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' REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

SUMMARY OF ARGUMENT

During the 2015-16 election cycle, the super PAC Correct the Record filed reports with the Federal Election Commission ("FEC") disclosing $9.61 million in purportedly independent disbursements, all for the benefit of Hillary Clinton's presidential candidacy. JA 191.

But as plaintiffs-appellants Campaign Legal Center ("CLC") and Catherine Hinckley Kelley alleged in their administrative complaint, there was reason to believe that a significant proportion of this spending was coordinated with Clinton's campaign committee, Hillary for America, and did not pay for internet communications exempt from the regulatory coordination regime. *See* 11 C.F.R. §§ 100.26, 109.20, 109.21; Appellants' Opening Br. 9-11.

The Federal Election Campaign Act ("FECA") provides that coordinated expenditures are in-kind contributions and must be reported as such, itemized to disclose each contribution's amount, date, and purpose. *See* 52 U.S.C. §§ 30104(b)(2), 30116(a)(7)(B)(i); 11 C.F.R. §§ 104.3(a)-(b), 104.13(a); Appellants' Opening Br. 7-9. But Correct the Record did not report making any contributions to Hillary for America, and Hillary for America did not report receiving any contributions from Correct the Record. Indeed, throughout the administrative proceedings and this litigation, Correct the Record has maintained

that "none of [its] over $9 million in expenditures constitute in-kind contributions." JA 201.

Plaintiffs' informational injury thus rests on their uncontroverted claim that Correct the Record and Hillary for America, both intervenors here, failed to disclose "information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). Plaintiffs alleged in their administrative complaint that Correct the Record made, and Hillary for America received, numerous undisclosed in-kind contributions; the Commission dismissed the administrative complaint without remedying any of these disclosure violations; and plaintiffs accordingly filed this action to redress their resultant informational harm.

The inquiry should have ended there. Instead, intervenors persuaded the district court to accept that Correct the Record's existing disclosure reports could serve as a substitute for the statutorily required information plaintiffs seek. The question before this Court is thus a simple one: assuming plaintiffs are correct that Clinton received numerous in-kind contributions from Correct the Record, were those contributions disclosed by either intervenor in accordance with FECA—or if not, is all requisite factual information regarding these unreported contributions available in Correct the Record's existing FEC reports? The answer is no.

Correct the Record's 2015-16 reports disclose only the ostensibly independent disbursements of a registered super PAC,[1] which primarily took the form of undifferentiated overhead payments for expenses like payroll, rent, salary, and travel. It is impossible to discern which disbursements (or which portions of any given disbursement) paid for activities qualifying for the internet exemption and which paid for non-exempt activities coordinated with the Clinton campaign. Consequently, plaintiffs still do not know *how much* Correct the Record contributed to Clinton in total, nor the specific amounts it contributed to fund any particular coordinated activity or purpose.

Intervenors nonetheless maintain that plaintiffs can obtain all the information they seek simply by moving Correct the Record's reported disbursements from "Line 21" to "Line 23" of its committee reports, thereby reclassifying all of them as contributions. Int.-Appellees' Principal & Resp. Br. 32 ("Resp. Br."). But this assumes every Correct the Record disbursement, in its entirety, was a coordinated expenditure. Many, if not most, of its reported disbursements covered both coordinated and non-coordinated expenditures, which would first need to be disaggregated before any "reclassification" could occur. Recharacterizing *all* of

[1] Correct the Record is organized as a "hybrid" PAC, but operated almost exclusively out of its independent expenditure-only, non-contribution account, *i.e.*, as a super PAC. *See* JA 191; JA 115 n.1.

Correct the Record's disbursements as "in-kind contributions" would only generate more inaccurate and incomplete disclosure.

Indeed, even in ruling against plaintiffs at summary judgment, the district court recognized that Correct the Record's reports lacked information about the in-kind contributions alleged; that is why it attempted to illustratively "disaggregate" this data from the group's disbursements for "salary" and other overhead. JA 300-01. It is not plaintiffs' burden to conjure up missing FECA-required information about candidate contributions from an incomplete public record and guesswork. And regardless, the task of divining the actual amounts of Correct the Record's contributions from its current reports is clearly impossible. It would require repeating the district court's "disaggregation" exercise across numerous discrete disbursements—but when the district court attempted it with respect to a single $4,521 line item, even that yielded no more than speculation and hypotheticals. JA 300-02.

