how [the payments] relate to CTR's overall activity," *id.* at 20 n.67. It would be premature for the Court to decide, on a motion to dismiss, whether it was reasonable to conclude that HFA's minimal payments to CTR covered the fair market value of CTR's

coordinated research and tracking work. In any event, HFA's relatively modest reported payments to CTR reveal nothing about coordinated activity *other than* research and tracking.

In short, neither CTR nor HFA have provided the public accounting of coordinated expenditures to which plaintiffs are entitled under FECA, and CTR's filed reports do not contain the information necessary cure this failure.

c. Intervenors cite no case suggesting that the failure to disclose up to $9 million in in-kind contributions does not inflict informational injury.

Unlike the judicial authority that intervenors cite to challenge plaintiffs' standing, this case does not merely concern a "re-classifi[cation]" of already known coordinated spending "as an in-kind contribution." Int. Br. at 12. Intervenors' cited precedents, insofar as they even concern coordinated spending, involved plaintiffs seeking a legal finding of violation in connection to a discrete reported expenditure as to which the fact of coordination had already been confirmed—for instance, because the FEC actually investigated or entered into a conciliation agreement. Here, by contrast, CTR spent as much as *$9 million* in coordination with HFA, but there has been *no* acknowledgment of coordination, no FEC investigation, and no information reported by either group revealing the extent of the in-kind contribution that HFA received from CTR.

Therefore, although intervenors lean heavily on *Wertheimer*, their reliance is misplaced. The apparent "impetus" for that lawsuit, as the Court noted, was the plaintiffs' dissatisfaction with the FEC's failure to find that the DNC's spending on certain advertisements in connection to President Clinton's 1996 campaign constituted illegal coordinated expenditures under the Presidential Election Campaign Fund Act. *Wertheimer*, 268 F.3d at 1072. In short, the plaintiffs sought a legal ruling that the DNC had violated the Fund Act, not new facts.

The problem with those plaintiffs' theory of standing was their failure to show that such a ruling "might lead to additional factual information." *Id*. at 1074. The plaintiffs *already knew* that

the DNC's spending was coordinated with President Clinton, because—as no one disputed—FECA already required political party committees to report their coordinated expenditures with presidential candidates. *Id*. at 1073; *see also id.* at 1075 (Garland, J., concurring) ("[A]ppellants do not dispute[] that political party committees are already required to report and to identify such coordinated expenditures as § [30116(d)] expenditures."). If the plaintiffs had prevailed, the result would have been to force *candidate* committees to "disclose" as contributions the exact same coordinated expenditures already disclosed by the DNC; therefore, they were not pursuing new factual information, but "the same information from a different source." *Id*. at 1075.[11]

The other cases intervenors cite are similarly inapposite. For example, in *CREW v. FEC*, 799 F. Supp. 2d 78 (D.D.C. 2011) ("*CREW 2011*"), this Court ruled that the plaintiffs lacked informational standing to challenge the FEC's failure to take enforcement action regarding an excessive in-kind contribution that a congressmember's PAC made to his presidential campaign in the form of $10,243 in travel expenses. *Id.* at 88. The plaintiffs already had all of the information they claimed to seek, because the FEC had conducted an investigation and published a report clarifying precisely how much the PAC spent on travel expenses, and under what factual circumstances. *Id*. The only remaining question was a legal dispute about how much of the $10,243 expenditure should be considered a contribution to the presidential campaign, and how much should be considered a non-contribution expenditure in furtherance of the PAC's own mission. *Id*. Unlike in this case, categorizing a specific portion of the expenditure in *CREW 2011* as an in-kind

[11] Intervenors characterize *Wertheimer* as holding that "'coordination' is a legal conclusion" no matter the context. Int. Br. at 12. But *Wertheimer* merely recognized that "coordination" *can be* a legal conclusion in situations where the underlying facts are known. 268 F.3d at 1075. At the same time, the court recognized that in other contexts, "*facts* are necessarily implied by the label 'coordinated,'" suggesting that plaintiffs *could* show informational injury in other cases based on a failure to disclose coordinated spending. *Id*. (emphasis added). This is such a case.

contribution would reveal no new facts about it.

Likewise off point are *CREW v. FEC*, 475 F.3d 337 (D.C. Cir. 2007) ("*CREW 2007*"), and *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138 (D.D.C. 2005), which both turned on the valuation of a discrete in-kind contribution in the form of a mailing list. In *CREW 2007*, the plaintiff lacked standing to challenge the FEC's dismissal of a complaint alleging an illegal contribution of a list of conservative activists to President George W. Bush's reelection campaign. 475 F.3d at 337-38, 341. Despite having extensive information about the list and how the Bush campaign acquired it, CREW claimed to sustain informational injury because it disagreed with the valuation of the list provided by the campaign. *Id.* at 338-39. The Court explained that this theory of injury was "highly attenuated" because "the list's precise value—if that could be determined—would add only a trifle to the store of information about the transaction already publicly available." *Id.* at 339-40. Similarly, in *Alliance for Democracy*, the plaintiffs sought to show informational standing on the ground that the FEC failed to calculate and publish the value of a donor list that allegedly constituted an illegal in-kind contribution. 362 F. Supp. 2d at 145. There, the Court noted that "there was no single, objective value that could be attached to the mailing list," and insofar as it was possible to estimate the list's value, the plaintiffs already had access to data that would enable that estimation. *Id*. at 145-46.

These cases have no bearing on plaintiffs' informational interest here. Unlike the value of the list in *Alliance for Democracy*, the nature and extent of CTR's coordinated spending with HFA is possible to quantify, but depends on information that is currently known only by respondents. And the information plaintiffs seek—specifically, the extent to which a $9-million "independent" super PAC was in fact working and spending money in coordination with the Democratic nominee for President—can hardly be dismissed as a "trifle." *CREW 2007*, 475 F.3d at 340. Intervenors

cannot escape the reality that plaintiffs' injury in this case consists of "their inability to obtain information" that FECA requires CTR and HFA to disclose. *Akins*, 524 U.S. at 21.

