UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiffs,

v.

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

Defendant

and

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

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

Defendant-Intervenors.

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

DEFENDANT-INTERVENORS HILLARY FOR AMERICA AND CORRECT THE RECORD'S REPLY BRIEF IN SUPPORT OF THEIR AMENDED MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES

Cases **Page**

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
FGCR	First General Counsel's Report
HFA	Hillary for America
MUR	Matter Under Review
PAC	Political Action Committee
SOR	Statement of Reasons

Plaintiffs' challenges to the FEC's decision to dismiss their administrative complaint against Defendant-Intervenors should be dismissed for lack of subject-matter jurisdiction and, alternatively, for failure to state a claim.

ARGUMENT

I. Plaintiffs lack Article III standing.

A. Plaintiffs have not suffered an informational injury.

A plaintiff does not suffer an informational injury to establish standing by merely seeking a legal determination based on factual information that is already publicly available. *See Wertheimer v. FEC*, 268 F.3d 1070, 1074-75 (D.C. Cir. 2001); *CREW v. FEC ("CREW 2011")*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011). That is precisely the case here, no matter how hard Plaintiffs work to disguise their desire for a legal determination that CTR's publicly disclosed expenditures constituted illegal in-kind contributions to HFA as a quest for additional facts.

Plaintiffs appear to concede, as they must, that determining whether payments constitute "in-kind contributions" posits a legal, not a factual, question. *See CREW 2011*, 799 F. Supp. 2d at 88-89 ("Much like 'coordination,' classifying a particular disbursement as an 'in-kind contribution' appears to us to be a legal conclusion that carries certain law enforcement consequences. . . ." (quoting *Wertheimer*, 268 F.3d at 1075)). Plaintiffs contend, however, that under *Wertheimer*, if they can show that additional facts can be gleaned from re-classifying CTR's expenditures as in-kind contributions, then they can demonstrate an informational injury. Pls.' Br. at 21 n.11. Once Plaintiffs finally get to this argument—which appears in a footnote but seems to be the crux of their claim to standing—what follows are tortured attempts to try to drum up additional facts that Plaintiffs contend they could learn as a result of a coordination finding. But the only facts Plaintiffs can remotely identify are ones that are not required to be disclosed under

the law. Indeed, Plaintiffs' circular arguments—that they will learn new facts if only *certain* of CTR's expenditures are re-classified as in-kind contributions and others are not, or that they will learn new facts about the "purpose" of expenditures if they are re-classified as in-kind contributions—are inaccurate and unavailing. *See* Pls.' Br. at 16-19.

As a threshold matter, to the extent that Plaintiffs' "view of the law" is that *all* expenditures made by CTR are in-kind contributions, then Plaintiffs' claim to new factual information clearly fails. All of CTR's expenditures, which have been publicly reported, would simply be re-classified and reported as in-kind contributions to HFA, and HFA would be required to report them as well. *See* 52 U.S.C. § 30104. While this change in reporting would provide Plaintiffs with a *legal* determination as to which expenditures are coordinated, it cannot be disputed that Plaintiffs would learn no new *factual* information sufficient for standing. *See Wertheimer*, 268 F.3d at 1074-75 (holding plaintiffs lacked standing because they "d[id] not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures," which would lead only to obtaining "the same information from a different source").

For standing purposes, however, Plaintiffs appear to contend that *some* of CTR's expenditures—those for input costs related to unpaid online communications—are exempt from being treated as coordinated communications or in-kind contributions, and all other CTR expenditures are in-kind contributions. *See* Pls.' Br. at 15-19. And, the fact that only *some* expenditures constitute in-kind contributions will provide them with new factual information (*i.e.*, which expenditures are in-kind contributions) sufficient for standing. *Id*. Moreover, Plaintiffs contend that they will be able to glean additional information regarding the purpose of the expenditures that are re-classified as in-kind contributions. *Id*. at 13-14, 16-19. Unfortunately for

Plaintiffs, this view of the law is unavailing because re-classifying CTR expenditures, in whole or in part, as in-kind contributions will not entitle them to any new factual information under the law.

1. Plaintiffs seek a legal finding of coordination.

Despite Plaintiffs' arguments to the contrary, the "fact" of the "extent," "scale and scope" of "coordination" with HFA in this case, *see* Pls.' Br. at 2-3, is no different from the "fact" of "coordination" held insufficient for standing purposes in *CREW 2011* and *Wertheimer*. *Wertheimer*, 268 F.3d at 1075; *CREW 2011*, 799 F. Supp. 2d at 88-89. And the fact that, under Plaintiffs' apparent view of the law, only *some* of CTR's expenditures, or a portion of certain CTR expenditures, may be classified as "coordinated" does not change that outcome. The legal determination of coordination, which dictates which portion of an expense is an in-kind contribution and which is not, is still the information sought regardless of which expenditures, or portions thereof, Plaintiffs seek to re-classify.

