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

REPLY BRIEF IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

Defendant-Intervenors Correct the Record ("CTR") and Hillary for America ("HFA) submit this Reply brief in support of their Cross-Motion for Summary Judgment.

Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley lack standing to sue because they have suffered no informational injury. They already have all of the information they would obtain, even if they were to prevail on their theory of the case. They believe that all of CTR's expenditures were coordinated with HFA and thus were in-kind contributions, which makes this case simply about moving expenditures from one line of CTR's Federal Election Commission reports to the other. *See, e.g.,* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 38, ECF No. 42 ("broad, systematic coordination with the Clinton campaign was [CTR's] raison d'être"). Plaintiffs reject the idea that some expenditures were coordinated, while others were not: in fact, they say that the Federal Election Commission ("FEC" or the "Commission) erred by "discounting the voluminous record evidence showing that CTR and HFA were collaborating *across the full range of CTR's activities,"* and by "demanding conclusive evidence on a transaction-by-transaction basis to determine whether specific conduct occurred with respect to particular expenditures." *Id.* (emphasis added). Plaintiff cannot have it both ways, branding CTR as a wholly-owned subsidiary of HFA for merits purposes, but averring that only some of its expenditures may have been attributable to HFA for standing purposes. Their case is just a thinly disguised effort to "get the bad guys." *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (internal quotation marks omitted), and they have suffered no real informational injury.

Plaintiffs fare no better on the merits. They accuse Intervenors of ignoring what they claim is the broad sweep of the Federal Election Campaign Act of 1971, as amended ("FECA's") coordination statute, by being "fixated on direct production costs." Pls.' Opp'n to Int. Cross-Mot.

for Summ. J. at 2, 3, ECF No. 42. But they cannot explain away the many enforcement matters in which the Commission has refused to tag campaigns with the costs associated with the production of Internet communications. Int. Opp'n to Pls.' Cross-Mot. for Summ. J. at 35-37, ECF No. 38-1. Plaintiffs claim that Intervenors have shown "no tenable argument for why the First Amendment even comes into play here," Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 30, ECF No. 42. But Plaintiffs refuse to recognize that the Commission's practice appropriately avoids constitutional difficulties, and that sweeping enforcement of their intuitive test for coordination—"I know it when I see it," *Jacobellis v. State of Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring) — would upset decades of Commission policy, and wreak havoc across a wide range of protected speech and association.

Finally, Plaintiffs' Administrative Procedure Act ("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 and in Intervenors' cross motion for summary judgment, Intervenors respectfully request that this Court deny Plaintiffs' motion for summary judgment and enter summary judgment in favor of Intervenors.

ARGUMENT

I. Plaintiffs lack standing.

A. Plaintiffs lack an informational injury because they will not learn any new factual information if they prevail.

Plaintiffs claim informational injury because they lack "itemized disclosures" that would allow them to determine whether (1) each particular expenditure made by CTR was coordinated with HFA; and (2) if a particular expenditure was coordinated, whether it was eligible for Plaintiffs' narrow construction of the Internet exemption. Plaintiffs say that they cannot know the

amount of in-kind contributions made by CTR to HFA during the 2016 election cycle without this information. Pls.' Opp'n to Int. Mot. for Summ. J. at 7, ECF No. 42.

This is pure fiction. CTR's publicly available FEC reports already disclose the information Plaintiffs claim they would obtain if they had their way. Plaintiffs advance a sweeping claim that CTR's spending represented coordinated expenditures, and thus in-kind contributions to HFA, because of the "voluminous record evidence showing that CTR and HFA were collaborating across the full range of CTR's activities …" *Id.* at 38. They allege "broad, systematic coordination with the Clinton campaign …" *Id.* They say it was error for the FEC to seek "conclusive evidence on a transaction-by-transaction basis to determine whether specific conduct occurred with respect to particular expenditures." *Id.* (internal quotation marks omitted). Plaintiffs are not genuinely trying to determine which of CTR's expenditures were coordinated, and which were not. Plaintiffs have gone to court to advance the argument that *all* of CTR's spending was coordinated.

There is a stark contradiction between Plaintiffs' position on standing—that "some unknown portion of CTR's expenditures were coordinated in-kind contributions," and that they need to know how much that was, *id.* at 7—with their position on the merits, which is that CTR was nothing more than a "surrogate arm of the campaign and under HFA's thumb." *Id.* at 39 (internal quotation marks and ellipses omitted). Plaintiffs try to hide this contradiction with circular arguments. They claim not to know the "amount, date, source and purpose" of each CTR disbursement. But CTR has already publicly disclosed all of its disbursements in accordance with FEC reporting guidelines, in the same detail as if it had treated these disbursements as in-kind contributions. Plaintiffs have never responded to Intervenors' argument that they would not learn any additional information about the "purpose" of CTR's disbursements if they were reported as in-kind contributions. There is no difference between the level of information a political committee

provides when reporting an operating expense, and what it provides when it reports making an in-kind contribution. *See Instructions for FEC Form 3X and Related Schedules* 10, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf. The only change that would occur is that after a *legal determination* of coordination, expenses now reported as "expenditures" would be disclosed instead as "in-kind contributions."

