IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
CATHERINE HINCKLEY KELLEY,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

HILLARY FOR AMERICA
CORRECT THE RECORD,

Intervenors.

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

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

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APA	Administrative Procedure Act
AR	Administrative Record
CLC	Campaign Legal Center
CTR	Correct the Record
DCCC	Democratic Congressional Campaign Committee
DSCC	Democratic Senatorial Campaign Committee
F&LA	Factual & Legal Analysis
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FGCR	First General Counsel's Report
HFA	Hillary for America
MSJ	Motion for Summary Judgment
MUR	Matter Under Review
OGC	Office of General Counsel
PAC	Political Action Committee
SOR	Statement of Reasons

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an effort by Plaintiff Campaign Legal Center ("CLC"), a campaign finance reform advocacy organization, to rewrite the law and impose a new rule it already tried and failed to obtain. After *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied*, No. 04-5352 (October 21, 2005) ("*Shays I*"), the Federal Election Commission ("FEC" or "the Commission") opened a rulemaking to decide when political communications posted on the Internet should be treated as "public communications" that are subject to the FEC's coordination rules and otherwise regulated under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). *See* Notice of Proposed Rulemaking: Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005). In the rulemaking, CLC tried to convince the FEC to write a rule that would have treated the costs to *produce* an unpaid online communication—including for example, filming costs, staff time, and overhead costs (hereinafter referred to as "input costs")—as "coordinated expenditures" or "in-kind contributions" under the FEC's coordination regulation found at 11 C.F.R. § 109.20. As in-kind contributions, such input costs would have been subject to the same limits as monetary contributions.

But the FEC considered CLC's proposal and dismissed it. It wrote no such rule. For more than a decade since, through a series of enforcement decisions and advisory opinions, the FEC's coordination rules have treated the costs associated with producing unpaid online communications the same as the communications themselves, despite CLC's desire to the contrary.

Having tried and failed to secure the rule it wanted in 2005, CLC tried again in 2016. With Plaintiff Kelley, it filed an FEC complaint against Intervenors Correct the Record ("CTR") and Hillary for America ("HFA"), alleging that they violated the coordination rules under the same theory CLC advanced in the rulemaking. The centerpiece of Plaintiffs' complaint was that CTR

made prohibited in-kind contributions to HFA, the presidential campaign committee of former Secretary of State Hillary Clinton, in the form of input costs for unpaid online communications. Following past decisions, the FEC dismissed the complaint—properly failing to adopt Plaintiffs' unconstitutionally vague and unsupported position on the treatment of input costs and finding that the record did not support a finding of coordination. Plaintiffs then sued, hoping that this Court might do what the FEC would not in the 2005 rulemaking, and what the agency has consistently and appropriately declined to do since—impose a sweeping, elastic interpretation of the coordination rules that would derail the agency's policy, expose the regulated community to new liability, and create serious First Amendment difficulties.

Plaintiffs cannot circumvent the FEC's rulemaking process simply because they disagree with the agency's interpretation of its regulations, and so this Court should deny Plaintiffs' motion for summary judgment. First, Plaintiffs lack standing to bring their FECA and Administrative Procedure Act ("APA") claims. They have suffered no concrete or particularized injury. They claim that the FEC has failed to make a *legal* determination that would simply move a range of expenditures, already disclosed by CTR, from one line of its FEC report to another. Time and time again, courts have held that legal determinations and a litigant's desire for the FEC to enforce the law are not informational injuries for purposes of Article III standing. Despite this Court's prior ruling on the motion to dismiss, there remains a triable issue of material fact as to whether Plaintiffs have suffered the necessary injury for Article III standing.

Plaintiffs' claim that the FEC's decision to dismiss their administrative complaint was contrary to law also fails. The FEC could not agree to pursue enforcement on CLC's theory. The controlling Commissioners correctly found that the transactions did not constitute coordinated expenditures, because of the plain language of the regulations, longstanding FEC precedent, and

the absence of proof of coordination in the factual record. Had the FEC done otherwise, and pulled an abrupt U-turn after more than a decade of enforcing the coordination rules as it has, it would have been even more exposed to a finding that it acted arbitrarily, capriciously, and contrary to law. Plaintiffs' independent APA claim likewise fails because FECA provides an adequate judicial review mechanism, as every court to consider that issue has held.

For the reasons set forth herein, Intervenors respectfully request that this Court deny Plaintiffs' motion for summary judgment and enter summary judgment in favor of Intervenors.

STATEMENT OF FACTS

HFA is the principal campaign committee of former United States Secretary of State Hillary Clinton, who was the nominee of the Democratic Party for the office of President of the United States in the 2016 general election. CTR is a "hybrid" or *Carey* political action committee ("PAC") that registered with the FEC in June 2015. CTR was active during the 2016 election cycle, serving as a strategic research and rapid response team designed to defend Secretary Clinton from baseless political attacks. As a hybrid PAC, CTR maintained one bank account that was subject to the Act's contribution limits and source restrictions and could make contributions to candidates, and a second bank account that could accept unlimited contributions from any source but could not contribute to federal candidates. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

CTR conducted the vast majority of its activities online, using its website and social media accounts to set the record straight about Secretary Clinton's record when her opponents and media outlets made false and misleading claims about her. CTR also shared similar content with the people who subscribed to its email list. It conducted a handful of other activities that were not related to its online presence, but those activities were relatively rare and represented a smaller portion of its program. CTR reported every dollar it spent from both of its accounts as

"expenditures" or "disbursements" on its regularly filed FEC reports and included a purpose description for each itemized disbursement. *See Correct the Record*, FEC, https://www.fec.gov/data/committee/C00578997/ (last visited Aug. 26, 2020).

Beginning in 2015, various complainants filed administrative complaints with the FEC against HFA and CTR, including Plaintiffs. Plaintiffs' complaint, which the FEC designated Matter Under Review ("MUR") 7146, alleged that Intervenors were unlawfully coordinating their activities and that CTR had made, and HFA had accepted, millions of dollars of excessive and prohibited contributions that they failed to properly report. AR001. Both HFA and CTR filed administrative responses defending their activities and arguing that there is no reason to believe any unlawful coordination occurred. *See* AR062-78.

After reviewing the record in MUR 7146, the FEC's Office of General Counsel ("OGC") recommended dismissing or taking no action on most of the allegations contained in the complaints, but recommended finding reason to believe Intervenors violated the Act by making and accepting "unreported excessive and prohibited in-kind contributions" in the form of coordinated expenditures. AR106, 108–09. OGC also recommended that the FEC investigate HFA's and CTR's conduct. AR107. The FEC, however, did not adopt OGC's conclusions on coordinated spending.

On June 4, 2019, by a vote of 2-2, the Commissioners were unable to find reason to believe any violations had occurred or that an investigation was warranted. AR372–75. The two controlling Commissioners published a Statement of Reasons on August 21, 2019 explaining the reasons why they voted to find no reason to believe. *See* AR380–97. The Commissioners reasoned that the regulation that governs coordinated communications, 11 C.F.R. § 109.21, applies only to "public communications." AR387–90. "Public communications," in turn, are enumerated types of

communications defined by the FEC's regulations. AR387–88. Notably, the term does "not include communications over the Internet, except for communications placed for a fee on another person's Web site." AR388. The controlling Commissioners concluded that, because none of CTR's communications were placed for a fee on a third party's website, they were not "public communications" and could not be "coordinated communications." AR390–94. Therefore, any minimal amounts of money CTR spent on placing the communications, and all the "production" or "input" costs related to creating the communications, were not in-kind contributions to HFA. *Id.* The Commissioners then analyzed CTR's remaining expenditures for its non-communicative activities under 11 C.F.R. § 109.20, the regulation which applies to coordinated expenditures besides communications. AR390, 394–97. Here, the Commissioners found that the evidence in the record was insufficient to establish that HFA and CTR engaged in prohibited coordination. AR394–97.

Plaintiffs filed this suit under 52 U.S.C. § 30109(a)(8). Compl., ECF No. 1. Having survived the dismissal stage, Plaintiffs moved for summary judgment based on the administrative record. Intervenors now file this cross-motion for summary judgment and opposition in response.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 322–23 (1986). To survive summary judgment, a plaintiff must demonstrate a genuine issue of material fact as to each element of every disputed claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A plaintiff's bare, unsupported, or conclusory assertions cannot meet the summary judgment standard. *See Stewart v. White*, 61 F. Supp. 3d 118, 130 (D.C. Cir. 2014). To defeat a motion for summary judgment, a movant who would not bear the burden of proof at trial need not

present evidence to put the plaintiff's claims in issue. *Id.* at 325. Rather, as in this case, Intervenors, need only "point[] out…that there is an absence of evidence to support the nonmoving party's case." *Id.*

ARGUMENT

I. PLAINTIFFS LACK STANDING.

Plaintiffs have failed to adequately prove that the FEC's dismissal of their administrative complaint injured them. They brought this litigation to persuade this Court to re-write the FEC's longstanding coordination rules to their liking, not to rectify any real injury. In 2005, CLC asked the FEC to adopt the same position Plaintiffs take in this litigation: that input costs for unpaid online communications should be treated as in-kind contributions. But the FEC said no. It has been 14 years since Plaintiff CLC lost that fight. Now, CLC has brought this litigation to make an end-run around the FEC's rulemaking procedures by trying to convince this Court to re-write these same rules. That the FEC stuck to the position it took during the rulemaking and dismissed Plaintiffs' administrative complaint does not "injure" Plaintiffs for standing purposes. The "injury-in-fact" element of standing "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973). The record evidence fails to prove that Plaintiffs have anything more than a generalized grievance and a "mere interest in the problem;" they have not suffered the concrete or particularized informational injury required for standing. *Id.*

A. Plaintiffs have failed to meet their heightened burden to establish Article III standing at the summary judgment stage.

