IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Legislative and Regulatory Authorities:

Other Materials:

TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act
CLC	Campaign Legal Center
CTR	Correct the Record
EC	Electioneering Communication
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HFA	Hillary for America
IE	Independent Expenditure
MUR	Matter Under Review

SUMMARY OF ARGUMENT

Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley submit this supplemental memorandum to further explain, consistent with the Court's December 2, 2020 Opinion and Order (ECF Nos. 46 and 47), why they have standing to pursue their independent APA challenge to the validity of the relevant FEC coordination rules, 11 C.F.R. §§ 100.26, 109.20, and 109.21, as construed. Unlike their FECA claim, plaintiffs' APA claim challenges the validity of the FEC's coordination regulations directly, to the extent they have been authoritatively construed to incorporate an exemption encompassing all "input expenses" for coordinated internet communications, even if such expenses also support non-internet expenditures or constitute general overhead costs. Am. Compl. ¶¶ 109-113 (ECF No. 15).

By allowing candidates and outside spenders to coordinate freely and without the transparency that FECA prescribes on virtually any activities that can be notionally tied to an exempt internet communication, the challenged rules open the floodgates to massive undisclosed contributions to federal candidates in the form of coordinated expenditures—placing them in direct conflict with FECA's mandate to regulate and require disclosure of coordinated expenditures, *see* 52 U.S.C. §§ 30101(8)(A)(i)-(ii), 30104, 30116(a)(7)(B)(i), and causing plaintiffs clear and concrete informational injury by "illegally den[ying] [them] information about who is funding [federal] candidates' campaigns," *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*").

As plaintiffs have explained at length, neither the internet rulemaking nor subsequent FEC enforcement decisions suggested that the internet exemption operates in this way.[1] But the

[1] Plaintiffs have consistently noted their disagreement with this characterization of the original scope and purpose of the internet exemption. *See, e.g.*, Pls.' MTD Opp'n at 7-8, 33-38 (ECF No. 27); Pls.' MSJ at 6-8, 26-28 (ECF No. 35); Pls.' MSJ Opp'n & Reply at 17-30 (ECF No. 42). Intervenors now misleadingly cite the amended complaint to suggest that plaintiffs instead have "acknowledge[d]" the opposite, insinuating that *plaintiffs* agreed "that the Commissioners'

controlling Commissioners insisted in their Statement of Reasons that the dismissal followed the FEC's "traditional approach" to the internet exemption, and that voting to find "reason to believe" in the administrative proceedings would amount to a "policy reversal[]" depriving respondents of fair notice. AR392-93. The very premise of intervenors' argument, and indeed, of the FEC's dismissal of plaintiffs' administrative complaint, is that the internet rules *by their terms* exempt all "input costs" from disclosure and regulation as coordinated expenditures—even if these expenditures support largely non-exempt activities or pay for general overhead costs. Plaintiffs are entitled to take that representation at face value and challenge the rules directly under the APA.

Therefore, the harms that plaintiffs' APA claim seeks to remedy are not limited to or contingent on the viability of their FECA challenge to the dismissal of their administrative complaint. For purposes of their APA claim, plaintiffs take the intervenors and controlling Commissioners at their word that the construction of the coordination rules and internet exemption applied to dismiss CLC's administrative complaint is authoritative and binding. Because this claim thus challenges an "authoritative" and generally applicable agency construction that limits which expenditures will qualify as coordinated—and which must be disclosed under FECA as a contribution—plaintiffs' informational injuries extend beyond those caused by the dismissal of their administrative complaint. Plaintiffs thus have independent standing to challenge the rules directly under the APA even though the Court has concluded that they lack an informational injury with respect to the dismissal alone.

While plaintiffs have noted that their constitutional standing to bring this APA claim is

---

interpretation of the Coordination Regulations is longstanding" and has been applied by the Commission consistently "for the past fourteen years." *See* Int. Suppl. Br. at 12 (ECF No. 47) (citing Am. Compl. ¶ 110). However, plaintiffs have at no point conceded that the interpretation is supported by the 2006 Internet Rulemaking or otherwise reflects the Commission's "longstanding" coordination framework. *See, e.g.*, Pls.' MSJ at 6-8, 26-28.

premised on the same kinds of informational and organizational injuries as their FECA claim, that does not mean the injuries are identical. For APA purposes, plaintiffs' injuries are caused by the rules themselves—and all the FECA-required disclosure information the rules allow spenders to conceal—not simply by the dismissal of a single matter. *See FEC v. Akins*, 524 U.S. 11, 21 (1998).[2]

Intervenors' argument that plaintiffs lack APA standing to challenge this "authoritative" construction of the rules reduces to one easily refuted claim: assuming that plaintiffs were not deprived of statutorily required factual information in connection to the unreported coordinated expenditures alleged in their administrative complaint, the challenged rules cannot and do not give rise to cognizable informational harm with respect to any *other* unreported coordinated expenditures that the rules allow. According to intervenors, because this Court concluded that plaintiffs have suffered no informational injury with respect to their administrative complaint, it is "completely speculative" that any other political spenders would similarly seek "to skirt the coordination rules" and FECA disclosure requirements they entail. Int. Suppl. Br. at 14.

But it is hardly a leap to anticipate that other spenders will take advantage of a regulatory loophole that allowed a single candidate to outsource potentially millions of dollars of valuable campaign services to an "independent" committee raising funds outside of FECA's limitations. Nor is it "speculative" to fear that the next group to take advantage of the loophole will report even less information to the FEC and the public. Many potential spenders would be under no obligation to organize as political committees or regularly report all of their receipts and disbursements, as FECA requires of committees. And few if any other independent spenders will publicly announce their plans to coordinate with a federal candidate, as CTR did, or attract comparable scrutiny from

[2] Because the challenged coordination rules were "applied" to dismiss CLC's administrative complaint, plaintiffs have a cause of action under the APA to challenge those rules directly. *See CREW v. FEC*, 971 F.3d 340, 348-49 (D.C. Cir. 2020) ("*CREW 2020*").

the national media in connection with those efforts. There is no reason to believe the next group's exploitation of the "internet loophole" will involve even the incomplete information available in this case via CTR's committee filings or news reports.