To use Plaintiffs' example, they argue that they are missing information about David Brock's salary because "the actual mix of coordinated and non-coordinated (or exempt) work that Brock performed in any given pay period remains a mystery." Pls'. Br. at 18. At the outset, HFA and CTR note that the inconsistency in Plaintiffs' "view of the law" is evident. On the one hand, Plaintiffs claim they have suffered an informational injury because they do not know which portion of David Brock's salary in any given paycheck was related to the production of online communications and was thus exempt, and which was not. *See* Pls.' Br. at 17-18. On the other hand, Plaintiffs claim that staff salaries amount to compensation for personal services rendered to a campaign and are therefore in-kind contributions under 11 C.F.R. § 109.20 regardless of whether the ultimate activity was related to an online communication. Pls.' Br. at 33 n. 13. If Plaintiffs have informational standing *because* only some CTR expenditures for input costs are in-kind

contributions—those unrelated to online communications—then they should be precluded from later arguing that expenditures for input costs related to online communications are in-kind contributions.

Putting the obvious inconsistencies in Plaintiffs' argument aside, Plaintiffs make clear that they want to know which portion of Brock's salary is coordinated and an in-kind contribution to HFA, and which portion is non-coordinated (or exempt) such that it is not an in-kind contribution to HFA. *See id*. In this way, they claim that they are deprived of information about the "amounts" of the in-kind contributions. Pls.' Br. Ex. B, Fischer Decl. ¶ 8. But the legal determination of coordination is still the information Plaintiffs seek. Plaintiffs disagree with CTR, HFA, and the FEC as to whether *the law* permits input costs for unpaid internet communications to fall within the internet exemption for non-public communications under 11 C.F.R. §§ 100.26 and 109.21. That *legal* determination—whether input costs for unpaid internet communications are required to be treated as in-kind contributions or whether they are encompassed by the internet exemption—is critical to determining which (and in what amounts) CTR expenditures would be re-classified as in-kind contributions under Plaintiffs' view of the law. This is not a factual dispute; it is purely legal.

In 2011, this Court held that CREW lacked informational standing in *CREW 2011* because the same information that Plaintiffs seek here—a finding of coordination and a classification of a certain portion of an expenditure as an in-kind contribution—is a legal determination, not an inquiry for additional facts. *CREW 2011*, 799 F. Supp. 2d at 88-89. Indeed, Plaintiffs acknowledge that in *CREW 2011* "[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." Pls.' Br. at 21. In other words, CREW wanted to know the "amount" of the in-kind contribution, but that was insufficient to provide standing. The same is true here. *See* Fischer Decl. ¶ 8. Plaintiffs already know how much CTR spent on each expenditure because "each transaction [Plaintiffs] allege is illegal is reported in some form." *Wertheimer*, 268 F.3d at 1074. The only remaining question is how much of each expenditure should be treated as an in-kind contribution and how much should be treated as a non-coordinated or exempt expenditure. That question will only be answered based on a legal finding of coordination and a legal resolution on the treatment of input costs, not based on an FEC investigation or additional facts. This is insufficient to show informational injury.

2. Plaintiffs are not be entitled to additional information about the purpose of a particular in-kind contribution or expenditure under their view of the law.

Contrary to Plaintiffs' baseless suggestion, CTR would not be required under FECA to reveal any new factual information in its FEC reports about expenditures that are re-classified as in-kind contributions in whole or in part. Accordingly, Plaintiffs have not suffered an informational injury because the "specific, itemized" expenditure information they claim to seek is not required to be disclosed by law. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (plaintiffs suffer an informational injury only when the alleged FECA violation causes the concealment of information that FECA requires be disclosed).

Plaintiffs take issue with CTR's descriptions of the purpose of certain expenditures, including for example, "payroll, salary, travel, lodging, meals," and erroneously claim that re-classifying them as in-kind contributions would require CTR to disclose more specific information about the purpose for those expenditures. Pls.' Br. at 17. But Plaintiffs do not cite to any authority to support their position that descriptions of coordinated expenditures require a more specific level

of detail than what CTR has already reported. Moreover, what Plaintiffs describe as "undifferentiated" or "lump" sum reporting is all that is required under FECA. Pls.' Br. at 3, 14, 17. There is certainly no FEC statute or guidance that requires committees to report in-kind contributions or coordinated expenditures with the level of detail Plaintiffs use in their brief: "In-Kind Contribution: Media Training for Surrogates." Pls.' Br. at 19.

To the contrary, if any of CTR's expenditures are re-classified as in-kind contributions, CTR would be required under FECA to disclose the same purpose that it has already disclosed on its FEC reports. It would need to disclose only 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 not garner additional factual information about the purpose for the expense.[1]

Indeed, the FEC's reporting guidance indicates that the purpose descriptions used by CTR are compliant for both disbursements and 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 (regarding reporting in-kind contributions, "[t]he item must be labeled 'contribution in-kind' and include the nature of the

[1] *See* Exhibit A (showing how designating a portion of David Brock's salary as an in-kind contribution would have been reported under Plaintiffs' example, Pls.'s Br. at 18-19, and demonstrating that no additional information would have been provided regarding the purpose of the expenditure); *see also* Exhibit B (showing that actual HFA reports reflecting the receipt of in-kind contributions for "staff time" contain none of the additional factual information Plaintiffs purportedly seek).

contribution (e.g., consulting, polling, etc.)"); *see also id*. at 13 ("[e]xamples of adequate descriptions [for disbursements] include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses and catering costs"). Plaintiffs' strained attempt to show that they would somehow be entitled to additional factual information regarding the purpose of CTR's expenditures if they were re-classified as in-kind contributions is meritless on its face. Plaintiffs have apparently confused the reporting requirements for independent expenditures with those for coordinated communications. Committees must report information about independent expenditures on a communication-specific basis and state which candidate each communication supports or opposes. *See* 11 C.F.R. § 104.3(b)(3)(vii). These reporting requirements do not apply to coordinated communications or in-kind contributions. Furthermore, Plaintiffs' insinuation that they would learn additional information simply by the re-classification of a particular expenditure as an in-kind contribution (regardless of whether the "purpose" field on the FEC report changes) is not correct. There are many reasons why a particular expense could be a "contribution" and not merely an "expenditure." The mere classification of an expense as falling into one category or the other does not provide any additional factual information.

