ORAL ARGUMENT NOT YET SCHEDULED

**No. 22-5336**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CAMPAIGN LEGAL CENTER
and CATHERINE HINCKLEY KELLEY,
*Plaintiffs-Appellees*,

*v.*

FEDERAL ELECTION COMMISSION,
*Defendant-Appellant*.

HILLARY FOR AMERICA and CORRECT THE RECORD,
*Intervenors*.

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

# PLAINTIFFS-APPELLEES' MOTION TO DISMISS

Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
Megan P. McAllen (DC Bar No. 1020509)
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200

*Counsel for Plaintiffs-Appellees*

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## GLOSSARY OF ABBREVIATIONS

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|---|---|
| **CLC** | Campaign Legal Center |
| **CREW** | Citizens for Responsibility and Ethics in Washington |
| **FEC** | Federal Election Commission |
| **FECA** | Federal Election Campaign Act |

## SUMMARY OF ARGUMENT

Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley respectfully move to dismiss this appeal. Appellant Federal Election Commission ("FEC" or "Commission") did not appear in the district court below until noticing the instant appeal, and instead attempts to raise "issues and legal theories not asserted at the District Court level" for the first time here. *Potter v. District of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009). The Commission's forfeiture of the issues it now seeks to appeal was complete and unexcused.

In 2019, plaintiffs initiated this lawsuit under the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30109(a)(8), to challenge the FEC's dismissal of their administrative complaint against the super PAC Correct the Record and Hillary Clinton's 2016 campaign committee, Hillary for America, for illegal coordination in the 2016 election cycle.

After dismissing plaintiffs' administrative complaint, the Commission affirmatively voted against authorizing defense of that dismissal in this case and did not appear. Instead of the Commission, respondents Correct the Record and Hillary for America intervened to defend the dismissal, and plaintiffs and intervenors litigated three rounds of dispositive motions in the district court, as well as an intervening appeal to this Court with full briefing and oral argument. As for the FEC, it remained on the sidelines throughout three years of the litigation, failing to file a

single pleading to defend the dismissal in the district court, despite having numerous occasions—and an operative quorum at most decisional junctures, *see infra* note 1—to do so.

The Commission only first appeared before the district court on December 21, 2022, almost two weeks after the district court issued an order and opinion holding the dismissal contrary to law and remanding the matter to the FEC to conform within 30 days. Addendum ("Add.") 2-21 But the Commission, rather than explaining its default or moving for reconsideration of the district court's order, instead noticed an appeal and moved for a stay pending appeal, which the district court subsequently denied. Add. 22-30.

The FEC's decision to sit on its rights for years, only to now seek an untimely and immediate leap to the Court of Appeals before attempting to present any arguments to the district court, is transparent "gamesmanship" that should not be permitted. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 98 (D.D.C. 2011). "[U]nder well-established law, a party forfeits a claim by failing to raise it below when the party 'knew, or should have known' that the claim could be raised." *Keepseagle v. Perdue*, 856 F.3d 1039, 1054 (D.C. Cir. 2017) (citation omitted). Moreover, none of the "exceptional circumstances" that this Circuit has identified as warranting consideration of "questions of law that were neither raised below nor passed upon by the District Court" appear here. *District of Columbia v.*

*Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984). This is a case of straightforward inaction, where the Commission affirmatively and deliberately chose not to appear in the district court for over three years; accordingly, the Commission's improper attempt to present its arguments in the D.C. Circuit in the first instance should be dismissed.

"[T]o the extent that the Commission now finds itself in a procedural tangle because of its late entry into this litigation, that is a knot of the agency's own tying," Add. 28—and it is not this Court's job to unravel it.

## PROCEDURAL HISTORY

On October 6, 2016, plaintiffs filed an administrative complaint with the FEC alleging that Correct the Record made, and Hillary for America accepted, unreported in-kind contributions in the form of coordinated expenditures, in violation of FECA's reporting requirements and contribution restrictions. Add. 6. Although the FEC's Office of General Counsel recommended that the Commission find reason to believe that Correct the Record and Hillary for America violated FECA, the FEC's then-four Commissioners deadlocked 2-2. Add. 23. *See also* 52 U.S.C. § 30109(a)(2). The Commissioners subsequently voted 4-0 to close the file, thereby dismissing the complaint.

Plaintiffs timely filed this action on August 2, 2019, challenging the dismissal of their FEC complaint under 52 U.S.C. § 30109(a)(8) and the Administrative

Procedure Act as contrary to law. Add. 8.

On June 4, 2019, the FEC voted on whether to authorize the defense of the controlling Commissioners' dismissal of plaintiffs' administrative complaint, but "failed to garner the four affirmative votes required by 52 U.S.C. §§ 30106(c) and 30107(a)(6) for the agency to defend [a] civil suit." *CLC v. FEC*, 334 F.R.D. 1, 4 (D.D.C. 2019) ("*CLC I*"). As a result, the FEC did not appear in or present any defenses to plaintiffs' action in the district court. Correct the Record and Hillary for America, however, sought and were granted the right to intervene as defendants. *Id.* at 7.

On February 4, 2020, intervenors moved to dismiss for lack of standing and failure to state a claim. Add. 8. On June 4, 2020, the district court denied the motion, holding that CLC had "proven its standing" and had stated a claim for relief. *CLC v. FEC*, 466 F. Supp. 3d 141, 154 (D.D.C. 2020) ("*CLC II*"). In considering plaintiffs' and intervenors' subsequent cross-motions for summary judgment on the merits, however, the district court "reverse[d] field" on plaintiffs' Article III standing, and dismissed their FECA claim without addressing the merits. *CLC v. FEC*, 507 F. Supp. 3d 79, 82-83 (D.D.C. 2020) ("*CLC III*").