To establish standing, a plaintiff must show (1) a concrete, particularized, and actual or imminent injury in fact that is (2) fairly traceable to the Defendant's challenged action and (3)

likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "What a plaintiff must assert to satisfy this burden varies depending on the stage of the litigation," and the evidence required to carry the plaintiff's burden "grows heavier at each stage." *Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180, 186 (2020). Unlike at the motion to dismiss stage, where general factual allegations of injury resulting from the defendant's conduct might suffice, *see id.*, at summary judgment, Plaintiffs must set forth specific evidence that establishes *each element* of Article III standing and disposes of any remaining, genuine issues of material dispute. *See* Fed. R. Civ. P. 56. Plaintiffs have failed to meet their burden.

B. Plaintiffs have failed to prove an informational injury.

To carry its burden "of demonstrating a sufficiently concrete and particularized informational injury" under Article III, a "plaintiff must show that (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) 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. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017). *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). Plaintiffs have failed to prove both.

1. Plaintiffs seek a legal determination rather than information whose disclosure is compelled by FECA.

Plaintiffs claim that they have suffered an injury-in-fact because they have been deprived of information about "the amounts and purposes of all in-kind contributions made by CTR to HFA in the form of coordinated expenditures." Decl. of Kelley ¶5, ECF No. 27-1; Decl. of Fischer ¶8, ECF No. 27-2. But this is precisely the type of legal determination that is insufficient for proving an informational injury. The Supreme Court has recognized that an injury-in-fact can result when

plaintiffs have suffered from an "inability to obtain information . . . that, on [their] view of the law, the statute requires that [other litigants] to make public." *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). But not just any information will do. Indeed, "the nature of the information allegedly withheld is critical to the [court's] standing analysis." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). Under *Wertheimer v. FEC*, and its progeny, plaintiffs must show that they are "directly being deprived of [] information or that the legal ruling they seek might lead to additional factual information." 268 F.3d 1070, 1074 (D.C. Cir. 2001).

Plaintiffs fail to carry their burden. They seem to recognize that under *Wertheimer*, a finding of coordination is a "legal determination" for purposes of proving an injury-in-fact. Pls.' Opp'n to Intervenors Mot. to Dismiss at 28-29, ECF No. 27. *See also Wertheimer*, 268 F.3d at 1075. But a plaintiff does not have standing merely to learn "whether a violation of the law has occurred," *Common Cause*, 108 F.3d at 418, or in having the FEC "get the bad guys," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013). Thus, Plaintiffs do not have standing to merely find out whether CTR and HFA coordinated their activity in violation of the law, unless such a finding would lead to additional *factual* information. *See* Pls.' Opp'n to Intervenors Mot. to Dismiss at 29 n.11, ECF No. 27; *see also Wertheimer*, 268 F.3d at 1075. Plaintiffs argue that this is a case where a legal finding of coordination would lead to additional factual information. They are wrong.

At the motion to dismiss stage, this Court asked the following questions to determine whether the legal determination that Plaintiffs seek—that input costs such as salary and travel for unpaid online communications must be treated as in-kind contributions as a matter of law—would lead to additional *factual* information required to be disclosed under FECA: "what information does CLC have access to now, and what would it have access to if successful on the merits in this suit?" Op. at 5, ECF No. 33. The administrative record answers these questions—and not in

Plaintiffs' favor. The record demonstrates that Plaintiffs already know or claim to know the following information about each expenditure made by CTR during the 2016 election cycle: (1) the **date** CTR made the expenditures, AR002–35; (2) the **purpose** of the expenditures, *id. at* 090-94; (3) the **source** of the expenditures, *id.*; (4) the **amount** of the expenditures, *id.*; and (5) that the expenditures in question were **coordinated**, *id*. at 003.

The plaintiffs in this case are in the same place as the plaintiff in *Free Speech for the People v. FEC*, a case decided by the District Court of the District of Columbia after this Court denied Intervenors' motion to dismiss. *Free Speech for People v. FEC (FSFP)*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020). Like the Plaintiffs here, the plaintiff in *Free Speech for the People* already professed to know "(1) that an in-kind contribution took place; (2) the source of the contribution; (3) the amount of the contribution; (4) the purpose of the contribution, and (5) the date of the contribution." *Id*. FECA required no further disclosures, and so the suit was just a thinly disguised effort by an advocacy group "to do no more than get the bad guys." *Id*. (internal quotations omitted). *See also CREW 2011*, 799 F. Supp. 2d at 89 (holding that plaintiffs lacked a cognizable informational injury where they failed to "allege any specific factual information . . . that [wa]s not already publicly available"); *see also CREW v. Fed. Election Comm'n*, 475 F.3d 337, 339–40 (D.C. Cir. 2007) ("*CREW 2007*") (holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website, which contains the [sought after] list and a good deal more").

Were Plaintiffs to prevail on their argument that input costs for unpaid communications must be treated as contributions, they would learn only that expenses now reported by CTR as "expenditures" were actually "coordinated" as a matter of law and must be reported as "in-kind contributions." As a practical matter, this means that two changes would occur: (1) expenses that

are currently reported on Line 21 of CTR's FEC reports as "operating expenditures" would be moved to Line 23 and reported as "in-kind contributions"; and (2) HFA would duplicatively report these same expenses on its own reports. *See* Instructions for FEC Form 3X and Related Schedules 7-8, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf. Moving these expenditures from one line to the other would not provide Plaintiffs with any new *factual* information; it would simply reflect a legal determination as to how the expenses should be treated. This is the same situation as in *Wertheimer*:

> "As far as we can determine, appellants do not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures. If so, candidates would be required to report allegedly coordinated expenditures, which currently only political parties disclose, as disbursements. But that would mean that appellants only seek the same information from a different source. Any such increase in information resulting from the imposition of duplicative reporting seems trivial."

Wertheimer, 268 F.3d at 1075.

Plaintiffs might try to contend they would learn more information about the "amount" of CTR's in-kind contributions to HFA because some amount of CTR's expenditures were in-kind contributions while a different amount was not. But that argument is inconsistent with their own view of the law. For example, on the one hand, Plaintiffs contend that (1) only the portions of David Brock's salary that are "connected" to unpaid Internet activity should be exempt from being treated as an in-kind contribution; (2) the remaining portions of David Brock's salary that are unrelated to unpaid Internet activity are in-kind contributions to HFA; and (3) requiring CTR to divide up Brock's salary in that manner would indicate to Plaintiffs how much time David Brock spent on unpaid Internet activity while working for CTR. *See*, *e.g.*, Pls.' Opp'n to Intervenors Mot. to Dismiss at 17-18, ECF No. 27. But on the other hand, Plaintiffs have repeatedly claimed that input costs for unpaid Internet activities are not exempt under any circumstances: "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*.'" Pls.' Opp'n to Intervenors Mot. to Dismiss at 41 n.13, ECF No. 27 (emphasis added).

Plaintiffs cannot have it one way for standing purposes, and another way for merits purposes. Under Plaintiffs' view of the law, all of CTR's expenditures were "in-kind contributions." The only things that would change if they won are that CTR would move its expenses from Line 21 to Line 23, and HFA would report those same expenses. In any case, however, this court has already previously held that the classification of a certain portion of an expenditure as an in-kind contribution is simply a legal determination, not an inquiry for additional facts. *See CREW v. FEC ("CREW 2011")*, 799 F.Supp. 2d 78, 88–89 (D.D.C. 2011) (finding plaintiff lacked standing where "[t]he 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").

Plaintiffs also claim that they would learn more information about the "purpose" of CTR's expenditures if they are re-classified as in-kind contributions. They are wrong. If the expenditures are re-classified as in-kind contributions, CTR would still disclose the same purpose. It would only need to disclose the name of the candidate (Clinton), the office the candidate was seeking (presidency), the election in question (general), the amount or value of the in-kind contribution, and the contribution's general purpose (*e.g.*, salary). As the recipient of the in-kind contribution, HFA would have been required to report the name and address of the contributor (CTR), the value of the in-kind contribution, and the general nature of the contribution (*e.g.*, In-kind contribution - salary). Plaintiffs would obtain no new information. Indeed, the FEC's reporting guidance shows

that the purpose descriptions would be the same, whether for operating expenses, coordinated expenditures, or in-kind contributions. *See Instructions for FEC Form 3X and Related Schedules* 10, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf.