3. Both plaintiffs sufficiently show that their inability to access FECA disclosure information directly and concretely injures their interests.

A plaintiff suffers an injury in fact when it shows that it has been deprived of information that must be disclosed pursuant to a statute, and that it "suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Pres. Advisory Comm'n on Election Integrity*, 828 F.3d 989, 992 (D.C. Cir. 2016).

"There is no reason to doubt" that information required to be publicly disclosed here is "helpful" to plaintiff Kelly in her evaluation of candidates for public office, and to CLC in its programmatic work in public education, policy development, legislative advocacy, and litigation. *Akins*, 524 U.S. at 21; *Shays III*, 528 F.3d at 923.

Like the *Akins* plaintiffs, plaintiff Kelley is a U.S. citizen and registered voter. *See* Kelley Decl. ¶ 1 (attached hereto as Ex. A); *see also* Am. Compl. ¶ 26; *Akins*, 524 U.S. at 13. As a voter, she wishes to use information missing from CTR's and HFA's disclosure reports to assess candidates for office and evaluate the role that CTR's funders and operatives might play in the 2020 and future elections. Kelley Decl. ¶¶ 5-7. The controlling Commissioners' unlawful construction of the coordination rules also deprives her of information about coordinated spending by similar outside groups, which she would use to evaluate the range of political messages she hears and monitor the influence of campaign money on officeholders and public policy. *Id.* ¶ 8. As a result of the FEC's refusal to require CTR and HFA, as well as other political actors, to disclose the extent of their coordinated activity, Kelley suffers a concrete injury: she cannot access information that she would use in her capacity as a voter. *Id.*; *Akins*, 524 U.S. at 24-25 (holding informational injury "sufficiently concrete and specific" when it is "directly related to voting, the

most basic of political rights").

Plaintiff CLC also suffers concrete informational injury due to the FEC's failure to require complete disclosure from CTR and HFA, and its construction of its coordination rules to exempt broad swaths of coordinated activities. *See infra* Part III. The harm Congress sought to prevent by requiring disclosure under FECA applies with equal force to those individuals and organizations, like CLC, who "communicate" such information to voters to facilitate informed participation in the political process. *Akins*, 524 U.S. at 21 ("There is no reason to doubt [plaintiffs'] claim that the information would help them (*and others to whom they would communicate it*) to evaluate candidates for public office.") (emphasis added); *CLC*, 245 F. Supp. 3d at 128.

Indeed, a central way that CLC works to advance its mission involves researching the money used to influence elections—including, critically, analysis of FEC disclosure reports—and communicating its research to voters. Am. Compl. ¶ 17. CLC relies on information reported under FECA to develop a wide variety of public education materials, including fact sheets, reports, and blogs, to inform voters about the sources and extent of candidates' financial support and the role of outside groups in elections. Fischer Decl. ¶¶ 14-16 (attached hereto as Ex. B). These public education activities are harmed when candidates and committees fail to file accurate disclosure. *Id.* ¶ 17; Am. Compl. ¶ 24.

CLC also uses information from FEC disclosure reports to prepare comments, letters, and complaints submitted to the FEC and state campaign finance agencies, Fischer Decl. ¶¶ 29-32; draft briefs and other filings for state and federal campaign finance litigation, *id.* ¶¶ 22-28; and provide testimony and educational materials to legislators, partner organizations, and other policymakers, *id.* ¶¶ 31-34. These efforts are directly harmed by the FEC's dismissal here, Am. Compl. ¶ 11, and by its construction of the coordination rules, *id.* ¶¶ 108-113.

All of these programmatic activities rely on CLC's ability to compile a factual record showing the problems addressed by campaign finance laws; the dismissal here has decreased the quantity of accurate and complete reporting from which CLC can draw in compiling such a record. For instance, key to any constitutional defense of FECA's coordination provisions is a record corroborating the anticorruption interests they serve, with evidence demonstrating, *e.g.*, the political influence and access facilitated by coordinated spending, as well as any explicit quid pro quos that arise from such "disguised" contributions. Similarly, a factual record of the problems to be remedied by campaign finance laws is necessary for CLC's legislative advocacy. Without accurate disclosure of the sources of candidates' support, attempts to "follow the money" and connect big contributors to officeholder action—thereby securing one of the most important forms of record evidence for campaign finance legislation—are greatly impeded. Fischer Decl. ¶ 28.

B. CLC's Organizational Interests Have Been Directly Impaired by the Lack of FECA Disclosure, and They Have Diverted Resources to Counteract That Harm.

CLC also asserts a claim of organizational injury, because the FEC's "actions cause[d] a 'concrete and demonstrable injury to the organization's activities' that is more than simply a setback to [CLC's] abstract social interests.'" *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (citation omitted). This is a two-part inquiry, requiring plaintiffs to show, "first, whether the agency's action . . . 'injured [CLC's] interest' and, second, whether [CLC] 'used its resources to counteract that harm.'" *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*") (citation omitted). CLC meets both prongs.

Intervenors contend that CLC's organizational standing claim is doomed because it is based only on "general assertion[s]." Int. Br. at 17. At the motion to dismiss stage, of course, "general factual allegations" of injury are sufficient, because the court assumes that they "embrace those specific facts that are necessary to support the claim." *Abigail All. for Better Access to*

Developmental Drugs v. Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006) (citation omitted). In any event, CLC has alleged in detail how the inability to obtain required disclosure information from CTR and HFA has harmed CLC's discrete programmatic interests and required it to use organizational resources to counteract the harm.