Plaintiffs timely appealed. The FEC did not seek to appear in the appeal. On April 19, 2022, this Court reversed, holding that plaintiffs had established standing by "demonstrat[ing] a quintessential informational injury," and remanded the case

for "further proceedings consistent with this opinion." *CLC v. FEC*, 31 F.4th 781, 784, 793 (D.C. Cir. 2022) ("*CLC IV*").

Upon remand, plaintiffs and intervenors again briefed the "merits" of the Commission's rationale for dismissal, as well as additional jurisdictional arguments raised by intervenors. Again, the FEC chose not to appear. On December 8, 2022, the district court granted summary judgment in favor of plaintiffs, holding that "[b]ecause the Commission's decision was based on an impermissible interpretation of the Act and was otherwise arbitrary and capricious, its dismissal of Plaintiffs' complaint was contrary to law." Add. 20 The district court remanded the matter for "the Commission to conform with this decision within 30 days." Add. 21.

Thirteen days later, on December 21, the FEC appeared for the first time in the district court to notice this appeal of the December 8 order, and filed a motion for stay of the district court's remand order pending appeal. Add. 24. The Commission did not move for reconsideration of the district court's December 8 order or present any substantive arguments or defenses in the district court.

The Commission's 30-day deadline to conform, as prescribed in the remand order and in FECA, *see* 52 U.S.C. § 30109(a)(8)(C), elapsed one day after its stay motion was fully briefed, but the FEC made no attempt to conform. Accordingly, CLC initiated a private action against Hillary for America and Correct the Record three days later, on January 10, 2023, as FECA provides it the right to do. *See id.*

*See also* Compl., *CLC v. Correct the Record and Hillary for America*, No. 23-cv-75 (D.D.C. Jan. 10, 2023).

On February 1, 2023, the district court denied the FEC's motion for a stay, noting that the injury upon which the FEC's motion was predicated related to its "loss of exclusive civil-enforcement jurisdiction" should it fail to timely conform—but this had "already come to pass now that CLC has initiated a private action." Add. 27. In any event, the district court noted, the campaign finance disclosure that CLC sought served the public interest, and the FEC's motion would only cause further delay. *See id.* at 8 (noting the public interest in FECA reporting: "'[d]isclosure [requirements are] justified . . . on the ground that they . . . help citizens make informed choices in the political marketplace'") (quoting *Citizens for Responsibility & Ethics in Washington (CREW) v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018)).

## ARGUMENT

### I. The FEC Has Forfeited its Arguments by Raising Them for the First Time on Appeal.

The Commission has forfeited all of the issues it attempts to raise on appeal by virtue of its more than three-year default in the district court, where it did not file a single pleading, much less present any substantive arguments in the first instance defending its dismissal of plaintiffs' administrative complaint.

### A. Circuit precedent makes clear that the FEC has waived its appeal.

"It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Potter*, 558 F.3d at 550; *see also, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."); *Keepseagle*, 856 F.3d at 1054 ("[U]nder well-established law, a party forfeits a claim by failing to raise it below when the party 'knew, or should have known' that the claim could be raised."); *United States v. Dillon*, 738 F.3d 284, 293 (D.C. Cir. 2013) (when a party "did not argue the point before the District Court," "we generally inquire no further into the matter"); *Air Florida*, 750 F.2d at 1084 ("Decisions in this Circuit have consistently followed a practice of dismissing appeals brought on grounds not asserted in the trial court.").

This rule "is not a mere technicality but is of substance in the administration of the business of the courts." *Air Florida*, 750 F.2d at 1084-85 (quoting *Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947)). "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact," which is "essential" in order both that "parties may have the opportunity to offer all the evidence they believe relevant to the issues" and

that "litigants may not be surprised on appeal by final decisions there of issues upon which they have had no opportunity to introduce evidence." *Hormel*, 312 U.S. at 556; *see also Keepseagle*, 856 F.3d at 1055. Indeed, this Court has recognized that "if counsel were permitted to appeal upon points not presented to the court below," as the FEC urges here, this practice would mean "[a]lmost every case would in effect be tried twice." *Air Florida*, 750 F.2d at 1084-85 (internal quotation marks omitted).

Based on this clear authority, the FEC's appeal should be dismissed because the Commission has forfeited all of the arguments it now seeks to make. In fact, the concerns animating the rule regarding forfeiture are particularly acute in this case, where the FEC did not simply fail to raise its arguments below, but rather affirmatively chose not to appear at all during more than three years of litigation before the district court—including an intervening appeal to this Court with full briefing and oral argument. *Cf. Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1031 (D.C. Cir. 2020) (noting that "entertaining a belatedly raised" defense is inappropriate where it "implicate[s] concerns about sandbagging the district court"). Indeed, the Commission did not file a single pleading in the district court—save its appearance and motion for a stay based on this appeal filed almost two weeks after the December 8 order. Add. 2-21. The Commission has neither acknowledged nor attempted to excuse its de facto default in the district court—nor could it. *See Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987) (refusing to set aside

default judgment where it was "willful," a "set-aside would prejudice plaintiff[s]," and the defendant's proposed defense was not "meritorious").

The Commission argued, in briefing its motion for stay below, that there is "no inherent barrier to a defaulting agency" seeking to raise issues on appeal in the first instance, *see* FEC Reply in Supp. Mot. for Stay at 4 ("Stay Reply"), *CLC v.* FEC, No. 19-cv-02336-JEB, ECF No. 76, but the Commission cited no apposite authority from this Circuit supporting its claim. Indeed, most of the cases it cited are either off point or suggest the opposite. *Id.* at 4-5 (citing, *inter alia*, *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695 (D.C. Cir. 1994) (considering timeliness of intervention to appeal by a government agency *not* named in the original action); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (holding that only under "exceptional circumstances" may an appellate court consider issues not raised below)).