Plaintiffs and others like them have repeatedly filed similar lawsuits when they disagree with the FEC's finding that particular expenditures are not in-kind contributions. And time and time again, courts reviewing these challenges have held that a disagreement about whether a coordination has taken place or a legal violation has occurred is not sufficient for standing. *See, e.g.*, *Wertheimer*, 268 F.3d at 1074–75 (D.C. Cir. 2001) (no informational standing to pursue a legal determination that expenditures were "coordinated" when all relevant expenditures had been publicly disclosed); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997) (holding plaintiffs lack injury by alleging they have "been deprived of the knowledge as to whether a violation of the

law has occurred"); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178–79 (D.D.C. 2013) (no informational standing to pursue legal determination that publicly reported expenditures exceeded applicable limitations); *CREW 2011*, 799 F. Supp. 2d at 88–89 (no informational standing to pursue legal determination that publicly reported expenditures were "in-kind contributions"); *see also* Mot. at 10-11. This case is no different. What Plaintiffs actually seek is a finding that CTR and HFA broke the law, and they contend that the FEC's decision to dismiss their administrative complaint hindered that. But a plaintiff does not have standing to merely 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). Plaintiffs thus lack an informational injury.

B. Plaintiffs fail to show that their alleged informational injury directly and concretely injures their interests.

Even if Plaintiffs had suffered an informational injury—and they have not—their claims are not concrete and particularized enough to confer standing. Plaintiff Kelley alleges that she has been deprived of information she would use as a voter to assess candidates for office. Am. Compl. ¶ 25-29; Pls.' Br. at 23; *id.* Ex. A, Kelley Decl. ¶¶ 5-6. However, Kelley's argument that, due to the FEC's actions, she was unable to access information about "the sources of" Secretary Clinton's support or the role of CTR's relationship with HFA, Kelley Decl. at ¶¶ 6-7, is not supported by the facts. As alleged throughout the Amended Complaint and opposition brief, Kelley possessed extensive evidence regarding the scale and scope of coordinated activities between HFA and CTR. Pls.' Br. at 29, 31, 38-40, 42; Am. Compl. ¶¶ 2, 63-66, 68-71, 76-77, 79. This evidence, of which Kelley was obviously privy, revealed that CTR was engaged in efforts to advance Secretary's Clinton's 2016 presidential campaign in coordination with HFA and the impact of those efforts. As Plaintiffs have already admitted, CTR made this information publicly available, including through press releases, statements to the press, and FEC reports. Pls.' Br. at 29, 31, 38-40, 42; Am.

Compl. ¶¶ 2, 63-66, 68-71, 76-77, 79. Kelley cannot credibly allege that knowledge of the specific dollar amount of coordinated expenditures would have any impact on her ability to evaluate Secretary Clinton's candidacy. *See CREW v. FEC*, 475 F.3d 337, 341 (D.C. Cir. 2007) ("*CREW 2007*") (lack of knowledge of precise valuation of mailing list was not sufficient informational injury when so much information was already publicly available); *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 148-49 (D.D.C. 2005) (same). The only reason that particular information would make a difference is because of Kelley's actual purpose, which is to prove that CLC and HFA broke the law. As discussed above, that is not sufficient for standing.

Similarly, CLC is not credible when it claims that its attempts to "follow the money" and connect big contributors to officeholder action for purposes of litigation or briefing policy makers are greatly impeded by the alleged inaccuracy of CTR's FEC reports. Pls.' Br. at 25. Like Kelley, CLC knew that HFA and CTR were coordinating on CTR's unpaid online activity, and both CTR and HFA have disclosed on their FEC reports all donors who contributed in excess of $200. If CLC was interested in determining which donors supported HFA by contributing to CTR, all it had to do was review publicly available donor information on CTR's FEC reports.

Plaintiffs have also failed to demonstrate the causation and redressability requirements for Article III standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S. 167, 180–81 (2000) (*citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). For the reasons discussed herein, and in the motion to dismiss, Plaintiffs cannot 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 lead to any new factual information that is required to be disclosed. Mot. 10-15, 17 n.5; *see supra* at 5-8.

C. Plaintiff CLC has failed to demonstrate organizational standing.

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, which is not a membership organization, and does not participate in or contribute to political campaigns given that it is legally foreclosed from doing so because of its status as a 501(c)(3) entity, fails to meet both criteria. *See CREW v. FEC ("CREW 2005")*, 401 F. Supp. 2d 115, 116 (D.D.C. 2005).