Plaintiffs already know whom CTR paid, when they paid them, and how much they paid them. The only thing they lack is a finding of coordination and a legal conclusion that treats these disbursements as in-kind contributions. That is what Plaintiffs seek, but it is not enough to prove informational standing. *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001) (seeking "a legal characterization or duplicative reporting of information that under existing rules is already required to be disclosed" is insufficient for informational standing).

B. The application of Plaintiffs' view of the law makes clear that they are merely seeking a legal determination.

Examining one category of Plaintiffs' claim—their allegations about David Brock's salary—makes clear that they do not genuinely seek any new factual information. In Plaintiffs' view, all of CTR's activities were coordinated with HFA, and such expenditures are presumptively in-kind contributions. *See*, *e.g.,* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 1, ECF No. 42 ("CTR coordinated millions of dollars in expenditures with HFA for 'opposition research, message development, surrogate training and booking, professional video production, and press outreach' for the benefit of the [2016] Clinton campaign"); *id.* at 8 ("As already detailed at length, CTR from its inception made clear—and announced publicly—that broad, systematic coordination with the Clinton campaign was its *raison d'etre*."); *id.* at 40 ("The unrefuted evidence shows that CTR's purpose—and consistent practice—was the systematic coordination of its operations with HFA.").

According to Plaintiffs' argument, Brock's salary would be treated no differently, and would presumptively represent an in-kind contribution to HFA.

The question then becomes whether—in Plaintiffs' view—Brock's salary was exempt from treatment as an in-kind contribution. Plaintiffs say no. In their view, expenditures for overhead expenses like Brock's salary, are not eligible for the Internet exemption. Pls.' Opp'n to Intervenors' Cross-Mot. to Dismiss at 41 n.13, ECF No. 27 (emphasis added) ("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.'*"). Thus, according to Plaintiffs, it does not matter whether David Brock's salary was divided between Internet and non-Internet activity, because salaries, in their view, are not eligible for the Internet exemption. This same reasoning applies to CTR's other expenses.[1]

What this means is that, even if Plaintiffs prevail, all that would happen is that these expenditures would be moved from Line 21 (operating expenditures) to Line 23 (in-kind contributions) of CTR's reports. The same payee names, dollar amounts, and dates would be

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[1] Even if Plaintiffs were willing to admit that "direct production costs" for Internet activity should fall within the Internet exemption, those expenses are already clearly disclosed on CTR's reports. *See*, *e.g.*, CTR's July 2016 Quarterly Report, *available at* https://www.fec.gov/data/committee/C00578997/?cycle=2016&tab=filings (showing, for example, an expenditure made to "Go Daddy" on May 10, 2016 for $16.46 for "domain services;" an expenditure made to WP Engine on May 10, 2016 for "web hosting services"). CTR's reports already clearly display the only Internet-related services that would *not* be deemed in-kind contributions to HFA under Plaintiffs' view. To the extent that Plaintiffs' argument is that costs for web hosting and domain services do *not* represent examples of "direct production costs" of unpaid Internet communications, it is not clear what types of expenses would fall in that category. Note also that the FEC Office of General Counsel considered costs for expenses such as "web hosting" to be related to the production of CTR's Internet communications. AR at 385.

disclosed on the reports, just as they are today. Plaintiffs would obtain no new factual information, which is why they lack standing.

C. CLC lacks organizational standing.

CLC continues to claim that the dismissal of its FEC complaint has "injured CLC's interest," and that it "used resources to counteract the harm." But the whole point of CLC's existence is 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 . . . ."). Responding to media inquiries about alleged "incomplete disclosure reports" is part of its job. *See* Fischer Decl. ¶27, ECF No. 27-2 (part of CLC's mission is to "identify[ ] problematic campaign practices"). CLC can scarcely claim injury, when the proximate result of the FEC's dismissal is that it simply continues to do the same things that it normally does.

II. The FEC's Dismissal Was Not Contrary to Law.

A. The First Amendment Played a Central Role in the Commissioners' Decision and Was a Reasonable Consideration in Interpreting FECA.