Plaintiffs cannot credibly claim that they will gain additional knowledge if CTR's expenditures are treated instead as in-kind contributions. Accordingly, Plaintiffs have failed to prove the causation and redressability requirements for Article III standing. *See Friends of the Earth, Inc.*, 528 U.S. at 180–81. Nor can they plausibly claim that the dismissal of their administrative complaint has caused any deprivation of information required to be disclosed under FECA, or that judicial relief will give them any new information.

C. Plaintiffs have not proven that they suffered a cognizable concrete and particularized harm.

1. Plaintiff Kelley

The second prong of the informational injury test turns the Court's attention to the relationship between the Plaintiffs' asserted informational injury and "type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr.*, 878 F.3d at 378; *Friends of Animals*, 828 F.3d at 992. This test scrutinizes whether the plaintiff has demonstrated that the information they allegedly lack causes the types of consequential harm that Congress sought to redress in FECA by allowing a private party to sue the FEC for unlawfully failing to act on its administrative complaint. The harm suffered must be "particularized" as well as "concrete." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citation omitted). "[P]articularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

Plaintiff Kelley claims that she is a "U.S. citizen and registered voter" who is "entitled to receive all the information FECA requires those engaged in campaign activities to report publicly

to the FEC." Kelley Decl. ¶ 4. She also claims that she has been deprived of "information missing from FEC disclosure reports filed by CTR and HFA, including the amounts and purposes of all in-kind contributions made by CTR and HFA in the form of coordinated expenditures, to assess candidates for office." *Id.* ¶ 6. But Kelley bears the burden of proving through specific facts *how* the information she was allegedly deprived of has harmed her ability to evaluate candidates. The assertions in her declaration, which merely recite some of the key language from the informational standing case law, cannot survive the deeper inquiry required at summary judgment.

Indeed, even if Kelley had been deprived of information required to be disclosed under FECA—and she has not—she has failed to say how the deprivation amounts to a "concrete" or "particularized" harm to her. It is far from clear how the re-classification of CTR's expenditures as "contributions" could have been useful to her in voting when, according to her own complaint, Kelley already knew CTR was "coordinating" its efforts with HFA. Am. Compl. ¶¶ 1, 67–68, ECF No. 15. Kelley never says how the information she claims to lack would help her "assess candidates for office," or how learning about the precise amounts of "large-scale coordinated spending" would help her choose whether to vote for one candidate or another. Courts have been dubious of similar claims in the past. *See, e.g.*, *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 147-48 (D.D.C. 2005) (value of mailing list would have no concrete effect on plaintiffs' voting).

2. Plaintiff CLC

Plaintiff CLC has likewise failed to demonstrate that its alleged deprivation of information has caused a concrete and particularized harm. That an organization has an "interest in a problem . . . is not sufficient" for standing, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Rather, an organization has standing only if it satisfies the same Article III requirements of injury-in-fact, causation, and redressability that apply to individuals. *See Lujan*, 504 U.S. at

560–61. To establish organizational standing, a plaintiff must demonstrate that the challenged dismissal decision caused a "'concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests.'" *Common Cause*, 108 F.3d at 417 (internal quotation omitted); *see also id.* ("The organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action.").

CLC exists in large part to identify potential campaign finance violations and file complaints. *See, e.g.*, *Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 122 (D.D.C. 2017) ("To advance [its] cause . . . . Campaign Legal Center provides information to voters . . . . [and] files administrative complaints . . . ."). At the motion to dismiss stage, CLC submitted a declaration from attorney Brendan Fischer that described its mission and purported to explain in very vague, conclusory terms how the FEC's failure to investigate Plaintiffs' administrative complaint has allegedly injured CLC: "CLC's public education efforts are directly harmed when it is deprived of complete and accurate campaign finance disclosure reports;" Fisher Decl. ¶17, ECF No. 27-2; "the FEC's failure to ensure complete and accurate reporting under FECA and FEC regulations of CTR's coordinated expenditures with—and resulting in-kind contributions to—HFA hinders CLC's achievement of these policy goals," *id.* ¶26; "[t]he FEC's action here has decreased the quantity of accurate and complete reporting from which CLC can draw in compiling a [litigation] record." *Id.* ¶ 37. These claims are neither concrete nor particular enough to meet the standard for proving "demonstrable injury" to the organization's activities at summary judgment, because they do not explain how CLC has specifically been harmed by the decision to dismiss in this case. And to the extent CLC claims that the FEC's dismissal has deprived the public of information, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance

about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

Moreover, these claims do not prove that CLC diverted resources from its "routine activities" to counteract the alleged harm caused by the FEC's decision to dismiss. *See Envtl. Working Grp. v. U.S. Food & Drug Admin.*, 301 F. Supp. 3d 165, 171 (D.D.C. 2018) ("[A]n organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'") (internal citation omitted). The activities to which CLC claims to have diverted resources are actually part and parcel of its mission and routine activities. If anything, the FEC's decision to dismiss has provided CLC with an avenue to perform its routine work. *See, e.g.*, *Campaign Legal Ctr.*, 245 F. Supp. 3d at 122 ("To advance [its] cause . . . . Campaign Legal Center provides information to voters . . . . [and] files administrative complaints . . . ."). For example, CLC claims that "the information contained in FEC reports assists CLC in identifying problematic campaign practices that require legislative solutions." Fischer Decl. ¶27, ECF No. 27-2. Accordingly, the "problematic campaign practice" that CLC has identified in this case provides it with an issue for advocacy with lawmakers. Similarly, Fischer says media inquiries have forced CLC to "divert resources from other organizational needs to spend staff time researching relevant law, pouring over incomplete and inaccurate disclosure reports, and explaining to reporters what information is missing and how they might attempt to find information not properly reported." *Id.* But what Fischer describes is, by his own account, the reason CLC exists. For example, he describes CLC's mission by stating that the organization "disseminat[es] [] legal and policy

reports, fact sheets, and other materials to educate reporters, policymakers, partner organizations, and the public." *Id.* ¶ 5; *see also Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 356 (D.C. Cir. 2020) (stating that CLC's mission is in part to "participate[] in public education" campaigns). Fischer's conclusory claims, which allege diversion of resources based on CLC's routine activities, prove no real injury-in-fact.

D. Plaintiffs lack standing to bring their APA claim.

Plaintiffs have failed to prove standing to bring their APA claim for the same primary reason they lack standing to bring their FECA claim: their alleged informational injury is premised entirely on a legal determination, which does not confer standing under the APA. *See Am. Farm Bureau. v. EPA*, 121 F. Supp. 2d 84, 98 (D.D.C. 2000) ("Plaintiffs' argument for informational standing [under the APA] presses . . . the same generalized grievance [in seeing the law enforced] that the court has already rejected."). Plaintiffs' argument that the FEC's interpretation of the internet exemption in this matter will lead to "gross abuse" and create a loophole in the campaign finance system further reveals that the essence of this lawsuit is Plaintiffs' deficient request for a legal determination and enforcement of the law against CTR and HFA. Such an injury does not prove standing under FECA or the APA.

II. THE FEC'S PROMULGATION OF REGULATIONS AND ITS DISMISSAL OF ADMINISTRATIVE COMPLAINTS ARE ENTITLED TO JUDICIAL DEFERENCE.

"Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt,* 512 F. Supp. 489, 502 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 455 U.S. 129 (1982). Indeed, when Congress enacted FECA, it vested the FEC "with exclusive jurisdiction over civil enforcement of the Act." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982) (citations omitted). Congress's intention was that the vast majority of issues arising under FECA, a highly technical statute, which implicates serious First Amendment

concerns, would be informed by the "FEC's specialized knowledge and cumulative experience." H.R. Rep. No. 94-917, at 4 (1976) (citations omitted). Constitutional concerns are particularly heightened, because the campaign finance rules "operate in an area of the most fundamental First Amendment activities," and regulation raises serious risks of unjustified intrusion into core constitutional rights. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981) (quotation marks omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 334–36 (2010) (discussing the FEC's risk of chilling speech at length); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (citations omitted). Congress, the FEC and the courts have struggled for nearly 50 years to strike a constitutionally sound balance between protecting the integrity of the electoral process, countering corruption and the appearance of corruption, and ensuring the free flow of speech and ideas. One key way to protect against serious intrusions into constitutional rights is to afford decisions made by the FEC in this highly technical area with substantial deference.

III. THE FEC'S DISPOSITION OF THE ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW.

With this lawsuit, Plaintiffs seek to uproot decades of the FEC's progress on crafting a standard for identifying coordinated expenditures that (1) is clear to the regulated community, (2) complies with the First Amendment's heightened protections for political speech, and (3) stamps out corruption and the appearance of corruption, as required by FECA. While the Commissioners could not fully agree on this matter, their divergence was the result of serious and well-reasoned debate—a debate that has lasted for decades. What speech can be regulated under FECA, and when an organization's activities should be treated as contributions, are critical questions in the interpretation and enforcement of the campaign finance laws.