First, CLC fails to articulate an actionable injury to the organization. CLC again asserts an informational injury—that it has been deprived of "complete and accurate reporting" information from CTR and HFA that has harmed its mission. For the reasons discussed above, *see supra* at 3-8, CLC has not been deprived of any factual information required to be disclosed under law. Given that all contributions to and all expenditures made by CTR and HFA have been publicly disclosed, the allegation that CLC could not convey useful information to voters about the scope of CTR's support for Secretary Clinton's candidacy, or that it could not "follow the money" or trace explicit quid-pro quo corruption for engaging in litigation or legislative policy, is simply unsupported. Pls.' Br. at 25. CLC could easily review all of the donors to CTR and HFA and draw conclusions as it normally would from that publicly available information. CLC has not alleged how having a precise number—which could only be derived from a legal finding of coordination—for the value of the alleged in-kind contributions has injured its work.

Second, CLC has failed to show how its alleged injury has caused a "drain" on the organization's resources. To the contrary, it is clear that CLC has not been forced to redirect resources in any substantial way in order to compensate for CTR's alleged inaccurate reporting. CLC has alleged, for example, that it had to "divert time" to "researching gaps in required reporting and explaining them to reporters, partner organizations, and the public." Fischer Decl. ¶ 21. But CLC also admits that CLC realizes its core missions by "identifying campaign finance and ethics violations and practices" and "identifying problematic campaign practices that require legislative solutions." Fischer Decl. ¶¶ 3, 21. Thus, the activities that CLC identifies hardly constitute the requisite "drain on [CLC]'s resources," as they are activities that CLC would otherwise undertake in order to achieve its core mission. S*ee 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).

D. Plaintiffs lack standing to bring an APA claim.

Bringing an APA claim does not relieve Plaintiffs from having to show that they have suffered a concrete and particularized injury in fact that is both fairly traceable to the FEC's action and likely to be redressed by a favorable judicial decision. *See Lujan*, 504 U.S. at 560. Plaintiffs' allegations that the FEC's interpretation of the internet exemption in this matter will lead to "gross abuse" and "sanctions potentially widespread failures to 'report as contributions many expenditures that they believe FECA requires them to report,'" Pls.' Br. at 13, 15 n.6, are completely speculative and insufficient to demonstrate a cognizable informational injury under the APA. Not only do such claims fail to identify any concrete or particularized informational injury to Plaintiffs, as discussed above, *see supra* at 8-9, but they further reveal that the essence of this

lawsuit is Plaintiffs' deficient request for a legal determination and enforcement of the law against CTR and HFA. As explained above, "[i]t is axiomatic that standing cannot rest on a plaintiff's alleged interest in having the law enforced . . . because such an injury is too generalized and ideological." *CREW 2005*, 401 F. Supp. 2d at 122; *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."). Indeed, the vast majority of plaintiffs' allegations involve two layers of efforts to enforce the law. *See*, *e.g.*, Pls'. Br. at 23 (seeking a legal determination of coordinated contributions here and in similar future cases); *see also* Am. Compl. ¶ 27 ("[Kelley] is further entitled to the FEC's proper administration of the federal campaign finance laws.").

Plaintiffs' heavy reliance on *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*") is inapposite. There, the D.C. Circuit found that the FEC's regulation defining "coordinated communications" resulted in the plaintiff suffering a concrete and particular injury—the deprivation of information about who was funding presidential campaigns. *Id.* at 923. Unlike in *Shays III*, Plaintiffs' alleged injury that they claim they will suffer at some unknown time in the future—that the FEC's interpretation of the internet exemption violates the APA because it will create a loophole in campaign finance rules that will be exploited in the future—is completely theoretical and hypothetical and will not cause an injury for Plaintiffs. Pl's Br. at 32; *cf. Envt'l Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) (finding in APA case that plaintiff had informational standing based on actual deprivation of information).

II. Plaintiffs fail to state a claim for relief under FECA.

An FEC decision to dismiss an administrative complaint is only "contrary to law" if "(1) the [FEC] dismissed the complaint as a result of an impermissible interpretation of the Act, or (2)

the [FEC's] dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). The arbitrary and capricious standard, "'presumes the validity of agency action' and permits reversal '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 citation omitted). The FEC's decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *FEC v. DSCC*, 454 U.S. 27, 39 (1981). Plaintiffs have failed to alleged facts sufficient to overcome this "extremely deferential" standard of review, which "requires affirmance if a *rational* basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167 (emphasis added).

A. The Commissioners' decision to dismiss the administrative complaint was not the result of an impermissible interpretation of FECA or FEC rules.

Contrary to Plaintiffs' argument, the Controlling Commissioners acted in accordance with FECA and FEC rules by basing their decision to dismiss Plaintiffs' administrative complaint on the principle that *unpaid* online communications and the costs associated with producing them are not "coordinated communications" under 11 C.F.R. § 109.21. This was not contrary to law. Instead, it is Plaintiffs' attempt to create a new and different internet exemption out of whole cloth—a process that they tried unsuccessfully during the 2006 Internet Communication rulemaking—that is plainly contrary to law. Plaintiffs' proposed cramped version of the internet exemption cannot form the basis of a legitimate Section 30109(a)(8)(A) suit.

1. The FEC exempts internet communications not placed for a fee, and their input costs, from the definition of "coordinated communications."