The Commission's forfeiture of its arguments is also not excusable, as it suggests, because the intervenors "made the arguments the FEC seeks to raise on appeal." Stay Reply at 4. First, even at this initial stage of the appeal, it is clear that the FEC seeks to press issues that the intervenors did not raise below, even in the broadest of senses. *See, e.g.*, FEC's Statement as to Issues on Appeal (Jan. 23, 2023), (Doc. #1982721) (questioning "[w]hether the district court had subject matter jurisdiction to issue an unqualified remand order"). But more fundamentally, the

FEC identifies no authority to support this proposition—nor could it, as permitting parties to jump in and out of litigation in this manner would authorize rampant gamesmanship and subvert the fair and deliberative process of adjudication. *See, e.g.*, *Baker*, 810 F. Supp. 2d at 98 (condemning as "gamesmanship" the attempt by defaulting defendants to "sit back and wait," and then "seek[] to vacate the judgment after eight years of litigation" when it was not "to their liking"). *Cf. Spanish Int'l Broad. Co. v. FCC*, 385 F.2d 615, 627-28 (D.C. Cir. 1967) (with regard to administrative exhaustion requirement, that "a person should not be entitled to sit back and wait until all interested persons" act and then "come into this court for relief" and attempt to "reopen[]" "the whole matter": that would create "an impossible situation" that would "permit successive appeals by many persons") (citation and internal quotation marks omitted).

In short, the Commission opted time and time again to default, *choosing* not to appear to defend itself in the district court or to raise any of the issues it now asks this Court to resolve. *Cf.* Add. 28 (noting that, "to the extent that the Commission now finds itself in a procedural tangle because of its late entry into this litigation, that is a knot of the agency's own tying"). It should not be rewarded for its own obstinacy. The Commission failed to protect its rights and, accordingly, its appeal should be dismissed.

### B. No "exceptional circumstances" exist here that would excuse the FEC's forfeiture of its arguments.

While this Court has recognized certain "exceptional circumstances" under which it has the discretion to consider questions of law that were neither raised below," none of those circumstances exist here. *Air Florida*, 750 F.2d at 1085 (citing, *inter alia*, *Homel*, 312 U.S. at 557).

This appeal does not present "a novel, important, and recurring question of federal law," nor was it occasioned by "an intervening change in the law" or "uncertainty in the state of the law." *Roosevelt*, 958 F.2d at 419 n.5. CLC brought a standard challenge to the FEC's dismissal of its administrative complaint under 52 U.S.C. § 30109(a)(8); dozens of such challenges have passed through this Circuit, governed by well-settled standards of review, *see Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)—that no party here disputes, *see, e.g.*, FEC's Statement of Issues (Doc. # 1982721), and which have not changed during the course of this litigation. Moreover, insofar as plaintiffs' challenge implicated any unique standing issues, those issues have already been thoroughly considered and resolved by this Court; thus, no open questions remain. *See CLC IV*, 31 F.4th at 784. The relevant statutory provisions governing coordination, *see* 52 U.S.C. § 30116(a)(7)(B)(i), have been on the books since shortly after FECA was enacted in the 1970s. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94–283, § 112, 90 Stat. 475 (1976). Finally, even if any open questions remained in terms of the FECA

provisions and Commission regulations underlying this case, CLC's ongoing private right of action against Correct the Record and Hillary for America, *CLC v. Correct the Record & Hillary for America*, No. 1:23-cv-75 (D.D.C.), provides a more than adequate venue to air any further questions of substantive law.

Dismissing the FEC's untimely and improper appeal also would not work "a miscarriage of justice" or threaten "the integrity of the judicial process." *Roosevelt*, 958 F.2d at 419 n.5. On the contrary, "[e]normous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice." *Air Florida*, 750 F.2d at 1084-85. It is the FEC's belated entry into this case that threatens the "integrity of the judicial process." *Roosevelt*, 958 F.2d at 419 n.5. Indeed, in arguing for a stay below, the FEC did not contest that its inexcusably late entry in this case would cause further delay. *See* Add. 29; FEC Mot. for Stay at 2, *CLC v. FEC*, No. 19-cv-02336-JEB, ECF No. 73 (acknowledging that the appeal would "add to the total duration of this case"). Instead, in perverse fashion, the Commission argued that relief in these proceedings has already been so severely deferred that another year or two of delay would amount to only a "minimal" marginal increase in prejudice to plaintiffs. *Id.* at 5-6.

Furthermore, as the district court found in denying the FEC's motion for a stay, the public interest is advanced by the campaign finance disclosure that CLC

seeks to obtain. Add. 29. Indeed, it is "well settled" that the public has "countervailing interests in receiving important voting information and in transparency." *CREW*, 904 F.3d at 1019. The Commission here, on the other hand, is not defending a statutory provision or a regulation of general applicability supported by well-recognized governmental interests, such as combating corruption or promoting transparency. *Cf. Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (defending 52 U.S.C. § 30101(6) and 11 C.F.R. § 102.14(a) on grounds that the provisions "limit[] fraud, abuse, and confusion"). Instead, the Commission seeks to defend the non-binding conclusions of a mere two Commissioners who declined to proceed on plaintiffs' administrative complaint; this minority opinion has no legal force or precedential value. *See Common Cause v. FEC*, 842 F.2d 436, 449 n.32 & 453 (D.C. Cir. 1988) (recognizing that minority Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases").

This case plainly does not present "exceptional circumstances" warranting consideration of the FEC's forfeited arguments, just run-of-the-mill inaction. The Commission sat on the sidelines for years, by choice, and its default cannot be excused by circumstances outside of its control, such as any lack of a quorum.[1] The

[1] Unlike in some other recent cases, the Commission's loss of a quorum in parts of 2019 and 2020 had no effect on its ability to appear or defend itself in this case. The Commission had an effective quorum: (1) when plaintiffs' administrative complaint

Commission's newfound zeal to litigate these issues was apparently not so acute as to motivate an appearance in the district court for over three years. And even after the Commission did finally decide to appear—almost two weeks after issuance of the December 8 order—it still made no attempt to present arguments to the district court, file any responsive pleadings, or move for reconsideration of the December 8 order.