Plaintiffs pay no heed to the reality that their legal position, if adopted by this Court, will have a serious impact on First Amendment speech and association. By taking the Rorschach test that is 11 C.F.R. § 109.20(a)'s general coordination standard, and applying it indiscriminately to non-communication expenses, they would throw into legal peril the wide range of organizations which interact with candidates and campaigns on a day-to-day basis, and which do things that might be construed to help them. Plaintiffs call Intervenors' First Amendment arguments "misplaced" and claim that the briefing in this case has shown "no tenable argument for why the First Amendment even comes into play here." Pls.' Opp'n to Cross-Int. Mot. for Summ. J. at 30, ECF No. 42. But the First Amendment is implicated by every FEC activity, because the agency's

purpose is to regulate core political speech. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."). Especially during an enforcement action, which can result in civil penalties for speaking about candidates and elections, and in lengthy investigations into political activities, the FEC "tread[s] in an area rife with first amendment" concerns. *FEC v. LaRouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987).

For example, imagine that a nonprofit corporation that advocates for anti-racist policies has a conversation with a candidate of color about the candidate's experiences on the campaign trail. In the conversation, the candidate tells the group that there would be more diverse people, like herself, in elected office if people took a stand against injustice and did not let others get away with making destructive comments. Then, months later, the nonprofit group writes an article for its website addressing a racist comment the candidate's opponent made, so that it can do its part to hold people accountable for their words and to educate the public on why the comment was harmful. Under Plaintiffs' view of the law, the group would now have to worry about whether the salary of the article's author and any travel the author did to interview people for the story is an unlawful contribution. The only way for the organization to avoid this concern would be to not write the story and forgo an opportunity to advance the organization's mission. This is an intolerable result under the First Amendment.

Plaintiffs claimed that "the dismissal did not hinge on a constitutional avoidance rationale," and it was "inappropriate" for Intervenors to raise these constitutional issues. *See* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 30, ECF No. 42. But the very first sentence in the controlling Commissioners' Statement of Reasons ("SOR") says: "These matters raise questions of . . . First Amendment rights." AR380. The Commissioners "approached these matters deliberately and with

caution" because "every action the Commission takes implicates core constitutionally protected activity." *Id.* They wanted to avoid a decision that would "potentially chill political speech online." *Id.* at 392. Contrary to Plaintiffs' incorrect characterization of the administrative decision, the record clearly shows that the Commissioners considered the First Amendment in dismissing CLC's complaint.

While rushing past the First Amendment, Plaintiffs failed to recognize another important factor of the Commissioners' approach to input costs for Internet communications: the unique characteristics of the Internet that separate it from other modes of communication. Plaintiffs say: "[T]here is no First Amendment impetus to exempt coordinated 'expenditures' for internet communications from regulation at all." Pls.' Opp'n to Cross-Int. Mot. for Summ. J. at 31, ECF No. 42. However, they ignore what the Supreme Court has said about the Internet, which has affected the FEC's policy. In 1997, when the Internet was first becoming part of American daily life, the Court called it a "vast democratic forum[ ]," observing that the web has a "relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997). The Supreme Court further noted that, unlike traditional forms of advertising such as television and radio, websites are not "invasive" and rarely "appear on one's computer screen unbidden." *Id.* at 869.

Quoting *ACLU v. Reno,* and relying on a voluminous administrative record, the FEC explained in its 2006 Internet rulemaking that websites, emails, blogs, and the like are distinct methods of communication that require a different regulatory approach. *See* Internet Communications, 71 Fed. Reg. 18589 (2006). The FEC pointed out that "a website's information is seen only by those who actively take the steps necessary to find, visit, and view the website." *Id.* at 18590. Because of these unique features, the FEC adopted a "restrained regulatory approach"

to Internet communications. *Id.* at 18589. It removed unpaid Internet communications from the definition of "public communication" and the coordination regulations, intending to treat input costs as exempt from coordination too. *See* Int. Mot. for Summ. J. at 40-42, ECF No. 38-1 (describing discussions of input costs during the rulemaking).

Plaintiffs claim that this approach contradicts the purpose of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 18-22, ECF No. 42. Plaintiffs characterize BCRA's purpose as expanding the definition of coordination, so that all forms of communication and their costs would be included. *Id.* at 21. In truth, BCRA focused especially on broadcast, cable and satellite media, which it did by creating a new class of reportable communications called "electioneering communications." *See McConnell v. FEC*, 540 U.S. 93, 189 (2003) (explaining that electioneering communications are only those occurring on "broadcast, cable, or satellite"). As Plaintiffs seem to admit, BCRA was silent about Internet political speech, *see* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 18-22, ECF No. 42, leaving the FEC to "fill in the statutory gaps," *Van Hollen v. FEC*, 811 F.3d 486, 495 (2016) (internal quotation marks omitted).