The dispute here is thus ultimately not whether FECA-required information is missing—it is—nor whether the missing information is useful to plaintiffs. Instead, intervenors and the district court dispute the "necessity" of this missing disclosure information, characterizing it as too "granular" to support a finding of cognizable informational injury. Resp. Br. 45. It was error for the district court to extend its inquiry beyond an analysis of whether plaintiffs are injured by the deprivation of

specific FECA-required information to an evaluation of whether "the plaintiffs have a cognizable interest in obtaining" this kind of information. JA 305. Here there is no dispute that FECA requires itemized, "granular" information about the dates, amounts, and purposes of all in-kind contributions made to or received by candidates. Plaintiffs have a "cognizable" interest in obtaining all information that FECA requires.

Instead of addressing plaintiffs' actual asserted bases for standing, intervenors devote much of their response brief to recharacterizing plaintiffs' merits arguments below. In particular, and contrary to every page in the record, they accuse plaintiffs of retreating from a merits position that *every* expenditure made by Correct the Record was coordinated with the Clinton campaign. Resp. Br. 7. This was never plaintiffs' argument. The central problem in both the standing and merits analysis has been the mixed nature of Correct the Record's activities and how to differentiate between its coordinated and non-coordinated expenditures. It is impossible to square intervenors' new conception of the case with the briefs and decisions below, all of which focused on how to determine which reported expenditures (or which portions thereof) qualified for the internet exemption and which did not.

But it is clear why intervenors push this revisionist account now: only if *all* of Correct the Record's expenditures were coordinated with the Clinton campaign can they credibly argue that there is no missing information about Correct the Record's

allegedly coordinated expenditures. Then, but only then, it might be possible to "reclassify" Correct the Record's disbursements as in-kind contributions simply by moving numbers from one line to another in FEC reports. But the public record does not suggest that Correct the Record engaged exclusively in coordinated expenditures, nor has this ever been plaintiffs' position. That intervenors must resort to misrepresenting the record only underscores the weakness of their defense: they cannot deny that the information plaintiffs seek was not reported by either intervenor, in any form or at any time.

ARGUMENT

I. Plaintiffs Have Demonstrated Informational Standing.

Plaintiffs have established "the 'irreducible constitutional minimum' of Article III standing: injury-in-fact, causation, and redressability." *Campaign Legal Center v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (citation omitted).

As intervenors note, the only live issue with respect to informational standing is the first prong: whether plaintiffs have established an injury-in-fact by showing "a denial of access to information . . . where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Id.* (citation omitted). *See also* Resp. Br. 2-3, 50. More specifically, the dispute centers on whether plaintiffs' informational injury is cognizable given the nature of the FECA-required disclosures

they seek—or whether, as intervenors insist, the district court was "precedent-bound" under *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), to conclude that plaintiffs lack standing. *See* Resp. Br. 26. This appeal thus turns on the legal errors committed by the district court when it reversed itself to find that plaintiffs lack informational injury.

Both plaintiffs have also clearly shown causation and redressability. Their injury flows directly from the FEC's dismissal of their administrative complaint, and can be redressed by a favorable decision in this action under 52 U.S.C. § 30109(a)(8). *See* Appellants' Opening Br. 22. While intervenors now contend that Plaintiff Kelley's injury cannot be redressed because "[t]he 2016 election is long-since over," Resp. Br. 50, there is "no reason to doubt" her continuing interest in this information and she is entitled to it under FECA; *Akins* requires no more. 524 U.S. at 21. *See also id.* at 25 (redressability inquiry considers whether injury is "fairly traceable' to the FEC's decision about which [plaintiffs] complain"); *Campaign Legal Center*, 952 F.3d at 356 (rejecting argument that organizations lacked standing because the information sought would not be useful in "personal voting" or partisan political activities).