Thus, regardless of whether the Commission has "consistently" applied the regulatory interpretation advanced here in its past enforcement decisions, CTR's public announcement of its plan to exploit the internet exemption and the FEC's endorsement of its approach in the administrative proceeding clearly alerted the regulated community about this loophole supposedly present in the coordination rules. *But see supra* note 1. That is reason enough to show that the rules inflict ongoing and imminent informational harm and explain why CTR's demand for a litany of *past* violations evidencing such harm is inappropriate. The challenged rules themselves authorize nondisclosure, so "it would be absurd" to force plaintiffs to identify specific past contributions that the rules allowed candidates to conceal by failing to regulate them as coordinated. *Cf. Regular Common Carrier Conference v. United States*, 793 F.2d 376, 378-79 (D.C. Cir. 1986) (Scalia, J.) (finding it "absurd" to deny review of a challenge based on a rule's allowance for "secrecy" with respect to certain regulatory rates "because petitioners cannot identify instances where the secret rates" had harmed their interests).

CLC has also demonstrated organizational standing. As in previous submissions, intervenors confuse the concepts of informational and organizational injury to claim that "the second prong of the informational injury test" requires CLC to demonstrate *organizational* injury under the *Havens Realty* line of cases. But these are separate bases for standing, and CLC asserts both. For the reasons explained in Part I.B, the challenged rules inflict organizational injury by limiting CLC's access to complete and accurate campaign finance information—information upon which CLC depends to conduct its programmatic activities—and CLC has expended resources to

counteract that harm.

Finally, FECA's judicial review provision does not foreclose plaintiffs' APA claim, as it properly challenges the facial validity of the regulatory standard applied to dismiss CLC's complaint, *see* Pls.' MTD Opp'n at 42-45, and there are no other barriers to review.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the FEC's Unlawful Construction of the Coordination Rules and Internet Exemption under the APA.

A. The coordination regulations, as construed, inflict concrete informational injuries on both plaintiffs.

"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." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir 2020) ("*CLC I*") (citation omitted). Indeed, the D.C. Circuit has recognized that "the denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 766 (D.C. Cir. 2020) (citing *Shays III*, 528 F.3d at 923).

1. Informational standing in the context of APA challenges to the validity of FEC regulations is well established.

Informational standing in the context of APA challenges to the validity of FECA regulations is well established in this Circuit's precedents, including *Shays III* and *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

In *Shays III*, a close analogue to this case, the D.C. Circuit held that the plaintiff, then-Representative Christopher Shays, "plainly ha[d] standing" to challenge the FEC's definition of "coordinated communications" that excluded coordinated advertisements for a presidential or vice-presidential candidate outside the 120-day window before the election. 528 F.3d at 923.

Relying on *Akins*, the Court concluded that Shays' "injury in fact [was] the denial of information he believes the law entitles him to," because "under the FEC's definition of coordinated communications, presidential candidates need not report as contributions many expenditures that Shays believes BCRA requires them to report." *Id.* The regulation therefore "illegally denied [plaintiff] information about who is funding presidential candidates' campaigns." *Id.* As in *Akins*, "'the information would help [Shays] (and others to whom [he] would communicate it) to evaluate candidates for public office . . . and to evaluate the role that [outside groups'] financial assistance might play in a specific election.'" *Id.* (alterations in original) (quoting *Akins*, 524 U.S. at 21). The Court was "[a]ssured of Shays's standing to challenge th[e] rule in its entirety" under the APA. *Id.*

Similarly, in *Van Hollen*, then-Representative Christopher Van Hollen, Jr. brought an APA lawsuit challenging an FEC rule limiting donor reporting requirements applicable to corporations and labor unions making "electioneering communications" ("ECs") to only those donors giving "for the purpose of furthering" such ECs. Plaintiff alleged that this "earmarking" rule left an "enormous loophole" in the law that permitted spenders to avoid disclosing the sources of all but a fraction of their spending on ECs. *Van Hollen v. FEC*, 851 F. Supp. 2d 69, 76, 78 (D.D.C. 2012) (finding informational injury based on plaintiff's representation that, as narrowed, the FEC regulation deprived him of information to which he was entitled under FECA), *rev'd on other grounds sub nom. Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012). Relying on *Shays III* and *Akins*, the D.C. Circuit affirmed the district court's conclusion that Van Hollen had informational standing to challenge the rule, noting that he "easily . . . demonstrated Article III standing by showing that he would be unable to obtain disclosure under the BCRA because of the allegedly unlawful restrictions imposed by [the regulation]." 694 F.3d at 109.

More recently, *CREW v. FEC*, 243 F. Supp. 3d 91, 101-02 (D.D.C. 2017) ("*CREW 2017*"),

applied *Shays III* and *Van Hollen* to hold that plaintiffs—CREW and an individual voter—had informational standing to challenge the validity of an FEC regulation that narrowed donor disclosures required in connection with "independent expenditures" ("IEs"), which the FEC had applied to dismiss CREW's administrative complaint. CREW's injury under the APA was premised not on the FECA-required disclosures it failed to receive from that one administrative respondent, but on all the FECA-required disclosure information it had not and would not receive by virtue of the unlawful regulation. *Id.* at 102. The regulation was ultimately invalidated as contrary to FECA, and on appeal, the D.C. Circuit affirmed without questioning whether the rule inflicted informational injury. *CREW 2020*, 971 F.3d at 343.

2. The challenged rules deprive plaintiffs of factual information that FECA requires to be disclosed.

Here, as in *Shays III* and *Van Hollen*, plaintiffs have shown that an unduly permissive FEC construction of the FECA provisions it implements denies plaintiffs factual information to which they are entitled under FECA: information "about who is funding [federal] candidates' campaigns" that would enable them to "evaluate the role that [outside groups'] financial assistance might play in a specific election." *Shays III*, 528 F.3d at 923.

a. FECA requires disclosure of all contributions made to and received by candidates, including coordinated expenditures.

As outlined in greater detail in plaintiffs' earlier briefs, coordinated expenditures are in-kind contributions covered by FECA's comprehensive disclosure requirements. 52 U.S.C. §§ 30104; 30116(a)(7)(B)(i). A candidate-authorized political committee must file regular reports disclosing all of its receipts and disbursements, including in-kind contributions in the form of coordinated expenditures. *Id.* § 30104(a), (b). These reports must both calculate the *total* contributions received from persons and committees, *id.* § 30104(b)(2)(A), (D), including in-kind contributions, and itemize each contribution received, stating each contribution's date, source, and

value, *id.* § 30104(b)(3)(A), (B). Moreover, because an in-kind contribution received by a candidate's campaign is also an "expenditure" 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).