CLC's inability to obtain required disclosure information directly harms its organizational mission to "strengthen the U.S. democratic process" and promote "representative, responsive and accountable government," which it achieves, in large part, by protecting the public's access to information about the financing of federal and state election campaigns and communicating about the influence that campaign finance has on policy. Am. Compl. ¶ 15; Fischer Decl. ¶ 4. Complete and accurate FEC reports are essential for programs advancing CLC's mission, including public education efforts to inform to voters about campaign spending and the true sources and nature of candidates' financial support. Am. Compl. ¶ 16; Fischer Decl. ¶¶ 9, 14; *see supra* Part I.A.3.

The D.C. Circuit recognized a similar theory of organizational injury in *PETA*. There, PETA alleged that the USDA's failure to apply the Animal Welfare Act to birds harmed its organizational interests by depriving PETA of information it needed to conduct public education efforts central to its mission of preventing animal cruelty and denying it the ability to combat bird abuse through USDA enforcement complaints. 797 F.3d at 1094-95. The Court concluded that the deprivation of bird-related information, including "investigatory information," created an injury sufficiently "concrete and specific" to confer organizational standing. *Id.* at 1095.

Likewise, CLC's inability to access information has harmed its public education efforts and strained several other key programmatic activities central to its mission. Fischer Decl. ¶ 17. Intervenors nevertheless insist that CLC, like the plaintiffs in *CREW v. FEC*, 401 F. Supp. 2d 115 (D.D.C. 2005) ("*CREW 2005*"), has failed to specify concrete injuries or articulate a "particular

plan" for using the information it seeks. Int. Br. at 17. This is wrong. CLC's regulatory practice is directly and concretely injured by the dismissal because CLC has been deprived of information it needs to participate effectively in rulemaking proceedings and engage in its "normal process of submitting [FEC] complaints." *PETA*, 797 F.3d at 1094; Fischer Decl. ¶ 24. The FEC's failure also decreases the store of judicially-noticeable information from which CLC can draw to prepare materials for campaign finance litigation in state and federal courts and in its legislative advocacy program. Fischer Decl. ¶¶ 23, 34. Furthermore, unlike the plaintiff in *CREW 2005*, CLC is not already "privy" to the information at issue. 401 F. Supp. 2d at 122-23; *see also infra* Part I.A.2.

CLC has also shown that it has expended resources to counteract the injury to its programmatic activities, so it meets the second prong of the organizational standing test. *See PETA*, 797 F.3d at 1094. Because the FEC failed to require disclosure in connection with CTR's and HFA's coordinated activity, reporters, researchers, and the public have contacted CLC for guidance as to whether CTR and HFA had violated disclosure laws and for advice about how to find the unreported information. Am. Compl. ¶ 24; Fischer Decl. ¶ 20. In response, CLC had to divert resources from other organizational needs to research relevant law, review inadequate disclosure reports, and explain to reporters and partner organizations how to they might attempt to find information not properly reported. Fischer Decl. ¶ 20.

Intervenors assert that the allegation "that CLC was injured by having to provide such information to reporters" is not legally sufficient for standing purposes. Int. Br. at 16. But plausible claims of injury based on the diversion of organizational resources clear the Article III bar—especially at this stage of the case. *See Abigail All.*, 469 F.3d at 132; *PETA*, 797 F.3d at 1096 (finding USDA's failure to provide for investigations of bird-related abuse caused PETA to expend resources to gather the information it sought from the USDA independently). CLC has been forced

to divert resources in a futile attempt to find the information sought here, reviewing incomplete disclosure reports and reallocating staff time to assist reporters and partner organizations. Fischer Decl. ¶¶ 20-21. These allegations, like PETA's, are "non-speculative" and directly result from the agency's failure to provide legally required disclosure. 797 F.3d at 1095.

C. Plaintiffs' Injury Is Fairly Traceable to the Dismissal of their Administrative Complaint and Is Likely to Be Redressed by a Favorable Court Decision.

Intervenors finally argue—albeit only in a footnote—that plaintiffs have "failed to meet the causation and redressability requirements for Article III standing." Int. Br. at 17 n.5. Not so. Any party "aggrieved" by the dismissal of their administrative complaint can seek review of that decision in court. 52 U.SC. § 30109(a)(8). *See also Akins*, 524 U.S. at 19 ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly."). Plaintiffs' inability to access information about the true scope of CTR's and HFA's coordinated activity is a direct result of the FEC's failure to find reason to believe that CTR and HFA had violated FECA.

For the plaintiffs' injuries to be redressable, it need only be likely that judicial relief will redress their injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If the Court agrees that the FEC's refusal to investigate plaintiffs' complaint was contrary to law, then it will set aside the agency's action and remand the case. *Akins*, 524 U.S. at 25. Even if the FEC reaches the same result on different grounds, the Court's action will have redressed plaintiffs' injury in fact. *Id.*

II. PLAINTIFFS PROPERLY STATE A CLAIM FOR RELIEF UNDER FECA.

Intervenors also claim under Rule 12(b)(6) that plaintiffs "fail[ed] to reasonably allege" that the dismissal of their administrative complaint was contrary to law. Int. Br. at 22. But the Amended Complaint details at length why the dismissal was arbitrary, capricious, and contrary to law: because it hinged on impermissible interpretations of FECA and FEC rules and arbitrarily disregarded the factual record. These allegations are more than sufficient to state a claim.

The controlling Commissioners advanced two principal reasons for their conclusion that there was no reason to believe CTR made any in-kind contributions to HFA in the form of coordinated expenditures. As plaintiffs set forth in their complaint, neither withstands the slightest scrutiny.

