ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5081

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER
and CATHERINE HINCKLEY KELLEY,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

HILLARY FOR AMERICA and CORRECT THE RECORD,
Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-02336-JEB
Before the Honorable James E. Boasberg

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), plaintiffs-appellants Campaign Legal Center and Catherine Hinckley Kelley hereby certify as follows:

(a) Parties and *Amici*. Campaign Legal Center and Catherine Hinckley Kelley are plaintiffs in the district court and appellants in this Court.

Pursuant to Circuit Rule 26.1, Campaign Legal Center certifies that it is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest. Campaign Legal Center works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

The Federal Election Commission ("FEC" or "Commission") is the defendant in the district court and appellee in this Court, but has not appeared in either.

Hillary for America and Correct the Record are intervenor-defendants in the district court and intervenor-appellees in this Court.

The Institute for Free Speech appeared in the district court as an *amicus curiae* and no *amici* have yet appeared in this Court.

(b) Rulings Under Review. Plaintiffs-appellants appeal the December 2, 2020 memorandum opinion and order of the U.S. District Court for the District of Columbia (Boasberg, J.), denying plaintiffs' motion for summary judgment and

granting intervenor-defendants' motions for summary judgment, and the February 12, 2021 final order dismissing the case. The December 2, 2020 memorandum opinion is reported at *Campaign Legal Center v. FEC*, 507 F. Supp. 3d 79 (D.D.C. 2020).

(c) Related Cases. The ruling under review has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which counsel are aware.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
PETA	People for the Ethical Treatment of Animals

INTRODUCTION

In the run-up to the 2016 elections, the super PAC Correct the Record declared an ambitious plan to spend millions of dollars on opposition research and media outreach to support then-presidential candidate Hillary Clinton—while openly coordinating with her campaign, Hillary for America ("Clinton campaign"). JA 47-48 ¶¶ 64-67. Correct the Record, intervenor here alongside Hillary for America,[1] claimed that this would not give rise to any in-kind contributions to Clinton subject to disclosure or regulation under the Federal Election Campaign Act ("FECA" or "the Act"), because Correct the Record would engage only in the types of unpaid internet communications that FEC regulations exempt from the statutory coordination regime. JA 32-33 ¶¶ 2, 65-66.

But its activities were not so confined. Plaintiffs-Appellants Campaign Legal Center and Catherine Hinckley Kelley (collectively, "plaintiffs") filed an administrative complaint with the FEC after widespread news reports indicated that Correct the Record and Hillary for America were coordinating on a host of activities—including campaign surrogate training, opposition research and tracking, polling, and media rapid-response efforts—"which are not fairly characterized as 'communications'" exempt from the coordination rules. JA 188. Nevertheless, and

[1] Defendant Federal Election Commission ("FEC") did not appear in the district court after a vote to authorize defense of suit failed 3-1, JA 53 ¶ 83; JA 254, and has not appeared in this appeal.

contrary to the recommendation of the FEC's Office of General Counsel, the Commission split 2-2 on whether there was reason to believe this massive joint undertaking gave rise to any "unreported, excessive, and prohibited in-kind contributions" from Correct the Record to the Clinton campaign, and dismissed plaintiffs' complaint. JA 208, 252-55. Plaintiffs filed this action to challenge the dismissal as contrary to law.

* * *

Despite the complexity of intervenors' coordination scheme and their elaborate arguments defending its legality, this appeal boils down to a simple question: have plaintiffs shown an injury-in-fact arising from the dismissal of their administrative complaint sufficient to establish standing under Article III?

The answer is equally simple: yes. Plaintiffs' administrative complaint charged, among other things, that Correct the Record and Hillary for America violated 52 U.S.C. § 30104 by failing to disclose any of the in-kind contributions made by Correct the Record or received by Hillary for America in the course of their multi-million dollar joint venture. JA 162-63, Counts IV & V. Under *FEC v. Akins*, 524 U.S. 11 (1998), this missing disclosure information—encompassing the amounts, dates, and purposes of each in-kind contribution that resulted from intervenors' coordinated spending—"establishes a quintessential injury in fact." *Comm. on the Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755,

762 (D.C. Cir. 2020) (en banc) (citing *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*")).

The complication in this case—a complication generating dozens of pages of ink spilled and two conflicting district court opinions below—arose not from the nature of plaintiffs' informational deprivation, but from the defense intervenors asserted in an effort to "cure" it. Intervenors did not contend that they reported the information FECA requires with respect to these contributions, *see* 52 U.S.C. §§ 30104(b)(2), 30116(a)(7)(B); 11 C.F.R. § 104.13(a); instead, they argued that plaintiffs can gather much of the information they seek from the disclosure reports that Correct the Record, a registered federal political committee, filed with the FEC in the 2015-16 election cycle.

That claim is wrong. Correct the Record's existing reports do not contain the requisite information about the amounts, dates, and purposes of the contributions it made to Clinton via coordinated expenditures; nor can that information be feasibly reconstructed from other sources. Correct the Record primarily reported undifferentiated disbursements for general overhead expenses like payroll, salary, or travel, or mixed-purpose disbursements covering both non-exempt and potentially exempt activities, without describing any in a manner that would allow plaintiffs to distinguish coordinated expenditures from non-coordinated or exempt activities.

What the district court wrestled with so mightily below—coming to opposite conclusions at different junctures of this litigation based on the same facts—was whether this "form" of reporting suffices to provide plaintiffs with the information they are due under FECA. It recognized that Correct the Record reported its disbursements only in general terms (*e.g.*, "salary" or "travel"), making it impossible to discern which disbursements, in whole or part, funded its undisclosed contributions to Hillary for America. At the motion to dismiss phase, the court accordingly concluded that "without itemized disclosures, [plaintiff] has *no* information as to the actual amount of money that, in its view, should have been considered a contribution or expenditure under the Act," JA 95 (emphasis added), and thus "has proven its informational injury," JA 100. The court also recognized that the FEC's dismissal allowed intervenors to coordinate and conceal potentially millions of dollars in contributions, thereby depriving plaintiffs of FECA-required information and "creat[ing] a loophole that effectively vitiates the plain language of FECA." JA 106.

In ruling on cross-motions for summary judgment six months later, however, the court had a change of heart—not because plaintiffs had failed to meet their heightened burden or intervenors presented new arguments, but based on the court's independent conclusion that its "previous Opinion did not sufficiently take account of" the "rule" of *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), which

"spell[ed] doom for Plaintiffs' standing." JA 294-95. The court now believed the information that remained outstanding was more in line with a legal finding of coordination. Although acknowledging that this still "may sound like a factual determination—*i.e.*, the campaign and PAC in fact coordinated," it concluded that plaintiffs have "no standing to sue." JA 295-96, 297.

This second ruling, however reluctantly reached, was in error. The Supreme Court has made clear that a plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21. None of the in-kind contributions resulting from intervenors' coordination scheme have been disclosed in any form, nor is the information FECA requires otherwise available to plaintiffs. Recasting the statutory requirement that political committees disclose in detail the amounts, dates, and purposes of all contributions as a "legal determination" simply because the contributions take the form of coordinated expenditures "vitiates" FECA's goal of ensuring transparency in the funding of candidate campaigns.

The district court's dismissal of this action for lack of standing should be reversed and the case remanded for further proceedings.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this timely appeal from a final order in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291 and 52

U.S.C. § 30109(a)(9). The district court exercised jurisdiction of the case under 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8)(A). Plaintiffs timely filed this Appeal on April 7, 2021, within sixty days of the district court's decision and order entered February 12, 2021, and also appeal the district court's interlocutory order and opinion entered December 2, 2020.

Plaintiffs-Appellants have standing for the reasons detailed herein.

ISSUES PRESENTED

1. Whether the district court erred in ruling that plaintiffs suffered no cognizable Article III injury when plaintiffs have been deprived of statutorily required information regarding the true amounts, dates, and purposes of the in-kind contributions that the Clinton campaign received from Correct the Record, a supposedly "independent" committee that in fact coordinated with the candidate's campaign.

2. Whether the district court erred in interpreting *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), to circumscribe plaintiffs' informational rights merely because the FECA-required disclosure information they lack involves contributions that took the form of coordinated expenditures.

STATUTES AND REGULATIONS

All applicable statutory and regulatory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

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

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

FECA "has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated," *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003), and regulated them "as contributions rather than expenditures . . . [to] prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley v. Valeo*, 424 U.S. 1, 46-47, 67 (1976) (per curiam). Accordingly, all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (*i.e.*, coordinated expenditures) are in-kind contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i). In-kind contributions also include "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." *Id.* § 30101(8)(A)(ii).