Plaintiffs try to get around the deference the FEC enjoys in setting policy by repeatedly citing the *Shays I* decision, which addressed a precursor to the coordination regulation at issue in this case. *See* Pls.' Opp'n to Int. Mot. for Summ. J. at 14, 19, 21, ECF No. 42. However, the FEC's current approach to Internet communications and their input costs is more nuanced than the one examined in *Shays I*. As the D.C. Circuit recognized: "Congress 'took great care in crafting . . . language [in BCRA] to avoid violating the important p[ ]rinciples in the First Amendment.'" *Van Hollen*, 811 F.3d at 495 (quoting 147 Cong. Rec. S3033 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords)) (alteration in original). And where an agency's interpretation of a statute is "a

reasonable accommodation of conflicting policies that were committed to the agency's care," such as accounting for differences in types of media while regulating coordinated expenditures, the agency's interpretation of the statute "demands [ ] deference." *Id.* (internal quotation marks omitted).[2]

The controlling bloc of Commissioners adopted a "sufficiently reasonable" interpretation of the Act when it found that CTR's production or input costs were not contributions to HFA. *See Reno*, 521 U.S. at 868-70; *FEC v. DSCC*, 454 U.S. 27, 39 (1981) (stating that a court's role in reviewing an FEC interpretation is to determine "whether the Commission's construction was sufficiently reasonable"); AR380, 392. Embracing an approach that avoids chilling political speech on what the Supreme Court has more recently described as "the most important place[ ] . . . for the exchange of views" and today's equivalent of "a street or a park" is an appropriate goal to balance with the robust regulation of campaign spending. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Plaintiffs argue that "the core premise of the 2006 rulemaking . . . bears no resemblance to the word today" in an effort say that the Internet is fundamentally different from what it was fourteen years ago. *See* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 29, ECF No. 42. This may be true, but it only supports Intervenors' point. With the advent of social media, and the Internet a central part of everyday life, there are now even more opportunities for free political expression. The Commission's First Amendment rationales are stronger now than in 2006, not weaker.

Far from being contrary to law, the FEC's decision reflected a carefully structured application of FECA to a unique form of communication. Plaintiffs would replace the

[2] While a federal court is not required to follow an agency's interpretation of constitutional law, an agency's failure to account for constitutional issues in the first place is itself arbitrary and capricious.

Commission's careful approach with a hyper-regulatory interpretation of coordination, which is achievable only if the First Amendment does not "come[ ] into play." *See* Pls.' Opp'n to Int. Mot. for Summ. J. at 37, ECF No. 42.

B. Plaintiffs Mischaracterize the Due Process Concerns at Play in this Matter and Fail to Recognize How They Shaped the Commissioners' Decision

Plaintiffs take a similarly cavalier approach to due process. They again overlook inconvenient parts of the record, claiming that "[t]he controlling Commissioners did not ground their decision on a fair notice rationale." *Id.* at 33 n.5. In fact, the Commissioners explicitly stated that the administrative matter raised "questions of . . . fair notice." AR380. They also concluded that prior decisions in enforcement actions and advisory opinions informed CTR's and HFA's understanding of input costs and included a long string of citations about courts striking "agencies' retroactive policy reversals as violations of due process." AR393-94 & n.66. The Commissioners were quite obviously concerned with the due process implications of reversing course after years of exempting input costs from the reach of the coordinated communication regulation. To say otherwise is a gross mischaracterization and conceals the sea change in agency policy that Plaintiffs' interpretation of the law would present.

To the extent Plaintiffs acknowledge that "due process concerns would even theoretically come into play" in this case, they assert that the FEC has never taken a position on the type of input costs CTR treated as uncoordinated, stating that CTR and HFA could have no reliance interest. Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 33, ECF No. 42. To reach this position, Plaintiffs assert that the FEC has not addressed whether overhead costs related to producing online communications—like travel, research, and salaries—are exempt expenses. *See id.* However, Intervenors dedicated an entire section of their Cross-Motion for Summary Judgment to detailing the string of enforcement matters in which the Commission has addressed this very question. Int.

Opp'n to Pls.' Mot. for Summ. J. at 35-37, ECF No. 38-1. The Commission has consistently declined to treat component costs of free online communications as coordinated expenditures. *See id.* While Plaintiffs argue that split decisions are not precedential, courts have recognized that SORs give notice to the regulated community about how the Commission will rule in similar, future matters. *See Common Cause v. FEC*, 842 F.2d 436, 450 (D.D.C. 1988) (stating that SORs "enhance the predictability of Commission decisions"). It is exactly this kind of predictability and notice that brings "due process . . . into play" here. Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 33, ECF No. 42.