There are no other contested jurisdictional facts: although intervenors insinuate that the district court reversed its initial standing ruling based on the heightened burdens plaintiffs must carry at each successive stage of the litigation,

Resp. Br. 27, the court at no point suggested that its reversal at summary judgment was based on anything other than a re-evaluation of legal precedent. *See* Appellants' Opening Br. 15-18. Regardless, plaintiffs clearly met their evidentiary burden: they submitted uncontroverted declaration testimony that prompted the district court to conclude (in its first ruling) that plaintiffs had "proven [their] informational injury" and "proven [their] standing." JA 100, 111. *See also* JA 68-70 (Kelley Decl.); JA 71-82 (Fischer Decl.).

A. The district court erred in finding that plaintiffs lack a cognizable informational injury.

1. Plaintiffs have been deprived of FECA-required information sought in their administrative complaint about Correct the Record's in-kind contributions to Clinton.

Under plaintiffs' reading of FECA and FEC coordination regulations—a reading shared by the FEC's General Counsel and half the voting Commissioners—Correct the Record's activities on Clinton's behalf likely gave rise to millions of dollars in coordinated expenditures. Both committees were required to disclose each in-kind contribution resulting from these efforts. *See* 52 U.S.C. §§ 30104(b)(2)-(6), 30116(a)(7)(B); 11 C.F.R. §§ 104.3(a)-(b), 104.13(a). Neither disclosed a single one.

"[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. Plaintiffs here suffer cognizable informational injury because they have been unable "to obtain information" about "campaign-related contributions and

expenditures . . . that, on [the plaintiffs'] view of the law, the statute requires that [respondent] make public." *Id.*

Intervenors' only response to this prima facie showing of informational deprivation is to reiterate over and over again that Correct the Record "disclosed all its 2015-2016 *expenditures* on campaign finance reports" and that the "amount, date, purpose, and recipient of each *expenditure* made by Correct the Record has already been publicly reported." Resp. Br. 6 (emphases added); *see also id.* at 24, 38-39. But plaintiffs are not seeking information about Correct the Record's purportedly independent "expenditures." They want to know what portions of this spending actually paid for its contributions to Clinton, and the specific amounts, dates, and purposes of *those* contributions. Otherwise put, plaintiffs do not seek to learn how much Correct the Record *spent*, but how much it *contributed* to Clinton—which both committees were required to report but neither did.

FECA requires an unauthorized committee like Correct the Record to report the total contributions it makes to other political committees, 52 U.S.C. § 30104(b)(4)(H)(i), and to itemize each contribution, *see id.* § 30104(b)(6)(B). Each in-kind contribution made by a political committee is also an operating expense of that committee, so the contributing committee must disclose the payment's recipient, "date, amount, and purpose." *Id.* § 30104(b)(5)(A); 11 C.F.R.

§ 104.13(a)(2). Reciprocal disclosure requirements apply to candidate committees receiving in-kind contributions. *See* Appellants' Opening Br. 7-9.

Intervenors do not contest these reporting requirements. But beyond making the irrelevant point that Correct the Record reported all of its ostensibly independent "expenditures" in the requisite detail, they also assert that the information it reported regarding these expenditures is exactly what it would have disclosed had it accurately reported its contributions to Clinton. *See* Resp. Br. 32-33 (asserting that if Correct the Record "change[d] its operating expenditures into in-kind contributions" the "amount, date, and purpose description" in its reports "would remain the same").

This cannot be correct. Correct the Record reported undifferentiated "lump sum" disbursements for various overhead expenses, without specifying which disbursements (or which portions of a given disbursement) were made for coordinated versus non-coordinated activities. *See, e.g.*, JA 192-93 ("[T]he bulk of [Correct the Record]'s reported disbursements are for purposes that are not communication-specific"—*e.g.*, payroll, salary, travel, lodging, rent, fundraising—or "for explicitly mixed purposes such as 'video consulting and travel' and 'communication consulting and travel.'"). Because only some portions of these multipurpose disbursements funded coordinated activity, the "amounts" reported cannot be correct. Nor were the "purposes" reported correctly; without accurate

information about whether or to what extent a disbursement paid for activities covered by the internet exemption, it is impossible to discern which of Correct the Record's disbursements funded its "coordinated expenditures" in the first place.