Like all contributions to candidates, those taking the form of coordinated expenditures are subject to FECA's comprehensive disclosure requirements—which

were crafted to "expos[e] large contributions and expenditures to the light of publicity," *Buckley*, 424 U.S. at 67, and ensure that voters "know exactly how a candidate's campaign is financed," S. Rep. No. 92-229, at 57 (1971)—as well as its contribution limits and source restrictions. *See* 52 U.S.C. §§ 30104, 30116(a), 30118; 11 C.F.R. §§ 104.13(a), 109.20(b), 109.21(b).

For each reporting period and the calendar year, a candidate-authorized committee must disclose the total contributions received from other committees, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104(b)(2)(D). The candidate's report must also itemize all contributions received from other committees, including those in the form of coordinated expenditures, and for each contribution, state its date, value, and whether it was in support of the candidate's primary or general election. *Id.* § 30104(b)(3)(B); *see Instructions for FEC Form 3P and Related Schedules* 5, FEC (updated May 2016). Because in-kind contributions received by a candidate's campaign are also functional "expenditures" of that campaign, the report must disclose a coordinated expenditure in two ways: as a contribution received and an expenditure made by the candidate. 11 C.F.R. §§ 104.13(a), 109.20(b), 109.21(b).

Likewise, for each reporting period and the election cycle, a non-candidate committee must disclose its total contributions to other committees, including in-kind contributions in the form of coordinated expenditures. A committee must

itemize each contribution made to another committee, including its coordinated expenditures, stating for each the date, amount, and recipient's name and address. 52 U.S.C. § 30104(b)(4)(H)(i), (6)(B)(i). In addition, because in-kind contributions by a committee are also *expenditures* of that committee, the report must disclose the person to whom each expenditure is made and its date, amount, and purpose. *Id.* § 30104(b)(5)(A).[2]

2. The FEC exempts only a narrow category of unpaid internet communications from regulation as "coordinated communications."

Adopting language from 52 U.S.C. § 30116(a)(7)(B)(i), FEC regulations define "coordination" as expenditures "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee." 11 C.F.R. § 109.20(a).

In addition to this general coordination regulation, the FEC has also promulgated rules defining a subset of coordinated expenditures made for certain "coordinated communications." *Id.* § 109.21. To qualify as coordinated under section 109.21, a communication must (1) be paid for by a person other than the candidate, *id*. § 109.21(a)(1); (2) satisfy one of the content standards set forth in section 109.21(c); and (3) satisfy one of the conduct standards set forth in section

[2] These disclosure requirements apply to all non-authorized political committees, including hybrid or "*Carey* committees" like Correct the Record. *See* JA 45 ¶¶ 56-57.

109.21(d). The "content" standards in section 109.21(c) cover only "public communications," which include communications made by "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." *Id.* § 100.26.

In its 2006 "internet rulemaking," the FEC carved out a narrow exception to the definition of "public communications" for "communications over the Internet" that are not "placed for a fee on another person's Web site." *See* Internet Communications, 71 Fed. Reg. 18589, 18613 (Apr. 12, 2006) (Explanation & Justification). Therefore, *unpaid* internet communications are not public communications and cannot be "coordinated communications" under 11 C.F.R. § 109.21, but expenditures for *paid* internet communications are not exempt. To maintain consistency across its rules, the FEC also exempted "Internet activity" by individuals and groups of individuals from the regulatory definitions of "contribution," *id.* § 100.94, and "expenditure," *id.* § 100.155, provided this activity was "*uncompensated*." 71 Fed. Reg. at 18604 (emphasis added).

This "internet exception" was necessarily narrow, because it responded to a judicial ruling striking down the FEC's prior rule that had exempted the internet entirely from the coordination rules and was found to conflict with the Act's clear terms, "severely undermine" its purposes, and "create the potential for gross abuse."

Shays v. FEC, 337 F. Supp. 2d 28, 69-70, 72 (D.D.C. 2004). Accordingly, in its 2006 Explanation and Justification, the FEC made clear that many payments underlying exempt internet activity were still "expenditures" under the rules, even where those payments supported eventual exempt internet communications. For example, "a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election, remains an 'expenditure' by the political committee," even if the internet activities conducted on that computer may have been exempt. 71 Fed. Reg. at 18606.

3. Statutory framework for FEC administrative complaints.

Any person may file a complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint, any responses thereto, and the Office of General Counsel's recommendations, the Commission votes on whether there is sufficient "reason to believe" that a FECA violation occurred to justify an investigation. After any investigation, if the Commission determines that there is probable cause to believe the law has been violated, *id*. § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties, *id*. § 30109(a)(4)(A), (5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id*. § 30109(a)(6)(A). All of these decisions require four affirmative votes.

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the "controlling" group of Commissioners who voted not to proceed must issue a Statement of Reasons to serve as the basis for any judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by the dismissal of its FEC complaint may seek review in the U.S. District Court for the District of Columbia to determine whether the dismissal was "contrary to law," 52 U.S.C. § 30109(a)(8)(A), (B), and appeal any such decisions to this Court, *id.* § 30109(a)(9).

B. Factual Background

On October 6, 2016, plaintiffs filed a sworn administrative complaint (designated Matter Under Review 7146) against Correct the Record and Hillary for America for failing to disclose Correct the Record's in-kind contributions to the Clinton campaign in the form of coordinated expenditures and for violating FECA's contribution restrictions. JA 46 ¶ 62.

Plaintiffs' administrative complaint—one of five raising similar concerns—documented millions of dollars Correct the Record spent on opposition research, message development, and press outreach for the benefit of Clinton's campaign. JA 47 ¶¶ 63, 72. Correct the Record's leadership publicly admitted to the news media that its activities were coordinated with Hillary for America but claimed that virtually all of the group's expenditures involved exempt "communications over the

Internet." JA 47-48 ¶ 66. This claim, however, as the plaintiffs argued, was contradicted by unrefuted reports that Correct the Record had spent millions of dollars on numerous *non*-communication activities, such as paying staff to build relationships with reporters; contracting with consultants to provide "on-camera media training" for Clinton supporters and surrogates; hiring private polling firms; and paying for extensive travel. JA 48-50 ¶¶ 68-71.

After reviewing plaintiffs' complaint together with the four other complaints, respondents' written replies, and other available evidence, the FEC's Office of General Counsel recommended the Commission find reason to believe that Correct the Record and Hillary for America violated FECA by making and accepting excessive and prohibited in-kind contributions and failing to report those contributions. JA 51 ¶ 74. The General Counsel's Report rejected claims by respondents that Correct the Record's expenditures were communications covered by the internet exception, and instead found that most of its approximately $9 million in spending went toward a "wide array of activities, *most of which are not fairly characterized as 'communications.*'" JA 51 ¶ 75 (emphasis in original). The Report also noted that in responding to the administrative complaints, neither Correct the Record nor Hillary for America had disputed "the description or scope of [Correct the Record's] activities on behalf of [Hillary for America] as set forth in [plaintiffs'

administrative complaint].” JA 51 ¶ 76. Nor did either dispute that their myriad non-communication activities were, in fact, coordinated. JA 52 ¶ 79.

On June 4, 2019, the FEC’s then-four Commissioners deadlocked 2-2 on whether to find reason to believe that Correct the Record and/or Hillary for America had violated any provision of the Act, and dismissed the administrative complaint. JA 252-55.

On August 21, 2019, the two controlling Commissioners issued their Statement of Reasons. JA 256-73; *see also* JA 53 ¶ 85. They drew the opposite conclusion from the Office of General Counsel. With respect to Correct the Record’s expenditures that the controlling Commissioners believed related to internet communications—“for example, computer equipment, office space, software, web hosting, video equipment, placing a poll online, and salaries for individuals to conduct internet activity,” JA 267—the Commissioners determined they were exempt internet communications, or “input costs” for such communications, under 11 C.F.R. § 109.21.

Their theory was that an expenditure cannot be “coordinated” if it in any way supports, or can be retrospectively “associated” with, an internet communication exempt from the definition of “public communication” in 11 C.F.R. § 100.26. They also rejected the possibility that overhead expenditures must be allocated across the exempt and non-exempt activities they supported, claiming that “exempting only

those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption . . . and potentially chill political speech online." JA 268.