First, the controlling Commissioners accepted that nearly all of CTR's expenditures went toward online activity falling outside the regulatory definition of "public communication," 11 C.F.R. § 100.26, and thus could not be "coordinated communications" under 11 C.F.R. § 109.21. This was an implausible legal analysis on its own terms, but manifestly arbitrary and contrary to law in that it treated CTR's general overhead expenses covering *both* internet communications and non-internet activities as categorically unregulable "input costs" for the former. *See* SOR at 12-13. The record before them plainly indicated that CTR's expenditures funded substantial *offline* activities like opposition research, polling, surrogate training, reporter pitches, and "rapid response" press outreach, while most of its reported disbursements took the form of general overhead expenses that were not communication-specific. OGC Rept. at 9-10. At a minimum, therefore, CTR's non-internet spending likely gave rise to significant unreported in-kind contributions to HFA under the general "coordinated expenditure" regulation, 11 C.F.R. § 109.20(b), and as OGC found, an investigation was warranted to determine "the extent" of the contribution. Am. Compl. ¶ 4.

Second, the controlling Commissioners found that "[e]ven assuming" any of CTR's expenditures were unconnected to exempt communications and could be analyzed under 11 C.F.R. § 109.20(b), the allegations of coordination were too "speculative" to support finding reason to believe, SOR at 14—notwithstanding copious record evidence to the contrary. By its own admission, CTR was operating as a "surrogate arm" of the Clinton campaign, OGC Rept. at 16,

and "work[ing] in support of Hillary Clinton's candidacy for president."[12] FEC Compl. ¶ 11. The controlling group's willful blindness to these facts does not render the administrative complaint's allegations insufficient.

A. The Dismissal Rested on an Impermissible Interpretation of FECA and FEC Rules that Frustrates the Act's Purposes and "Creates the Potential for Gross Abuse."

1. The Commission's expansion of the internet exception was contrary to FECA's clear text and core purposes.

Since *Buckley*, the Supreme Court has recognized that candidate contribution limits are central to FECA's core anticorruption purposes, and has made clear that "expenditures controlled by or coordinated with the candidate might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse." 424 U.S. at 46. For this reason, "such controlled or coordinated expenditures are treated as contributions," thus "prevent[ing] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 46-47. To this end, FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i). The controlling group's unbounded construction of the internet exemption defies this clear statutory language and frustrates Congress's unambiguous intent to regulate and require disclosure of all expenditures coordinated with a candidate.

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[12] Intervenors have maintained that *none* of CTR's activities—save those reflected in the two payments HFA made to CTR for unspecified "research services" that amounted to less than 3 percent of CTR's total receipts, *see supra* at 19-20—could be "contributions," because they either involved exempt "internet-only" "communications activities" or qualified for the "media exception." As for the latter, CTR is a political committee, and as such, unable to claim the media exemption—either for its own websites or for its public relations efforts involving speaking to reporters and placing op-eds. 11 C.F.R. § 100.73 (political committee's communication not covered by media exemption unless it is "a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility" and "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates").

These Commissioners took at face value that all of CTR's activities constituted or were "input costs" for exempt internet communications—even though the record did not support that characterization. CTR's own description of its supposedly exempt "communications" included activities well beyond communications distributed for free online. In addition to internet activities undertaken by paid staff like "[p]ublishing websites" or "[t]weeting," CTR claimed the absolute ability to "coordinate with HFA" on expenditures including: commissioning a poll and distributing it online; hiring media consultants to train Clinton campaign surrogates; paying employees to contact reporters in support of Clinton or opposition to her opponents; "[h]iring trackers to attend and film campaign events"; and paying senior staff to publish op-eds supporting Clinton in *The Hill* and *The Detroit Free Press*. HFA Resp. to FEC Compl. at 2 (Dkt. No. 26-3). As OGC concluded, "CTR's characterization of most of its activity as communications is inconsistent with CTR's known activity, CTR's reported disbursements for that activity, and the Commission's approach to coordinated expenditures as in-kind contributions." OGC Rept. at 24-25.

Nevertheless, the controlling Commissioners treated all of CTR's general operating expenditures as subject to an apparently limitless exemption for "expenses incurred by [CTR] to produce an internet communication." SOR at 12; Am. Compl. ¶¶ 89-91. Under this view, the exemption goes far beyond internet communications not "placed for a fee on another person's Website," 11 C.F.R. § 100.26, and includes all "associated expenses" and "overhead expenses" that in some small part support "internet communications." SOR at 14. Their votes to dismiss thus rested on a "bright-line rule" requiring that the Commission: *first*, treat any cost "associated" with an unpaid internet communication as an "input" cost categorically exempt from regulation; and *second*, include in such "input costs" general overhead disbursements only *partly* attributable (at most) to exempt internet communications. Am. Compl. ¶¶ 89-91.

Intervenors defend this unsustainable approach to the coordination rules by insisting that it reflects the FEC's "clear and deliberate intent to include input costs within the scope of the Internet exception." Int. Br. at 25. Even if that were actually true, *see infra* Part II.A.2, it still would not explain why expenditures for *non*-internet activities can be lumped in with the direct costs of internet communications and treated as exempt on the same terms. Indeed, although the controlling Commissioners described "input expenses" as only those costs "'necessary to make' the internet communication," SOR at 13, their analysis sweeps almost all of CTR's reported disbursements—over $9 million dollars in expenditures that largely paid for office space, staff salaries, and travel—into that unregulable zone.

Even if CTR had some input expenses that were plausibly "necessary to make" an exempt internet communication, its general operating costs were not tied to any specific communications and supported at least some activities clearly outside the scope of the exception. *See* Am. Compl. ¶¶ 90-91. Under the controlling group's standard, however, one dollar of internet-related spending immunizes all general operating expenses from disclosure and regulation as contributions, regardless of a group's other coordinated activities.