Finally, it is unclear whether the December 8 remand order, which expired after the Commission failed to conform within 30 days, by its terms and in accordance with the Act, *see* 52 U.S.C. § 30109(a)(8)(C), has any continuing legal effects on the Commission's rights or obligations—or indeed, whether there is even a live case or controversy to be decided here. The predictable result of the FEC

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was dismissed and their cause of action to challenge that dismissal accrued, on June 4, 2019; (2) when plaintiffs filed this lawsuit, on August 2, 2019; (3) when the district court issued its ruling on intervenors' motion to dismiss, on June 4, 2020; and (4) when intervenor-defendants filed their Answer to the Amended Complaint, on June 18, 2020. *See supra* 3-6.

While the Commission was without a quorum from July 3 to December 9, 2020, it then regained a full complement of six Commissioners and has maintained one ever since, including throughout the appellate proceedings on plaintiffs' successful 2021 appeal, and for the duration of summary judgment briefing that ensued on remand. *See* Cong. Research Serv. Rep. No. 45160, *Fed. Election Commission Membership and Policymaking Quorum, In Brief*, at 3 https://crsreports.congress.gov/product/pdf/r/r45160 (updated Jan. 13, 2023). The FEC's failure to appear or file a single paper in this litigation until December 21, 2022—by way of an immediate appeal attempting to bypass the district court entirely—was assuredly not the product of helplessness or any inability to act.

waiting almost two weeks to seek a stay of the December 8 remand order was that its 30-day deadline to conform[2] expired prior to disposition of the motion and without any action by the FEC to conform. Accordingly, plaintiff CLC duly availed itself of its right to bring a private civil action against Correct the Record and Hillary for America under 52 U.S.C. § 30109(a)(8)(C), and the Commission's enforcement jurisdiction over the administrative complaint was terminated. *Cf. In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 543 (D.C. Cir. 1980) (noting, in the context of agency delay, that § 30109(a)(8) limits the FEC's exclusive enforcement authority). The Commission's appeal of the December 8 remand order—which now poses no obvious effects or burdens on its prerogatives under FECA[3]—would therefore appear to be moot.

[2] The FEC did not seek to extend the conformance deadline pending resolution of its stay motion although plaintiffs proposed this as an alternative.

[3] To be sure, some actions challenging FEC enforcement dismissals under 52 U.S.C. § 30109(a)(8) involve the validity of authoritative interpretations of law, which the Commission may have a continuing interest in defending, including after it has ceded enforcement jurisdiction over the underlying matter by failing to conform. But this is not such a case. The FEC disposition challenged here did not represent the majority position of the Commission, but instead the non-binding opinion of two Commissioners issued only to facilitate judicial review. *See Common Cause*, 842 F.2d at 449. One may fairly question if the Commission has any cognizable interest in defending a non-authoritative minority interpretation of law arising in an enforcement matter once it has voluntarily relinquished its jurisdiction over the matter and is under no further legal obligation to take any action.

In any event, even if there remains some live case or controversy here, the FEC's diminished—and likely non-existent—stake in the outcome of this appeal further reinforces that dismissal of its appeal for its failure to appear below would not work any "miscarriage of justice." *Roosevelt*, 958 F.2d at 419 n.5. Dismissal of this appeal is appropriate under the governing precedents of this Court, and will have little, if any, effect on the legal rights or interests of the FEC.

## CONCLUSION

For the foregoing reasons, the Commission's appeal should be dismissed.

**Dated: February 6, 2023**

Respectfully submitted,

*/s/ Tara Malloy*
Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
Megan P. McAllen (DC Bar No. 1020509)
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005
(202) 736-2200

*Attorneys for Plaintiffs-Appellees*

## CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 3,913 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also 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 the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

*/s/ Tara Malloy*
Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005

## CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I electronically filed this motion 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*

Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005

# ADDENDUM

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Campaign Legal Center (CLC) 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. CLC 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.

*/s/ Tara Malloy*
Tara Malloy (DC Bar No. 988280)
tmalloy@campaignlegalcenter.org
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, D.C. 20005
(202) 736-2200

*Attorney for Plaintiffs-Appellees*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,**

**Plaintiffs,**

**v.**

**FEDERAL ELECTION COMMISSION,**

**Defendant,**

**and**

**HILLARY FOR AMERICA and CORRECT THE RECORD,**

**Defendant-Intervenors.**

**Civil Action No. 19-2336 (JEB)**

**MEMORANDUM OPINION**

2006 was a big year for the internet: Twitter began operations, Facebook announced the News Feed, and the Federal Election Commission promulgated a Final Rule known as the "internet exemption," which exempts online communications placed without a fee from certain campaign-finance restrictions. That exemption, if perhaps overshadowed by the former two developments, lies at the heart of this case.

Plaintiff Campaign Legal Center filed a complaint with the FEC in October 2016, alleging that Correct the Record, a super PAC that supported Hillary Clinton in the 2016 presidential election, had improperly used the internet exemption to justify not reporting millions of dollars' worth of in-kind contributions. By an evenly divided vote, however, the FEC

effectively sided with CTR and declined to investigate. Its naysayers concluded that the exemption protected some of CTR's activities and that the Commission lacked sufficient evidence that others were coordinated with the Clinton campaign. CLC responded with this lawsuit to challenge that determination, and both CLC and CTR (intervening on behalf of the short-staffed Commission) now cross-move for summary judgment. Finding the Commission's analysis flawed on both points, the Court will grant CLC's Motion and deny CTR's.

## I. Background

The legal, factual, and procedural background of this case has by now been covered thrice by this Court and once by the D.C. Circuit. Campaign Legal Ctr. v. FEC, 334 F.R.D. 1, 3–4 (D.D.C. 2019) (CLC I); Campaign Legal Ctr. v. FEC, 466 F. Supp. 3d 141, 146–50 (D.D.C. 2020) (CLC II); Campaign Legal Ctr. v. FEC, 507 F. Supp. 3d 79, 81–83 (D.D.C. 2020) (CLC III); Campaign Legal Ctr. v. FEC, 31 F.4th 781, 784–88 (D.C. Cir. 2022) (CLC IV). The Court assumes familiarity with that compendium and here offers just the highlights.