It is wrong for Plaintiffs to refer to these fundamental constitutional concerns as "indistinct." *Id.* at 33. There is no shortage of court opinions concluding that an agency's decision to penalize conduct it previously allowed triggers the Due Process Clause, because the regulated community lacked fair notice of the impending reversal in policy. *See* AR 394 n.66 (citing several such cases). It is equally well-established that a vague rule that does not provide meaningful guidance about what is allowed and what is prohibited cannot survive under the Due Process Clause, particularly where the First Amendment is concerned. *See, e.g.*, *Buckley*, 424 U.S. at 77. To fashion a new rule through litigation that takes input costs and shrinks them down to what Plaintiffs call "bona fide production costs"—whatever that means—would leave the regulated community guessing about what is sufficiently related to an online communication to be exempt from coordination. *See* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 33, ECF No. 42.

C. The FEC's History Supports the Commissioners' Dismissal.

Plaintiffs bristle at the claim that they are taking a second bite at the regulatory apple, trying to get this Court to enforce a policy that the Commission would not adopt through rulemaking. They try to prove that CLC did not raise—and the FEC did not reject—an invitation to regulate

input costs during the 2006 Internet rulemaking. *Id.* at 22-23. However, Plaintiffs republish in full a key passage of CLC's comment on the proposed Internet rules, which shows the exact opposite. *See id.* at 23. Plaintiffs try to square the circle by claiming that the reference to "production costs" in the comment meant only "*direct* production costs" and did not include "staff time or overhead." *See id.* at 22-23. But the comment contains no such restriction. It speaks of payments for the "professional creation and production of campaign materials," which would appear to encompass fees for consultants or the labor of professional staff—the same types of expenses which Plaintiffs now try to shoehorn into the coordination rules. *Id.* at 23.

Plaintiffs also claim that there is no evidence the Commission actually considered CLC's comment. However, at a hearing on the proposed Internet rules, the vice chairman of the FEC questioned a representative of CLC concerning the organization's position on input costs, explicitly citing the footnote in CLC's comment. *See* FEC, Public Hearing on Internet Communications (June 29, 2005), Transcript at 185, 194-95, https://sers.fec.gov/fosers/showpdf.htm?docid=775. In fact, the input cost question was the first issue the FEC raised to CLC after CLC's opening comments. *See id.* at 194. The record shows a colloquy between the CLC representative and the FEC vice chairman, concluding with the CLC representative stating that "payments to third parties" should not be sheltered from regulation as exempt production costs. *Id.* at 196. Thus, CLC's comment was not simply one comment among many, that the FEC happened to overlook. The Commission considered CLC's proposal to regulate input costs and rejected it.

The rest of Plaintiffs' arguments about the FEC's past actions on input costs are simply misplaced. As noted above, one of Plaintiffs' core contentions is that while the FEC may exempt costs directly related to Internet communications, like web hosting and email list costs, it has never

determined that overhead costs like rent, salaries, research, and travel are similarly exempt. *See* Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 32-33, ECF No. 42. However, this is at odds with the FEC's enforcement history, as controlling blocs of Commissioners have explicitly exempted "the cost of staff time, office space [and] equipment usage," and the cost of hiring consultants and conducting research, when connected to free online communications. *See* SOR of Comm'rs Hunter, Goodman & Petersen at 1, MUR 7023 (Kinzler for Congress) (Jan. 23, 2018); First Gen. Counsel's Rpt. at 4, MUR 7080 (Babeu for Congress) (Dec. 15, 2016); Factual and Legal Analysis ("F&LA") at 1 n.1, MUR 7080 (Babeu for Congress) (Oct. 30, 2017); "F&LA" at 6-7, 11-12, MUR 6414 (Carnahan in Congress Committee) (July 17, 2012).

Second, even in cases where the FEC discussed only those costs Plaintiffs appear to concede are exempt production costs, it is clear that the FEC is also exempting "overhead." There is no practical way that a political committee could send emails or make videos for its website without staff to do the work. Those staffers also require places from which to work; computers on which to create the communications; travel in order to interview subjects and confirm the facts that will be part of advertisements or articles; and research materials to develop and support the communications. Online content does not simply spring from an author's head onto a website or into an email; there are myriad other "inputs" that go into creating communications. That is why the FEC has not, in matters like Akin for Senate, agreed that costs closely related to activities like sending emails are exempt, while the staff time and office rent allocable to those activities must be treated as contributions. *See* F&LA at 2, MUR 6657 (Akin for Senate). Exempting only the costs "necessary" for "placing" a communication online would be unworkable and would, as the Commissioners articulate in their SOR, "eviscerate the internet exemption and the deliberate policy decisions behind it. . ." AR392.