As for the universe of Correct the Record's spending that even the controlling Commissioners conceded was "unrelated to creating and disseminating online political communications," JA 266, they argued that plaintiffs had not alleged facts sufficient to establish coordination conclusively, "transaction-by-transaction," and had "fail[ed] to meet their burden." JA 271. In so holding, the Commissioners chose to disregard public statements by Correct the Record, as provided in plaintiffs' complaint and otherwise obtained by the Office of General Counsel, *see* JA 119-21 ¶¶ 9-12; JA 125-27 ¶¶ 24, 26-27; JA 190-91, 194-95, as well as corroborating documents posted on Wikileaks that were presented by complainants other than Campaign Legal Center, JA 194-96. They also did not address that, as the General Counsel's Report noted, respondents never denied that many of these activities were in fact coordinated.

C. Proceedings Below

Plaintiffs filed this action under 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act ("APA") on August 2, 2019, challenging the dismissal of their FEC complaint as contrary to law, and arbitrary, capricious and an abuse of discretion. JA 8. On August 21, 2019, seventy-eight days after dismissing the

administrative complaint, the controlling Commissioners issued their Statement of Reasons, and plaintiffs amended their complaint on October 29, 2019 to address its belated issuance. JA 32-61.

The FEC has not appeared to defend this action, but Correct the Record and Hillary for America sought and were granted the right to do so in the agency's place as Defendant-Intervenors, over plaintiffs' objection. JA 91; *Campaign Legal Center v. FEC*, 334 F.R.D. 1 (D.D.C. 2019).

On February 4, 2020, intervenors moved to dismiss for lack of standing and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In opposing the motion, plaintiffs submitted two declarations substantiating their standing claims, *see* JA 96, one from Plaintiff Kelley, JA 68-70, and one from Brendan Fischer, Director of Federal Reform at Campaign Legal Center. JA 71-82. On June 4, 2020, the district court denied the motion, holding that plaintiffs had "proven [their] standing" and "present[ed] significant and largely uncontroverted evidence that the Commission's dismissal of [their] administrative complaint was 'contrary to law.'" JA 111.

In ruling on the motion to dismiss, the court rejected intervenors' argument that Correct the Record had included all FECA-required information about the alleged coordinated spending in its 2015-16 FEC committee reports, noting that "CLC has no information as to the actual amount of money that, in its view, should

have been considered a contribution or expenditure under the Act." JA 95. Accordingly, the court concluded that plaintiffs had been deprived of factual information about the contributions that Correct the Record made to Hillary for America via coordinated expenditures, including their amounts, dates, and purposes—and that it was "clear" this "information would help" plaintiffs and "advance CLC's mission of 'improving democracy and promoting representative, responsive, and accountable government for all citizens.'" JA 94-95.

The parties then briefed cross-motions for summary judgment on the merits, with intervenors simultaneously renewing their challenge to plaintiffs' standing. "After previously coming out the other way," the court "reverse[d] field," JA 291, based on its own reconsideration of the applicable law. Explaining this reversal as compelled by precedent and necessary to correct the "error" of its earlier decision, JA 288, the district court now determined that "plaintiff[s] lack[] a cognizable informational injury" because, the court believed, the information plaintiffs seek was "reported in some form" in Correct the Record's existing FEC filings. JA 294. According to the court, providing plaintiffs with further factual information about the undisclosed contributions would amount to a mere "legal determination," JA 296, and was "precluded by a faithful reading of *Wertheimer*." JA 297.

The court then ordered further briefing on whether plaintiffs could maintain their APA claim even if they lacked standing with respect to their FECA claim. In

the end, it dismissed this claim too, entering its final order dismissing the case on February 12, 2021. JA 309. This appeal followed. JA 318.

SUMMARY OF ARGUMENT

Plaintiffs appeal because the district court's ruling that plaintiffs lack standing is premised on three legal errors.

First, importantly, this is not a factual dispute. The district court agreed that neither intervenor disclosed (and the public record does not otherwise reveal) the detailed, FECA-required information plaintiffs seek regarding Correct the Record's in-kind contributions to the Clinton campaign, itemized with their specific amounts, dates, and purposes. Instead, the court focused on the degree to which some of this information could be "hypothetical[ly]" deduced from Correct the Record's existing FEC reports—by, for instance, disaggregating "lump sum" overhead disbursements into constituent coordinated "sub-expenditures," or intuiting "purposes" for such sub-expenditures that had not been reported. *See* JA 301-02.

This entire line of inquiry was in error. The basis for plaintiffs' informational injury is clear—their failure to obtain the FECA-required information sought in their administrative complaint about Correct the Record's unreported contributions to the Clinton campaign. Once it was also clear that the existing public record could not supply all statutorily required information, the inquiry should have been at an end. A plaintiff that "suffers an 'injury in fact'" under *Akins* because it "fails to obtain

information which must be publicly disclosed pursuant to a statute," 524 U.S. at 21, need not settle for hypothetical accounts of what the missing disclosures *might* be—particularly where, as here, the effort could be no more than partially successful.

Second, the district court suggests that wherever a plaintiff seeks information about contributions that are clearly subject to disclosure under the Act but may also implicate a collateral "legal determination"—for instance, "that [Correct the Record] vastly exceeded the $2,700 contribution limit and improperly used union and corporate funds in doing so," JA 296—the plaintiff's failure to obtain FECA-required disclosures about those contributions can never support informational standing. This is not how informational injuries work. A "finding of coordination" can lead to a legal determination that FECA's contribution restrictions were violated *and* prompt statutory disclosure obligations. A plaintiff's failure to receive all FECA-required information about a contribution is no less injurious simply because the undisclosed contribution could also implicate other FECA violations.

To hold otherwise is a distortion of *Wertheimer*. That case involved a request to construe terms in the Presidential Election Campaign Fund Act such that a class of political party expenditures coordinated with presidential candidates would constitute contributions to those candidates, and thus, would be prohibited when they supported publicly funded candidates. 268 F.3d at 1071. But the expenditures plaintiffs wanted to require candidates to report as contributions were already

required to be disclosed and itemized by political parties in a way that revealed all pertinent information about each transaction—they were designated "§ 441a(d) expenditures," or party-coordinated expenditures,[3] and reported with their amounts, dates, and purposes. Declaring again that those expenditures were "coordinated" therefore would amount to *only* a "legal conclusion" that the expenditures were unlawful. *Id*. at 1075.

Wertheimer's holding was that a plaintiff lacks informational injury if *all* it seeks is a legal conclusion or entirely duplicative reporting. It does not categorically preclude a finding of Article III injury simply because a plaintiff's informational harm stems from undisclosed coordinated expenditures, as the district court extrapolated incorrectly below. Indeed, interpreting *Wertheimer* in this way puts it in considerable tension with *Akins*, which underscored that FECA reflects "a congressional intent to cast the standing net broadly." 524 U.S. at 19.

Third, in addition to misconceiving plaintiffs' informational injury and misapplying *Wertheimer*, the district court erred in failing to consider whether plaintiff Campaign Legal Center had demonstrated a distinct organizational injury that would suffice to confer standing. The court initially found in its June 2020 decision that Campaign Legal Center had sufficiently pled organizational injury,

[3] Section 441a(d) was editorially reclassified as 52 U.S.C. § 30116(d), and pertains to expenditures by national and state party committees "in connection with general election campaign of candidates for Federal office." *See also infra* note 6.

although it did not make explicit if this was a stand-alone basis for standing. In its December 2020 ruling, the court found no informational injury due to deprivation of FECA-mandated information, but did not address whether Campaign Legal Center had nevertheless suffered an organizational injury sufficient to meet Article III standards.

For all these reasons, the district court's December decision should be reversed and the case remanded for further proceedings.

STANDARD OF REVIEW

This Court "review[s] questions of standing *de novo*." *Maloney v. Murphy*, 984 F.3d 50, 58 (D.C. Cir. 2020) (citing *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020)). "In doing so, [the Court] accepts as true the plaintiffs' material factual allegations, and . . . assume[s] that the [plaintiffs] would prevail on the merits of their lawsuit." *Id.* (citing *McGahn*, 968 F.3d at 762).