The controlling Commissioners utterly failed to explain how this approach "rationally separates election-related advocacy from other activity falling outside FECA's expenditure provision," *Shays II*, 414 F.3d at 102, or is otherwise permissible under the Act. Their standard has no basis in FECA and creates a massive loophole in the FEC's regulation of coordinated spending. A categorical exception of this magnitude plainly "compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165. Courts "must reject administrative constructions . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*,

454 U.S. 27, 32 (1981). FECA simply does not permit the FEC to create a blanket exception to the contribution limits allowing for unfettered strategic collaboration between candidates and "independent" groups on any expenditures that can be notionally "associated" with communications disseminated for free online.[13]

2. The interpretation is contrary to the FEC's own rules.

The controlling Commissioners' single-minded focus on 11 C.F.R. § 109.21 and the "public communication" definition—and their extreme interpretation of the internet exception underlying it—was also inconsistent with the FEC's own rules and precedent. As OGC noted, this was not how the internet exemption has previously been understood or applied. OGC Rept. at 28.

And certainly, notwithstanding intervenors' claims to the contrary, the FEC has not "consistently adhered to this interpretation" of FECA. *Orloski*, 795 F.2d at 166. Most obviously, the assertion that the internet exemption has always broadly covered any conceivable "input costs" ignores what the FEC actually did in its 2006 internet rulemaking.[14] As OGC recently observed, "[n]either the [internet] regulation itself nor the Commission's accompanying explanation and

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[13] As plaintiffs alleged in Count II of their FEC complaint, CTR's disbursements for staff salaries amounted to "compensation for personal services" rendered to the campaign, and were therefore in-kind contributions under FECA whether or not the ultimate activity qualified as a "public communication." *See* 52 U.S.C. §§ 30101(8)(A)(i)-(ii), 30116(a)(7)(B)(i); Am. Compl. ¶ 69; FEC Compl. ¶¶ 81-83, 98-102. The controlling group did not even address this claim, much less attempt to harmonize their myopic focus on the content standards in 11 C.F.R. § 109.21 with FECA's clear intent to regulate this activity.

[14] Intervenors quote at length from comments jointly filed by CLC and several other groups in the rulemaking for the proposition that CLC was "well aware" in 2006 that the rule would require this treatment of input costs. Int. Br. at 25-26. In fact, the comment said no such thing. In the footnote that intervenors reproduce—albeit in a materially altered and misleading form—the comments sought to clarify the treatment of production costs for internet communications by individuals, because "[t]he Commission's proposed rule [was] *unclear*." Democracy 21, CLC & Ctr. for Responsive Politics Comments on Notice 2005-10: Internet Communications at 12 n.10 (June 3, 2005), https://sers.fec.gov/fosers/showpdf.htm?docid=36918) (emphasis added). The comments did not say that the rule "*would* permit" the exemption of input costs, much less affirmatively require it. Int. Br. at 25 (emphasis added).

justification expressly address whether the regulation also exempts production costs that are incurred unrelated to the advertisement's dissemination over the internet." FGCR at 6, MUR 6729 (Checks and Balances) (Aug. 6, 2014). Far from supporting a blanket exemption for input costs, the rulemaking record suggests that the internet exemption was far narrower, and addressed primarily to activities by individuals and non-committees—not single-candidate super PACs like CTR. In promulgating the final rules, for example, the FEC confirmed that computer purchases and payments to bloggers can be "expenditures" *even if* the blogs themselves ultimately fall under the "internet exemption." FEC Compl. ¶¶ 94-95 (citing 71 Fed. Reg. at 18604-06).

Even if the rulemaking record were silent on this point, that would be no justification for an interpretation that dismantles the entire statutory scheme. Nor was the controlling Commissioners' interpretation reasonable because it supposedly avoids "chill[ing] political speech online." SOR at 13. "[S]o would regulating nothing at all, and that would hardly comport with the statute." *Shays II*, 414 F.3d at 101. Besides, as the Supreme Court recognized in *McConnell*, "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. at 221. In any event, the First Amendment concerns noted in the internet rulemaking were reserved for individual citizens and bloggers who might incidentally communicate about a candidate online; they do not reasonably extend to a "full-fledged media machine dedicated to providing HFA with services only tangentially related to internet communications." SOR of then-Chair Weintraub at 3 (cited in Am. Compl. ¶ 9; attached hereto as Ex. F).

FEC precedent likewise did not justify dramatically expanding the exemption. The controlling SOR and the intervenors both point to MUR 6657 (Akin for Senate), but that matter

bears no resemblance to this case. First, as OGC explained in justifying its recommendation not to proceed there, "the alleged prospective coordinated communications . . . *never occurred*." FGCR at 2, MUR 6657 (May 6, 2013) (emphasis added). Second, the only question OGC was examining with respect to "input costs" was whether expenditures for "'Email List Rental' or 'Online Processing,'" *id*. at 6, alone were sufficient to cause the group's internet communications to be "placed for a fee"—thereby rendering the "internet exemption" *entirely* inapplicable. *Id*. at 6-7. The question was not whether a broader category of disbursements not tied to online communications, such as CTR's overhead expenses here, should be exempt as "input costs."[15]

The other FEC "precedents" intervenors cite also do not validate their unbounded approach to input costs. *See* Int. Br. at 25-29. For one thing, none of the enforcement matters or advisory opinions cited in their brief involved a remotely comparable scheme, either in substance or in scale, to coordinate with a campaign; indeed, many did not address coordinated activity at all. *See, e.g.*, Int. Br. at 26-27 (citing FEC Advisory Op. 2011-14 (Utah Bankers Ass'n) (approving corporate PAC's request to operate an email list soliciting contributions to particular candidates, where the PAC appended a detailed policy confirming that it was structured to operate independently of candidates); FEC Advisory Op. 2008-10 (VoterVoter.com) (permitting nonpartisan commercial vendor to operate online marketplace facilitating the purchase and sale of political ads, where unpaid ad creators and broadcast buyers were transacting at arm's length and not coordinating with candidates or each other)).