As the Controlling Commissioners explained, they were closely following Commission rules and precedent in coming to their decision to include input costs in the exemption for unpaid online communications: "the Commission has repeatedly interpreted the internet exemption to

encompass expenses incurred by a speaker to *produce* an internet communication." SOR at 12. Indeed, the FEC has consistently interpreted 11 C.F.R. § 100.26's "placed for a fee" language to mean what it says—it captures internet communications one pays to *place*, not to *produce*. *Id.* at 9, 12. Moreover, the FEC has repeatedly refused to use 11 C.F.R. § 109.20 to capture expenditures for internet communications that are excluded from regulation under 11 C.F.R. §§ 100.26 and 109.21. *See* 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *see also* FEC Matter Under Review ("MUR") 6037 (Democratic Party of Oregon), First General Counsel's Report ("FGCR") (Sept. 17, 2009). When it explained the coordination rules, the FEC said clearly that "section 109.20 addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee." 68 Fed. Reg. 425 (emphasis added).

To the extent that Plaintiffs contend that the FEC's position is not clear as to whether input costs for unpaid online communications are considered exempt, they need look no further than the comments Plaintiff CLC submitted during the 2006 Internet Communication rulemaking, and the FEC's failure to change its position in response. As stated in Defendant-Intervenors' Amended Motion, Plaintiffs' argument here is not new. CLC submitted comments during the 2006 rulemaking making the same arguments they make here and recognizing a default rule for the treatment of input costs: "[t]ypically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials." Mot. at 25. Input costs are considered part and parcel of other exempt activities under the Commission's regulations. *See* 11 C.F.R. §§ 100.74, 100.75 (providing that, not only are volunteer services exempt from the definition of contribution, but the value of any real or personal property an individual uses while volunteering do not become contributions, either); Advisory Op. 2012-16 (Angus King for U.S.

Senate Campaign) (when a firm provides exempt legal and accounting services under 11 C.F.R. § 100.86, the value of the services *and* of "firm resources" used to provide the services are exempt).

CLC warned the FEC that if it applied that default rule and treated production costs for internet communications the same as production costs for other types of media, then individuals and organizations would be able to spend significant amounts of money in coordination with a candidate through internet activity: "If the production costs are also treated as outside the coordination rules, this could lead to a large loophole in the rules on coordinated campaign spending—precisely the kind of loophole that the court in *Shays* indicated should not be permitted." Democracy 21, Campaign Legal Center & Center for Responsive Politics, Comment on Notice of 2004-12: Internet Communications (*Shays I*) at 12 n.10 (June 3, 2005).

While Plaintiffs may argue with the wording used to characterize their comments—which was accurate—they cannot dispute the fact that during the 2006 rulemaking, they cautioned the FEC of precisely the factual situation that they allege has taken place here. Nor can they dispute that the FEC did *not* promulgate a rule in response to their concerns. Instead, the FEC clarified that input and production costs are considered part of the cost of an internet communication and are thus exempt from the coordinated communication rules—just like input costs are considered part and parcel of other exempt activities under the FEC's regulations. *See* 71 Fed. Reg. 18589, 18597 (Apr. 12, 2006) (addressing costs of producing Internet communications). Plaintiffs tried to get a second bite at the apple with this enforcement action against CTR and HFA. Plaintiffs also contend that in promulgating the final rules, the FEC confirmed that computer purchases and payments to bloggers can be "expenditures" even if the blogs themselves ultimately fall under the "internet exemption." Pls.' Br. at 34. These examples simply support the common-sense conclusion that a campaign must report those expenditures it actually makes. In no way do they

support taking third-party internet communications, not placed for a fee, and subjecting them to the coordination rules. Importantly, CTR reported all such expenditures and Plaintiffs do not allege otherwise. The FEC's position is settled; the FEC followed its default position for input costs and applied them to online communications. Just because Plaintiffs disagree with the FEC's interpretation does not mean that the FEC acted contrary to its rules in following it.[2]

Plaintiffs contend that CTR should be treated differently because of the "scale and scope" of CTR's coordination with HFA. *See* Pls.' Br. at 32, 34, 37. But Plaintiffs cannot cite to a single rule stating that the "scale and scope" of an organization's activity somehow determines whether the internet exemption applies. As the Controlling Commissioners acknowledged, while some internet communications may require only minimal input costs for staff time, computer usage, and electricity—like those incurred by bloggers—other internet communications—like those at issue here—"could necessitate additional overhead and other expenses, such as travel and services of consultants, graphic designers, videographers, actors, and other specialist." SOR at 13; Mot. at 29. That does not make such expenses ineligible for the exemption. And, as a factual matter, Plaintiffs significantly exaggerate the scope of CTR's non-Internet related spending as compared to its spending for expenses associated with communications that were placed online. See Pls.' Br. at 32 (stating that "one dollar of internet-related spending immunizes all general operating expenses from disclosure and regulation as contributions"). Of the 11 types of CTR expenditures set forth

[2] Further, the 2006 Internet Communication rulemaking makes clear that in response to the decision in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), the FEC opted to treat paid internet advertising on another person's website as a "public communication," but otherwise sought to exclude all internet communications from the definition of "public communication." *See generally* Explanation and Justification, Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006). The FEC found that the revised definition of "public communication" comports with the *Shays* decision by removing the wholesale exclusion of all internet communications from the definition of public communication. *See id.*

in Plaintiffs' administrative complaint, only four were unrelated to online communications, and those expenditures were either not coordinated or paid for by HFA, as discussed in HFA's response to the administrative complaint. Mot. Ex. B, HFA Response to MUR 7146, at 3, 7-9. This is unsurprising because as Plaintiffs have pointed out multiple times, CTR set out to coordinate its online communications with HFA. Pls.' Br. at 38-42. This type of coordinated activity was essentially CTR's primary purpose, and it relied on the internet exemption to engage in that activity in accordance with federal campaign finance laws.