The D.C. Circuit recognized as much in *Orloski v. FEC*, which Plaintiffs rely on throughout their motion—but without discussing its outcome. There, the court deferred to the FEC's expertise and upheld the FEC's judgment that a picnic sponsored by a corporation, where there were signs expressly advocating an incumbent officeholder's reelection and his campaign employees and official office had both participated in the planning, was not a contribution. *See Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). The court noted the FEC's de-regulatory approach on the issue, but also recognized that a different test would "inevitably curtail permissible conduct," and so it allowed the FEC's balancing to stand as a permissible interpretation of FECA and its First Amendment backdrop. *See id.* at 165.

The FEC has continued to define which activities of an independent organization should be treated as contributions to candidates in many other contexts after *Orloski*, constantly trying to achieve FECA's purpose while construing the statute to avoid constitutional difficulties. *See*, *e.g.*, MURs 4553/4671 & Audit Report 99-13 (Republican National Committee) (defining when a political party's issue ads are contributions to a candidate); MUR 5564 (Alaska Democratic Party) (defining when a political party's "field program" transitions from an overhead expense to a contribution). When the coordination debate reached the Internet, the Commission crafted the rule at issue in this case: if a communication is free to place, then expenses incurred in creating the communication cannot be contributions.

Plaintiffs, however, believe this rule, which the FEC crafted with years of expertise, does not capture enough speech. They urge a more regulatory approach, but they fail to recognize that their alternative would work an even worse harm than what allegedly resulted from the FEC's interpretation of input costs. Indeed, if the FEC were made to embrace the rule Plaintiffs push—whether the rule is a requirement to treat all input costs for an online communication as

contributions, or to parse out which input expenses are regulated and which are not—the FEC would chill a substantial amount of speech. This constitutional problem would prove fatal to the rule, as the FEC must interpret FECA in a manner that avoids constitutional issues. *See Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). As recognized in *Orloski*, while there may not be a coordination standard that pleases everyone, the FEC is well within its boundaries to fashion a standard that avoids chilling speech. At the very minimum, agency deference demands that such a rule survive challenge and that an interest group's judgment not be substituted for that of the Commissioners.

A. FEC Dismissals Must Be Affirmed Unless They Are "Contrary to Law."

FECA is clear and direct—a court may not disturb the FEC's decision to dismiss an administrative complaint unless the decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see Orloski*, 795 F.2d at 161. This standard respects the deference afforded to the decision-making of the FEC. A decision is "contrary to law" only if "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act or (2) the FEC's dismissal . . . was arbitrary, capricious, or an abuse of discretion." *Akins v. FEC*, 736 F. Supp. 2d 9, 16 (D.D.C. 2010).

When examining whether the FEC has permissibly interpreted FECA, a court is "not to interpret the statute as it [thinks] best." *FEC v. DSCC*, 454 U.S. 27, 39 (1981). Rather, the court's role is to determine "whether the Commission's construction was sufficiently reasonable." *Id.* (internal quotation marks omitted). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* This is because Congress granted the FEC "'extensive rulemaking and adjudicative powers'" and the authority to "'formulate general policy with respect to the administration of [the] Act,'" making it "precisely

the type of agency to which deference should presumptively be afforded." *Id.* at 37 (quoting *Buckley v. Valeo*, 424 U.S. 1, 110 (1976)).

Similarly, whether a decision is "arbitrary, capricious, or an abuse of discretion" is an "extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown." *Akins*, 736 F. Supp. 2d at 17 (internal quotation marks omitted). Under this standard, reversal is permitted "only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted). In short, the arbitrary and capricious standard "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). It is well-established that, where, as here, "the Commissioners deadlock on a vote and consequently dismiss the matter, the Commissioners who vote not to proceed (Controlling Commissioners) must explain their reasons" in a Statement of Reasons that is entitled to deference. *CREW v. FEC*, 892 F.3d 434, 442 (D.C. Cir. 2018); *see also CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017), *aff'd*, 892 F.3d 434 (D.C. Cir. 2018). By contrast, a rejected OGC report, such as the one Plaintiffs repeatedly cite as if it is authoritative, does not represent the decision of the FEC and is not entitled to deference. *See DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (refusing to even review a General Counsel's Report when a controlling bloc of Commissioners voted against it).

B. The Commissioners' decision to exempt input costs for free online communications was not contrary to FECA or its implementing regulations.

1. The Commissioners did not misinterpret FECA – the statute says nothing about when expenditures made for unpaid online communications are "coordinated" as a matter of law.

Plaintiffs do not fairly or accurately characterize the controlling Commissioners' Statement of Reasons, when they claim that it departs from the longstanding general principle that

"coordinated expenditures" constitute "contributions" under FECA. *See* ECF No. 35 at 29–31. The Commissioners' Statement of Reasons says no such thing. The FEC did not categorically refuse to regulate "coordinated expenditures" as "contributions." Rather, Plaintiffs disagree with how the FEC answers the threshold question of when a particular "expenditure" is "coordinated" as a matter of law. While FECA says that "coordinated expenditures" are "contributions," it does not speak clearly to specifically when an "expenditure" is "coordinated." To treat the interactions between a political committee and a candidate in such a sweeping way, such that all of the political committee's disbursements are illegal contributions to the candidate, would raise grave issues of statutory interpretation and First Amendment rights.

Thus, to answer the difficult question of precisely when a political committee's expenditure is an in-kind contribution to a candidate, one must turn to fifty years of rulemaking, advisory opinions and enforcement actions taken by the expert agency charged with exclusive civil jurisdiction, because FECA mandated the FEC to exercise its "extensive rulemaking and adjudicative powers." *FEC v. DSCC*, 454 U.S. 27, 37 (1981). Congress even specifically required the FEC to write regulations providing when a communication is "coordinated" with a candidate as a matter of law. *See* Bipartisan Campaign Reform Act (BRCA, McCain–Feingold) Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002) ("The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees."); *see also Shays I*, 337 F. Supp. 2d at 69 (discussing the coordinated communication regulation and the definition of "public communication" and stating: "What constitutes 'general public political advertising' [within the definition of 'public communication'] in the world of the Internet is a matter for the FEC to determine"). The FEC was explicitly empowered to create its own standards for determining when

a communication is "coordinated" such that it must be treated as a "contribution." Because FECA is silent on this question, the controlling Commissioners, who were informed by nearly fifty years of agency experience and decisions, had ample room to answer.

2. Unpaid online communications and the costs associated with producing them were properly analyzed by the Commissioners under section 109.21.

There is no support in the FEC regulations or elsewhere for Plaintiffs' erroneous position that the costs associated with producing unpaid online communications should be regulated under the FEC's general coordinated expenditure regulation, found at 11 C.F.R. § 109.20, rather than under the regulation that specifically applies to communications, found at 11 C.F.R. § 109.21. Section 109.20 plainly does not apply to the regulation of "communications." *See* Coordinated & Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (unambiguously announcing when promulgating the coordinated communication regulation that section 109.21 applies to "communications" and "section 109.20 addresses expenditures that are not made for communications"). And the FEC has not deviated from that position when interpreting the regulations in the context of enforcement matters. *See, e.g.*, First Gen. Counsel's Rpt. ("FGCR") at 13, MUR 6037 (Democratic Party of Oregon) (July 10, 2008) ("However, the regulation [at section 109.20] applies only to those coordinated expenditures which are not made for communications. . . . Accordingly, section 109.20(b) is inapplicable here.").

The text of the regulations is clear. But even if it were not, longstanding canons of statutory interpretation support the Commissioners' conclusion that section 109.21 provides the applicable regulatory framework for determining when communications are "coordinated" under the law. First, under rules of statutory interpretation, specific provisions (here, section 109.21, the regulation defining when the costs of communications must be treated as coordinated expenditures) usurp more general provisions (here, section 109.20, the regulation broadly defining

when expenses should be treated as coordinated). *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."); *D. Ginsburg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling"). Second, rules promulgated more recently in time supersede earlier rules. *See, e.g.*, *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991) ("When two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will."). Section 109.20 existed long before the coordinated communication regulation. *See* 68 Fed. Reg. at 425 (stating that the relocation of 109.20(b) was "not intended to change or alter current Commission interpretations of its predecessor in pre-BCRA section 109.1(c)," which had existed within section 109.1 since 1977).

Moreover, the record in this very action refutes Plaintiffs' claim that the Commissioners' application of section 109.21 turns section 109.20 into a "superfluity." Pls.' MSJ at 33, ECF No. 35. The Commissioners properly applied the coordination rules at section 109.20 to several of CTR's non-communication activities, like surrogate training and research. AR390, 394–97. Section 109.20 has its place in the FEC's regulatory landscape and the FEC does not hesitate to apply it, but it does not apply to communications, where a specific, more recent regulation controls. Given that the Internet exemption applies only to communications that are free to place, there would be nothing to exempt if it did not also apply to input costs.