[15] Other matters cited by intervenors and in the SOR are also readily distinguishable. For example, MUR 6414 (Carnahan in Congress) involved entirely *uncompensated* activity. In fact, the OGC analysis quoted by the controlling Commissioners here, SOR at 12 n.60, goes on to emphasize, in the very next sentence, that "the individuals responsible for the website *were not compensated for their work* in hosting, designing or creating the website or its written content." Factual & Legal Analysis at 11, MUR 6414 (July 17, 2012).

Many of the cited matters also ended in deadlock, but intervenors repeatedly present the views of a minority bloc of Commissioners as if they reflect a settled interpretation of law adopted by the full Commission. *See, e.g.*, Int. Br. at 27-28 (citing MURs 6729 (Checks and Balances); 7023 (Kinzler for Congress); 7080 (Babeu for Congress)).[16] That intervenors must resort to a handful of non-binding minority statements in deadlocked matters only serves to underscore that the legal interpretation underlying this dismissal was neither "traditional" nor authoritative.

MUR 6729 (Checks and Balances) is illustrative. There, the Commission deadlocked 3-3 on allegations that a 501(c)(4) group had failed to disclose or include required disclaimers on two broadcast advertisements, despite reportedly spending almost $900,000 to buy air time for the ads. But the group had countered with a sworn declaration averring that the two ads in question were only disseminated online, and the broadcast air time was in fact used to run a third ad that did not trigger FECA disclosure obligations. FGCR at 6, MUR 6729 (Aug. 6, 2014). There was no other

[16] In MUR 7080 (Babeu for Congress), the Commission deadlocked on whether a candidate had accepted an impermissible in-kind contribution from an Arizona sheriff's office that allegedly used paid staff to coordinate Facebook posts promoting the candidate. Although OGC found that the Facebook posts did not meet the content standards in 11 C.F.R. § 109.21(c) by virtue of the internet exception, it concluded that Babeu still "may have received an impermissible in-kind contribution from [the Sheriff's Office] in the form of free staffing" to create internet communications. FGCR at 12-13, MUR 7080 (Dec. 15, 2016). Therefore, despite recommending dismissal as a matter of discretion because the amount in violation was de minimis, OGC recognized that "coordinated communications" are not the entire universe of potential in-kind contributions under FECA. *See id.* But three Commissioners disagreed, preferring to find no violation rather than to dismiss on discretionary grounds, and the Commission deadlocked. Certification, MUR 7080 (Oct. 24, 2017).

The relevant vote in MUR 7023 (Kinzler for Congress) deadlocked along similar lines. OGC accepted in theory that the resources used to support an exempt internet communication, i.e., "staff time, office space, and equipment," could be an in-kind contribution, but recommended dismissing because the costs of disseminating candidate campaign materials via a single tweet were de minimis. FGCR at 14, 16, MUR 7023 (Oct. 6, 2016). The Commission then deadlocked 2-3 on whether to accept that recommendation, with some Commissioners opining that the "Internet Freedom Rules" forestalled the mere suggestion that such costs could ever be regulated. SOR of Comm'rs Hunter, Goodman & Petersen at 2, MUR 7023 (Jan. 23, 2018).

information about the group's spending, nor any suggestion that its activities had been coordinated with a candidate. Although OGC assumed that any *direct* production costs incurred for the ads beyond the purchase of air time might be included under the regulatory exemption for uncompensated internet activities, 11 C.F.R. § 100.155, it did not address the types of indirect costs that intervenors attempt to subsume under the exemption here. And even with respect to direct costs, OGC acknowledged that the question was unsettled, *id.*, and ultimately recommended dismissal on an alternative ground. *Id.* at 6, 10 (finding that ads were not reportable "independent expenditures" because they lacked express advocacy).

Here, however, CTR's operating costs are not direct input expenses for exempt expenditures—or, in many instances, even related to exempt activity whatsoever. "[M]uch of CTR's approximately $9 million in disbursements for activity during the 2016 election cycle cannot fairly be described as for 'communications,' public or otherwise, unless that term covers almost every conceivable political activity." OGC Rept. at 20. At a minimum, the controlling group did not "articulate a satisfactory explanation," "including a rational connection between the facts found and the choice made," for the conclusion that CTR's payments for general overhead expenses supporting multiple organizational activities constituted "input costs" that were "necessary to make" covered internet communications, and thus entirely exempt from treatment as coordinated expenditures or in-kind contributions. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted).

The controlling Commissioners' unbounded construction of the internet rules directly compromises FECA's core anticorruption goals by inviting "attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. Even if there *were* FEC precedent supporting their "input cost" theory, it would

not permit them to extend that interpretation in a way that betrays FECA's plain text and purposes.

B. Finding No "Reason to Believe" CTR Violated Statutory or Regulatory Coordination Provisions Was Arbitrary, Capricious, and Contrary to the Record.

Although the controlling group largely accepted CTR's claims that all of its expenditures were associated with exempt online "communications activities," they granted—at least for the sake of argument, *see* SOR at 14—that some of CTR's activities did not "relate directly" to internet communications. As for this category of expenditures, they simply dismissed the allegations of coordination as too "speculative" to support a reason-to-believe finding. SOR at 2. But that sweeping conclusion was "counter to the evidence before the agency." *State Farm,* 463 U.S. at 43.

There was no rational way to review this record and conclude that CTR had in fact "limited its interactions with [HFA] to the very communications that the Commission has previously decided not to regulate." SOR at 16. Incredibly, the controlling group arrived at this conclusion even though neither CTR nor HFA denied that their non-communication activities were coordinated, as OGC noted. OGC Rept. at 10 n.28. Instead, respondents generally argued that CTR *had* no non-communication activities subject to the coordination rules, so all of its spending was exempt. *See, e.g.*, Am. Compl. ¶¶ 2, 63, 79.[17]

To draw the counterfactual conclusion that CTR's admittedly coordinated activity was "uncoordinated," therefore, the controlling group had to ignore the voluminous evidence of 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 advocating Clinton's election online, in full coordination with her authorized campaign committee. *See, e.g.*, Am.