The rest of Plaintiffs' attacks on the FEC authority cited in Intervenors' motion are feeble attempts to distinguish those cases from CTR's activities, or to question their value. Plaintiffs contend that SORs adopted by only three Commissioners carry no weight. Pls. Opp'n to Int. Cross-Mot. for Summ. J. at 33, ECF No. 35. They say they represent only the "idiosyncratic views" of a few Commissioners. *Id.* at 42. Critically, they fail to recognize that these SORs are "controlling" decisions, and in practice articulate the prevailing opinion of the FEC. Plaintiffs also conflate "binding" with "consistent." *Id.* The FEC can exhibit consistency in its decision-making even when it is not rendering binding conclusions—and consistency is the hallmark of a decision that is not arbitrary, capricious, or an abuse of discretion.

Plaintiffs then separately contend that, because certain enforcement matters concerning input costs included alternative holdings, or contained facts suggesting the "conduct" prong of the coordinated communication test was not met, the Commission's legal conclusions concerning input costs should be disregarded. *Id.* at 25-28. Plaintiffs cast the Commission's input-cost analyses as dicta in these matters, when in fact, what Plaintiffs highlight was dicta (or was raised only by the Commission's staff). *See id.*

Plaintiffs also state that these past FEC matters indicate that the Internet exemption applies only to "incidental online communications created and disseminated by individuals at marginal cost." *Id.* at 28. This again is plainly refuted by the very matters discussed in Plaintiffs' motion. The FEC has addressed input costs totaling into the hundreds of thousands of dollars, incurred by political committees and corporations alike. *See id.* at 26-28. These decisions far surpass the bounds of individuals spending negligible amounts. And the significance of these decisions is not undercut by matters like MUR 5564 (Alaska Democratic Party), which did not involve online activity. *See id.* at 28.

Rather, the only real difference between prior FEC cases and this one is the Plaintiffs' zeal to apply the general coordination standard to what they call a "scheme." *See id.* at 13, 34, 36-37. Plaintiffs would set aside the regulatory and enforcement history and take a "know it when you see it" approach to finding coordination, instead of weighing this case on the scales of existing guidance. They see an "unambiguous statutory mandate" in the indeterminate language of 11 C.F.R. § 109.20(a). But the FEC has spent almost fifty years, multiple rulemakings, and several advisory opinions trying to figure out what a phrase like "in cooperation, consultation or concert with" means in practical application. *Id.* at 13. Now that the FEC has landed on a reasonable, nuanced approach that it has applied consistently to the realm of free online communications, the approach should not be disturbed.

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

A. The controlling Commissioners properly applied the "reason to believe" standard.

The gravamen of Plaintiffs' complaint is that the controlling Commissioners declined to find reason to believe that CTR coordinated its non-exempt activities with HFA based on Plaintiffs' allegations of "broad, systematic coordination" and the fact that CTR's "sole mission" was to defend Hillary Clinton. Pls. Opp'n to Int. Cross-Mot. for Summ. J. at 13, 38, ECF No. 42. Plaintiffs erroneously argue that these allegations provided a sufficient basis for the FEC to find "reason to believe" prohibited coordination occurred with respect to CTR's non-exempt activities. *See* AR003, 005–07. This is incorrect. It is not unusual—and certainly not incriminating—for a PAC to focus its efforts on a particular race, especially a presidential race. More importantly, the FEC has wisely avoided the nebulous standard of coordination that Plaintiffs push in this case. Pls.' Opp'n to Int. Cross-Mot. for Summ. J. at 37-40, ECF No. 42. As the controlling Commissioners' SOR states, "'[c]oordination' is not a status, however, such that coordination in

one activity can be imputed to other activities. Finding coordination requires more than considering the general relationship between entities — it requires a transaction-by-transaction assessment to determine whether specific conduct occurred with respect to particular expenditures." AR 395.

To separate the wheat from the chaff, in a docket that is dominated by politically or ideologically motivated complaints, the FEC requires complainants to put forth "sufficient *specific facts*, which, if proven true, would constitute a violation of FECA" in order to satisfy the "reason to believe" standard. *See* SOR of Comm'rs Mason, Sandstrom, Smith & Thomas at 1, MUR 4960 (Clinton for Senate) (Dec. 21, 2000). Here, the controlling Commissioners reasonably concluded that there were not enough specific facts to support CLC's allegation of coordination on non-exempt activity. This was not unreasonable, given the factual allegations CLC made in its administrative complaint. Indeed, the media articles cited in Plaintiffs' complaint merely confirm what was already public—that CTR and HFA interacted over unpaid Internet activity. *See*, *e.g.*, AR005–06 (citing Matea Gold, *How a Super PAC Plans to Coordinate Directly with Hillary Clinton's Campaign*, Wash. Post (May 12, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/, which quotes a CTR spokesman saying, "The FEC rules specifically permit *some* activity—in particular, activity on an organization's website, in email, and on social media—to be legally coordinated with candidates" (emphasis added); and Rebecca Ballhaus, *Pro Clinton Group Sets Novel Strategy*, Wall St. J. (May 12, 2015), https://blogs.wsj.com/washwire/2015/05/12/pro-hillary-clinton-group-sets-novel-strategy-to-back-presidential-hopeful/, which quotes CTR as saying it "will spend money on activities *that can legally be coordinated* with a campaign" (emphasis added)).