3. The 2006 Internet communications rulemaking supports the decision to dismiss.

Nowhere does CLC acknowledge that it is effectively asking this Court to write a rule that CLC long ago failed to persuade the FEC to write itself. Following the district court's decision in *Shays v. FEC*, the FEC opened a rulemaking to determine when unpaid online communications

should be treated as "public communications" under section 109.21 and thus regulated under campaign finance law. *See* Notice of Proposed Rulemaking: Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005). In the short section of Plaintiffs' MSJ dedicated to this 2006 rulemaking, Plaintiffs glaringly omit the role that CLC played in the rulemaking process. CLC submitted comments to convince the FEC to adopt the position they now advance in this litigation—to treat input costs for online communications as coordinated contributions under section 109.20—while reciting the same "parade of horribles" they rely on here. The FEC considered CLC's argument and dismissed it, promulgating a regulation that does not treat the costs associated with producing unpaid online communications any differently than the communications themselves. This litigation and the underlying administrative complaint filed by Plaintiffs are simply an attempt to circumvent the FEC by trying to convince this Court to step into the shoes of an FEC Commissioner and adopt their view of what they want the law to be. But Plaintiffs are not FEC Commissioners, and the FEC is not required to follow their view of the law. Congress entrusted the FEC, not Plaintiffs, with the interpretation and enforcement of FECA. That the Commissioners' decision to dismiss Plaintiffs' administrative complaint—by rejecting the precise arguments that the FEC reviewed and explicitly declined to adopt during the rulemaking on this precise issue—could now be deemed "contrary to law" is illogical.

While Plaintiff CLC knows very well the history of the 2006 rulemaking, it is worth reviewing how the FEC arrived at the current rule and the specific arguments they rejected. After the rulemaking process was well underway, the Commission released a proposed definition of "public communication," which like the regulation ultimately adopted, stated that the only Internet communications that are "public communications," and therefore subject to the coordinated communication test, are those "placed for a fee on another person's website." *See* 11 C.F.R. §

100.26; 70 Fed. Reg. at 1697. The FEC invited comment on the proposed regulation, and Plaintiff CLC submitted a comment noting that the proposed rule—unless altered or clarified—would have the effect of exempting the input costs of non-public communications from a coordination finding. *See* Democracy 21, Campaign Legal Center & Center for Responsive Politics, Comment on Notice of 2005-10: Internet Communications (June 3, 2005).

CLC even admitted that "the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials." *Id.* at 12 n.10. Thus, if the distribution of a communication is treated as a contribution, the production costs are also a contribution; but if the distribution costs are not a contribution, then the production costs are also not a contribution. *See id.* (providing, by way of example, that if the costs of broadcasting a television advertisement are an expenditure, then so too are the costs of producing the television advertisement). CLC continued that, if the FEC did not alter its proposed regulatory scheme and clarify that the traditional approach to input costs does not apply, then a person could "spend very large sums of money outside the campaign finance laws on the production of ads, if those ads are then disseminated on the individual's own Web site." *Id.*

Specifically, CLC highlighted that, under the proposed rules:

> [A] wealthy individual could set up a Web site and then spend very large amounts of money in coordination with a candidate on the professional creation and production of campaign materials - such as campaign videos or other campaign ads - which he then disseminates via his own Web site (or by email). Because the distribution itself would not be considered a "public communication," (i.e., it would not be distribution "for a fee on another person's or entity's Web site"), it would fall outside the coordination rules. If the production costs are also treated as outside the coordination rules, this could lead to [what CLC's colorfully describes as] a large loophole in the rules on coordinated campaign spending.

Id. at 12–13 n.10. CLC urged the FEC to adopt an altered final rule that would treat "spending for production costs above a reasonable threshold, such as, for example, $25,000," as subject to the coordination regulations, among other restrictions. *Id.* at 13 n.10.

The FEC, however, rejected CLC's invitation to regulate input costs differently from the ultimate communication. Indeed, when the Commission transmitted to Congress its rationale for its final Internet rules via its Explanation and Justification ("E&J"), it referenced CLC's comment on production costs, stating that "commenters observed that the Commission generally treats the costs of producing campaign-related materials as subject to the same funding limits and source prohibitions as the costs of distributing the materials." Internet Communications, 71 Fed. Reg. 18589, 18597 (Apr. 12, 2006); *see* 52 U.S.C. § 30111(d)(1) (requiring the Commission to transmit "a detailed explanation and justification" of its proposed rules to Congress for approval). Thus, the FEC deliberately rejected calls to subject input costs to a coordination test.

In its MSJ, CLC tries to recast the outcome of the 2006 rulemaking by making irrelevant arguments about how the FEC acknowledged that costs such as computer purchases and payments to bloggers could be "expenditures" even if some of the final products, such as the blogs themselves, fall under the Internet exemption. Pls.' MSJ at 37, ECF No. 35 (citing 71 Fed. Reg. at 18604, 18606). But whether such costs constitute "expenditures" is not in dispute. CTR reported all the costs it incurred in creating online communications as "expenditures" on its FEC reports, as all political committees must do. The question here is whether those "expenditures" constitute "coordinated communications," and thus in-kind contributions. The passages from the related E&J touted by Plaintiffs in their MSJ have absolutely no bearing on that question. To the extent that the E&J touches on coordination at all, it supports the Commissioners' decision to dismiss. *See* 71 Fed. Reg. at 18589 (noting "Congress did not use the term 'public communication' to regulate the vast majority of the American Public's activity on the Internet or elsewhere" and concluding that the First Amendment and FECA demanded a "restrained regulatory approach" to Internet activity). It was thus entirely consistent with FECA, FEC regulations, and the rulemaking process

undergirding those regulations, for the controlling Commissioners to conclude that reading the regulations to treat CTR's input costs as contributions "would eviscerate the Internet exemption and the deliberate policy decisions behind it, and potentially chill political speech online." AR392.

C. The Commissioners' decision to exempt input costs for unpaid online communications was not arbitrary, capricious, or an abuse of discretion.

The controlling Commissioners in this case determined that CTR's expenses related to unpaid Internet communications, including web hosting, video equipment, software, computer equipment, an opinion poll, office space, and overhead like staff salaries and travel, were not in-kind contributions to HFA because, under FEC regulations and precedent, the input costs for unpaid online communications cannot be coordinated as a matter of law. *See* AR391-94. Under the arbitrary and capricious or abuse of discretion standard, reversal of the FEC's decision is permitted "only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin*, 411 F.3d at 242. Nor was it arbitrary, capricious, or an abuse of discretion. To the contrary, the Commissioners' decision to dismiss (1) followed longstanding FEC precedent in similar enforcement actions and advisory guidance; and (2) was reasonable in light of constitutional avoidance principles that required the agency to consider the significant First Amendment and Due Process concerns that would have resulted from a decision to open an investigation.

1. FEC precedent supports the Commissioners' decision to dismiss.

Since 2006—when the Internet rulemaking was completed and the FEC made the decision to exempt unpaid Internet communications from the definition of "coordinated communication" under sections 100.26 (defining "public communication") and 109.21 (defining "coordinated communications")—the agency has consistently and repeatedly interpreted its regulations as exempting the input costs of free online communications from regulation as coordinated

expenditures. Plaintiffs' primary means of distinguishing this precedent are to ignore it completely or argue that it should not apply because CTR spent more money on creating its exempt Internet activities than the previous groups who came before the FEC. *See* Pls.' MSJ at 37, ECF No. 35 (noting that authorities cited by the Commissioners did not involve a "remotely comparable coordination scheme"). But there is no rational basis for applying entirely different regulatory regimes to various speakers based on the amount of money they spend. Even more fundamentally, there is no room in the First Amendment for applying such a ceiling to spending or punishing someone for speaking more than others. *See Davis v. FEC*, 554 U.S. 724, 739 (2008) (invalidating a statutory scheme that "impose[d] an unprecedented penalty" on candidates for "robustly exercis[ing] that First Amendment right"); *Buckley*, 424 U.S. at 54 (stating there is no government interest sufficient "to justify the restriction on the quantity of political expression").

The Commissioners' decision to follow FEC precedent and dismiss Plaintiffs' administrative complaint was not arbitrary or capricious. Ironically, the FEC would have been far more seriously exposed to a charge that it acted arbitrarily and capriciously if it had departed from this precedent, as Plaintiffs would have it do.

a. The FEC has consistently treated direct production input costs associated with creating unpaid online communications as exempt.

In MUR 6657 (Akin for Senate), the FEC unanimously acknowledged that a political committee sending fundraising emails on behalf of a candidate incurred more than $100,000 of input costs for "Email List Rental" and "Online Processing." *See* Factual & Legal Analysis ("F&LA") at 2, MUR 6657 (Akin for Senate) (Sept. 17, 2013). However, the Commission found no reason to believe the political committee made any coordinated expenditures, as all of its communications occurred via email and thus were not placed for a fee on another person's website.

See id. at 5-6. Accordingly, the expenses underpinning the emails were not considered "contributions." *See id.* Plaintiffs acknowledge Akin and appear to concede that it stands for the proposition that input costs cannot be coordinated, but they claim that the FEC's findings in the CTR/HFA MUR are an unprecedented expansion of Akin and the FEC's position on input costs. *See* Pls.' MSJ at 37, ECF No. 35. In so doing, Plaintiffs overlook additional precedent and offer no analytically sound reason for distinguishing the Akin MUR (and others) from CTR.