### A. Legal Framework

Congress passed the Federal Election Campaign Act in 1971 to "remedy any actual or perceived corruption of the political process." FEC v. Akins, 524 U.S. 11, 14 (1998). As relevant here, the Act places various restrictions — amount limitations, disclosure requirements, and the like — on contributions to candidates. The term "contribution" under the Act is defined very broadly to include any "gift, . . . deposit 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). Non-monetary contributions, such as gifts of "staff time, office space, or other resources," are known as "in-kind" contributions. CLC IV, 31 F.4th at 784.

FEC regulations define a relevant subset of in-kind contributions: coordinated communications. See 11 C.F.R. § 109.21(a)–(b) (defining "coordinated communication" and treating as in-kind contribution). As elaborated in 11 C.F.R. § 109.21, a communication qualifies as a "coordinated communication," and so a type of in-kind contribution, if it is paid for by an entity other than the campaign, with the campaign's involvement or collaboration, and qualifies as one of certain types of public communications. See 11 C.F.R. § 109.21(a)–(d); Shays v. FEC, 414 F.3d 76, 98 (D.C. Cir. 2005). "Expenditures coordinated with a candidate . . . are contributions under the Act." FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 438 (2001). This structure is designed to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." Buckley v. Valeo, 424 U.S. 1, 47 (1976).

In a 2006 rulemaking, however, the FEC carved out a narrow exemption from the "coordinated communications" definition for unpaid internet communications — that is, "communications over the Internet . . . [not] placed for a fee on another person's Web site." 11 C.F.R. § 100.26; see Internet Communications, 71 Fed. Reg. 18589, 18593–95 (Apr. 12, 2006); see also 11 C.F.R. §§ 100.94(a), 100.155(a)(1) (providing that uncompensated internet activity does not constitute a contribution or an expenditure). This is the so-called "internet exemption," and it is at the crux of the dispute here. Its upshot is that unpaid internet communications, such as blog posts, do not count as in-kind contributions at all. In its explanation and justification for the rule, however, the Commission made clear that certain expenses related to unpaid communications could still themselves qualify as in-kind contributions. For instance, the Commission noted, "[A] political committee's purchase of computers for individuals to engage in [unpaid internet communications]" would still constitute an expenditure and so an in-kind

contribution if coordinated with a campaign — even if the ensuing unpaid internet activities conducted on that computer were exempt. See 71 Fed. Reg. at 18606; see also 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20. So, too, with staff salaries. The Commission explained that "if a political committee pays a blogger to write a message and post it within his or her blog entry," that salary payment would similarly (if coordinated) constitute an in-kind contribution — even if the blog post itself would not. See 71 Fed. Reg. at 18604–05. In other words, the Commission made clear the unremarkable conclusion that the internet exemption covers only unpaid internet communications themselves, and not all offline inputs to those communications.

FECA also sets out a specific scheme for enforcement of its provisions. Under the Act, any person who believes that a violation has occurred may file a complaint with the Commission. See 52 U.S.C. § 30109(a)(1). The FEC's Office of General Counsel reviews the complaint and any response and recommends to the Commission whether there is "reason to believe" a violation has occurred. Id. § 30109(a)(2), (3). The FEC Commissioners — six total, half from each of the two major political parties — then vote on whether there is "reason to believe" the Act was violated. Id. §§ 30106(a)(1), 30109(a)(2). If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint may not go forward. Id. §§ 30106(c), 30109(a)(2). If they deadlock, the "declining-to-go-ahead" Commissioners — who are the "controlling" Commissioners — must issue a Statement of Reasons, which provides a basis for judicial review. Common Cause v. FEC, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by the dismissal of a complaint may then seek such review. See 52 U.S.C. § 30109(a)(8)(A).

B. Factual Background

The Super PAC Correct the Record was conceived and organized specifically to press the limits of the internet exemption. See Matea Gold, How a super PAC plans to coordinate directly with Hillary Clinton's campaign, Wash. Post (May 12, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/ [https://perma.cc/AM7A-L9SX]), cited in ECF No. 43 (Joint Appendix) at 78–79, OGC Report at 7–8. Its activities, according to Plaintiffs' administrative complaint (and which Defendant-Intervenors do not dispute), included: producing voluminous digital content, conducting press outreach, staffing a "30-person war room" during Secretary Clinton's appearance before the House Select Committee on Benghazi, commissioning private polling about the campaign, training campaign surrogates and arranging their travel, sending "trackers" to record Clinton's opponents at events, and more. See OGC Report at 10–11 (JA 81–82).

Plaintiff Campaign Legal Center is a non-profit campaign-finance watchdog group. CLC II, 466 F. Supp. 3d at 148. CLC filed an administrative complaint with the FEC in October 2016. Id. Catherine Hinckley Kelley, a director at CLC and a registered voter, later joined as a Plaintiff in this suit. Id. CLC alleged that CTR had coordinated the aforementioned activities, which had millions of dollars in value, with the Clinton campaign (known as Hillary for America) — and did so without properly disclosing those expenditures as in-kind contributions and in gross violation of FECA's contribution limits. See OGC Report at 4–6 (JA 75–76); see also generally Administrative Complaint dated Oct. 6, 2016 (JA 3–54). In response, CTR argued that this spending qualified for the internet exemption because the items it purchased were inputs to CTR's unpaid online communications. See CTR Letter dated Jan. 24, 2017 (JA 62–71).

(CTR also contended that some spending fell within a separate exemption not relevant here. Id.) CTR did not dispute that its activities, and in particular its polling, surrogate training, and other offline activities, were coordinated with HFA. Id.