An unauthorized (*i.e.*, non-candidate) political committee must file analogous comprehensive and regular disclosure reports. For each reporting period and the calendar year, an unauthorized 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)(4)(H)(i), (6)(B)(i).[3]

In contrast to federal political committees (*i.e.*, entities that meet the statutory definition in 52 U.S.C. § 30101(4) and whose "major purpose" is "the nomination or election of a [federal] candidate," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)), *non-committee* groups or individuals engaged in independent campaign activity are subject to much lighter disclosure requirements under FECA, centering on two types of independent spending. First, FECA requires any person making $250 or more in "independent expenditures," defined as disbursements for communications "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101(17), to report information about the recipients of the disbursements, the dates, amounts, and purposes of the expenditures, and certain donors over $200, *id.* § 30104(c)(1), (2). Second, FECA requires any person making disbursements of more than $10,000 on "electioneering communications" to report various information, including the amount spent, the recipient of such disbursements, and the name

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

and address of certain donors funding the communication. *Id.* § 30104(f)(1)-(2). An EC is any broadcast, cable, or satellite ad that "refers to a clearly identified candidate for Federal office," is made within 30 days of a primary election or 60 days of a general election, and is targeted to the relevant electorate. *Id.* § 30104(f)(3)(A).

Thus, a non-committee group that is ostensibly independent is unlikely to trigger any disclosure obligation under FECA if its spending relating to federal candidates does not fall in the two categories outlined above. Even if such a group does make disbursements for IEs or ECs, its disclosure obligations will be event-driven, not comprehensive: reporting will be limited to only the expenditures associated with these communications, and in the case of ECs, only to those donors who earmarked their funds for such communications.

Importantly, non-committee persons can fund a range of activities that are not subject to any FECA disclosure if independent but that may qualify as contributions if coordinated with a candidate or party. For instance, if a non-committee group had engaged in the opposition research or polling activities that CTR is alleged to have conducted, but did so independently of a candidate, the group's associated disbursements would not likely trigger any FECA disclosure requirements. If, however, the group had coordinated its polling or opposition research spending with the candidate it supported, this coordinated expenditure would have to be reported as an in-kind contribution received by the candidate, as well as an expenditure made by the candidate. 11 C.F.R. §§ 104.13(a), 109.20.[4]

[4] With respect to non-committee groups, there are also significant categories of candidate-related communications that are generally subject to disclosure only when coordinated, but not when independent, given that the coordinated communications rule, 11 C.F.R. § 109.21, covers more communications than do FECA's IE and EC disclosure provisions. In particular, under this rule, a regulable coordinated communication in a presidential race includes public communications that reference a candidate and are disseminated "during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or

b. The challenged rules dramatically narrow the universe of in-kind contributions subject to disclosure under FECA.

As explained in plaintiffs' prior briefing, the relevant FEC rules exempt certain online postings from FEC regulation as coordinated expenditures; as a result, neither the spender nor the candidate need disclose coordinated spending for exempt communications. *See* Pls.' MSJ at 6-8; 11 C.F.R. §§ 100.26, 109.20, 109.21(b)(3). The extraordinary expansion of the internet exemption to encompass all expenditures deemed "inputs" for exempt communications thus creates an immense loophole in FECA's disclosure provisions, which would otherwise require disclosure of these expenditures as in-kind contributions. Under the challenged rules, as was the case in *Shays III*, "candidates need not report as contributions many expenditures that [plaintiff] believes BCRA requires them to report," thereby "illegally den[ying] [plaintiffs] information about who is funding [federal] candidates' campaigns." 528 F.3d at 923.

That the rules deprive plaintiffs and the public of FECA-required disclosure is not "conjectural" but self-evident. The FEC's unbounded construction of the internet exemption inflicts concrete informational harms beyond this particular matter because the construction leaves unregulated and undisclosed what FECA does not: a broad spectrum of coordinated expenditures that function as "disguised contributions" and are "as useful to the candidate as cash." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("*Colorado II*") (quoting *Buckley*, 424 U.S. at 47). Practically speaking, this loophole allows almost any campaign activity to be outsourced to coordinating groups operating outside of FECA's disclosure requirements and

---

nominating convention or caucus in that jurisdiction, up to and including the day of the general election." *Id*. § 109.21(c)(4)(ii). Therefore, an ad that references a presidential candidate and is broadcast within 120 days of her primary election in Iowa, but before the 30-day EC pre-election window, would not likely trigger FECA disclosure if independent of this candidate. If the non-committee group coordinated its spending on this type of ad with the candidate, however, it would constitute an in-kind contribution subject to disclosure under FECA.

limits, because it enables these groups to categorize virtually any coordinated spending as their "input costs" or "unallocable" overhead for exempt communications.

Indeed, that is precisely the scheme that prompted CLC's administrative complaint against CTR and HFA. Plaintiffs maintain that they suffer informational injury with respect to the dismissal of this complaint, but regardless, the uncontested allegations therein also demonstrate that plaintiffs' broader APA injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *see infra* Part I.A.3. CTR spent millions to benefit Clinton's candidacy, and an unknown but significant proportion of its spending appeared to be for non-exempt activities undertaken "in full coordination" with her campaign. AR003 ¶ 5, AR005-031 ¶¶ 9-67, AR141-43; *see generally* Pls.' MSJ at 9-12. However, under the expansive construction of the internet exemption challenged here, HFA and CTR were permitted to treat all of their coordinated spending as exempt from FEC coordination regulations—and thus, from FECA's contribution disclosure provisions—by characterizing all of CTR's offline expenditures as "input costs" or "unallocable" overhead for exempt communications. AR391-92.

There is thus no need to look beyond this matter to confirm that opening this loophole permits campaigns to avoid disclosing contributions received in the form of coordinated expenditures. Plaintiffs may not be totally "in the dark as to the relationship between CTR and HFA," Op. at 13 (ECF No. 46), but whatever little they can reconstruct about CTR's contributions to HFA from committee filings and published media reports is no substitute for the comprehensive disclosure that FECA requires from candidates.[5] And, even if this incomplete public record means

[5] In past briefing, intervenors claimed (and the Court agreed) that "[i]f . . . expenditures are reclassified as in-kind contributions, CTR would still disclose the same purpose." Int. MSJ at 11 (ECF No. 38-1). But this would not comply with the FEC's instruction that committees must report a purpose that makes clear "why the disbursement was made." FEC Statement of Policy: "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007),

that plaintiffs have already received "enough" information to foreclose their informational standing with respect to the dismissal of MUR 7146—a conclusion that plaintiffs respectfully dispute—the same does not hold true for the broader universe of coordinated expenditures this rule leaves unregulated.