To illustrate this with an example, if a political committee made $50,000 in aggregate disbursements for "media consulting" in a reporting period, and some amount of that total was connected to non-exempt activities "coordinated" with a candidate, FECA does not permit the committee to report the $50,000 as a lump-sum disbursement for media consulting. Instead, the committee must itemize those particular expenses from the $50,000 total that funded "coordinated expenditures" and report them as contributions. Thus the campaign would have to report, for instance, an in-kind contribution in the form of a $20,000 coordinated expenditure for "media consulting re: press strategy (non-exempt)," and a $30,000 disbursement for "media consulting re: social media (exempt)." Only with accurate and complete reporting about the *in-kind contributions* made can the public understand what goods or services of value the committee has provided to the campaign. The $50,000 thus cannot simply be "move[d] . . . from Line 21 to Line 23" and "labeled . . . in-kind contributions." Resp. Br. 32. This "amendment" would also obscure and falsify the amount and nature of the actual in-kind contributions made.

Even the district court recognized that, on their face, Correct the Record's existing reports do not disclose any contributions to Hillary for America. JA 301-02.

Rather than ending the standing inquiry there, the court embarked on an unsuccessful effort to see if it could theoretically disaggregate information about the alleged in-kind contributions from Correct the Record's reported overhead disbursements. But as illustrated by the court's intensive attempt to tease apart a single $4,521 salary payment to David Brock into coordinated and non-coordinated "sub-expenditures," this endeavor was futile. The court came up with only a hypothetical $2,261 in-kind contribution that left plaintiffs none the wiser about the actual amounts or dates of even one single contribution that Hillary for America received from Correct the Record. JA 301-02.

The district court thus did not discover or "disaggregate" the missing information so much as deem it insufficiently important. In the words of intervenors, the court appeared to believe that plaintiffs "do not have standing to bring this lawsuit just because they wish that they had more granular—and unnecessary—details about how each dollar was spent." Resp. Br. 45; *see also* JA 301 (stating that "plaintiffs have no cognizable interest in unearthing" "new information" about the portion of Brock's salary payments that constituted in-kind contributions). But FECA requires exactly these details about "each dollar" spent in coordination with a candidate. It was error for the district court to conclude that plaintiffs have "no cognizable interest in learning 'which activities were in fact coordinated between [Correct the Record and Clinton's campaign],'" JA 295, or the actual amounts, dates,

and purposes of such transactions, JA 301—FECA creates this interest by requiring that the information be publicly disclosed. Moreover, the missing information in this case may appear "granular" when focusing on one particular transaction, but the scale of the informational deficit is harder to dismiss as "unnecessary" when considering that the *aggregate* undisclosed contributions likely totaled millions of dollars.

Intervenors are effectively proposing that if a political committee reports its aggregate spending for certain common line items—salary, travel, rent—it meets its disclosure obligations under FECA, regardless of its failure to disclose distinct reportable transactions, *e.g.*, candidate contributions, subsumed within that overall total. But by this logic, political committees could simply file a single post-election report disclosing their total spending, and declare that any more "granular" information was "unnecessary." While this one report might contain some FECA-mandated information, it is absurd to claim, as intervenors do, that this is all the statute requires.

FECA demands comprehensive information about the sources and scale of a candidate's financial support and a complete accounting of each candidate's spending: it is perhaps the most important information the Act requires. *See Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) ("[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent

by the candidate in order to aid the voters in evaluating those who seek federal office.") (internal quotation marks omitted). The information plaintiffs seek—the in-kind contributions a presidential campaign actually accepted and "spent" in an election—is precisely the kind of information that FECA's disclosure regime is designed to make public.

2. Intervenors' attempt to recharacterize plaintiffs' legal theory is both false and irrelevant.

Instead of defending the district court's standing decision on its own terms, intervenors devote much of their response to describing—and misrepresenting—plaintiffs' merits arguments below. Resp. Br. 33-36. But the assertion that plaintiffs have somehow "revamped" their merits argument is false. *Id.* at 33.