Nor can Plaintiffs cite to a single example of the FEC requiring "speakers to further allocate overhead expenses across internet communications (or other activities) and then exempting only those component fees deemed essential for the internet communication's placement." SOR at 13. Thus, the Commissioners' decision to not require such allocation of CTR's overhead can hardly be portrayed as irrational or contrary to law. As stated by the Controlling Commissioners, this type of allocation "would eviscerate the Internet Exemption and the deliberate policy decisions behind it, and potentially chill political speech online." *Id.* More importantly, "*the Commission has never required speakers to do so*." *Id*. (emphasis added). The Commissioners recognized that "a speaker will almost always incur expenses to produce [a free] internet communication." *Id.* Requiring political committees to attribute each expense to a particular Internet communication would defy the rationale for developing the internet exemption in the first place. *Id.*; Mot. at 28-29.

Indeed, in decision after decision, the Commission has consistently refused to use 11 C.F.R. § 109.20 to capture input costs associated with internet communications that are excluded from regulation under 11 C.F.R. §§ 100.26 and 109.21. Plaintiffs' attempts to distinguish key enforcement actions on this issue are unavailing. *First*, where the only relevant authority on a question is a decision from the Commission that resulted in a deadlock, it is the decision of the

Commissioners who voted to dismiss a complaint that controls and is entitled to deference. *See, e.g.*, *CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017), *aff'd*, 892 F.3d 434 (D.C. Cir. 2018); *see also FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (the controlling group's statement of reasons states "the agency's reasons for acting as it did," not the OGC report). Plaintiffs' chastising of HFA and CTR for citing such decisions is unwarranted.

Second, there *are* enforcement actions regarding input costs in which the FEC dismissed allegations of coordinated communications. For example, in MUR 6722 (House Majority PAC), the Commissioners unanimously approved the dismissal of a complaint wherein the video at issue, which undoubtedly cost money to produce and featured appearances by two federal candidates (clearly indicating that there was coordination), was placed for no fee on YouTube and thus was not a "public communication" subject to the coordination rules. FGCR, at 3-4 (Aug. 6, 2013). Further, if the FEC considered input costs to be part and parcel of an internet communication in a particular action, then that action is relevant to determining how the FEC treats input costs regardless of whether it involves allegations of coordination. For example, in MUR 6729 (Checks and Balances for Economic Growth), where an organization allegedly spent nearly $1 million to produce two television advertisements broadcasted only on YouTube for free, and failed to disclose the costs associated with producing them, the controlling group of the Commissioners determined that under the internet exemption, "the direct costs of producing an Internet communication are exempt from regulation on the same basis as costs associated with distributing the communication." SOR of Comm'rs Goodman, Hunter & Petersen, at 3-4 (Oct. 24, 2014).

Third, CTR and HFA have not located any authority for Plaintiffs' contrived theory that only "direct" input costs for internet communications are exempt. None of the authority cited in the Amended Motion limits the application of the internet exemption to "direct" input costs as

articulated by Plaintiffs. For example, when five out of six Commissioners first explained that "[t]he costs incurred by an individual in creating an ad will be covered by the Internet exemption from the definition of 'expenditure' as long as the creator is not also purchasing TV airtime for the ad," they never mentioned such a limitation. Advisory Op. 2008-10 (VoterVoter.com) at 7. The absence of this limit on "direct" input costs is clear in MUR 6657 (Akins for Senate), where a political committee reported several expenditures for online fundraising communications for a candidate. The Commission noted that "[e]ven though the communications themselves may have been created at little cost," the committee "incurred significant related expenses." Factual & Legal Analysis ("F&LA") at 5 (Sept. 17, 2013). However, because the committee's online communications were not placed for a fee, and the Commission has not construed "the term Internet Communication 'placed for a fee' . . . to cover payments for services necessary to make an Internet communication," the Commission unanimously found no reason to believe that those related expenses constituted coordinated expenditures. *Id.* The same is undoubtedly true here: Even though Plaintiffs allude that CTR may have created the underlying internet communications at "little cost," the "significant related expenses" CTR incurred while producing those communications, including staff salary, travel, and other overhead expenses, fit within the internet exemption. *Id.* Indeed, a controlling group of Commissioners has already disregarded an argument that the internet exemption did not apply to "the cost of staff time, office space, equipment usage, etc. required . . . to undertake [unpaid online] activities." MUR 7023 (Kinzler for Congress), SOR of Comm'rs Hunter, Goodman & Petersen, at 5 n.21 (Jan. 23, 2018). Rather, these "production costs are not regulated unless a communication is disseminated for a fee on another person's website." *Id.* ("[T]he exemption would be meaningless if we 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."). The Controlling Commissioners applied the exact same reasoning to CTR's overhead expenses in this case. Plaintiffs have not—and cannot—point to any authority requiring the opposite conclusion here.