Indeed, plaintiffs and the public only became aware of the coordination between CTR and HFA because CTR itself took the extraordinary steps of publicizing the scheme and courting national media attention for its efforts. *See, e.g.*, AR005-07 ¶¶ 9-12; AR011-13 ¶¶ 24, 26-27. Other campaigns and outside groups seeking to conceal their coordinated expenditures and skirt FECA's limits by exploiting the "input costs" loophole will not be so forthcoming. But the rules now permit those groups to use the internet exemption in the same way to shield their in-kind contributions from plaintiffs and the public.

This scheme easily could be replicated by committees, groups, and individuals that do not even provide the public with CTR's level of disclosure. For instance, this coordination scheme could also occur between a candidate and a political committee that advocates for the election of *multiple* candidates—unlike CTR, which was founded and operated solely to support Clinton. AR006 ¶ 11. Committees that support multiple candidates do not generally allocate their operating disbursements among the different candidates they support. *See generally, e.g.*, FEC, *How to report: Operating expenditures*, https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/operating-expenditures (last visited Jan. 12, 2021). In this scenario, there would be no

---

https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2006-23_EO13892.pdf. For example, HFA could not report receiving an in-kind contribution in the form of Brock's personal services as "In-kind contribution–salary," as intervenors' suggested. Int. MSJ at 11. This would violate FEC policy because "salary" can only describe a disbursement *to a staff member*; HFA would instead need to furnish a new description of the actual service provided (e.g. media training, consultant-media, etc.). 72 Fed. Reg. at 888.

method to identify which of the coordinating committee's reported general disbursements were allocable to each candidate benefitting from the committee's coordinated expenditures—not even in the broad, undifferentiated way that CTR claims is possible with respect to its activities coordinated with HFA.

For example, in the 2019-2020 cycle, the major Democratic and Republican multi-candidate super PACs focused on congressional races—House Majority PAC, Congressional Leadership Fund, Senate Majority PAC, and Senate Leadership Fund—together reported to the FEC over $19 million in disbursements described as polling or research, as of the third quarter of 2020.[6] As is typical for super PACs, they disclosed each disbursement's recipient, amount, and date, but not the specific candidates to which those payments pertained. *See, e.g.*, SMP, 2020 August Monthly Report, FEC Form 3X at 3663 (filed Aug. 20, 2020), https://docquery.fec.gov/cgi-bin/fecimg/?202008209266445630 (reporting a $169,900 payment to The Majority Institute LLC for "research" on July 10, 2020). Under the challenged rules, super PACs (including multicandidate super PACs) could directly coordinate that spending with one or more candidates and avoid reporting coordinated expenditures by simply posting some portion of the polling or research online, preventing plaintiffs from ever learning that the polls were in fact contributions to specific candidates. Nor would the public know which candidate or combination of candidates a given research or polling payment benefitted or how much was contributed to those candidates by way of the coordinated payments.

---

[6] House Majority PAC, Congressional Leadership Fund, SMP, and Senate Leadership Fund, Disbursements with "poll" or "research" in purpose descriptions, Jan. 1, 2019–Sept. 30, 2020, FEC, https://www.fec.gov/data/disbursements/?spender_committee_type=O&data_type=processed&committee_id=C00484642&committee_id=C00495028&committee_id=C00504530&committee_id=C00571703&two_year_transaction_period=2020&min_ (last visited Jan. 12, 2021).

Even worse, a candidate could coordinate with a non-committee group (a group that lacks the "major purpose" of influencing federal elections), such as the section 501(c)(4) groups which have become increasingly influential in recent election cycles. *See, e.g.*, *CREW 2020*, 971 F.3d at 344-45; Abby K. Wood, *Citizens United turns 10 today. Here's what we've learned about dark money*, Wash. Post (Jan. 21, 2020), https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money. In this scenario, because such groups are not subject to FECA's disbursement reporting requirements, there would be very little public reporting whatsoever to enable CLC to reconstruct or even guess at the magnitude of coordinated spending subsumed under the FEC's internet loophole.

For example, nonprofit dark-money groups like House Majority Forward, Iowa Values, and America First Policies, among others, routinely post polling results, opposition research, and similar materials on their own websites and Twitter feeds.[7] These activities would ordinarily not trigger any reporting obligations unless they qualify as "coordinated expenditures." *See, e.g.*, 52 U.S.C. §§ 30104(c)(1), (f)(1)-(2). Under the challenged rules, all associated payments for polling, opposition research, research databases and subscription services, overhead, staff time, and more could be shielded from disclosure, even if wholly or partially coordinated with candidates.

These are not "doomsday scenarios," as intervenors claim, Int. Suppl. Br. at 14; they are fact patterns that, in large part, are already occurring. All of the groups mentioned above are

[7] *See, e.g.*, House Majority Forward, *Research*, https://www.housemajorityforward.org/research (last visited Jan. 12, 2021); House Majority Forward (@HouseForward), *Everything is bigger in Texas...*, Twitter (Oct. 1, 2019), https://twitter.com/HouseForward/status/1179123439111675906; Iowa Values, *Your Guide to Voting for Iowa Values*, https://ouriowavalues.com/guide (last visited Jan. 12, 2021); Christina Wilkie, *Dark money group America First Policies is running a pro-Trump polling operation. Here is an inside look at its secretive work*, CNBC (Mar. 1, 2018), https://www.cnbc.com/2018/03/01/america-first-policies-dark-money-polling-for-trump.html (featuring a quote from America First Policies' communication director stating, with respect to polling, that they "put all of them up online").

already active. Contrary to intervenors' claims, *id.* at 13, these activities are no more "speculative" or less "certain" than those the *Shays III* plaintiffs alleged were made possible by the overly lax coordination standard challenged there. As was the case in *Shays III*, plaintiffs need only show that the unlawful rules exempt large categories of coordinated spending from FECA's disclosure requirements. But here it is also clear that spenders are already engaged in the types of activities that, if coordinated, the internet loophole will categorically shield from regulation.

Long experience with attempts to circumvent FECA refutes the idea that spenders will voluntarily refrain from doing what this loophole allows: "skirt[ing] the coordination rules." Int. Suppl. Br. at 14. The history of "campaign finance reform well demonstrates that 'candidates, donors, and parties test the limits of the current law.'" *McConnell v. FEC*, 540 U.S. 93, 174-75 (2003) (quoting *Colorado II*, 533 U.S. at 457), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). There is no question that exempting such a broad category of campaign spending from the FEC's coordination regime reduces plaintiffs' access to factual information otherwise subject to disclosure under FECA. Plaintiffs need not identify specific cases of non-disclosure to prove that point; the "claim that no one will take advantage of the enormous loophole [the FEC] has created ignores both history and human nature." *Shays III*, 528 F.3d 914, 928.