ARGUMENT

I. Plaintiffs Have Standing to Bring Their FECA Claim.

To show Article III standing, plaintiffs must establish three elements: (1) "injury in fact"; (2) causation; and (3) redressability. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). Each "element" of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiffs' injury—the deprivation of information to which they are entitled under FECA regarding the undisclosed in-kind contributions alleged in their administrative complaint—is directly traceable to the FEC's dismissal of their complaint. And the relief they seek—an order declaring the dismissal contrary to law—would unquestionably redress their injuries. *See Akins*, 524 U.S. at 25. Neither proposition was seriously contested below. The only real question in this appeal is whether plaintiffs have shown a cognizable "injury in fact," and specifically, whether the informational deprivation that caused their injuries satisfies the standards of Article III.

It clearly does. "[T]he denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." *McGahn*, 968 F.3d at 766 (discussing *Akins* and *Public Citizen v. DOJ*, 491 U.S. 440 (1989)). Here, FECA entitles plaintiffs to comprehensive disclosure of the in-kind contributions Correct the Record made and Clinton's campaign received in the form of coordinated expenditures—including itemized information about their dates, amounts, and purposes. There is no dispute that FECA requires this disclosure, nor that intervenors never provided it. In short, there is no question that the "statute (on the claimant's reading) requires that the information be publicly disclosed" and "there is no reason to doubt their claim that the information would help them.'" *Campaign Legal Center*

& Democracy 21 v. FEC, 952 F.3d 352, 356 (D.C. Cir. 2020) ("*CLC II*") (citation omitted). Plaintiffs have demonstrated their standing.

A. Plaintiffs have suffered informational injury.

1. The dismissal of their administrative complaint deprives plaintiffs of information that FECA requires to be disclosed.

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

Consistent with *Akins*, this Court has recognized that plaintiffs are injured in fact when an alleged FECA violation causes the concealment of information that is required to be disclosed under the statute, including information about coordinated expenditures. For example, in *Shays III*, this Court held that the plaintiff had standing under *Akins* to sue the FEC for promulgating an unlawfully narrow "coordinated communications" rule, which would result in presidential candidates failing to

"report as contributions many expenditures that [the plaintiff] believes [the Act] requires them to report." 528 F.3d. at 923. *See also Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 109 (D.C. Cir. 2012) (per curiam).

To be sure, *Akins* standing is unavailable in cases where the "information" plaintiffs seek is not factual information at all, but merely a legal determination about what FECA prohibits. *See Wertheimer*, 268 F.3d at 1074 (finding no standing where plaintiffs "failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information"). That undisputed principle has no bearing on this case, where plaintiffs' injury is not an abstract "interest in having the Executive Branch act in a lawful manner," *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997), but a concrete denial of plaintiffs' statutory right to obtain information.

Specifically, plaintiffs seek information about what expenditures Correct the Record made on the activities it coordinated with the Clinton campaign, and the amounts, dates, and purposes of these expenditures, *see* 52 U.S.C. § 30104(b)(3)—as the law requires to the extent they do not qualify for the FEC's limited regulatory exemption for unpaid online communications. And FECA treats all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" as "contribution[s] to such candidate," *id.* § 30116(a)(7)(B), subject to FECA's general

reporting requirements for "contributions." *See supra* at 7-9 (Statutory and Regulatory Framework).

The district court acknowledged these statutory reporting requirements, JA 288-89, and no party disputes that FECA requires full, itemized disclosure of a political committee's expenditures made in coordination with a candidate—by both the committee and the candidate. The FEC's failure to require such disclosure from Correct the Record and Hillary for America deprives plaintiffs of information that FECA requires to be disclosed.

That this outstanding disclosure might *also* support a legal determination that the unreported contributions were excessive or from prohibited sources does not obviate plaintiffs' right to receive the information that FECA requires. *See, e.g.*, *Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119, 122-23 (D.D.C. 2017) ("*CLC I*") (finding informational injury arising from alleged violations of "straw donor" prohibition that entails both disclosure obligations and contribution restrictions). The district court appeared to believe that where a "finding of coordination" implicated a "legal determination"—for instance, "that [Correct the Record] vastly exceeded the $2,700 contribution limit and improperly used union and corporate funds in doing so," JA 296—it would not entail the type of "factual information" that supports informational standing. This is incorrect. A "finding of coordination" can lead to both a legal determination that FECA's substantive contribution

restrictions were violated, 52 U.S.C. § 30116(a), *and* reporting obligations under 52 U.S.C. § 30104. A plaintiff's informational harm is no less significant simply because a disclosure violation is accompanied by other violations of law.

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

No party contends that Correct the Record or Hillary for America actually reported any of the in-kind contributions alleged by plaintiffs, or provided the itemized information about the amounts, dates, and purposes of such contributions as FECA requires. Still, the district court ultimately accepted that the information plaintiffs seek is already available to them, JA 299, whether through Correct the Record's past FEC filings or through the news reports and other sources cited in plaintiffs' administrative complaint.[4]

But plaintiffs have made clear that they do not know the magnitude of unreported in-kind contributions arising from this scheme: the public record does not reveal which activities were in fact coordinated between Clinton's campaign and

[4] Although news reports make clear that Correct the Record and Hillary for America coordinated *some* activities that gave rise to reportable in-kind contributions, plaintiffs know only the broadest contours of that activity, and nothing about the specific coordinated expenditures that funded it. This is a far cry from the detailed, verified campaign finance information, provided in disclosure reports filed under penalty of perjury, that FECA demands. Plaintiffs need not settle for incomplete second-hand information contained in media reports in lieu of the comprehensive verified disclosure they are owed under FECA.

Correct the Record, nor the extent to which any of Correct the Record's reported disbursements in fact funded its contributions to Clinton.

Indeed, even after reviewing the groups' filings and responses to the administrative complaint, the FEC's General Counsel determined that an investigation was necessary because "the extent" of Correct the Record's unreported in-kind contributions to the Clinton campaign remained unknown. JA 33 ¶ 4; JA 209. In similar circumstances, plaintiffs had informational standing to learn the true donors behind discrete contributions funneled through corporate entities to super PACs even though there were news reports suggesting who those donors might be—because "the [FEC's] General Counsel did not believe it knew the entire story about the contributions." *CLC I*, 245 F. Supp. 3d at 127. So too here: "[i]f the General Counsel did not know the whole story then, there is little reason to believe that plaintiffs know it now." *Id.*

a. Existing FEC filings lack the requisite information about Correct the Record's undisclosed in-kind contributions to Clinton.

Intervenors argued, and the district court ultimately accepted, that because Correct the Record's committee filings from the 2015-16 cycle reported all of the group's disbursements, plaintiffs are suing merely to have that spending "re-classified" as in-kind contributions. JA 303. But this argument is based on the false premise that Correct the Record's reports actually disclose specific, itemized "expenditures" that *could* be "re-classified" as coordinated or non-coordinated.

During the 2015-16 election cycle, Correct the Record filed periodic reports with the FEC disclosing $9.61 million in disbursements. JA 191. It reported no contributions to Hillary for America. JA 192.[5] As the FEC's General Counsel noted, most of Correct the Record's reported disbursements were for purposes that were "not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping." JA 192. Some of its disbursements were "explicitly mixed" between communications and non-communications purposes, including "video consulting and travel" and "communication consulting and travel." JA 193.

These generic and mixed-purpose disbursement descriptions do not reveal "[t]he details" of Correct the Record's in-kind contributions to Hillary for America "to the same extent" as FECA requires, JA 304, because they make it impossible to know whether or the extent to which any given payment supported its coordinated expenditures.

At the motion to dismiss phase, the district court recognized that the available reporting could not stand in for the missing FECA-required information, noting that "without itemized disclosures, [plaintiff] has no information as to the actual amount

[5] Correct the Record did report receiving two payments *from* Hillary for America in 2015, totalling $281,961—comprising less than 3 percent of Correct the Record's total receipts for the election cycle. JA 192.

of money that, in its view, should have been considered a contribution or expenditure under the Act." JA 95. *See also id.* ("[I]t seems likely that some portion of [Correct the Record]'s travel was 'in cooperation, consultation, or concert, with, or at the request or suggestion of' [Hillary for America] . . . but [plaintiffs] cannot know this amount . . . without itemized disclosures.").

The district court then reversed course, finding that under "a faithful reading of *Wertheimer*," this missing information amounted to only a legal "finding of coordination." JA 297. The court recognized that under *Wertheimer*, "it was 'conceivable that certain facts are necessarily implied by the label 'coordinated,'" but insisted that plaintiffs had "at no point . . . ever explained what those 'certain facts' would be." JA 298 (quoting 268 F.3d at 1075). This ignores the court's *own* prior ruling specifically noting those facts: FECA-required factual information about the amounts, dates, and purposes of Correct the Record's undisclosed in-kind contributions to Clinton. *See* JA 95.