First, there is no support for intervenors' assertion that plaintiffs previously argued that "*every*" disbursement made by Correct the Record constituted a coordinated expenditure and thus an in-kind contribution to Clinton.[2] Resp. Br. 7. This is pure fabrication. The central and dispositive question in both the standing and merits analysis has been how the FEC should regulate the "mixed" activities of a committee that engaged in both exempt internet communications and a host of non-

[2] Intervenors also falsely assert that plaintiffs relied "on information 'illegally obtained by Russian intelligence officers through hacking operations and thereafter published on WikiLeaks.'" Resp. Br. 19 (citing JA 257 n.4). Not so. Several *other* administrative complaints considered alongside CLC's cited hacked Wikileaks information—but CLC's did not. *See* JA 54 ¶ 86; JA 57 ¶ 96; JA 263.

exempt activities, some of which had no conceivable connection to the internet. *See, e.g.*, Pls.' Summ. J. Opp'n 16 (ECF No. 42) (distinguishing between "direct production costs" and broader "inputs" for purpose of applying internet exemption, and noting that plaintiffs' case "does not rest on any finding that direct production costs for internet communications are non-exempt"); JA 105 (distinguishing undisputedly exempt costs related to internet communications like "email list rentals and contribution-processing fees" from broader "creation and production costs" that intervenors were also claiming as exempt). Intervenors themselves acknowledge that plaintiffs "do not dispute the existence of the internet exemption." Resp. Br. 12. Plaintiffs have never claimed that all of Correct the Record's spending was "coordinated" within the meaning of the law.

Intervenors thus have no basis for their charge that plaintiffs are "trimming the sails" of their merits arguments.[3] Further, there is no doubt that plaintiffs have

[3] The argument relies on misrepresenting a handful of selectively quoted sentences from plaintiffs' summary judgment briefs below, where plaintiffs were arguing that there was sufficient evidence to conclude that intervenors' coordination was not (as they claimed) entirely confined to exempt internet activities—by, for example, highlighting public reports suggesting the coordination was "broad" and "systemic." *See* Resp. Br. 35 (citing Pls.' Summ. J. Opp'n 38 (ECF No. 42)). Plaintiffs never argued that the coordination was total.

This section of the merits argument concerned only a subset of Correct the Record's expenditures—namely, those that even the no-voting Commissioners conceded were not exempt because they had no conceivable nexus to the internet. *See* JA 269. As to this subcategory, the Commissioners explained that dismissal was warranted because the complaint failed to present sufficient evidence to support

consistently centered their informational standing argument on whether intervenors' existing FEC reports sufficiently revealed which expenditures (or which portions of which expenditures) were coordinated. Indeed, two opposing district court opinions and multiple briefs below all focused almost exclusively on this issue. JA 95 ("[W]ithout itemized disclosures, CLC has no information as to the actual amount of money that, in its view, should have been considered a contribution"); JA 295 (noting plaintiffs' asserted interest in "finding out" "which, if any, of [Correct the Record's] expenditures, or which portions thereof," were coordinated).

However doubtful the basis of the "trimming their sails" charge, the intervenors' motivation in advancing it is clear. If *all* of Correct the Record's spending amounted to in-kind contributions to Clinton under plaintiffs' reading of the law—if, for instance, Correct the Record conducted *no* exempt internet activities—this case would look much more like *Wertheimer*. Only in these circumstances might it be possible to simply reclassify Correct the Record's disbursements by moving them from "Line 21 to Line 23." There would be no daylight between its reported "expenditures" and the "in-kind contributions" alleged.

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finding "reason to believe" that *any* of these offline expenditures were coordinated. JA 269-71. In response, plaintiffs argued that the public record at least "makes clear that CTR and HFA coordinated *some* activities that qualified as reportable in-kind contributions," but that "without an FEC investigation, [plaintiffs] do not know which activities were in fact coordinated." Pls.' Opp'n to Mot. to Dismiss 16 (ECF No. 27) (emphasis added).

But this is neither what the public record suggests nor what plaintiffs have argued. Indeed, the unique facts of this case explain why the district court's attempt to follow *Wertheimer* had the tenor of fitting a square peg in a round hole. The court felt bound to interpret *Wertheimer* as a near-absolute bar to informational standing in the context of coordination allegations for fear that a future litigant might "manufacture standing" by "trimming its sails and claiming only that some portion of a previously disclosed expenditure (or some subset of previously disclosed expenditures) should be treated as coordinated." JA 300. However, the cornerstone of the informational standing inquiry is not what future plaintiffs may allege, but "the nature of the information allegedly withheld" from plaintiffs in a given case. *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). The district court's focus on the possibility that later litigants may attempt to engineer standing based on pretextual or unsupported allegations about the "mixed" nature of a different committee's spending overlooks that here, all record evidence indicates that Correct the Record's spending was *in fact* mixed between exempt and non-exempt activities. It is contrary to every tenet of informational standing doctrine to hold that a plaintiff is not entitled to the information a statute requires and the plaintiff has not received because some later complainant might attempt to "manufacture" an analogous injury.