3. The record refutes the contention that plaintiffs' injuries are unsupported or too "speculative" to permit review.

Intervenors—who do not dispute any material facts, but again focus on whether plaintiffs have presented sufficient evidence to support standing as a matter of law—raise two objections to the informational injury supporting plaintiffs' APA claim: (1) that plaintiffs have not "alleged" or "provided evidence" of a broader informational injury, and (2) that the injury is too speculative. Int. Suppl. Br. at 8-14. The record refutes both claims.

First, intervenors claim that "[t]here is not a single statement in the Amended Complaint

alleging that Plaintiffs will suffer any informational injury outside the scope of MUR 7146 as a result of the Commissioners' interpretation of the Coordination Regulations." *Id.* at 9. This is wrong. The Amended Complaint alleges that "[b]oth plaintiffs rely on information about campaign-related spending," Am. Compl. ¶ 29, and that both plaintiffs are injured when that information is not disclosed pursuant to FECA. *Id.* ¶¶ 24, 27, 30-31. Intervenors' demand for more specificity elevates form over substance: these allegations are more than adequate to support informational injury owing to agency regulations that circumscribe the information subject to disclosure under the statute. *See Abigail All. for Better Access to Dev. Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (holding that "general factual allegations" of injury in pleadings are assumed to "embrace those specific facts that are necessary to support the claim").

The record also specifically establishes that plaintiffs have suffered and will suffer concrete informational injury as a result of this unlawful regulatory coordination regime. In her sworn declaration, Plaintiff Kelley testified that "[i]nformation about CTR's and HFA's coordinated spending, *as well as other instances of large-scale coordinated spending*, allows [her] to understand the sources of candidates' financial support" and the "roles that CTR *and similar outside groups* play in elections." Kelley Decl. ¶¶ 6-7 (emphasis added). She accordingly suffers informational injury from the FEC's "creat[ion] of a roadmap for other campaigns and political committees to evade disclosure laws in a similar fashion" to HFA and CTR. *Id.* ¶ 9. CLC also testified that it is directly harmed "when it is deprived of complete and accurate campaign finance disclosure reports." Fisher Decl. ¶¶ 17, 27, 29, 32, 36; *see infra* Part I.B. Plaintiffs have, in other words, put forward specific facts to support the concrete and particularized informational injury underlying their APA claim.

Second, plaintiffs' informational injury is not "hypothetical" or "speculative." Int. Suppl.

Br. at 10. Regardless of plaintiffs' standing to challenge the FEC's dismissal of their complaint in this matter, the very existence of CTR and HFA's scheme confirms that spenders rely on the internet exemption and thereby avoid required disclosures of coordinated expenditures and in-kind contributions. *See supra* Part I.A.2. And it is neither speculation nor conjecture to infer that other entities are exploiting, and will continue to exploit, the same massive loophole without broadcasting their activities in the same manner as CTR.

This inference easily satisfies this Circuit's test for proving an imminent injury by showing a "substantial risk of this harm." *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504-05 (D.C. Cir. 2019). It entails "[n]o long sequence of uncertain contingencies," *Attias v. Carefirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), but rather a "single inference" that is "eminently reasonable—indeed, irresistible." *N.Y. Republican*, 927 F.3d at 504-05. Contrary to intervenors' suggestion, injuries are not "overly speculative" simply because they may arise in part from "future actions to be taken by third parties." Int. Suppl. Br. at 11. Rather, where the asserted injury depends on the response of regulated third parties, the touchstone is whether "the relevant third parties will react to the challenged action in such manner as to create that substantial risk." *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 22 (D.D.C. 2018) (citation omitted).

The risk that political spenders will exploit the massive loophole left by the controlling Commissioners' construction of the internet exemption—and thereby deprive plaintiffs of FECA-mandated disclosures—is "substantial." *Id.* As this Circuit has long recognized, when FEC rules present the opportunity to avoid statutory requirements, "savvy campaign operators will exploit them to the hilt." *Shays v. FEC*, 414 F.3d 76, 115 (D.C. Cir. 2005) ("*Shays II*"). And that concern is especially acute here, given that independent spending—often flowing through entities with close ties to federal candidates—has skyrocketed since *Citizens United*, and increasingly involves

the use of online media.[8] In the meantime, the FEC has declined to pursue even a single violation of its coordination regulations. *See* FEC Comm'r Ellen L. Weintraub's Suppl. Responses to Questions from House Admin. Comm. at 4 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf ("[H]ow many times [since *Citizens United*] has the Commission found a violation of the coordination regulations?"—"The simple answer is *zero*."); *see also id.* at 5.

Given this landscape, it is not "speculation" to conclude, with substantial certainty, that the internet exemption has allowed, is allowing, and will continue to allow candidates to receive undisclosed in-kind contributions in the form of coordinated expenditures. Like the *Shays* plaintiffs, CLC has standing based on what the rules purport to allow and the "'hard lesson of circumvention' evident in 'the entire history of campaign finance regulation.'" 414 F.3d at 90 (quoting *McConnell*, 540 U.S. at 165).[9]

Finally, intervenors' attempt to distinguish plaintiffs' informational injury from that of the *Shays* plaintiffs is unavailing. *See* Int. Suppl. Br. at 13. They argue that *Shays III* is not comparable to this case because there "it was *certain*, not merely speculative" that coordinated advertisements outside the 90/120-day window were actually occurring. *Id.* (emphasis in original). Not so. The

---

[8] *See, e.g.*, *CREW 2020*, 971 F.3d at 344-45 (affirming rise of independent spending since *Citizens United*); Ctr. for Responsive Politics, Total Outside Spending by Election Cycle, Excluding Party Committees, OpenSecrets.org, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Jan. 12, 2021); Matea Gold & Cristina Rivero, *The 2016 presidential contenders and their big-money backers*, Wash. Post (Aug. 11, 2015), https://apps.washingtonpost.com/g/page/politics/the-2016-presidential-contenders-and-their-big-money-backers/1677 (noting close connections between candidates and outside groups); Gerry Smith, *Political Ad Spending Seen Surging 63% to Record $6.89 Billion*, Bloomberg (Feb. 12, 2020), https://www.bloomberg.com/news/articles/2020-02-12/political-ad-spending-on-pace-for-record-in-tight-contest (noting surging digital political ad spending in recent years).