FEC's Office of General Counsel investigated the allegations and issued a report recommending that the Commission find reason to believe that several violations had occurred. See OGC Report at 27–28 (JA 98–99). Specifically, OGC concluded that CTR had "systematically coordinated with HFA on its activities," id. at 16 (JA 87), that the bulk of CTR's spending "cannot fairly be described as for 'communications' . . . unless that term covers every conceivable political activity," id. at 20 (JA 91), and that most of CTR's activities thus are not themselves communications at all but rather in-kind contributions to HFA. Id. at 22 (JA 93).

By a 2-2 vote, however, the deadlocked Commission (with two vacancies) rejected OGC's recommendation and dismissed the administrative complaint without further action. See Controlling Commissioners' Statement of Reasons, JA 226–43. The controlling and dissenting Commissioners each wrote a Statement of Reasons to explain their views. First, the controlling Commissioners concluded that "input costs" to online communications "are treated as in-kind contributions only when the internet communication itself is an in-kind contribution." Id. at 12 (JA 237). Because CTR's online polling, staffed war room, and the rest all resulted in unpaid internet communications, those expenses themselves were thus not in-kind contributions. Id. at 12–13 (JA 237–38). In the controlling Commissioners' view, this is a "bright-line rule." Id. at 13 (JA 238). Second, the controlling Commissioners concluded that insufficient record evidence indicated that CTR had coordinated with HFA on non-communications activities, such as CTR's surrogacy program, research and tracking, and contacts with reporters. Id. at 14–17 (JA 239–42). They accordingly declined to proceed with an investigation.

The dissenting Commissioners disagreed on both fronts. They first emphasized that the standard for opening an FEC investigation is very low: the Commission needs only a "reason to believe" that a violation has occurred. See Dissenting Commissioners' Statement of Reasons at 4 (JA 247). Here, the dissenters emphasized, the Commission's first holding impermissibly broadened the internet exemption, and its second ignored extensive evidence of off-the-internet coordination. Id. at 5–11 (JA 248–54). The dissenting Commissioners accordingly would have investigated CTR for possible campaign-finance violations.

C. Procedural History

In August 2019, CLC and Kelley filed this action challenging the FEC's dismissal order under 52 U.S.C. § 30109(a)(8). See ECF No. 1 (Complaint) at 22–23; see also ECF No. 15 (Amended Compl.). Plaintiffs asked the Court to declare that the Commission's dismissal was contrary to law and to remand the matter to the Commission for a reconsideration of its decision. See Amended Compl. at 29–30. The FEC failed to garner the four affirmative votes required by 52 U.S.C. §§ 30106(c) and 30107(a)(6) to defend this civil suit. CLC I, 334 F.R.D. at 4–5. Notwithstanding the Commission's apparent default, this Court permitted HFA and CTR to intervene as Defendants in November 2019 over Plaintiffs' objection. Id. at 5–7. (The Court will refer to Defendant-Intervenors jointly as CTR or Defendants.) Defendants then moved to dismiss the Amended Complaint, arguing that Plaintiffs lacked standing and had failed to state a claim under Rule 12(b)(6). The Court rejected both arguments, holding that CLC had standing to seek additional information from CTR and had pled facts that plausibly stated a claim against the FEC. CLC II, 466 F. Supp. 3d at 154, 162.

On motions for summary judgment, however, the Court "reverse[d] field" and held that Plaintiffs in fact did lack standing. CLC III, 507 F. Supp. 3d at 82. The Court explained that its

prior opinion had "not sufficiently take[n] account of" the Circuit's decision in Wertheimer v. FEC, 268 F.3d 1070 (D.C. Cir. 2001). CLC III, 507 F. Supp. 3d at 85. Under that case, a plaintiff lacks a cognizable informational injury where "the plaintiff 'do[es] not really seek additional facts[,] but only the legal determination that' the facts of which she is already aware amount to a legal violation." Id. at 84 (alterations in original) (quoting Wertheimer, 268 F.3d at 1075). The Court accordingly concluded that the information Plaintiffs seek "would not actually entail the disclosure of any information other than legal determinations of coordination" and therefore did not support informational standing. Id. at 88. The Court separately dismissed CLC's Administrative Procedure Act claim as precluded by FECA. See ECF No. 53 (Mem. Op. of Feb. 12, 2021, dismissing APA count).

Earlier this year, however, the D.C. Circuit reversed this Court's standing analysis. It concluded that Plaintiffs have standing because they seek the additional "factual information" of what proportion of CTR's spending constitutes coordinated contributions. CLC IV, 31 F.4th at 783. In so doing, that court took a different view of whether this type of information, about whether certain campaign spending is legally categorized as coordinated or not, constitutes a "fact" or a "legal conclusion" under Wertheimer. Finding "no doubt" that such information constitutes facts (albeit not really grappling with this Court's contrary analysis), the Circuit held Plaintiffs have standing to pursue their FECA challenges. Id. at 791–93. With the case now back in the district court, both sides have again cross-moved for summary judgment on CLC's two live FECA counts. See ECF Nos. 61 (CTR MSJ), 62 (CLC MSJ).

## II. Legal Standard

The legal question for a court reviewing the FEC's decision to dismiss an administrative complaint is whether that dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). "The

FEC's decision is 'contrary to law' if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious . . . ." Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986); see also CLC & Democracy 21 v. FEC, 952 F.3d 352, 357 (D.C. Cir. 2020).

With respect to the first of those two Orloski grounds, the Court's task is "not to interpret the statute as it th[inks] best," but rather to ask whether the Commission's interpretation is "sufficiently reasonable to be accepted by a reviewing court." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) (internal quotations omitted); see also CLC, 952 F.3d at 357 (same). With respect to the second, the Court applies the arbitrary-and-capricious standard of review provided by the APA. See 5 U.S.C. § 706(2)(A). As administrative-law practitioners well know, agency action is arbitrary and capricious if the Commission "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "'The scope of review [in an APA case] is narrow and a court is not to substitute its judgment for that of the agency,' provided the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Airmotive Eng'g Corp. v. FAA, 882 F.3d 1157, 1159 (D.C. Cir. 2018) (second and third alterations in original) (quoting State Farm, 463 U.S. at 43).