B. *Wertheimer* and its progeny support a finding of injury here.

Like the district court, intervenors strain to liken this case to *Wertheimer*—arguing that plaintiffs know all FECA-required information about Correct the Record's "$9 million dollars of disbursements [that] have already been reported." Resp. Br. 38-39. But again, this just elides the relevant informational harm. Plaintiffs have failed to obtain statutorily required disclosure information about Correct the Record's *contributions* to Clinton, individually or in aggregate. That Correct the Record reported its own "disbursements" does not reveal what proportion of its roughly $9 million in overall spending funded its contributions to Clinton—much less which of its specific disbursements did so in whole or part.

This is a far cry from the "duplicative" information deemed insufficient to support standing in *Wertheimer*, 268 F.3d at 1075. *See* Appellants' Opening Br. 39-44. The *Wertheimer* plaintiffs sought to require presidential candidates to disclose the *same* information about expenditures they coordinated with national political parties that the parties themselves were already required to disclose as "§ 441a(d) expenditures," *i.e.*, party-coordinated expenditures. *Id.* at 1075 (Garland, J., concurring). Moreover, the plaintiffs there, who were challenging the FEC's failure to define such coordinated spending as illegal if the coordinating candidate was publicly financed, asserted two theories of informational injury: one claiming the FEC's failure deprived them of purely duplicative reporting, and another claiming it

prevented them from "determining whether publicly financed candidates were abiding by the law." *Id.* at 1073. In the end, "they simply failed to establish that the ruling sought would yield *anything* more than a legal characterization or duplicative reporting of information that under existing rules is already required to be disclosed." *Id.* at 1075 (emphasis added).

But plaintiffs here are not seeking duplicative reporting or a declaration of illegality. *Wertheimer* would only be analogous to this case if Correct the Record had disclosed its contributions to Clinton and designated them as such, and plaintiffs were simply seeking reciprocal disclosure from Clinton of those *same transactions*. As intervenors read *Wertheimer*, however, a political committee's failure to disclose FECA-required information will likely *never* give rise to an informational injury: if the committee files even a single report, intervenors would argue that its receipts and disbursements would have been reported "in some form." That would amount to a breathtaking diminution of the informational rights created in FECA.

Intervenors also err in arguing that plaintiffs' attempt to learn which expenditures (or which portions thereof) represented in-kind contributions is nothing more than the pursuit of a "legal determination." Resp. Br. 8, 29. As plaintiffs have pointed out, when a statutory disclosure violation occurs and causes informational harm, that harm is no less potent simply because the undisclosed contributions might

also, once revealed, be found to violate other FECA provisions. *See* Appellants' Opening Br. 25-26.

The district court apparently agreed with intervenors.[4] Unlike intervenors, however, it at least acknowledged that plaintiffs are missing factual information. *See, e.g.*, JA 301 (noting that plaintiffs seek to learn what "portion of a CTR disbursement qualifies as a coordinated expenditure" and which "sub-expenditure was coordinated with [the campaign]"). The court, however, recharacterized this missing information as amounting to only the "fact of coordination," which "under *Wertheimer*" is merely "a legal conclusion" *Id*. (internal quotation marks omitted); *see also* Resp. Br. 34.

But the better and simpler way of seeing these omissions is to say that Correct the Record's reports lacked "amount" information for the alleged contributions, one of the basic categories of data required by FECA. The district court's convoluted language about legal conclusions and "sub-expenditures" elevates semantics above substance. Plaintiffs seek to know how much Correct the Record actually contributed to Clinton, information to which they are clearly entitled under FECA. Rephrasing

[4] Intervenors also defend the district court on the basis that it did "recognize[] that seeking a legal determination of coordination does not always foreclose a cognizable informational injury." Resp. Br. 45. The district court's reasoning may not "always" foreclose a finding of informational injury in future coordination cases—but it would wherever one of the coordinating groups is a federally registered political committee that reports some information about its disbursements.

this as an attempt to uncover the "fact of coordination" or obtain a "legal conclusion" does not make it analogous to *Wertheimer*; however framed, the legal ruling plaintiffs seek will lead to "additional factual information" that FECA requires to be disclosed. 268 F.3d at 1074.