By contrast, CLC's administrative complaint did not contain specific facts about alleged coordination between HFA and CTR on non-exempt activity, and thus it failed to meet the reason to believe standard. When it came to non-exempt activity, Plaintiffs relied on general discussions of CTR's coordination with HFA. *See*, *e.g.*, Pls. Opp'n to Int. Cross-Mot. for Summ. J. at 38-40, ECF No. 42 (CTR and HFA were collaborating "across the full range of CTR activities"; CTR existed "*solely* to make expenditures in cooperation, consultation, or concert with, or at the request or suggestion of Clinton and HFA;" CTR "conducted its activities under HFA's thumb"). But the articles Plaintiffs rely on do not discuss coordination specific to any type of non-exempt activity; they are mere general statements about CTR's relationship with HFA. However, "mere 'official curiosity' will not suffice as the basis for FEC investigations") (footnote omitted); *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (distinguishing the Commission from administrative agencies "vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices . . . . the FEC has no such roving statutory functions").

Plaintiffs have never articulated why it was arbitrary or capricious for the controlling Commissioners to require specific facts to support legal allegations of coordination before finding "reason to believe." The FEC has never imputed coordination on one activity to a whole range of activities, as Plaintiffs would have it do. *See* Pls.' Mot. for Summ. J. at 33, ECF No. 35 (claiming that the FEC should have found reason to believe that CTR's surrogacy program was coordinated because "[n]othing in the record suggests that CTR departed from its modus operandi [of coordination] in the area of surrogacy").

Furthermore, the vast majority of the statements discussing CTR's coordination in more general terms were secondhand characterizations of CTR's activity. It was not arbitrary or

capricious for the controlling Commissioners to attribute more weight to direct quotations from HFA and CTR spokespersons than to third party hearsay, especially when the FEC has hewed to such a standard in the past. *See* SOR of Petersen, Hunter & Goodman at 6-7, MUR 6518 (Gingrich) (June 2, 2016) ("As a threshold matter, we observe that unsworn news reports by authors who are not first-hand complainants or witnesses before the Commission present legal and practical problems for the Commission and respondents, and, in any event, may be of limited probative value.").

B. Intervenors did not concede that they coordinated on non-exempt activities.

Plaintiffs repeatedly contend that Intervenors conceded in their administrative responses that they coordinated on the activities that Plaintiffs deem ineligible for the Internet exemption, and that the controlling Commissioners' failure to treat these so-called "concessions" as evidence of coordination was arbitrary and capricious. Pls. Opp'n to Int. Mot. for Summ. J. at 41, ECF No. 42. But Intervenors made no such concessions, and Plaintiffs' argument fails.

With respect to activities that Plaintiffs deem ineligible for the Internet exemption, CTR's response to CLC's administrative complaint stated that (1) HFA compensated CTR for the fair market value of the research and tracking services it provided, *see* AR067, 076-77; (2) CTR contacts with reporters were not "public communications" and were exempt under the media exemption, *see* AR066-67; (3) polling costs were for polls that were distributed on CTR's website and were thus exempt from being treated as contributions under the Internet exemption, *id.* at 65; and (4) the media training sessions did not include official Clinton campaign surrogates or HFA staff, and that CTR did not solicit or accept any suggestions from HFA regarding who should

attend the sessions or otherwise permit HFA to direct individuals to the sessions.[3] Plaintiffs argue with no basis that CTR somehow tacitly conceded coordination on these activities. This argument is completely without support. It also reverses the burden of proof that applies to FEC complaints. Intervenors were not required to contest CLC's facts by presenting their own evidence *disproving* coordination. *See* SOR of Comm'rs Wold, Mason & Thomas at 2, MUR 4850 (Deloitte & Touche, LLP) (July 20, 2000) ("The burden of proof does not shift to a respondent merely because a complaint is filed."). It was neither arbitrary nor capricious for the controlling Commissioners to decline to read concessions into CTR's response that were never made in the first place.

C. The controlling Commissioners' treatment of polling costs and the David Brock podcast was not arbitrary or capricious.