## III. Analysis

Plaintiffs challenge the Commission's dismissal under both prongs of Orloski. First, they reject its analysis of the internet exemption as contrary to law; second, they describe its conclusions about CTR's offline activities as arbitrary and capricious. In addition to resisting these positions, CTR also adds what it characterizes as a standing argument, contending that any injury to CLC is no longer redressable.

For narrative cohesion the Court begins with CLC's merits challenges and then considers (and rejects) CTR's standing contention. On the merits, it sides with Plaintiffs on both Orloski bases. The Commission's opinion was doubly flawed: first because it failed to define any limits on when "inputs" to online exempted communications themselves become offline in-kind contributions, and second because its analysis of CTR's offline activities flagrantly disregarded key pieces of evidence.

### A. Impermissible Interpretation

CLC first contends that the FEC's opinion constituted an "impermissible interpretation" of FECA. Orloski, 795 F.2d at 161. It emphasizes that the Act defines "contributions" and "expenditures" broadly and makes clear that contributions or expenditures made in concert with a candidate shall be reportable. See CLC MSJ at 12–21 (citing 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)). As for the internet exemption, Plaintiffs argue that CTR's expenditures were not on communications at all. They were instead on things like polling, computers, and staff time — which ultimately became "inputs" to communications, but were not themselves communications or sufficiently direct components of communications to be exempt.

The Court agrees. To state the obvious: the Commission's opinion would create a loophole in the internet exemption through which a truck could drive. Its self-described "bright-

line rule" excluding from regulation any input to an unpaid online communication would seemingly allow any coordinated expenditure to escape treatment as a contribution, so long as that expenditure somehow informs a blog post or improves a tweet. This massive expansion of the exception that essentially swallows the rule cannot stand for at least two reasons.

First, the Commission's decision contravenes FECA's plain language. See CLC II, 466 F. Supp. 3d at 157–58. As this Court has explained, the Act explicitly defines expenditures to include "anything of value," 52 U.S.C. § 30101(9)(A)(i), and includes as regulated contributions "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." Id. § 30116(a)(7)(B)(i); see 11 C.F.R. § 109.20(a) (same). By doing so, the statutory scheme "prevent[s] attempts to circumvent the Act through . . . disguised contributions." Buckley, 424 U.S. at 47. "Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly — say, paying for a TV ad or printing and distributing posters." Shays, 414 F.3d at 97; see also CLC II, 466 F. Supp. 3d at 158.

To comply with that statutory language, the internet exemption must be meaningfully bounded. Otherwise, as the Court has written, political committees could avoid reporting (and therefore limiting) almost any coordinated expenditure merely by posting a message on Facebook that purports to rely on that expenditure as an "input cost" to the post. CLC II, 466 F. Supp. 3d at 158. The controlling Commissioners' own explanation all but concedes that this is the world their approach puts us in. See Controlling Statement of Reasons at 13 (JA 238) (committing to "bright-line rule" that all "input costs" to unpaid internet communications, no matter scale or remoteness, qualify for exception). That approach cannot be squared with the

clear text, not to mention the clear purpose, of the statute. See 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i); see also Buckley v. Valeo, 424 U.S. at 47.

Perhaps appreciating these weaknesses, CTR spends much of its briefing supplementing the Commission's reasoning with *post hoc* justifications. It suggests that the Commission's interpretation has not resulted in widespread abuse, that other regulatory provisions can check the worst abuses, and that First Amendment considerations favor its approach. See CTR MSJ at 10–12. But these are not justifications that the Commission offered in its Statement of Reasons (beyond an entirely threadbare reference to the First Amendment), and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." State Farm, 463 U.S. at 50; see also SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (courts "judge the propriety of [an agency's] action solely by the grounds invoked by the agency"). That principle rings particularly true here given that an intervenor, not even the Commission itself, is the one offering these arguments on the Commission's behalf. See CLC MSJ at 18.

Second, the controlling Commissioners' anything-goes approach is inconsistent with Commission precedent. When publishing the Final Rule exempting unpaid internet activity from the definition of a contribution or expenditure, "[t]he Commission note[d] that" the Rule "does not exempt all political activity involving the use of technology from regulation." 71 Fed. Reg. at 18,606. Importantly, the FEC there explained: "Therefore, 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." Id. Expenditures, as discussed above, are treated as contributions where they are coordinated with a campaign committee. See Colo. Republican Fed. Campaign Comm., 533 U.S. at 438.

The FEC thus made clear in its original rulemaking that inputs to unpaid online communications can themselves still be in-kind contributions.

The Commission here bucked that commonsense approach. Most objectionably, it considered polling services, which it has long treated as "an in-kind contribution," just the way that the 2006 Rule instructed it not to. See CLC II, 466 F. Supp. 3d at 158 (quoting Fed. Election Commission, Campaign Guidance: Nonconnected Committees 25 (2008), https://www.fec.gov/resources/cms-content/documents/nongui.pdf [https://perma.cc/53DN-C52H]). Indeed, the FEC's own OGC had emphasized in its 2018 report that "placing poll results on [CTR]'s own website" may be covered by the internet exemption, but that "payment for the underlying polling" would not be. See OGC Report at 20 (JA 91); see also id. ("The fact that the polling results were subsequently transmitted over the internet does not retroactively render the costs of the polling a 'communication' cost."). This coordinated expenditure is virtually indistinguishable from the computer example in the 2006 Rule. In other words, substitute "polling" for "computers" as the relevant in-kind contribution and the Rule resolves this case — but the opposite way from how the controlling Commissioners did. Similarly, the controlling Commissioners treated the purchase of "video equipment" and "software" as non-expenditures falling within the internet exemption, notwithstanding the fact that (just like the hypothetical computers) both sets of equipment can just as easily be used to produce paid versus unpaid communications and are not exempt just because of their connection to an unpaid communication. The controlling Commissioners' analysis thus without explanation flew in the face of the examples and reasoning the Commission had itself offered when promulgating the rule.