Finally, insofar as the district court followed its own decision in *Citizens for Responsibility & Ethics in Washington v. FEC*, 799 F. Supp. 2d 78, 87-89 (D.D.C. 2011) ("*CREW*"), for the proposition that plaintiffs have no cognizable interest in knowing how much a committee contributes to a candidate, its reliance was misplaced. In *CREW*, Peace Through Strength PAC made $10,243 in disbursements to pay for the travel of then-presidential candidate Rep. Duncan Hunter, and, following a reason-to-believe finding and investigation, the FEC's General Counsel publicized its analysis of Hunter's trips and what the PAC had paid for each. *Id.* at 82, 88. The contributions were known in granular detail. At issue was the PAC's defense that some portion of the $10,243 disbursement also benefited the PAC, and consequently should have been allocated between the candidate and PAC such that the resulting contribution would not exceed the applicable $5,000 limit. *Id.* The concern was thus not whether or in what amounts the PAC had contributed to Hunter—that was known down to the dollar—but whether the FEC should have allocated these funds in such a way as to find a violation of FECA's contribution limits.

Here, by contrast, plaintiffs do not have *any* information about how much Correct the Record contributed to Clinton, much less an itemized accounting of these contributions like the one the FEC generated in the *CREW* case. And Correct the Record is not making a legal argument about how the contribution limits should be applied to an allocable expenditure; instead, it has denied making *any* contributions to Clinton. JA 201. Whatever persuasive weight *CREW* might merit in a different case, it should be afforded none here; it certainly does not support the conclusion, urged by intervenors, that plaintiffs' informational injury is "not an inquiry for additional facts" but merely an attempt to "reclassify" facts already available to them. *See* Resp. Br. 34. Accepting that plaintiffs lack a cognizable injury because the information they seek "is reported in some form," *id*. at 37, requires accepting that the actual amount of an undisclosed contribution—or a series of them—is not "factual information" as to which plaintiffs have any informational interest.

Neither *Akins* nor FECA permits circumscribing informational injuries in this manner. As intervenors themselves acknowledge, "if a legal determination of coordination would also actually result in the reporting of further factual information, then there would be a cognizable informational harm." Resp. Br. 25. So too here. Knowing the identities of contributors is a key element of such disclosure, JA 305 (allowing that "the identity of a contributor qualifies" as cognizable), but it is far from the only important piece of factual information that

FECA requires to be disclosed. The precise amounts, dates, and purposes of all candidate contributions is clearly also "factual information" subject to disclosure under FECA. *Cf. Common Cause*, 108 F.3d at 418 (finding no informational injury but acknowledging that infringement of "an interest in knowing how much money a candidate spent in an election" could be legally cognizable under *Akins*). And as the Supreme Court has made clear, 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. Plaintiffs are entitled under FECA to full disclosure of "where political campaign money comes from and how it is spent by the candidate," *Buckley*, 424 U.S. at 66-67—including the information they seek here about Correct the Record's undisclosed contributions to Clinton.

II. Campaign Legal Center Established a Distinct Injury to its Organizational Interests that the District Court Failed to Consider.

In briefing intervenors' motion to dismiss and the parties' cross-motions for summary judgment below, Plaintiff Campaign Legal Center made clear that it was asserting organizational injury as an independent basis for standing. Pls.' Opp'n to Mot. to Dismiss 25 (ECF No. 27) ("CLC also asserts a claim of organizational injury."); Pls.' Summ. J. Opp'n 9 (ECF No. 42) ("CLC has also proven both prongs of the test for organizational injury."). In its June 2020 decision, the district court found that CLC had not only shown informational injury, but also alleged facts sufficient to establish a cognizable organizational injury. JA 96-100. Upon reversing

itself on summary judgment and ruling that plaintiffs had suffered no informational injury, however, the district court failed to assess whether the deficiencies in intervenors' reporting nevertheless inflicted organizational injury on CLC. If the district court viewed the two injuries as interdependent bases for standing, it did not say so. This omission was reversible error.