The FEC has held in multiple cases that the costs of producing high-quality online videos placed without a fee are not analyzed separately from the resulting communication. For example, in 2012, in MUR 6477 (Turn Right USA), a super PAC paid close to $6,000 to produce a YouTube video attacking a candidate, which the FEC unanimously concluded was not a "coordinated communication" with the targeted candidate's opponent because the video was only distributed on free online platforms. *See* F&LA at 3, 7–8, MUR 6477 (Turn Right USA) (July 17, 2012). The FEC did not separately analyze the input costs, viewing them as part and parcel of the final communication and covered by the exemption within section 109.21 for non-public communications. *See id.* at 7–8.

Likewise, in MUR 6729 (Checks and Balances for Economic Growth), a nonprofit organization produced two video advertisements that were only disseminated across the Internet for free. FGCR at 4, MUR 6729 (Checks and Balances for Economic Growth). In weighing whether the nonprofit organization had any reporting obligations, OGC noted that "the cost of 'creating' an internet communication falls within the scope of the [Internet] exemption—which necessarily would include creation costs associated with production elements *unrelated to internet dissemination itself*." *Id.* at 6 (emphasis added). OGC then concluded that "any production costs

the Respondent may have incurred would not constitute contributions" or reportable expenditures.[1] *Id.* Three Commissioners agreed with OGC, stating that, because the videos appeared solely on free online platforms, "the communications (including any associated production costs) were exempt from FEC regulation." SOR of Comm'rs Goodman, Hunter & Petersen at 4, MUR 6729 (Checks and Balances for Economic Growth) (Oct. 23, 2014).

b. The FEC has also treated input costs such as overhead expenses as exempt.

The FEC has also made clear that overhead expenses, like staff time, computer equipment, and office space—the very expenses Plaintiffs credit with contributing to the Commissioners' "unbounded" approach to input costs in this matter—are production costs and will not be regulated as "coordinated expenditures" if they are connected to free online communications. Far from acting arbitrarily and capriciously, the Commissioners in this case met their obligation "to treat like cases alike." *See Bush-Quayle '92 Primary Committee, Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). For example, in MUR 7023 (Kinzler for Congress), a nonprofit organization used its Twitter account to link to a candidate's YouTube video, which formed the basis of a complaint of impermissible coordination filed with the FEC. SOR of Comm'rs Hunter, Goodman & Petersen at 1, MUR 7023 (Kinzler for Congress) (Jan. 23, 2018). On review of the complaint, the controlling bloc of Commissioners rejected the complaint's argument that "[w]hether or not the Commission views the electronic distribution of campaign materials itself as an expenditure, we believe it must take into account the cost of staff time, office space, equipment usage, etc. required . . . to undertake such activities." *Id.* at 5 n.21 (internal quotation marks omitted). The Commissioners stated that the Internet exemption applies, and that "*the exemption would be meaningless if [the Commission]*

[1] Unlike registered political committees, which must report all of their contributions and expenditures to the Commission, there is no requirement that nonprofit organizations file regular reports of receipts and expenditures.

were to scrutinize and regulate the component costs of an exempt communication or otherwise limit the exemption to only the negligible costs of a communication's Internet distribution." *Id.* (emphasis added).

Similarly, in MUR 7080 (Babeu for Congress), when a sheriff's office ran by a candidate for Congress posted pictures of the candidate to its Facebook feed that appeared to be republished from the candidate's campaign website, the FEC did not pursue a coordination violation for the input costs. *See* FGCR at 4, MUR 7080 (Babeu for Congress) (Dec. 15, 2016); F&LA at 1 n.1, MUR 7080 (Babeu for Congress) (Oct. 30, 2017). Though OGC noted that the compensation paid to sheriff's office employees to create the Facebook posts was "something of value," the FEC did not conclude that those expenses were "contributions" to the candidate. *See* FGCR at 4, MUR 7080 (Babeu for Congress) (Dec. 15, 2016); F&LA at 1 n.1, MUR 7080 (Babeu for Congress) (Oct. 30, 2017).

These matters, and several others like them, demonstrate that the FEC has consistently interpreted its regulations to exempt virtually the full category of input costs CTR used to create its online communications from the definition of coordination under section 109.21. *See* Advisory Op. 2008-10 (VoterVoter.com) ("The costs incurred by an individual in creating an ad will be covered by the Internet exemption . . . as long as the creator is not also purchasing TV airtime for the ad."); Advisory Op. 2011-14 (Utah Bankers Association) (advising that a separate segregated fund's website posts and emails soliciting funds for candidates would not be coordinated communications because they are free Internet communications, making no reference to the fund's stated costs for content creation, vendors, and server time); F&LA at 3-4, MURs 6722/6723 (House Majority PAC) (Mar. 6, 2014) (finding, with respect to both "the production and dissemination" of Internet videos posted to a super PAC's website and YouTube, that there were

no in-kind contributions to the candidates featured in the videos); F&LA at 6, MUR 6522 (Lisa Wilson-Foley for Congress) (July 3, 2013) (finding that a corporation that featured a candidate in its social media and website postings did not make a contribution, without any separate reference to the staff time involved in creating the posts); F&LA at 6–7, 11–12, MUR 6414 (Carnahan in Congress Committee) (July 17, 2012) (finding no coordination when individuals, working at least for some time with a candidate, paid a vendor to research the candidate's opponent, then used their own resources to design a website featuring information and a video about the opponent, and made additional payments for purchasing a domain name and hosting the website). The FEC has determined that costs as diverse as web hosting, salaries, video equipment, and office space, are not "contributions" when made in the course of producing Internet communications placed without a fee.

The FEC's consistent treatment of input costs undercuts the charge that they acted arbitrarily and capriciously in this case. While the controlling Commissioners saw the law as it was and applied it, plaintiff CLC presents the law as it would like it to be and asks this Court to apply that instead. The Court should reject what is just another invitation to substitute someone else's judgment for the reasoned decision of an administrative agency that is entitled to strong deference.

2. The Commissioners' decision to avoid the constitutional issues that would arise from a decision to find reason to believe was reasonable.

In their MSJ, Plaintiffs march out a parade of activities inconsistent with campaign finance law that they contend the Commissioners' decision to dismiss has now sanctioned. *See* Pls.' MSJ at 32–33, 53–54, ECF No. 35. They overlook the other regulatory provisions that block the march

of this parade of horribles.[2] And they give short shrift to the serious constitutional concerns that would abound if the FEC had adopted the position they advance in this case. As the Commissioners point out in their Statement of Reasons, had they reversed a decade of decision-making and found CTR's Internet communication production costs to be coordinated expenditures, the FEC would have written new rules retroactively, violated CTR's and HFA's due process rights, and exposed the entire regulated community to potential violations they could not have foreseen. *See* SOR at 14 n.66.

An administrative agency cannot suddenly reverse its legal interpretations without providing fair notice to the regulated community. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) ("The Commission's lack of notice . . . that its interpretation had changed . . . failed to provide a person of ordinary intelligence fair notice of what is prohibited." (internal quotation marks omitted)). "This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon sensitive areas of basic First Amendment freedoms." *Id.* (internal quotations omitted). Had the FEC reversed course in this case and investigated and sought penalties against CTR and HFA for activity approved in other enforcement matters and advisory opinions, a serious and constitutionally-prohibited injustice would have taken place, against the sensitive backdrop of First Amendment rights. Plaintiffs implicitly acknowledge the due process concerns that the

[2] For example, Plaintiffs caution that foreign money will seep into U.S. elections, but there is a separate ban on foreign nationals, directly or *indirectly*, making "expenditures." 52 U.S.C. § 30121(a)(1). BCRA also bars federal candidates and political parties from "directing" or "controlling" soft money and soft money organizations. *Id.* § 30125(a), (e). Further, Plaintiffs act as if all spending will migrate online where it will be totally unregulated. However, the Commission subjects most Internet communications to the coordination regulations, not to mention all television and radio ads, and all other forms of "public communications," which continue to occur.

Commissioners faced by recognizing that they may have been required to invoke FECA's "safe-harbor" provision in this matter, which provides that "any person who relies upon any rule or regulation prescribed by the Commission . . . and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act." *See* Pls.' MSJ at 52, ECF No. 35; *see also* 52 U.S.C. § 30111(e). Given the due process concerns that would have arisen had the Commissioners come to the opposite conclusion, it can hardly be said that their decision to dismiss was arbitrary or capricious.

Indeed, courts reviewing agency actions under the arbitrary and capricious standard have remanded decisions precisely because they depart from the agency's past policies. "An agency interpretation that would otherwise be permissible is, nevertheless, prohibited when the agency has failed to explain its departure from" its prior interpretation. *Bush-Quale '92 Primary Comm., Inc.*, 104 F.3d at 453. Here, there is no principled reason why the FEC should have departed from its existing approach to input costs in this matter, as the only difference between CTR's spending and other entities' scrutinized spending is the number of communications CTR produced and how much it spent. The activities themselves—payments to produce free online communications—are exactly the same. Thus, Plaintiffs here seek not to remedy an arbitrary and capricious decision, but to turn a well-reasoned decision that rationally applied the law based on a decade and a half of consistent interpretations into a ruling that would violate the Due Process Clause.