This case is thus unlike the decisions cited by intervenors and the district court where all information about an allegedly coordinated expenditure—date, amount, purpose, recipient—was known, so it was conceivable to simply move "a PAC's travel expenditures totaling $10,243" from one line on a report to another and "reclassify" them as coordinated. *See* JA 303 (discussing *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 799 F. Supp. 2d 78, 89 (D.D.C. 2011)).

The same is not true here; even in its second opinion, the district court recognized that Correct the Record's reported disbursements would have to be "disaggregated" into more meaningful "sub-expenditures" to reveal the FECA-required information that remains undisclosed. JA 301. But there is no such thing as a "sub-expenditure." There are the "already-reported" general disbursements that Correct the Record did disclose and the in-kind contributions that neither intervenor disclosed; as a factual matter, the two are not equivalent. The district court was simply wrong to conclude that "[t]he details of the relevant transactions here have already been disclosed, *by Defendants*, to the same extent they would be if Plaintiffs' suit were successful." JA 304 (emphasis original).

b. A "hypothetical" reconstruction of the FECA disclosure information plaintiffs seek does not rectify their informational harm.

In order to make the informational deficit here more concrete, it is helpful to reexamine a specific category of spending to show how the district court's attempt to "reclassify" and "disaggregate" Correct the Record's reported disbursements is unworkable and does not provide the FECA information that plaintiffs are seeking.

For example, in the proceedings below, plaintiffs illustratively highlighted and the district court discussed Correct the Record's reported disbursements to one individual on its payroll (of its at least 20 to 30 paid staffers, *see* JA 156; JA 152-55 ¶ 90): namely, its 36 "salary" payments to David Brock totaling over $168,500. *See* Pls.' Opp'n to Motion to Dismiss at 17 (Dkt. No. 27). While the amounts of these

disbursements varied, one typical paycheck was the $4,521 that Brock received on July 28, 2016. Like most overhead expenses Correct the Record paid, this payment was reported simply as "Salary." *Id.* There is reason to believe, however, that Brock's salary payments compensated him for work in coordination with the Clinton campaign on matters other than exempt online communications. These portions should have been broken off from the lump sum disbursement and reported as in-kind contributions, including their dates, amounts, and purposes. *See* JA 199 (General Counsel's Report found that "[t]he available information shows that [Correct the Record] systematically coordinated with [Hillary for America] on its activities").

The district court initially recognized that the salary disclosure in existing reports could not cure Correct the Record's failure in the first instance to disclose all FECA-required information about its alleged coordinated expenditures. The court's June 2020 decision noted that if Correct the Record had correctly disclosed these salary disbursements (in whole or in part) as in-kind contributions to Clinton, it "would have [had] to report both (a) how much of Brock's salary paid for production costs related to internet communications not properly exempted from regulation under Plaintiffs' interpretation of the internet-communications exception, and (b) any of his other activities that were, despite [Correct the Record]'s characterization,

coordinated with [Clinton's campaign]." JA 94 (citing 52 U.S.C. § 30104(b)(2)(D), (3)(B), (5)(A), (6)(B)(i)).

Six months later, the district court found the opposite. But Correct the Record's reports provide *no* information about the dates or amounts of the in-kind contributions arising from those salary disbursements, nor "purpose" information indicating whether the disbursements related to exempt or non-exempt activity—making it impossible to determine whether they funded any of Correct the Record's "coordinated expenditures."

Nor is it possible to glean this information from Correct the Record's reported disbursements. Indeed, the full page that the district court has to devote to explain how plaintiffs could hypothetically disaggregate one disbursement of $4,521.56 for Brock's "salary" into differentiated coordinated "sub-expenditures," JA 301-02—meant to demonstrate how all FECA-required information *might* be deduced from Correct the Record's thousands of reported disbursements—instead testifies to the impossibility of reconstructing the actual coordinated expenditures plaintiffs allege occurred. If plaintiffs have to construct a "hypothetical world" and "suppose" facts about the FECA information they seek, JA 301, they plainly do not have access to that information in any meaningful way.

The granularity of this analysis should not obscure that the district court was essentially positing imaginary contributions to further the purely intellectual

exercise of whether disaggregation was feasible. The court "supposed" that half of one $4,521.56 monthly salary disbursement to one Correct the Record employee represented coordinated spending and should have been disclosed as an in-kind contribution of $2,260.78. JA 301. But this is not the FECA-required information plaintiffs are due; this is just a supposition in service of a hypothetical. What are the *actual* amounts, dates, and purposes of Correct the Record's contributions to the Clinton campaign? Both with respect to this single example, and across Correct the Record's *hundreds* of other disbursements? Plaintiffs remain in the dark. However well-intentioned, the district court's intelligent guess work is no substitute for the detailed and comprehensive disclosure plaintiffs are owed under FECA.

And these illustrative "salary" disbursements comprise only a small fraction of the universe of Correct the Record disbursements that could have funded its undisclosed contributions to the Clinton campaign. But they make clear that neither committee has provided the public accounting of coordinated expenditures to which plaintiffs are entitled under FECA, and Correct the Record's filed reports do not cure this failure.

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

Under *Akins*, a plaintiff suffers an injury in fact when it shows that it has been deprived of information that must be publicly disclosed pursuant to a statute, 524 U.S. at 21, and "there is no reason to doubt their claim that the information would

help them." *CLC II*, 952 F.3d at 356. There was no serious dispute that plaintiffs had proven this second element of the informational injury test below, nor did the district court dismiss on this basis. Nor is there any doubt that plaintiffs "suffer[], by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016).

Like the *Akins* plaintiffs, plaintiff Kelley is a U.S. citizen and a registered voter. JA 39 ¶ 26; JA 68 ¶ 1; *see Akins*, 524 U.S. at 13. As a voter, she wishes to use information missing from Correct the Record's and Hillary for America's disclosure reports to assess candidates for office and to evaluate the role that Correct the Record's funders and operatives and similar outside groups might play in the 2020 and future elections. JA 69 ¶ 4. Kelley would also use the information to evaluate the range of political messages she hears and to monitor the influence of campaign money on officeholders and public policy. JA 68-69 ¶ 3. As a result of the FEC's failure to require Correct the Record and Hillary for America to disclose the extent of their coordinated expenditures, Kelley cannot access concrete information that she would use in her capacity as a voter. JA 69 ¶ 5; *Akins*, 524 U.S. at 24-25 (holding that an informational injury is "sufficiently concrete and specific" when it is "directly related to voting, the most basic of political rights.").

The denial of access to complete and accurate FECA disclosure information also inflicts concrete injury on Campaign Legal Center (also known as "CLC"), which has been deprived of factual campaign finance information that is statutorily required to be disclosed and that would be helpful to its organizational mission and activities. *See CLC II*, 952 F.3d at 356. The informational rights Congress created by requiring disclosure under FECA applies with equal force to those individuals and organizations, like CLC, who "communicate" such information to voters to facilitate informed participation in the political process. *Akins*, 524 U.S. at 21 ("There is no reason to doubt [plaintiffs'] claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office.").

Indeed, a central way that Campaign Legal Center works to advance its mission involves researching the money used to influence elections and communicating its research to voters. *See* JA 71-77; JA 36 ¶ 17. CLC relies on the comprehensive information reported under FECA to develop a wide variety of public education materials, including reports, blogs, and social media content, to inform voters about the sources and extent of candidates' financial support and the role of outside groups in elections. JA 73-79 ¶¶ 11-21; 28. It also routinely uses information from FEC disclosure reports to prepare letters and complaints submitted to the FEC and state campaign finance agencies, JA 78 ¶ 22, support state and federal

court filings, JA 81-82 ¶¶ 36-37, and develop testimony and educational materials for legislators, partner organizations, and other policymakers, JA 78-79 ¶¶ 22-28; JA 39-40 ¶¶ 31-34. These efforts are directly harmed by the FEC's dismissal here. JA 35 ¶ 11.

B. Campaign Legal Center also suffers organizational injury, providing an alternative basis for standing that the district court failed to address.

Campaign Legal Center has also proven both prongs of the test for organizational injury: first, that the FEC's dismissal "injured [Campaign Legal Center's] interest," and second, that it "used resources to counteract that harm." JA 97 (citing *People for the Ethical Treatment of Animals (PETA) v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). Despite addressing this distinct claim of organizational injury in ruling on the motion to dismiss, the district court's second decision makes no mention of it, although plaintiffs' summary judgment briefing made clear that organizational injury was an independent basis for Campaign Legal Center's standing. The failure to address it was reversible error.