Intervenors argue primarily that it is not "improper" for a court to "summarily reject [an] organizational standing" claim if it finds that the "organizational injury fails for the same reason an informational injury does." Resp. Br. 48. Certainly, a court could so hold. But the district court *here* did not—its summary judgment ruling did not address CLC's organizational standing at all. Intervenors go so far as to surmise that the court found that "the only separate and discrete injury alleged by CLC and Kelley was informational in nature, because any organizational harm was collateral[.]" Resp. Br. 49. But the court did not mention this issue at all.

The cases intervenors cite only underscore the omission. *See* Resp. Br. 48-49 & n.17. In all of them, the courts specifically analyzed whether the informational and organizational theories of injury "overlap[ped]," *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 115 n.9 (D.D.C. 2015), and only then explicitly rejected the plaintiffs' theory of organizational injury, *see Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017). No such analysis was undertaken here. The only holding on this issue was the district

court's June 2020 decision finding that CLC *successfully* stated a cognizable organizational injury. JA 96-100.

As the district court found, CLC has demonstrated organizational injury by showing, first, that the FEC's dismissal "injured CLC's interest," and second, that it "used resources to counteract that harm." JA 97 (citing *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). Correct the Record's failure to disclose complete and accurate information about its spending on supposedly exempt internet communications—making it impossible for CLC to know the true magnitude of intervenors' coordinated spending—impedes each of CLC's four programmatic activities: public education, JA 73-77 ¶¶ 11-21; legislative policy, JA 78-79 ¶¶ 22-28; regulatory practice, JA 79-80 ¶¶ 29-32; and litigation, JA 81-82 ¶¶ 33-37. In particular, accurate and complete reports are essential to CLC's efforts to inform voters about the true sources and nature of candidates' support, as well as the growing impact of super PACs on federal elections. JA 73 ¶ 9; *see PETA*, 797 F.3d at 1094-95 (finding organizational injury where an agency deprived an organization of information necessary to conduct public education efforts).

Even assuming plaintiffs lacked a "cognizable" informational injury under FECA, the deficiencies in Correct the Record's reporting still inflict concrete harm on CLC's operations and impede its pursuit of its mission. There is no dispute here that Correct the Record failed to disclose any in-kind contributions to Clinton or

delineate its expenditures in a way that would enable CLC to reconstruct the information it seeks. The district court ultimately found that this incomplete reporting did not constitute a cognizable informational injury under *Akins*, but only because it believed that most of this data was available to plaintiffs in "some form" or comprised the sort of "legal determination" that *Wertheimer* rejected as a basis for standing. JA 294, 296. Plaintiffs vigorously contest this ruling. But even in so holding, the district court was well aware of the deficiencies in intervenors' reporting, noting that "[o]ne could be forgiven for thinking . . . that whether an expenditure was coordinated between a PAC and a campaign is a piece of information . . . that citizens can also use to inform their participation in the political process." JA 297. So too is the "fact of coordination" a piece of information that CLC uses to inform its participation in the political process, as well as its efforts to educate the public about the financing of elections.

The failure to obtain this information perceptibly impairs CLC's programmatic activities, particularly its public education efforts. Because of the FEC's failure to require disclosure in connection with intervenors' alleged coordinated activity, CLC was required to "divert resources from other organizational needs" "to answer questions from reporters and allied groups about [intervenors'] incomplete disclosures." Pls.' Summ. J. Opp'n 10 (ECF No. 42). And although the district court apparently believes plaintiffs have access to all

information they are due under FECA in "some form," CLC still does not even know *how much* Correct the Record contributed to Clinton or *which activities* the contributions funded.

Both plaintiffs are concretely harmed when candidates knowingly and strategically conceal the amounts and sources of their contributions, as are all voters in their efforts to assess the "sources of a candidate's financial support" and "the interests to which a candidate is most likely to be responsive." *Buckley*, 424 U.S. at 67. But the FEC's failure to require accurate and complete disclosures from intervenors has inflicted extensive harm on CLC's operations as a campaign finance advocacy group, above and apart from its statutory informational injury under *Akins*. It was error for the district court to not even consider this claimed injury.

CONCLUSION

For these reasons and those stated in Appellants' Opening Brief, 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: September 8, 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 6,166 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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Tara Malloy

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, I electronically filed this Brief and Joint Appendix 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/ Tara Malloy
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