Furthermore, if the Commissioners followed the rules advocated by Plaintiffs for purposes of attempting to prove standing, they would have had to draw a new "line" between "non-Internet activities" related to producing Internet communications (which would be "contributions" if coordinated) and "the direct costs of Internet communications" that were "necessary to make" the communications (which could not be legally coordinated and could never be "contributions"). *See*

Pls.' Opp'n to Intervenors' Mot. to Dismiss at 40, ECF No. 27 at 40. Putting aside the fact that there is no support for such a distinction in FECA, FEC regulations, or any other FEC authority and thus, the Commissioners would have been improperly promulgating a new rule via an enforcement action had they subscribed to Plaintiffs' views, such line-drawing would be unclear, illogical, and unconstitutionally vague in violation of due process and the First Amendment because it would fail "to provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley*, 424 U.S. at 77. "Where First Amendment rights are involved, an even greater degree of specificity is required" to delineate what is legal and what is not. *Id.* (internal quotation marks omitted). "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek a declaratory ruling before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. Such complicated and ambiguous rules not only violate due process rights, but chill speech. *See id.*; *Buckley*, 424 U.S. at 77.

Practically speaking, if the FEC were required to embrace an interpretation of its regulations where the "direct" input costs of an online communication are regulated and more "attenuated" production costs are not, it would be exceedingly difficult for the regulated community to know what activity is allowed and to structure its expenditure so that they comply with the law. Any group seeking to add content to its website or create a Facebook post after speaking with a candidate would have to decide whether it wants to risk potentially making an excessive contribution or filing a false FEC report, or if it would rather not speak at all and remain safe. That choice is untenable under the Constitution. Such a rule would have a significant effect on political parties, which regularly interact with candidates. For example, a political party may make a contribution each time it writes a post about a candidate on its website after speaking to

the candidate about what policy points the campaign wants to promote or how it can best attack an opponent. This would fundamentally alter the way political parties advocate for their candidates. *See, e.g.*, *Research*, GOP, https://www.gop.com/research/ (devoting a webpage to near daily posts promoting President Trump and criticizing Vice President Biden).

Furthermore, such a vague standard would harm the Commission by requiring it to make case-by-case determinations on subjects of a highly political nature. This would open the Commission up to criticism that its decisions are motivated by partisanship rather than fidelity to the law and would injure the institutional credibility of the agency. That is why the D.C. Circuit has explained that, "in this politically-charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results." *Orloski*, 795 F.2d at 167. Bright-line tests ensure that the regulated community has fair notice of what conduct is permitted and allows the FEC to maintain the confidence of the public.

"No one disputes the FEC can craft bright-line rules." *Emily's List v. FEC*, 581 F.3d 1, 30 (D.C. Cir. 2009). Plaintiffs are not the federal agency tasked with making the rules, and do not have the ability to use the judiciary to force their view of the law. Courts must defer to agencies and their expertise, and here, where an agency has crafted an interpretative framework that is "sufficiently reasonable" and carefully balances constitutional concerns, there is no room to disturb the agency's judgment. *See DSCC*, 454 U.S. at 39.

D. The Commissioners' decision to exempt expenses unrelated to unpaid Internet activity was not arbitrary, capricious, or an abuse of discretion.

The FEC's review of CTR's non-communication expenses, unlike its review of CTR's communication production costs, turned primarily on the factual record rather than on a purely legal determination. *See* AR394–97. The controlling bloc of Commissioners examined CTR's research and tracking endeavors, surrogacy program, and contacts with reporters under section

109.20 and concluded that, based on the evidence presented in the administrative complaint, there was no reason to believe that CTR coordinated these efforts with HFA. *See id.* Contrary to Plaintiffs' position, the Commissioners' decision was "supported by substantial evidence" and accordingly was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *See Hagelin*, 411 F.3d at 237, 242.

1. The Commissioners did not create an artificially high bar for proving there is reason to believe a violation occurred.

Plaintiffs first attack the Commissioners' evidentiary findings by claiming they have misinterpreted the reason-to-believe-standard by requiring specific evidence of coordination, which they say makes it impossible for any complainant to establish coordination. *See* Pls.' MSJ at 38–40, ECF No. 35. They stress that "reason to believe" is a preliminary finding that does not assign guilt but rather opens the door to a more robust investigation. *See id.* While Plaintiffs are correct that a reason to believe finding is not the final stage of an enforcement matter, "[t]he Act's complaint requirements and limits on Commission investigative authority serve no purposes if the Commission proceeds any time it can imagine a scenario under which a violation may have occurred." SOR of Comm'rs Hunter, McGahn & Petersen at 7, MUR 6296 (Buck for Colorado) (June 14, 2011). The standard is meaningless if the Commission acts when it "simply [does] not have . . . sufficient information to find *no* reason to believe . . . . The Commission must have more than unanswered questions before it can vote to find RTB and thereby commence an investigation." SOR of Comm'rs Petersen, Hunter & McGahn at 6 n.12, MUR 6056 (Protect Colorado Jobs, Inc.) (June 2, 2009).

The FEC has good reason to hold complainants to this evidentiary burden. As is true with all aspects of the FEC's activities, investigations are laden with First Amendment implications. As court have recognized, FEC investigations "tread in an area rife with first amendment association

concerns." *FEC v. LaRouche Campaign*, 817 F.2d 233, 234 (2nd Cir. 1987). "Mere 'official curiosity' will not suffice as the basis for FEC investigations, as it might others." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d at 388. The information revealed to the FEC "is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter" of other agencies' investigations, "since release of such information to the government carriers with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." *Id.* at 275; *see also Am. Fed. Of Labor & Congress of Indus. Orgs. v. FEC*, 333 F.3d 168, 176 (D.D.C. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation."). This is why the Commission has long required "a complaint [to] set[ ] forth sufficient *specific* facts, which, if proven true, would constitute a violation of FECA" before finding reason to believe. SOR of Comm'rs Mason, Sandstrom, Smith & Thomas, MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee) (Dec. 21, 2000) (emphasis added). If CLC had presented facts suggesting that CTR and HFA coordinated on the activities that were non-communicative in nature, as opposed to coordinating on CTR's Internet communications, then the FEC would have found reason to believe and investigated; the standard is not "impossible" to meet.

2. The record evidence supports the Commissioners' conclusion that CTR's non-communication expenses were not coordinated.

The Commissioners carefully considered the expenses that were unrelated to unpaid Internet communications—including CTR's surrogacy program, research and training efforts, and contacts with reporters—and reasonably concluded that the record evidence supported the conclusion that they were not coordinated with HFA. Plaintiffs, however, argue that the Commissioners ignored, or failed to properly weigh, evidence of coordination. *See* Pls.' MSJ at

46, ECF No. 35. But as the Commissioners point out, the evidence CLC presented in its complaint does not show that CTR coordinated the non-communication activities. *See* AR396–97. CLC cited news articles showing that CTR was coordinating *some* of its activities with the Clinton campaign, but not *all* of them. *See* AR005–6. One cited article even explains that the Clinton campaign said that "[a]ny nonpublic information of value that [CTR] shares with Clinton staff will be purchased" to avoid accepting a contribution. AR007 (quoting Matea Gold, *2016 Race's Theme Song: Blurred Lines*, Wash. Post (July 12, 2015), 2015 WLNR 20606053).

While there are some news articles in the record that discuss CTR's coordination in more general terms and without the caveats CTR's and HFA's spokespersons normally took care to use, the Commissioners did not place as much weight on these second-hand characterizations as they did on CTR's and HFA's direct responses. *See* AR394–97. As the Commissioners have stated in the past: "[A]s a general evidentiary matter, we decline to open investigations based solely upon hearsay reports or editorial characterizations contained in press articles, particularly where, as here, the speculation is rebutted by record evidence." SOR of Comm'rs Petersen, Hunter & Goodman at 7 n.29, MURs 6470/6482/6484 (Romney) (Mar. 30, 2016). Plaintiffs may disagree with the Commissioners' interpretation of the evidence, but that is not enough to trigger a finding of arbitrary and capricious decision-making. When reviewing factual findings under the arbitrary, capricious, or abuse-of-discretion standard, reversal is warranted only if no reasonable factfinder could have reached the agency's conclusion based on the record evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

a. Media Trainings and Contacts with Reporters

In its administrative response, CTR explained that with respect to its efforts to provide media trainings to Clinton supporters, it "did not include any official Clinton campaign surrogates

(as identified by HFA) or HFA staff in the trainings. CTR did not solicit or accept any suggestions from HFA regarding which individuals should attend the sessions or otherwise permit HFA to direct individuals to the sessions." AR066. A news article cited in Plaintiff CLC's administrative complaint also quotes CTR officials as saying HFA "played no role in the training sessions." AR003 n.3. In light of these representations, and in the absence of any evidence in the complaint specifying that CTR and HFA coordinated on the surrogate trainings, the controlling Commissioners correctly found no reason to believe. *See* AR395.