2. The FEC's decision to dismiss the coordination allegations for the non-Internet expenditures was rational.

Contrary to Plaintiffs' claims, the Controlling Commissioners did not "took at face value that all of CTR's activities constituted or were 'input costs' for exempt internet communications." Pls.' Br. at 31. The Controlling Commissioners found that there was a category of expenditures—namely CTR's surrogacy program, research and tracking, and contacts with reporters—that was not directly related to online communications. The Commissioners dismissed Plaintiffs' allegations as to those claims because Plaintiffs simply failed to present sufficient evidence that such activities were "coordinated." *Id.* at 14-15.

As an initial matter, "[t]he Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. . . . Unwarranted legal conclusions from asserted facts …, or mere speculation, … will not be accepted as true." MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). And on judicial review, this Court must not disturb the Controlling Commissioners' decision if it was rational. *See Orloski*, 795 F.2d at 164.

In this case, Plaintiffs simply speculate that because CTR coordinated with HFA regarding the internet communications underlying their complaint, "some amount of [CTR's expenditures] was connected to activities 'coordinated' with [HFA]" and should have been reported as in-kind contributions. Pls.' Br. at 14, 16-19. But that speculation is not enough support a "reason to believe" any violation occurred here. Though there was evidence that HFA and CTR coordinated various internet communications, which are exempt from the definition of "coordinated

communications," the Controlling Commissioners reasonably noted that "'[c]oordination' is not a status . . . such that coordination in one activity can be imputed to other activities. Finding coordination requires more than considering the general relationship between entities . . . ." SOR at 16.

When determining whether any of HFA and CTR's non-internet activities violated FECA, the Controlling Commissioners thoroughly analyzed the information alleged as to each transaction and HFA and CTR's responses. SOR at 17; Mot. at 23. As an example, for the research and tracking services, the Commissioners found that HFA paid CTR for those services, and there was nothing in the record to support Plaintiffs' speculative allegations that the payments were not equivalent to the fair market value. SOR at 15-16, n.78. Similarly, the Commission would not permit Plaintiffs to rely on their speculative allegations that CTR's contacts with reporters were "coordinated." *Id.* at 16, n. 80. Moreover, such communications with the media are not "public communications" under 11 C.F.R. § 100.26, and thus are not coordinated expenditures.

III. Plaintiffs' purported APA claim is preempted by FECA and must be dismissed.

Plaintiffs' opposition brief only confirms what the Amended Complaint makes clear: Plaintiffs' APA claim is simply a restatement of their challenge to the Commission's interpretation of its regulations, not the regulations themselves. Pls.' Br. at 42-45. Because FECA provides an adequate and exclusive judicial mechanism to review the Commission's interpretation of its regulations, no claim separate from Plaintiffs' FECA claim exists here.

Plaintiffs unconvincingly attempt to recast their improper APA challenge to the Commission's dismissal of their administrative complaint as "as-applied and facial challenges under the APA to the validity of the FEC's coordination regulations[.]" Pls.' Br. at 44. But their APA claim does not actually challenge FEC regulations at all. Indeed, Plaintiffs do not ask the

Court for a declaratory order that 11 C.F.R. §§ 100.26, 109.20, 109.21 are unlawful and invalid. Nor do Plaintiffs identify particular provisions of 11 C.F.R. §§ 100.26, 109.20, and 109.21 that conflict with FECA. Rather, the APA claim challenges how the FEC has "construed" or "interpreted" the relevant regulations in this administrative complaint, not the regulations themselves. *See, e.g.*, *See* Am. Compl. ¶ 112 (alleging that "*this construction* of the relevant coordination regulations conflicts with FECA and the Commission's own regulations") (emphasis added); *id.* ¶ 113 ("[T]he coordination regulations, *as construed*, conflict with FECA and the Commission's own regulations[.]") (emphasis added); *see also id.* ¶¶ 29-30 (requesting Court "[d]eclare that *the construction of the coordination regulations*, *see* 11 C.F.R. §§ 100.26, 109.20, 109.21, to exempt all "input expenses" connected to internet communications from regulation as "coordinated expenditures" is contrary to law, arbitrary and capricious, and invalid[.]") (emphasis added). *See also* Pls. Br. at 44. Plaintiffs have no quarrel with the regulations—in fact, they believe that the regulations, if interpreted under their view, prohibit the activities ascribed to CTR and HFA. Pls.' Br. at 42-43.

As the Amended Motion set out in detail, *see* Mot. at 18-20, FECA's judicial review provision provides the "exclusive" means to challenge the Commission's enforcement actions. *See CREW v. FEC ("CREW 2015")*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("This alternative, comprehensive judicial review provision precludes review of FEC enforcement decisions under the APA."*); accord CREW v. FEC ("CREW 2017")*, 243 F. Supp. 3d 91, 105 (D.D.C. 2017). Plaintiffs' attempt to wedge an APA claim into their claim seeking judicial review under FECA is squarely foreclosed by circuit precedent, including decisions of this court involving analogous claims. *See* Mot. at 18-20. For example, in *CREW 2015*, this court dismissed an attempt to review the Commission's interpretation of FECA under the APA due to exclusive review allowed under