[9] Indeed, neither intervenor would have a personal stake in preserving this loophole—or standing to defend its prospective application—unless *they* intend to engage in future coordinated expenditures that the loophole allows, but FECA does not.

Shays III district court specifically noted that "neither Plaintiff nor any of the written comments submitted during the coordinated communications rulemaking adduced evidence of actual coordination outside of the pre-election windows," *Shays v. FEC*, 508 F. Supp. 2d 10, 39 (D.D.C. 2007), and that commenters had in fact "acknowledged that there was no evidence that any of these advertisements had been coordinated," *id.* (citing testimony of Paul Ryan and Marc Elias). On appeal, the FEC again stressed that there was no evidence of "actual abuse" under the rule, that "no one presented evidence [in the rulemaking] that coordinated spending has shifted to the pre-election windows," and that Shays's only examples were "hypothetical" and thus failed to show any risk of abuse. Resp. & Reply Br. of FEC, *Shays III*, 528 F.3d 924, 2008 WL 838372 (D.C. Cir. Mar. 7, 2008). The Court of Appeals emphatically rejected the argument, finding that "the Commission's prediction about what will happen in the future disregards everything Congress, the Supreme Court, and [the D.C. Circuit] have said about campaign finance regulation." 528 F.3d at 927. The important question was whether the rules *enabled* coordination. *Id.* at 924 (noting evidence that campaign ads were run outside the windows and "*could* have been coordinated with candidates under the Commission's rule" (emphasis added)).

Intervenors are thus wrong to claim that *Shays III* requires a plaintiff to prove conclusively that specific regulated parties have already exploited the challenged regulatory loophole to make undisclosed contributions; were this true, no pre-enforcement challenges would be permitted. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995) ("[A]n agency rule, unlike a statute, is typically reviewable without waiting for enforcement.") (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41 (1967)). Proving a risk of harm with "literal certainty" is not the relevant test; plaintiffs need only show—as they clearly have—that the risk is "substantial." *N.Y. Republican*, 927 F.3d at 504-05.

And unlike the alleged injury in *Judicial Watch v. FEC*, 293 F. Supp. 2d. 41, 48 (D.D.C. 2003), the probability of informational harm here does not hinge on a chain of implausible inferences. *See* Int. Suppl. Br. at 11. The plaintiff in that case alleged an informational injury that rested on at least two speculative possibilities: that the FEC would initiate an enforcement action against him and that the information he sought would actually help him in that action. 293 F. Supp. 2d at 48. Here, by contrast, plaintiffs' informational injury rests on a single reasonable inference: that regulated entities will do what the rules permit.

4. There is no question the FECA-mandated disclosure information plaintiffs seek would be helpful to them.

The Supreme Court has held that an informational injury under FECA is "concrete and particularized" when plaintiffs are deprived of "information that would help them (and others to whom they would communicate it) to evaluate candidates for public office," even though many others may share the same informational injury. *Akins*, 524 U.S. at 21; *Shays III*, 528 F.3d at 923 ("Shays's 'injury consequently seems concrete and particular.'"). This is because FECA reflects "a congressional intent to cast the standing net broadly." *Akins*, 524 U.S. at 19.

"There is no reason to doubt" that the above information—basic disclosure of contributions made to and received by candidates in the form of coordinated expenditures—is helpful to both plaintiffs (and those to whom they would communicate it) in evaluating candidates for public office. Kelley Decl. ¶¶ 5-6; Fischer Decl. ¶ 12.

The statutorily required disclosure information this rule conceals would be "helpful" to plaintiff Kelley 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. Kelley Decl. ¶ 1; *see Akins*, 524 U.S. at 13. As a voter, she wishes to use

information about contributions received by candidates through coordinated spending with 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. Kelley Decl. ¶ 5. As a result of the FEC's refusal to require political actors to disclose the extent of their coordinated activity, Kelley suffers a concrete informational injury: she cannot access information that she would use in her capacity as a voter. *Id.* ¶¶ 8-9; Am. Compl. ¶ 28.

Intervenors' demands for a heightened demonstration of informational injury from Plaintiff Kelley have no basis. Plaintiff Kelley is not required to formally "state[] that her informational injury is imminent," Int. Suppl. Br. at 16, or reiterate the legal claims in the Amended Complaint. Regardless, she directly avers her concern that the precedent set by the dismissal has "created a roadmap for other campaigns and political committees to evade disclosure laws in a similar fashion" and will thereby "further prevent [her] from obtaining complete and accurate information about the true sources of candidates' support." Kelley Decl. ¶ 9.

Plaintiff CLC also suffers concrete informational injury due to the FEC's construction of its coordination rules to exempt broad swaths of coordinated activities from disclosure. 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).

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. Fischer Decl. ¶ 12-13. CLC relies on information reported

under FECA to develop a wide variety of public education materials, including reports and blogs, to inform voters about the sources and extent of candidates' financial support and the role of outside groups in elections. *Id.* ¶ 14-16. CLC also uses information from FEC disclosure reports to prepare comments, letters, and complaints submitted to the FEC and state campaign finance agencies, *id.* ¶¶ 30-32; draft briefs and other filings for state and federal campaign finance cases, *id.* ¶¶ 36-37; and provide testimony and educational materials to legislators, partner organizations, and other policymakers, *id.* ¶¶ 23-28. These programmatic efforts are directly harmed by the informational deficits created by the challenged rules. *Id.* ¶¶ 9, 17, 28, 32, 37.

As plaintiffs have shown, the campaign finance information they seek is "helpful" across CLC's programmatic activities and to Plaintiff Kelley as a voter. Because "there 'is no reason to doubt'" these facts, *CLC I*, 952 F.3d at 356, both plaintiffs have proven concrete and particularized informational injuries cognizable under Article III.

B. Plaintiff CLC has suffered organizational injury.

CLC also has organizational standing because the challenged rules "cause[d] a 'concrete and demonstrable injury to [CLC's] activities' that is more than simply a setback to [its] abstract social interests.'" *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). This is a two-part inquiry, requiring CLC to show, "first, whether the agency's action . . . 'injured [CLC's] interest' and, second, whether [CLC] 'used its resources to counteract that harm.'" *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (citation omitted). CLC has made the requisite showing under both prongs.