In addition to the statutory informational harm suffered by both plaintiffs, Campaign Legal Center suffers organizational injury because it depends on complete and accurate FECA information to advance its mission and programmatic activities. "As in *PETA*," the challenged agency action here "has 'perceptibly impaired'" plaintiff's "organizational interests by depriving it 'of key information that it relies

on' to fulfill its mission." *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 619 (D.C. Cir. 2020) (citing *PETA*, 797 F.3d at 1094).

The declaration submitted by Campaign Legal Center's Director of Federal Reform below describes in detail the injuries caused by incomplete FEC disclosures to each of the organization's four programmatic activities: public education, JA 73-78 ¶¶ 11-21; legislative policy, JA 78-79 ¶¶ 22-28; regulatory practice, JA 79-80 ¶¶ 29-32; and litigation, JA 81-82 ¶¶ 33-37. Most crucially, complete and accurate reports are essential for its efforts to analyze FEC reports and inform voters about campaign spending and the true sources and nature of candidates' support. *Id.* ¶ 9. Incomplete reporting also directly hinders Campaign Legal Center's ability to engage effectively in federal and state regulatory proceedings, develop reform proposals, provide expert and legislative testimony, and produce amicus briefs, because all of these activities depend on access to reliable and complete FEC disclosure data. *See* 79-81 ¶¶ 27-28, 32, 36.

And the organization has "used resources to counteract the harm." *PETA*, 797 F.3d at 1094. The inability to access information regarding intervenors' coordinated expenditures required Campaign Legal Center to "divert resources from other organizational needs"—including the public education and campaign finance reform activities detailed above—to answer questions from reporters and others about Correct the Record's and Hillary for America's incomplete disclosures. JA 77 ¶ 20.

The FEC's actions in this case thus caused plaintiff to divert resources from its routine, mission-furthering activities to attempt to remedy gaps in required reporting.

In its June 2020 decision, the district court found that Campaign Legal Center had alleged facts sufficient to establish a cognizable organizational injury, although it did not make clear if it considered this an independent basis for standing or contingent on establishing informational injury under *Akins*. JA 96-100. But it agreed that the FEC's dismissal injured Campaign Legal Center's organizational interests and impeded discrete programmatic activities by depriving it of information that "CLC needs for work central to its mission," JA 99, and concluded that these "injuries are surely "more than simply a setback to the organization's abstract social interests," JA 99 (quoting *Am. Anti-Vivisection Soc'y*, 946 F.3d at 618). The court also found that Campaign Legal Center had "pled in adequate detail" that it "must use resources to counteract the harms of inadequate disclosure." JA 100.

In its December 2020 ruling, the district court found no informational injury because it believed (incorrectly) that all the statutorily required information plaintiffs seek was available "in some form," JA 304 (quoting *Wertheimer*, 268 F.3d at 1074-75), a counterfactual that plaintiffs vigorously dispute. But it did not address whether the informational deprivation it deemed non-cognizable under *Akins* nevertheless inflicted organizational injury. This was a reversible omission.

Even if the conjectural, unverified, and incomplete information available to plaintiffs could suffice to rectify their statutory informational injury, Campaign Legal Center would still suffer cognizable organizational injury under *PETA*. Indeed, its "claim for standing is even stronger than was PETA's," because, "[w]hereas PETA had standing even though it had no legal right to the incident reports it sought," plaintiff here is seeking information that is unquestionably subject to public disclosure under the Act. *Am. Anti-Vivisection Soc'y*, 946 F.3d at 619 (citing *PETA*, 797 F.3d at 1103 (Millett, J., dubitante)).

As an organization that advances its mission by informing the press, policymakers, and the public about federal candidates' campaign financing, Campaign Legal Center cannot perform its core programmatic activities effectively with partial or unconfirmed disclosure data. The existing public record simply does not reveal the magnitude and nature of Correct the Record's contributions to the Clinton campaign, and whatever incomplete information it does contain is not a substitute for the detailed information FECA requires and on which Campaign Legal Center depends. But the district court failed to consider this harm.

II. Plaintiffs' Standing Is Not Categorically Precluded by *Wertheimer v. FEC*.

Plaintiffs' administrative complaint alleged that Correct the Record and the Clinton campaign had engaged in an ongoing scheme to coordinate campaign spending over the course of an entire election cycle, giving rise to numerous discrete

in-kind contributions—likely totaling in the millions of dollars, but their actual scope is impossible to quantify because not a single one was disclosed. The district court nevertheless concluded that under *Wertheimer*, these direct and continuing violations of FECA disclosure provisions inflict no cognizable informational harm. In so holding, the court came perilously close to treating *Wertheimer* as a reflexive barrier to Article III standing in all cases involving undisclosed coordinated expenditures, regardless of the factual context or statutorily required disclosure information outstanding.

But this analysis rests on an improperly confined view of the informational rights created in FECA. None of the precedents and lower court decisions cited in its December 2020 decision authorized the district court to circumscribe the informational rights FECA creates based on the form a contribution takes. Voters are entitled to detailed information about all contributions and expenditures by candidates, whether they arise from coordinated expenditures or direct cash transfers. The Act's treatment of coordinated expenditures as contributions reflects a congressional determination that when a candidate is involved in deciding how its supporters' resources are directed, that is a fact the public should know—on the same terms and to the same extent as any other contribution.

A. *Wertheimer* does not foreclose standing where plaintiffs fail to receive specific, FECA-required factual information that is neither "duplicative" nor "trivial."

Contrary to the district court's belief that *Wertheimer* and related "precedents spell doom for Plaintiffs' standing," JA 294, there is no categorical rule that FECA plaintiffs lack cognizable injury whenever the information they seek involves undisclosed contributions from a political committee to a candidate via coordinated expenditures.

This case is unlike *Wertheimer* in multiple material respects. For one thing, *Wertheimer* was an action under section 9011(b) of the Presidential Election Campaign Fund Act—not FECA section 30109(a)(8)—seeking a prospective construction of the terms "contribution" and "expenditure" within the meaning of the Fund Act, under its distinct review provision authorizing individuals eligible to vote for President to institute actions "as may be appropriate to implement or construe" its provisions. 268 F.3d at 1071. Unlike FECA, however, the Fund Act does not itself require any public disclosure. *Id.* at 1072. And unlike plaintiffs here, the plaintiffs in *Wertheimer* were seeking a forward-looking declaration construing the Fund Act to prohibit specific activity by classifying it as coordinated in the first instance; specifically, they sought a declaration that a class of political party expenditures coordinated with presidential candidates "constitute contributions to and expenditures by" those candidates, and "as a corollary," that publicly-funded

presidential candidates "may not coordinate with their respective political parties" on such expenditures. *Id.* at 1071.

But most importantly, unlike here, there was *no* outstanding factual information because the plaintiffs were seeking purely "duplicative reporting of information that under existing rules [was] already required to be disclosed." *Id.* at 1075. It was undisputed that political parties were required to report as coordinated "§ 441a(d) expenditures" precisely the transactions plaintiffs wanted presidential candidates to report as contributions, so "each transaction [plaintiffs] allege[d] [was] illegal" was in fact disclosed in the relevant political party's FEC reports as a coordinated expenditure, *id*. at 1074. And in its briefing, the FEC stressed that the complaint "made no *factual* allegations that any publicly funded presidential candidate had failed to report contributions from political party committees . . . or that any party committee had failed to report a soft money disbursement . . . or a coordinated expenditure in support of a presidential candidate," as was required under FECA and FEC regulations. *See* Br. for FEC at 35, *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001) (No. 00-5371), 2001 WL 36037938.

As Judge Garland explained in a succinct concurrence, the plaintiffs had "fail[ed] to articulate how a judicial declaration would provide them with additional information" given that the law already provided for the disclosures they sought:

> [Plaintiffs] contend that in the absence of the judicial declaration they seek, they are deprived of information that a political party committee

> has coordinated its expenditures with its presidential candidate. The FEC responds, *and appellants do not dispute*, that political party committees are already required to report and to identify such coordinated expenditures as § 441a(d) expenditures in their FECA filings.