the plaintiffs' FECA claims. 164 F. Supp. 3d at 118. There, the plaintiff argued that "the repeated and consistent application of several Commissioners' interpretation" created a "de facto regulation" governing how the Commission interprets the law and when it will take action to investigate an administrative complaint in violation of the APA. *Id.* at 115, 118. But as the court pointed out, even if the plaintiff's claim that the controlling group's view had become the "broader policy" of the FEC as a whole, "the fact remains that the FEC has announced any such policy only through adjudication." *See id.* at 118. Agencies like the FEC have broad discretion to choose between rulemaking and adjudication to carry out their statutory mandate, and if an agency appropriately exercises this choice and announces a new principle in an adjudication, "no court has ever held that the resulting order or the rationale underlying it should be treated as a regulation for purposes of judicial review." *Id.* at 119. After determining that the principles reflected in the controlling group' statements of reasons were not Commission regulations but rather adverse enforcement decisions, the *CREW 2015* court dismissed the APA claim, noting Congress's clear intention to make FECA's judicial review provision the exclusive means of challenging an adverse FEC enforcement decision, and holding that such procedures are an adequate alternative to APA review. *See id.* at 120. In *CREW 2017*, a different judge of this court applied the same reasoning to dismiss claims brought under the APA to challenge FEC enforcement decisions. *See CREW 2017*, 243 F. Supp. 3d at 105; *see also Conference Group LLC v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013) (holding that the "fact that an order rendered in an adjudication 'may affect agency policy and have general prospective application' . . . does not make it [a] rulemaking subject to APA").

Plaintiffs' APA claim is no different than the claims dismissed in *CREW 2015* and *CREW 2017*, and Plaintiffs do not even mention—let alone attempt to distinguish—the reasoning of these

precedents. Like the plaintiffs in *CREW 2015*, who alleged that consistent FEC enforcement decisions represented a "de facto rule" challengeable under the APA, Plaintiffs' APA claim rests on the premise that the Commission has followed its "traditional approach" to interpreting the internet exemption to include "input costs" for unpaid internet communications—an approach that constitutes a "bright-line rule[.]" *See* Pls.' Br. at 42-44. And like the plaintiffs in *CREW 2015*, Plaintiffs attempt to recast their disagreement with the Commission's interpretations of its own regulations as a challenge to the regulations themselves. *See id.* But as in *CREW 2015*, the fact remains that the FEC's adjudication decisions do not amount to a regulation under the APA. *See* SOR at 12 n.60 (citing interpretation of the Internet exemption to the coordination regulations in various MURs). Indeed, Plaintiffs' argument that they are challenging a rule rather than an interpretation is even weaker here, where Plaintiffs assert that the challenged interpretation does not even represent any settled policy. *See* Pls'. Br. at 36, 37. Thus, Plaintiffs may not maintain their APA claim here.

Plaintiffs offer no persuasive rebuttal. *First*, Plaintiffs identify instances in which courts have permitted APA suits against the FEC, and argue that such cases show that FECA's judicial review provision is not "adequate" for all challenges to FEC action. Pls.' Br. at 43. But none of those cases involve whether Plaintiffs may challenge *FEC enforcement dismissals* under the APA, even though FECA provides judicial review. The unremarkable fact that litigants may challenge FEC *regulations* under the APA does not alter the conclusion that challenges to FEC *enforcement dismissals* must proceed exclusively through FECA's judicial review provisions. *See Perot v. Fed. Election Comm'n*, 97 F.3d 553, 560 (D.C. Cir. 1996).

Second, Plaintiffs confusingly argue that FECA's judicial review mechanisms are inadequate to "declar[e] the construction of the[challenged] rules unlawful and invalid, and

ordering the FEC to apply the Act's anti-coordination provisions in the manner that Congress prescribed here and in all future cases." Pls.' Br. at 45. Plaintiffs do not and cannot dispute that judicial review under Section 30109(a)(8) permits them to pursue their argument that the FEC's interpretation of the coordination regulations and the internet exemption was contrary to law and, if they satisfy their burden, to obtain an order declaring that the dismissal of their administrative complaint was contrary to law and requiring the FEC to conform with that declaration. 52 U.S.C. § 30109(a)(8)(C). Thus, Plaintiffs' APA claim is preempted by FECA and must be dismissed.

Third, Plaintiffs argue, citing *Shays II*, that when an FEC complaint is dismissed based upon an allegedly invalid regulation, relief under FECA alone is inadequate. Pls.'s Br. at 45 (citing *Shays v. FEC ("Shays II")*, 414 F.3d 76, 96 (D.C. Cir. 2005)). But the court was referring to whether FECA's judicial review procedures for enforcement denials were adequate for plaintiffs to challenge FEC regulations themselves. The D.C. Circuit concluded that they were not because FECA's safe harbor provisions might cause courts to uphold FEC non-enforcement without reaching a regulation's validity, and thus permitted APA review of the regulations. *See Shays II*, 414 F.3d at 96. But challenges to regulations and challenges to FEC enforcement dismissals are not treated the same way in FECA: while FECA contains no provisions governing judicial review of regulations—thus leaving it to courts to fill in the gaps—FECA contains a "delicately balanced scheme of procedures of remedies" regarding judicial review of enforcement denials. *See CREW 2015*, 164 F. Supp. 3d at 120. Thus, *Shays II* has no bearing on this case, where Plaintiffs do not directly challenge any regulations.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court dismiss the Amended Complaint in this matter.

March 27, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2020, that 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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