[17] The only "qualifying" contribution they acknowledged was the research and tracking services for which HFA supposedly paid in full. *See supra* at 19-20. Given the reported extent of this activity, Am. Compl. ¶¶ 63, 70, the claim that CTR was fully compensated for it was not credible.

Compl. ¶¶ 63, 65, 75, 79-81. CTR and its spokespeople consistently touted the group as a "strategic research and rapid-response" operation that could "work in coordination with the Clinton campaign as a stand-alone super PAC" but "avoid the coordination ban by relying on [the internet exception]." FEC Compl. ¶¶ 9, 12. From its inception, CTR took the position that it could—and *would*—freely coordinate with the campaign, and its leadership affirmed this arrangement consistently in press reports and interviews throughout the election cycle. *See, e.g., id.* ¶¶ 9-12, 14, 24, 26, 27, 30, 52; OGC Rept. at 18.

The controlling group arbitrarily discounted these admissions, concluding instead that the complaint "did not present facts to show that particular efforts were even 'coordinated' with [HFA]." SOR at 16. That required disregarding abundant contrary evidence. Indeed, these Commissioners suggested that the only record evidence supporting the conclusion that CTR "systematically coordinated with" HFA amounted to CTR's "May 2015 press release, information not included in the complaints or responses, and information stolen and disseminated by Russian intelligence officers." SOR at 6. But this ignores the extensive and unrefuted evidence of coordination in plaintiffs' complaint, which cited numerous reliable public sources other than CTR's 2015 press release and in no way relied on materials "disseminated" by Russia.

For instance, the complaint cited a 2016 *Time* magazine profile in which Brock reportedly explained that he would "talk to [Clinton] and her campaign staff about strategy, while deploying the unregulated money he raises to advocating for her election online, through the press, or through other means of non-paid communication." FEC Compl. ¶ 24. "These representations by CTR are not the puffery of an entity acting outside the orbit of HFA. CTR leadership spoke publicly about communications with senior HFA personnel, confirming that CTR and HFA had a close relationship and worked together to benefit HFA." Weintraub SOR at 2.

The controlling group sidestepped other inconvenient facts by mischaracterizing or simply ignoring credible allegations in the record. For example, they suggested repeatedly that the administrative complaint "concede[s] the speculative nature of its coordination violations" because it phrased certain clauses in the "conditional tense." SOR at 14, 16 n.80. On the contrary, the complaint alleged in detail that CTR openly coordinated at least some of its activities with HFA, and respondents did not dispute the factual basis for these allegations. The fact that CTR and HFA trumpeted their coordination scheme brazenly and in public does not make it any less illegal.

At the bare minimum, CTR and HFA were obviously wrong about *some* of the reasons they asserted to claim their activities were legally "exempt" from the coordination rules: for example, they argued that CTR's public relations efforts contacting reporters and placing op-eds qualified for the *media exemption*, which is not available to political committees like CTR. *See supra* note 12. The controlling group, lacking any justification for this patent legal error, did not even try to address it. But it defied all logic for them to then feign blindness as to whether this effort was coordinated: CTR and HFA all but admitted it was, arguing instead that it was conducted under the supposed protection of a different exemption that categorically *did not apply*.

These Commissioners also refused to consider other "information readily available to the general public," Weintraub SOR at 10, that was raised in OGC's report, claiming that they were bound to ignore any information outside of the four corners of the complaint, *see* SOR at 6-7 & nn.29-30. This included a first-person podcast interview in which Brock described the group's "coordinated status" and detailed his regular contacts with high-ranking campaign officials on strategy. OGC Rept. at 11. Refusing to consider this interview, beyond being unreasonable, contravenes the FEC's 2007 statement of enforcement policy, which confirms that it will consider "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. 12545, 12546. *See* Weintraub SOR at 9-10 & nn.50-54.

Finally, having thus arbitrarily rejected much of the record, the controlling group claimed that even at the reason-to-believe stage, complainants must establish coordination conclusively, "transaction-by-transaction," and the complainants did not "meet their burden" under that strict test. Am. Compl. ¶¶ 93-94. That demand sets an unreasonably high bar that has no grounding in FECA and directly contravenes internal agency policies and precedent regarding enforcement procedures at the reason-to-believe stage.

The standard applicable to a "reason-to-believe" finding is not specifically defined in FECA, but the structure of section 30109(a) makes clear that it involves a threshold determination antecedent to any finding of even probable liability, because it is a necessary precondition for a "probable cause" determination or civil enforcement action. *See* 52 U.S.C. § 30109(a)(2) (reason-to-believe finding authorizing investigation); *id.* § 30109(a)(4)(A) (probable cause finding). Therefore, the Commission has long recognized that "[a] 'reason to believe' finding is not a finding that the respondent violated [FECA], but instead simply means that the Commission believes a violation *may* have occurred." *FEC Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12, https://transition.fec.gov/em/respondent_guide.pdf (emphasis added). For instance, in its 2007 policy statement, the FEC stressed that reason-to-believe findings are not "definitive determinations that a respondent violated the Act," but instead, "indicate only that the Commission found sufficient legal justification to open an investigation to determine *whether* a violation of the Act has occurred." 72 Fed. Reg. at 12545 (emphasis added). In contrast, a finding of *no* reason to believe is appropriate only where "evidence convincingly demonstrates that no violation has occurred," or when a complaint is "not credible," "so vague that an investigation

would be effectively impossible," or "fails to describe a violation of the Act." *Id.*

On this record, and by their own admission, it was clear that CTR and HFA engaged in a systematic effort to coordinate their activities outside of FECA's reporting requirements and contribution source and amount limits. Even if the administrative complaint had not been so thoroughly corroborated by Brock's podcast interview, the record was clearly "at least sufficient to warrant conducting an investigation." *Id.* The controlling group's demand for conclusive proof at the reason-to-believe stage was manifestly unreasonable, and all but ensures that FECA's anti-coordination provisions will continue to go unenforced. *See* Am. Compl. ¶ 103.