268 F.3d at 1075 (Garland, J., concurring in the judgment) (emphasis added) (citing 2 U.S.C. § 434(b)(4)(H)(iv), (6)(B)(iv); 2 U.S.C. § 441a(d)(2); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001)). Because § 441a(d) expenditures were already required to be disclosed and itemized in a way that revealed all of the pertinent information about each transaction—the fact of cooperation between the party and the candidate, and the expenditure's amount, date, and purpose—declaring that those expenditures were "coordinated" would amount *only* to a "legal conclusion" that the expenditures were unlawful. *Id*. at 1075.[6]

On these facts, the judicial decree the plaintiffs were seeking would not "lead to additional factual information," but would merely create an obligation for candidates to provide "duplicative reporting" of coordinated spending that the parties were already disclosing as such. *Id.* at 1074-75. The Court was left to conclude that the plaintiffs were "only seek[ing] the same information from a different source." *Id.* at 1075. At the same time, however, the Court recognized that

[6] By designating these expenditures as "§ 441a(d) expenditures," the party flagged that those expenditures were coordinated with the candidate. *See* 52 U.S.C. § 30116(d)(2) (formerly codified at 2 U.S.C. § 441a(d)(2)) (limiting parties' spending "in connection with the general election campaign of [a] candidate for President of the United States").

there might be other contexts in which plaintiffs could show that "certain facts are necessarily implied by the label 'coordinated'"—but the plaintiffs there "did not make clear what were those facts (nor did they make this argument to the district court or in their briefs)." *Id.*

This case is very different. Here, plaintiffs seek a ruling that will result in *new* factual revelations—by compelling intervenors to disclose their coordinated expenditures and thereby reveal for the first time the precise amounts, dates, and purposes of Correct the Record's in-kind contributions to the Clinton campaign. Unlike in *Wertheimer*, the disclosures plaintiffs seek will uncover facts that do not duplicate and cannot be deduced from available FEC filings.

All of the other "precedents" that supposedly "spell doom" for plaintiffs' standing are also off point. JA 294. Each involved discrete—in most cases, singular—transactions as to which *all* pertinent, FECA-reportable facts were known, or at most, where any outstanding information was exceedingly de minimis or "trivial," or not actually subject to disclosure under the Act at all. *Wertheimer*, 268 F.3d at 1075; *see also, e.g.*, *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41 (D.D.C. 2003) (no informational injury where a candidate allegedly failed to report the complainant's *own* in-kind contribution because the individual was already "aware of the facts underlying his own alleged contributions"); *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 145-46 (D.D.C. 2005) (no informational injury stemming

from FEC's asserted failure to calculate the value of a mailing list that allegedly constituted an illegal in-kind contribution because it had "no single, objective value" and the plaintiffs already had access to the necessary data for an estimation because the FEC *did* investigate).

For example, in *CREW v. FEC*, 475 F.3d 337 (D.C. Cir. 2007) ("*CREW 2007*"), this Court held that a plaintiff lacked standing to challenge the FEC's dismissal of a complaint concerning an allegedly illegal contribution of a list of conservative activists to President George W. Bush's reelection campaign. *Id.* at 341. Despite having extensive information about the list and how the Bush campaign acquired it, the plaintiff claimed to sustain informational injury because no precise valuation of the list had been disclosed. *Id.* at 339. The Court explained that this theory of injury was "highly attenuated" because "the list's precise value—if that could be determined—*would add only a trifle* to the store of information about *the transaction* already publicly available." *Id.* at 339-40 (emphasis added). Moreover, the plaintiffs had not actually alleged any disclosure violations in their administrative complaint, making the asserted informational harms "appear unredressable." *Id.* at 339.

As Circuit precedent makes clear, the touchstone of the informational standing analysis is "the nature of the information allegedly withheld." *Common Cause*, 108 F.3d at 417. None of these cases involved allegations of informational harm that

were remotely comparable to the direct and significant disclosure violations at issue here. And the information plaintiffs seek—specifically, itemized information about each unreported in-kind contribution arising from a super PAC's "systematic" coordination with a presidential candidate across an entire election cycle, possibly totaling in the millions of dollars—can hardly be dismissed as a "trifle." *CREW 2007*, 475 F.3d at 340.

Wertheimer and its progeny cannot "dictate the outcome here." JA 303. Yet the district court relied on them to second-guess its own original determination that plaintiffs suffered informational injury because they were deprived of factual information. The upshot is that under its reading of *Wertheimer* and related cases, any injury premised on a failure to disclose in-kind contributions that take the form of coordinated expenditures amounts to a "legal conclusion," regardless of "the nature of the information allegedly withheld." *Common Cause*, 108 F.3d at 417.

The court's heavy reliance on another recent district court standing decision, *Free Speech for People v. FEC*, 442 F. Supp. 3d 335 (D.D.C. 2020), is instructive. *See* JA 298. In that case, the plaintiff already knew "(1) that an in-kind contribution took place, (2) the source of the contribution, (3) the *amount* of the contribution, (4) the *purpose* of the contribution, and (5) the *date* of the contribution"—and indeed, "a great deal more," by virtue of a federal criminal prosecution confirming many additional details about the one transaction at issue. 442 F. Supp. 3d at 343 (emphasis

added). The plaintiff suffered no informational injury because there was no conceivable information left to disclose under FECA, *id.*, not because the failure to disclose in-kind contributions as FECA requires can *never* give rise to a cognizable informational injury. *See* JA 298.

Far from "spell[ing] doom" for plaintiffs' standing, *Wertheimer* and its progeny make clear that the informational injury here falls squarely within the scope of those recognized as cognizable in *Akins*. Nor are plaintiffs' informational rights limited simply because the factual deprivation they identify, which "is accomplished and complete, and continues to be felt," *Maloney*, 984 F.3d at 61 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016)), involves undisclosed contributions that may have also violated substantive contribution limits or source restrictions. The standing inquiry assumes plaintiffs' theory of the law is correct—it does not turn back the clock and look at what factual information *would* have been subject to disclosure if all parties had followed the law in the first place.

As interpreted by the district court, *Wertheimer* would be in considerable tension with the governing precedent of *Akins*, a conflict the district court itself appeared to recognize. It noted that "[o]ne could be forgiven for thinking, as Plaintiffs appear to, that whether an expenditure was coordinated between a PAC and a campaign is a piece of information—regardless of its separate law-enforcement consequences—that citizens can also use to inform their participation

in the political process." JA 297. But plaintiffs do not claim to be injured because they lack information about "coordination"; they are injured because *when* an expenditure is coordinated, FECA compels its disclosure as a contribution.[7]

Fortunately this Court can easily avoid any potential conflict by recognizing that the coordinated expenditures at issue in *Wertheimer* were not only known to be "coordinated," but already required to be reported as such by parties, 268 F.3d at 1075 (Garland, J., concurring in the judgment). The Court thus had no occasion to consider whether plaintiffs deprived of the "fact of coordination" in the first instance would be injured. That would also avoid a conflict with the informational injury recognized in *Shays III*, which confirmed that the failure to obtain FECA-required disclosures about coordinated expenditures is "no differen[t]" than "the injury deemed sufficient to create standing in *Akins*." 528 F.3d at 923.

B. The broad informational rights in FECA are not vindicated by partial disclosure.

The district court "reverse[d] field" (JA 291) from its initial recognition that plaintiffs have standing based on a radical proposition: that FECA, a statute devoted

[7] Of course, it is also true that the "fact of coordination" could be a kind of information useful to informed voting, no less than the disclosures sought in *Akins*. As Judge Boasberg expounded, "upon learning that a candidate and a PAC coordinated, an interested voter could choose to avoid supporting, financially or electorally, that candidate or other candidates who coordinate with that same PAC or its leaders in the future. Why should the deprivation of such a finding not constitute actionable informational injury?" JA 297.

to informing voters in comprehensive detail about the money raised and spent in federal elections, creates no informational rights with respect to the actual *amounts*, dates, and purposes of in-kind contributions received by a candidate. JA 301-02.

But "'[t]he law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimant's reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them.'" *CLC II*, 952 F.3d at 356 (emphasis added) (citation omitted).

This principle is not limited to particular categories of FECA-required disclosure information. Under the district court's reading of *Wertheimer*, however, a plaintiff suffers a cognizable Article III injury only when it has *no* information about an in-kind contribution, notwithstanding its inability to obtain specific FECA-required information regarding the contribution's amount, date, or purpose. On this reasoning, a FECA plaintiff alleging a concrete denial of statutorily required disclosure information—including "how much money a candidate spent in an election," *Common Cause*, 108 F.3d at 417—lacks a cognizable injury wherever the immediate sources of the money are known but the amounts are not. And such a plaintiff's informational standing would be foreclosed regardless of whether "the increase in information resulting from" the legal ruling it seeks is "trivial," as in *Wertheimer*, 268 F.3d at 1075, or "admittedly quite high," as here. JA 304. That cannot be compatible with *Akins*.