Plaintiffs' argument that "[t]he controlling Commissioners' rationale was arbitrary and capricious because it disregarded CTR's and HFA's responses to the administrative complaint" is odd, because it directly contradicts what actually happened: the controlling Commissioners adopted Intervenors' position that, while the information indicated that CTR and HFA coordinated on exempt communications, there was insufficient evidence to find reason to believe that CTR and HFA illegally coordinated on non-exempt activities. For example, with respect to CTR's polling, Intervenors maintain that the controlling Commissioners properly treated costs associated with CTR's polling activity as input costs for exempt communications because the polls were placed on CTR's website, as Plaintiffs admit. Pls.' Opp'n to Int. Mot. for Summ. J. at 39. Intervenors

[3] Because they do not square with Plaintiffs' misguided argument that Intervenors *never* denied coordinating on non-exempt activities, Plaintiffs disingenuously suggest that CTR's descriptions of its media trainings should not be "taken at face value" because they were "offered only in the form of an unsworn statement by CTR's counsel." Pls.' Opp'n to Int. Mot. for Summ. J. at 42, ECF No. 42. In other words, Plaintiffs criticize Intervenors for failing to assert facts disproving coordination, but when they do, such facts are not to be believed because they do not fit neatly into Plaintiffs' narrative. CTR's description of its media trainings was intended to make clear that the type of conduct that would have resulted in the media trainings being coordinated with HFA simply did not occur.

pointed to the polling regulations under 11 C.F.R. § 106.4 to make it clear that even if Plaintiffs were to prevail on their argument that input costs should not be treated as exempt, then there were other bases upon which the controlling Commissioners could have relied to dismiss Plaintiffs' complaint. Plaintiffs' admission that "CTR posted data from the poll on the Internet" only strengthens Intervenors' argument. *See* 11 C.F.R. § 106.4(c) ("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."). Plaintiffs' argument that the controlling Commissioners did not directly consider the application of 11 C.F.R. § 106.4 misses Intervenors' point: a court does not reverse agency action for harmless error, when the ultimate outcome would have been the same regardless of the reasoning. *See* 28 U.S.C. § 2111 (codifying a harmless error standard). As the D.C. Circuit has recognized, remand is unnecessary when "[e]ven were the Commission to return to square one . . . it is virtually inconceivable that its decision would differ." *FEC v. Legi-Tech, Inc*., 75 F.3d 704, 708 (D.C. Cir. 1996). Plaintiffs have no answer to this.

Finally, it was not "irrational" for the controlling Commissioners to exclude consideration of statements made by CTR's chairman during a podcast interview that was not cited in CLC's administrative complaint on the grounds that Intervenors did not have the opportunity to respond to the evidence. Plaintiffs do not directly respond to this argument, insinuating instead that the podcast interview should be construed as a response to the complaint, since it was given after the complaint's filing. *See id.* at 39 ("In that way, Brock's comments can be themselves construed as a response to CLC's complaint."). However, Plaintiffs never acknowledge that the controlling Commissioners indicated that the podcast *would not have changed their decision to dismiss*: "Brock's statements [made during the podcast interview] about Correct the Record's coordination

with Hillary for America merely reinforce what we already know from information in the record." AR 386. Plaintiffs could have supplemented their administrative complaint with evidence of the podcast. They chose not to. It was not arbitrary or capricious for the controlling Commissioners to decline to explicitly analyze evidence that Plaintiffs failed to put before the Commission and that would not have changed the outcome if they had.

IV. Plaintiffs' APA claim fails.

For the reasons set forth in Intervenors' cross-motion for summary judgment, Plaintiffs lack standing to bring their claim under the APA. *See* Int. Mot. for Summ. J. at 16, ECF No. 38-1. Furthermore, Intervenors maintain that Plaintiffs' FECA claim is an adequate remedy at law, and the APA is thus unavailable to address the FEC's disposal of an administrative complaint. *See id.* at 44. Plaintiffs have yet to present any argument to rebut this authority. They instead attempt to recast their claim as one challenging the validity of the regulations, even though they concede that they are challenging "the coordination regulations, *as construed*" by the controlling Commissioners. Pls. Opp'n to Int. Mot. for Summ. J. at 44, ECF No. 42. Accordingly, Plaintiffs are not challenging the validity of the regulations themselves, but rather, the Commission's interpretation of the regulations, and the APA is not available for such claims. *See* Int. Mot. for Summ. J. at 44, ECF No. 38-1. But if the Court reaches the merits of Plaintiffs' APA claim, it should grant summary judgment in favor of Intervenors for the reasons stated herein and in Intervenors' brief in support of its cross motion for summary judgment. *See id.* at 45.

CONCLUSION

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

DATED: October 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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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