III. PLAINTIFFS PROPERLY STATE A CLAIM UNDER THE APA.

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 are in direct conflict with FECA's mandate to regulate coordinated expenditures. *See* 52 U.S.C. §§ 30101(8)(A)(i)-(ii), 30116(a)(7)(B)(i).

The APA claim is made necessary by intervenors' insistence that the dismissal followed the Commission's "traditional approach" to the internet exemption, and that this exemption was meant to comprehensively encompass all "input costs" for an eventual unpaid internet communication, even general overhead expenses that support multiple organizational functions. Int. Br. at 25. They contend that this "bright-line rule" reflects the "longstanding" view that all coordinated activity with any arguable nexus to an internet communication is exempt, because the "Commission has *never* required speakers to allocate costs" and "overhead expenses across internet communications *(or other activities)*." *Id.* at 18, 25, 28 (emphases added). The controlling Commissioners likewise claimed that CTR and HFA "properly understood" FEC precedent with regard to the scope of the exemption, arguing that voting to find "reason to believe" would amount

to a "policy reversal[]" depriving respondents of fair notice. SOR at 13-14 & n.66.

Plaintiffs' disagree with this characterization of the scope and purpose of the internet exemption. But if intervenors' alternative narrative is accepted, and this construction of the coordination regulations deemed authoritative, then plaintiffs' informational injury extends beyond this matter—as does the remedy needed to redress it, because then the severe damage this administrative construction inflicts on FECA's comprehensive regime for regulating and requiring full disclosure of coordinated expenditures will occur not only in this matter, but in any coordinated expenditure case involving internet activity.

Intervenors nevertheless move to dismiss plaintiffs' arguments under the APA. They generally argue that FECA provides the exclusive avenue for challenging FEC actions, Int. Br. at 18, because "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. But that principle only applies "in situations where Congress has provided special *and adequate* review procedures." *Id.* (emphasis added). And contrary to intervenors' assertion, "every court to consider [the] issue" has *not* held that FECA precludes APA suits against the FEC, Int. Br. at 2; courts have routinely found that FECA's judicial review mechanism is not "adequate" for all challenges to FEC action. *Unity08 v. FEC*, 596 F.3d 861, 866 (D.C. Cir. 2010) (finding that FECA judicial review provision did not "implicitly" foreclose APA review of advisory opinion); *Shays II*, 414 F.3d at 96 (reviewing regulations under the APA and noting limits of FECA's remedial scheme); *CREW 2017*, 243 F. Supp. 3d at 105 (reviewing APA claim alongside FECA claim because an unlawful regulation was applied to dismiss plaintiff's FEC complaint).

Intervenors' motion relies on a fundamental misunderstanding of plaintiffs' APA claim. In Count One of the Amended Complaint, plaintiffs challenge the controlling Commissioners'

application of the coordination rules to find that none of the coordinated activities described in CLC's administrative complaint qualified as "coordinated expenditures" under FECA, and to dismiss the administrative complaint on that basis. Am. Compl. ¶¶ 106-107. But in Count Two, plaintiffs also bring as-applied and facial challenges under the APA to the validity of the FEC's coordination regulations, 11 C.F.R. §§ 109.20 and 109.21, insofar as they have been construed to incorporate an exemption that encompasses all "input expenses" for a political committee's coordinated internet communications, even if such expenses also support non-internet expenditures or constitute general overhead costs. Am. Compl. ¶¶ 109-113.

This regulatory construction permits exactly what FECA forbids: the provision of paid professional campaign services and other things of value to candidates by groups operating outside of the contribution and disclosure requirements of the Act. The regulations, as construed, thus contradict the clear text and express purposes of FECA's anti-coordination provisions. *See* 52 U.S.C. § 30101(8)(A)(ii) (defining in-kind contributions to include "compensation for the personal services of another person which are rendered to a political committee without charge for any purpose"); *id.* § 30116(a)(7)(B)(i) (providing that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" or her agents "*shall be considered to be a contribution to such candidate*") (emphasis added).

The controlling group defended this construction on the ground that it "operates as a bright-line rule and recognizes that a speaker will almost always incur expenses to produce an internet communication," SOR at 13—but as the D.C. Circuit recognized in *Shays II*, "a bright line can be drawn in the wrong place." 414 F.3d at 101. There was no basis to create a per se exception of this magnitude, which takes a narrow carve-out originally justified as a way to avoid unduly restraining the speech of "bloggers in their pajamas," Weintraub SOR at 5, and turns it into a vehicle for the

wholesale "evasion of campaign finance restrictions through unregulated collaboration." *Shays II*, 414 F.3d at 102. Indeed, the abuses sanctioned by this construction of the rules go far beyond even the egregious scheme alleged here. For example, it would appear to permit a "dark money" nonprofit, even one funded by foreign nationals, to mount an undisclosed $100 million public relations campaign in full coordination with the federal candidate it seeks to elect—avoiding the FEC's coordination rules on the pretext that some small portion of the effort will appear online.

Plaintiffs thus seek an order declaring the construction of these rules unlawful and invalid, and ordering the FEC to apply the Act's anti-coordination provisions in the manner that Congress prescribed here and in all future cases. This is not a remedy that FECA can provide. As the D.C. Circuit has observed, 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)). Because FECA's remedial scheme does not offer plaintiffs an adequate avenue to challenge the FEC's unlawful construction of statutory and regulatory anti-coordination provisions, the motion to dismiss their APA claim should be denied.

CONCLUSION

For these reasons, intervenors' motion to dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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.

Respectfully submitted,

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