Even if Correct the Record's total reported spending in 2015-16 at least suggests an upper limit for its overall in-kind contributions to the Clinton campaign, this possible ceiling cannot satisfy FECA's standard for comprehensive, itemized reporting of all campaign receipts and expenditures, nor vindicate the statutory "right to know who is spending money to influence elections, how much they are spending, and when they are spending it." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019) (citing *Akins*, 524 U.S. at 24-25).[8] Knowing that some proportion of Correct the Record's approximately $9.6 million of "already-disclosed" disbursements funded its unreported in-kind contributions to Clinton does not fulfill plaintiffs' informational rights under FECA to know *which* of Correct the Record's reported disbursements (and which portions of which disbursements) funded its coordinated expenditures, in what amounts, and for which purposes.

FECA mandates detailed, itemized disclosures of all contributions received and expenditures made by a candidate, including in-kind contributions in the form of coordinated expenditures. Congress provided for transparency about "[t]he sources of a candidate's financial support" to "aid the voters in evaluating those who

[8] This Court has recognized informational injuries where "plaintiffs sought to compel compliance with statutory provisions that guaranteed a right to receive information *in a particular form*." *Friends of Animals*, 828 F.3d at 994 (emphasis added) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982), and *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 615-19 (D.C. Cir. 2006)). The informational harm here is far more consequential.

seek federal office" and "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office," as the Supreme Court recognized in upholding the reporting requirements. *Buckley*, 424 U.S. at 66-67. Indeed, the comprehensive candidate disclosure provisions in FECA, which generally predate its contribution limits, are closely tied to the Act's original and animating purpose: achieving "total disclosure" of the amounts and sources of funds used to influence federal elections, *id.* at 76, so voters "know exactly how a candidate's campaign is financed." S. Rep. No. 92-229, at 57 (1971); *see also* S. Rep. No. 93-689, at 2 (1974) (noting that FECA was "predicated upon the principle of public disclosure").

Requiring the disclosure of "expenditures controlled by or coordinated with the candidate," as the Supreme Court has likewise made clear, is closely tied to FECA's core informational and anti-corruption purposes, because such expenditures "have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse." *Buckley*, 424 U.S. at 46. Accordingly, "Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated," *McConnell*, 540 U.S. at 221-22, and regulated them as contributions rather than expenditures to prevent "disguised contributions." *Buckley*, 424 U.S. at 46-47. Like all contributions to candidates, therefore, those taking the form of

coordinated expenditures are subject to FECA's comprehensive reporting provisions to expose them to "the light of publicity" and ensure "full disclosure." *Id.* at 67.

The disclosure provisions at issue here thus serve the electorate's compelling interest in knowing "where political campaign money comes from and how it is spent by the candidate," *id.* at 66, by requiring prompt, accurate, and complete disclosure of all funds a candidate receives and spends, as well as by preventing "disguised contributions" to candidates in the form of coordinated expenditures, *see id.* at 46-47.

The district court's disregard for the missing information here is patently at odds with the broad informational rights bestowed under FECA, where "[t]he whole theory of the statute is that voters are benefitted insofar as they can determine who is contributing *what* to whom." *Akins v. FEC*, 101 F.3d 731, 737 (D.C. Cir. 1996) (emphasis added) (en banc) (citing *Buckley,* 424 U.S. at 66-67), *vacated on other grounds by* 524 U.S. 11 (1998). What a candidate actually received and spent in an election is information at the heart of FECA's disclosure regime, and withholding it from plaintiffs here "is a quintessential form of concrete and particularized injury within the meaning of Article III." *Maloney*, 984 F.3d at 59.

CONCLUSION

For the foregoing reasons, the district court's December 2, 2020 ruling and February 12, 2021 final order of dismissal should be reversed, and the case remanded for further proceedings.

Dated: July 22, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

/s/ Megan P. McAllen
Megan P. McAllen

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2021, I electronically filed this Brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Megan P. McAllen
Megan P. McAllen

ADDENDUM

ADDENDUM – TABLE OF CONTENTS

Federal Statutes

Federal Regulations

UNITED STATES CODE
TITLE 52. VOTING AND ELECTIONS
Chapter 301—Federal Election Campaigns
Subchapter 1—Disclosure of Federal Campaign Funds

§ 30101. Definitions

When used in this Act:

* * *

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

* * *

§ 30104. Reporting requirements

(b) Contents of reports. Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;
(B) for an authorized committee, contributions from the candidate;
(C) contributions from political party committees;
(D) contributions from other political committees;
(E) for an authorized committee, transfers from other authorized committees of the same candidate;
(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;
(G) for an authorized committee, loans made by or guaranteed by the candidate;
(H) all other loans;
(I) rebates, refunds, and other offsets to operating expenditures;
(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of Title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 30116(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 30116(b) of this title;

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 30116(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all

operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office); and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

* * *

§ 30109. Enforcement

(a) *Administrative and judicial practice and procedure*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote

on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

* * *

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

* * *

§ 30116(a)(7) For purposes of this subsection—

* * *

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

* * *

CODE OF FEDERAL REGULATIONS
Title 11—FEDERAL ELECTIONS
Chapter I—Federal Election Commission
Subchapter A—General

§ 100.26 Public communication

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

* * *

§ 104.13 Disclosure of receipt and consumption of in-kind contributions.

(a) (1) The amount of an in-kind contribution shall be equal to the usual and normal value on the date received. Each in-kind contribution shall be reported as a contribution in accordance with 11 CFR 104.3(a).

(2) Except for items noted in 11 CFR 104.13(b), each in-kind contribution shall also be reported as an expenditure at the same usual and normal value and reported on the appropriate expenditure schedule, in accordance with 11 CFR 104.3(b).

* * *

§ 109.20 What does "coordinated" mean?

(a) *Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee. For purposes of this subpart C, any reference to a candidate, or a candidate's authorized committee, or a political party committee includes an agent thereof.

(b) Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted under 11 CFR part 100, subparts C or E.

§ 109.21 What is a "coordinated communication"?

(a) ***Definition.*** A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

(b) ***Treatment as an in-kind contribution and expenditure; Reporting***—(1) *General rule*. A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate, authorized committee, or political party committee with whom or which it is coordinated, unless excepted under 11 CFR part 100, subpart C, and must be reported as an expenditure made by that candidate, authorized committee, or political party committee under 11 CFR 104.13, unless excepted under 11 CFR part 100, subpart E.

(2) *In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section*. Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) *Reporting of coordinated communications*. A political committee, other than a political party committee, that makes a coordinated communication must report the payment for the communication as a contribution made to the candidate or political party committee with whom or which it was coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A candidate, authorized committee, or political party committee with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and as an expenditure under 11 CFR 104.3(b).

(c) ***Content standards.*** Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication, as defined in 11 CFR 100.26, that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

(4) A public communication, as defined in 11 CFR 100.26, that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv) of this section:

(i) *References to House and Senate candidates*. The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(ii) *References to Presidential and Vice Presidential candidates*. The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(iii) *References to political parties*. The public communication refers to a political party, does not refer to a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a regularly scheduled non–Presidential general election, the time period in paragraph (c)(4)(i) of this section applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a Presidential general election, the time period in paragraph (c)(4)(ii) of this section applies.

(iv) *References to both political parties and clearly identified Federal candidates*. The public communication refers to a political party and a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing only a reference to that candidate applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated outside the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(iii)(B) or (C) of this section that would apply to a communication containing only a reference to a political party applies.

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(d) ***Conduct standards.*** Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion*. (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement*. This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;
(iii) The means or mode of the communication;
(iv) The specific media outlet used for the communication;
(v) The timing or frequency of the communication; or
(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion*. This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor*. All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;
(B) Selection of audiences;
(C) Polling;
(D) Fundraising;
(E) Developing the content of a public communication;
(F) Producing a public communication;
(G) Identifying voters or developing voter lists, mailing lists, or donor lists;
(H) Selecting personnel, contractors, or subcontractors; or
(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor*. Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(6) *Dissemination, distribution, or republication of campaign material*. A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated,

distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

(e) ***Agreement or formal collaboration.*** Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication. Agreement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. Formal collaboration means planned, or systematically organized, work on the communication.

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