The D.C. Circuit has recognized that a deprivation of access to information can create an injury-in-fact sufficient for organizational standing distinct from informational injuries asserted under *Akins*. *See Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016); *Ctr. for Biological Diversity v. U.S. Dep't of State,* No. CV 18-563 (JEB), 2019 WL 2451767, at *3

(D.D.C. June 12, 2019) ("The D.C. Circuit has established distinct frameworks for informational and organizational injury"). In *PETA*, the D.C. Circuit found that an organization suffers a cognizable injury-in-fact where it is "deprived [] of key information that it relies on to educate the public," 797 F.3d at 1094, *even if* the organization does not have "any legal right" to the information sought, *id.* at 1103 (Millett, J., dubitante); *see also Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (recognizing that an organization can show standing under *PETA* even if it has no legal right to the information sought).

Here, of course, CLC *does* have a legal right to the information it seeks. As discussed in Part I.A, the challenged rules deprive CLC of access to statutorily required disclosure information upon which CLC relies for its programmatic work, e.g., to disseminate information to partners and others, to educate the public, and to understand and analyze evolving campaign finance practices. *See supra* Part I.A.4. The challenged rules thus "perceptibly impair[]" CLC's ability to engage in its day-to-day programmatic work. *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). As CLC has explained, Pls.' MTD Opp'n at 26, the inability to obtain required disclosure information from candidates, political committees, and others directly harms discrete programmatic concerns central to CLC's organizational mission of promoting "representative, responsive and accountable government," which it achieves, as relevant, 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. Fischer Decl. ¶¶ 4-5; Am. Compl. ¶ 15. Complete and accurate FEC reports are essential for activities advancing CLC's mission, including public education efforts to inform voters about campaign spending and the true sources and nature of candidates' financial support. Fischer Decl. ¶¶ 9, 14; Am. Compl. ¶¶ 16-17.

CLC's inability to access FECA disclosure information—including the candidate

contributions concealed by this rule—impedes these public education efforts and other CLC programmatic activities. Fischer Decl. ¶ 17. This impairment goes well beyond harm to CLC's "abstract social interests." *ASPCA*, 659 F.3d at 25; *but see id.*, 659 F.3d at 27 (D.C. Cir. 2011) ("[M]any of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and, indeed, sometimes are."). Because the challenged rules reduce the quantum of publicly available disclosure data about campaign spending practices, they impair CLC's ability to impart informed analyses of campaign finance practices and trends to the media, policy stakeholders, and others. Fischer Decl. ¶¶ 16-17. The rules also necessarily limit the store of judicially noticeable information from which CLC can draw to prepare materials for campaign finance litigation in state and federal courts, *id.* ¶¶ 36-37, and in its legislative advocacy program, *id.* ¶¶ 27-28. CLC's regulatory practice is also directly and concretely injured by the rules because CLC is 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. ¶¶ 29-30.

And CLC has "used its resources to counteract [these] harms." *PETA*, 797 F.3d at 1094. The rules make it more difficult for CLC to find information about federal campaign spending, forcing it to divert staff resources to fill in the informational gaps through other, more time-consuming means. Fischer Decl. ¶¶ 18-21. When complete information about contributions made to and received by federal candidates is unavailable via FEC disclosure reports—because those reports are inaccurate, incomplete, or non-existent—CLC's "alternative means" of uncovering such facts, *see PETA*, 797 F.3d at 1096, is laborious and resource-intensive, requiring CLC to expend resources far beyond what is normally expended. It requires the diversion of staff resources for further investigative efforts, e.g., scouring press reports, locating (and sometimes incurring fees

to access) corporate records, and diligently monitoring social media. Fischer Decl. ¶¶ 20-21. Even still, any information uncovered through such efforts will inevitably fall short of the comprehensive and authenticated reporting that FECA prescribes.

Moreover, in the case of contributions received through coordination with non-committee spenders, reconstructing information about the relevant federal campaign spending is even more difficult—because CLC is then only able to consult external sources of information unlikely to remedy that deficiency, e.g., media reports or public disclosures made to other federal and state regulators. As to those groups, CLC lacks even the incomplete political committee reports available for entities like CTR and HFA, and the publicly reported information about such groups' spending is ordinarily limited to their federal tax returns (which are usually unavailable until long after the election is over and do not require much of the information that FECA does).[10] Most of the time, there is no way from public records to confirm details about such a spender's disbursements in the absence of FEC disclosure reports.

Contrary to intervenors' assertions, CLC *has* demonstrated how its inability to access disclosure information "subjects [CLC] to 'operational costs beyond those normally expended.'" *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). *See* Int. Suppl.

[10] For example, 501(c)(4) spenders are required to report to the IRS their lump-sum "political campaign activity expenditures," as well as "the five highest compensated independent contractors that received more than $100,000 in compensation for services, whether professional or other services, from the organization." *See* IRS, *Instructions for Schedule C (Form 990 or 990-EZ)* at 3-4 (2019), https://www.irs.gov/pub/irs-pdf/i990sc.pdf; IRS, *Instructions for Form 990 Return of Organization Exempt from Income Tax* at 38 (2019), https://www.irs.gov/pub/irs-pdf/i990.pdf. But tax filings do not contain anywhere near the same level of information as FEC filings, and most entities do not report their spending to the IRS until long after the election is over. *Id.*; IRS, Return Due Dates for Exempt Organizations: Annual Return, https://www.irs.gov/charities-non-profits/return-due-dates-for-exempt-organizations-annual-return (last visited Jan. 12, 2021) (showing, for IRS returns, earliest due dates of May 15 of the year following the end of the tax year, and extended due dates of November 15).

Br. at 16 (contending that CLC failed to show that "researching information about an organization's or candidate's unreported activity" is "outside of the scope of its routine activities," such that it "creates additional operational costs" that "divert resources from other activities"). Intervenors mischaracterize both the law and the record, which contains undisputed testimony that lapses in FECA-required disclosure require CLC to "divert resources from other organizational needs"—including the public education and campaign finance reform activities detailed above—to remedy gaps in FEC reporting. *See* Fischer Decl. ¶¶ 20-21. Intervenors do not dispute the veracity of this testimony. Instead, they appear to believe that CLC is not injured *enough* for Article III purposes: in their estimation, CLC already engages in research and public education, so the imposition of additional concrete burdens on those activities is irrelevant. But that is not the test under this Circuit's organizational standing precedents.