Similarly, the controlling Commissioners found that CTR's contacts with reporters were not "contributions" because the administrative complaint did not point out any evidence suggesting that CTR was contacting reporters at the request or suggestion of HFA, or in cooperation, consultation, or concert with the campaign. *See* AR396. Indeed, Plaintiff CLC's administrative complaint contained no evidence related to these conversations, other than to say that they occurred. *See generally* AR001–52.

b. Research and Tracking Efforts

Both CTR and HFA stated in their responses that HFA compensated CTR for the fair market value of the research and tracking services it provided to HFA. *See* AR067, 076-77. The committees' FEC reports confirm that HFA made a $275,615.43 disbursement to CTR for "research" in June 2015 and a second $6,346 disbursement for "research services" in July 2015. Correct the Record, FEC Form 3X, Schedule A, line 17 at 8 (July 31, 2015); Correct the Record, FEC Form 3X, Schedule A, line 17 at 17 (Dec. 31, 2015). Plaintiff CLC's administrative complaint did not cite any evidence showing that these substantial payments did not represent the fair market value of CTR's research and tracking (tracking being a form of opposition "research"). *See*

generally AR001–52. Thus, the SOR's conclusion that there was not sufficient evidence to find a contribution squares neatly with the record. *See* AR395–96.

c. The Podcast Statements

Plaintiffs erroneously contend that the Commissioners' decision to exclude consideration of statements made by CTR's chairman during a podcast interview that was not cited in Plaintiff CLC's administrative complaint was "irrational." *See* Pls.' MSJ at 47, ECF No. 35. The Commissioners stated that it would be inappropriate to consider the podcast because CTR and HFA did not have the opportunity to respond to the evidence. *See id.* Importantly, the Commissioners also noted that, even if they were to consider the podcast, it did not reveal anything new about whether HFA and CTR were coordinating on non-Internet activities. *See* AR385 n.28. Thus, the FEC provided two reasons the podcast did not mandate a reason-to-believe finding.

d. Poll

Plaintiffs repeatedly single out CTR's payments for a poll. While Intervenors maintain the poll was an input cost for an Internet communication, even if the poll were analyzed under section 109.20, it still would not be a contribution. Plaintiffs fail to discuss or analyze the actual FEC regulation that prescribes when polls are treated as in-kind contributions, and they present no evidence that the elements of that regulation are met here.

Section 106.4 of the FEC regulations states that a political committee's sharing of a poll with a campaign results in a contribution only if the "poll results are accepted by [the] candidate." 11 C.F.R. § 106.4(b). "The acceptance of any part of a poll's results which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordinated by the candidate-recipient . . . shall not be treated as a contribution." *Id.* § 106.4(c). Moreover, a candidate does not accept poll results such that they are a "contribution" unless the candidate receives "cross-

tabs, questions asked, and methodology." SOR of Comm'rs Hunter, Goodman & Petersen at 6, MUR 6958 (McCaskill) (Feb. 28, 2017). "Top line" results, without more, do not constitute a contribution. *See* SOR of Comm'rs Hunter & Petersen at 6, MUR 6908 (NRCC) (May 2, 2019).

Plaintiff CLC's administrative complaint did not include any specific allegations that CTR paid for the poll related to Clinton's performance in a Democratic debate, or released the results, at the specific request or suggestion of HFA, or in cooperation, consultation or concert with HFA. *See generally* AR001–52. Nor did it allege that CTR publicly posted the raw data from the poll on the Internet or gave the data to HFA. *See id.* Thus, under the polling regulations and the relevant Statement of Reasons (as well as the coordination analysis discussed in Section III.A-C *supra*), there was no in-kind contribution in the form of polling from CTR to HFA. *See* 11 C.F.R. §106.4(c). Plaintiffs may argue that the controlling Commissioners did not consider the preceding arguments as reasons for dismissal in their SOR. But federal courts do not reverse for harmless error, as here when the ultimate outcome would have been the same regardless of the reasoning. *See* 28 U.S.C. § 2111 (codifying a harmless error standard); *see also FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996).

3. The Commissioners' failure to address the press exemption argument was rational because they dismissed on other grounds.

Plaintiffs contend that the Commissioners' failure to address CTR's and HFA's argument on the press exemption in their SOR illustrates that they were not engaged in "reasoned agency decision-making." Pls.' MSJ at 13, ECF No. 35. However, agencies need not discuss every argument raised before them when they have already reached a decision based on alternative grounds. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency decision is arbitrary and capricious only if it "entirely failed to consider an important aspect of the problem," not every possible aspect). The SOR demonstrates

that the controlling Commissioners looked at the record as a whole, discussed the ultimate issue of coordination at length, and omitted superfluous lines of reasoning. This was sufficient to show a "rational basis for the agency's decision." *Akins*, 736 F. Supp. 2d at 17.

Furthermore, while the Commissioners reasonably relied on other grounds to reach their decision, Intervenors object to Plaintiffs' characterization of the press exemption argument as "clearly erroneous." Pls.' MSJ at 13, ECF No. 35. The FEC has never recognized a conversation with a reporter as something of value.[3] And for good reason: doing so would lead to absurd results. For instance, each time a political party employee speaks to a reporter about a candidate's election or the wrongdoing of a candidate's opponent, the party would make a "contribution" to the relevant candidate, because political parties, by their nature, interact frequently with their candidates. This only serves to highlight the extreme consequences of the coordination standard urged by the Plaintiffs in this case.

IV. PLAINTIFFS' APA CLAIM IS BARRED BY THEIR FECA CLAIM.

A. Standard of Review

Plaintiffs separately seek APA review of the Commissioners' *construction* of 11 C.F.R. §§ 100.26, 109.20, and 109.21 *as applied* to online communication input costs. *See* Pls.' MSJ at 51, ECF No. 35. Agency actions are reviewable under the APA if they "are made reviewable by statute" or "there is no other adequate remedy in a court." 5 U.S.C. § 704. Accordingly, "where the Congress has provided special and adequate review procedures," the APA is not available as an additional judicial remedy. *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (internal quotation marks omitted); *see El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health*

[3] Rather, the item of value is the news story, which itself cannot be treated as a contribution or expenditure under the press exemption. See 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

& Human Servs., 396 F.3d 1265, 1270 (D.C. Cir. 2005) ("Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the [special] review provision and the APA." (internal quotation marks omitted) (alterations omitted)).

"When considering whether an alternative remedy is 'adequate' and therefore preclusive of APA review, [courts] look for 'clear and convincing evidence' of 'legislative intent' to create a special, alternative remedy and thereby bar APA review." *CREW v. U.S. Dep't of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017) (quoting *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009)). Such intent exists "where Congress has provided an independent cause of action or an alternative review procedure." *Id.* at 1245 (internal quotation marks omitted).

B. FECA is an adequate alternative remedy for Plaintiffs' claims.

As this court has already noted, D.C. district courts have held multiple times that FECA is an adequate remedy at law, and the APA is unavailable to address the FEC's disposal of an administrative complaint. Op. at 29 ECF No. 33; *see CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) ("Undertaking judicial review under the APA would enable administrative complainants to make an end run around the scheme established by Congress, and therefore, the APA does not supply a basis for this lawsuit to proceed."); *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) (stating that FECA provides the same relief as the APA when a litigant challenges the Commission's "application" of a regulation); *CREW* 164 F. Supp. 3d at 119–20 ("FECA itself indicates that the remedy it provides is sufficient to preclude APA review . . . . FECA grants the FEC 'exclusive jurisdiction' over civil enforcement of campaign finance laws."). The Fifth Circuit has also held that FECA provides "the exclusive means for judicial review" to the exclusion of APA suits, and the D.C. Circuit has suggested the same. *See Stockman v. FEC*, 138 F.3d 144, 156–57 (5th Cir. 1998); *Perot v. FEC*, 97 F.3d 553, 557 (D.C. Cir. 1996) ("Congress

could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA."). Indeed, FECA includes a comprehensive judicial review mechanism for FEC enforcement actions. *See* 52 U.S.C. § 30109(a)(8).

Plaintiffs do not present any argument to rebut this authority. They instead attempt to recast their claim as one challenging the validity of the regulations. *See* Pls.' MSJ at 52, ECF No. 35. But they admit themselves that they seek an order declaring that the controlling Commissioners' *construction* of the regulations as applied to coordinated internet activity is contrary to law. *See id.* at 42-43. Because they seek the exact same remedy for their FECA claim, it is unquestionable that FECA provides an adequate remedy and APA review is not available. *See* 5 U.S.C. § 704.

C. Even if Plaintiffs can seek relief under the APA, the Controlling interpretation of the regulations withstands scrutiny.

Intervenors maintain that Plaintiffs' APA relief is barred in this case. But if the Court reaches the merits of Plaintiffs' APA claim, it should grant summary judgment in favor of Intervenors for the reasons stated in Section III, as the Commissioners' interpretation of sections 100.26, 109.20, and 109.21 is consistent with FECA and its First Amendment background.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenors' Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2020, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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