Indeed, as this Court has previously recognized, the precedent "is quite generous in defining harm to an organizational plaintiff's 'activities.'" *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 983 F. Supp. 2d 170, 177 (D.D.C. 2013) (finding cognizable injury where the promulgation of a rule at the federal level required the plaintiff organization to engage in advocacy at the local and state levels to combat the harm they sought to prevent). Courts have found organizational standing under *Havens* where a challenged action "made the [organization's] overall task more difficult," including by "increas[ing] the number of people in need of" its assistance, by making it harder for the organization to provide the services it seeks to provide, and by decreasing the effectiveness of the assistance it provides. *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). And importantly, the D.C. Circuit has also recognized that organizational standing is not confined to the discrete service-providing context but extends to settings where an organization's programmatic activities are otherwise

concretely impaired. *Abigail All.*, 469 F.3d at 133.

The expansive construction of the internet exemption plaintiffs challenge causes organizational injury not only because it allows coordinated expenditures to escape FECA disclosure requirements, but also because it authorizes a broad spectrum of otherwise *impermissible* contributions to candidates (e.g., through coordinated expenditures with dark-money nonprofit corporations)—incentivizing candidates and outside groups to route their coordinated campaign spending through non-disclosing entities and thus reducing the system's transparency as a whole. As a result, for the reasons detailed above, CLC's programmatic activities are made appreciably more difficult. *See* Fischer Decl. ¶¶ 20-21.

While organizations cannot "convert [their] ordinary program costs into an injury in fact," *Nat'l Taxpayers Union*, 68 F.3d at 1434, "an injury is not a 'self-inflicted . . . budgetary choice[ ]' merely by having been made willfully or voluntarily" provided it is a legitimate attempt to counteract the harm, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 20-cv-1630-JEB, 2020 WL 5232076, at *9 (D.D.C. Sept. 2, 2020). The harm here—the deprivation of information about the true sources and magnitude of federal candidates' support—requires CLC to "divert resources from other organizational needs." Fischer Decl. ¶¶ 20-21. This expenditure of organizational resources is not, as intervenors suggest, an ordinary program cost that would be incurred in the routine course of conducting CLC's day-to-day activities. Int. Suppl. Br. at 16. As explained, performing the research and analysis underlying CLC's programmatic activities is costlier and far more time-consuming when required information is unavailable in FEC reports. CLC has thus established organizational standing.

C. Plaintiffs' informational and organizational injuries flow directly from the challenged rules and will be redressed by a favorable decision.

As in *Shays III*, plaintiffs' injuries are fairly traceable to the FEC because they are caused

by the Commission's coordinated communications regulations, as construed, and the injury would be redressed were this court to declare that construction invalid in all future matters. *See Shays III*, 528 F.3d at 923.

II. Plaintiffs' APA Claim Is Reviewable and Is Not Precluded by FECA.

Intervenors again suggest that FECA provides the exclusive avenue for challenging FEC actions, Int. Suppl. Br. at 4-5, because "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). But that principle only applies "in situations where the Congress has provided special *and adequate* review procedures." *Id.* (emphasis added). Contrary to intervenors' arguments, courts have routinely recognized that FECA's judicial review mechanism is not "adequate" for all challenges to FEC action. *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); *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 (noting the limits of FECA's remedial scheme).

As the D.C. Circuit has observed, when an FEC complaint is dismissed based on an unlawful 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 on its face, it does not bar their facial APA claim.

Intervenors are also incorrect insofar as they suggest that the Article III injury supporting

plaintiffs' APA challenge must be coextensive with the injury underlying their narrower action for judicial review under 52 U.S.C. § 30109, or that plaintiffs' APA claim "seeks the same relief" as their FECA claim. *See* Int. Suppl. Br. at 4. Far from "seek[ing] the same relief as their FECA claim," Int. Suppl. Br. at 5, plaintiffs' APA claim challenges the relevant rules directly. *CREW 2020*, 971 F.3d at 348 (affirming that FECA complainants "affected" by the FEC's application of a rule to dismiss an enforcement complaint may challenge the rule's validity under the APA).

Article III standing as to plaintiffs' APA claim is also distinct from questions of reviewability, which go to the merits. Intervenors conflate these concepts throughout their supplemental brief, to the point of supporting their chief argument—the contention that plaintiffs' claimed informational and organizational injuries are "purely speculative"—by citing a vacated district court decision that considered *the merits* of a First Amendment challenge to FEC regulations under the substantial overbreadth doctrine. *See* Int. Suppl. Br. at 10 (citing *EMILY's List v. FEC*, 569 F. Supp. 2d 18, 49 (D.D.C. 2008), *overruled by* 581 F.3d 1 (D.C. Cir. 2009)). The upshot of this argument is that no plaintiff could challenge an FEC regulation as inconsistent with statutory disclosure mandates absent a concomitant FECA claim under Section 30109(a)(8) and informational standing to challenge that particular application of the rule, or unless the plaintiff could "conclusively" "prov[e] the occurrence" of a specific, non-disclosed coordinated expenditure permitted by the rule. *See* Int. Suppl. Br. at 12. That is not how standing is ordinarily assessed in an APA challenge to the facial validity of agency rules. *See Shays III*, 528 F.3d at 923. *Cf. CREW v. FEC*, 904 F.3d 1014, 1018 (D.C. Cir. 2018) (CREW's abandonment of FECA challenge to enforcement dismissal did not moot CREW's constitutionally cognizable informational interest in validity of FEC rule applied to dismiss its enforcement complaint).

Nor are there any other barriers to review. For instance, in arguing that plaintiffs' APA

challenge is based on an inadequate "future injury," intervenors blend the "imminence" component of an Article III injury-in-fact with ripeness doctrine. But here, the regulatory loophole applied by the controlling Commissioners—which purports to be the FEC's "longstanding" and authoritative approach to the internet exemption and coordination rules—is a generally applicable, "purely legal" interpretation of FECA; accordingly, plaintiffs' facial challenge to the internet loophole is "presumptively suitable to judicial review." *Shays II*, 414 F.3d at 79. And, given that FECA's safe-harbor will continue to bar future enforcement complaints, the disclosure harms discussed above will remain unredressed in the absence of judicial action.

There is thus no jurisdictional or other impediment to the review of plaintiffs' claim under the APA. The challenged FEC construction directly conflicts with the statute and unjustifiably circumscribes the coordinated expenditures subject to disclosure under FECA as "contributions," thereby causing injury to plaintiffs' informational interests and curtailing the electoral transparency that FECA was intended to promote.

CONCLUSION

For the reasons above, plaintiffs have standing to bring their APA claim. Plaintiffs thus seek an order awarding them summary judgment, declaring the construction of these rules unlawful and invalid, and ordering the FEC to apply FECA's anti-coordination provisions in the manner that Congress prescribed.

Dated: January 13, 2021

Respectfully submitted,

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2021, 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,

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