CTR rejoins that the Commission's approach appropriately follows from a prior 2013 FEC decision. There, the Commission had concluded that a PAC's payment of $118,000 for "email list rentals and contribution-processing fees" in connection with "email solicitations" for donations fell within the internet exemption. See Controlling Statement of Reasons at 13 (JA 238) (citing MUR 6657 (Akin for Senate)). As this Court previously held, however, "The difference between those 'input costs' and the 'creation and production costs' at issue in this case is one of kind and not of degree." CLC II, 466 F. Supp. 3d at 157. The exemptions that the Commission permitted here "are far broader categories of expenses, and far less directly connected to a specific unpaid internet communication, than email-list rentals and donation-processing software purchased to enable email blasts." Id. Indeed, if anything, the Commission's email-list case illustrates the vast gulf between narrow, direct-communications inputs and the wholesale coordinated-communications operation CTR ran here. The Commission's failure to distinguish these categorially different operations undermines its precedent.

Because the Commission's expansion of the internet exemption would thus swallow both the statute and the regulation, the Court holds that it is contrary to law and thus invalid under Orloski's first prong. The Court leaves the task of defining the exemption's precise parameters to the expert agency, so long as it is consistent with the principles expressed here.

B. Arbitrary and Capricious

CLC also challenges the second half of the Commission's opinion as arbitrary and capricious, arguing that it disregarded evidence that various offline activities (that undisputedly did not qualify for the internet exemption) were coordinated with the Clinton campaign. See Orloski, 795 F.2d at 161. Here, too, the Court agrees with Plaintiffs.

The Commission's Office of General Counsel documented substantial evidence, both leaked and public, of systematic coordination between HFA and CTR — evidence that the controlling Commissioners largely (and unreasonably) ignored. The Court highlights just some illustrative examples. One early internal HFA memorandum proposed countering attacks on Clinton "through work of CTR and other allies," and another noted that having CTR pay a governor to work as a surrogate would allow HFA to "make sure her speaking and media opportunities met our needs/requests." OGC Report at 12–13 (JA 83–84). In a January 2016 email, someone from HFA described "engag[ing] CTR" as part of an effort to "rally the troops to defend" an anticipated attack. Id. at 13 (JA 84). A CTR fundraiser, in an update sent to the HFA chairman, described the structure of CTR as "allow[ing] CTR to retain its independence but coordinate directly and strategically with the Hillary campaign." Id. at 14 (JA 85). And so forth. See generally CLC II, 466 F. Supp. 3d at 16 (discussing these examples).

Even setting aside internal campaign documents as the fruits of a poisoned Wikileaks cache, moreover, OGC documented ample public information that was more than sufficient to support opening an investigation. Again, only a sampling suffices to make the point. In the press release announcing its creation, a CTR spokesperson described the super PAC as "a strategic research and rapid response team designed to defend Hillary Clinton from right-wing baseless attacks" and stated that the committee intended to "work in support of Hillary Clinton's candidacy for President, aggressively responding to false attacks and misstatements." OGC Report at 8–9 (JA 79–80). So far, so good. But the press release also stated that, because CTR would not be engaged in "paid media," it would "be allowed to coordinate with campaigns and Party Committees." Id. at 8 (JA 79). CTR again stated a few days later that activity posted for free online could "be legally coordinated with candidates and political parties," id., suggesting

that it undertook many of its activities "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C. § 30116(a)(7)(B)(i).

As further evidence, CTR chairman David Brock stated in an interview that "the coordinated status was, you're basically under their thumb but you don't have to run everything by them." OGC Report at 11 (JA 82). He elaborated that when, for example, he had raised an issue in public before first consulting the Clinton campaign, he "took [his] lumps and then [he] obeyed" after the HFA chairman tweeted that he should "chill out." Id. On another occasion, CTR changed its position on defending the Clinton Foundation after a discussion with an HFA campaign manager. The reason, Brock stated, was that "we are a surrogate arm of the campaign and you need the campaign on board for this." Id. at 12 (JA 83). Indeed, perhaps recognizing the overwhelming evidence of coordination, CTR did not even deny before the Commission that it had systematically coordinated with the Clinton campaign. See CTR letter dated Jan. 24, 2017 (JA 62–71).

The controlling Commissioners' failure to engage with these facts was arbitrary and capricious. They did not meaningfully consider these broad statements of intent to coordinate and instead looked for "transaction-by-transaction" evidence of coordination. See Controlling Statement of Reasons at 16 (JA 241). That approach ignored CTR's entire *raison d'être*. In view of CTR's statements, the Commission could have found individual activities independent had it identified evidence that, for instance, those activities were walled off from the organization's otherwise coordinated work. But the Commission did not do so. It instead looked at the record piecemeal and in so doing ignored the overwhelming and public evidence that the organization's entire purpose was top-to-bottom coordination with the Clinton campaign.

That approach was all the more arbitrary given what a low bar the reason-to-believe standard represents. As the dissenting Commissioners observe, the standard does not require "conclusive evidence" that a violation occurred or even "evidence supporting probable cause" for finding a violation. See Dissenting Statement of Reasons at 4 (JA 247). Instead, the Commission here needed "only a credible allegation that coordinated activity yielded an impermissible contribution." Id. That it had. The Commissioners nitpicked around the margins, arguing that OGC's conclusions about coordination were the result of "selective Google searches" and did not show that CTR "fully coordinated its activities with Hillary for America." SOR at 7 (JA 232). Even if all that were true, it would not support the Commission's rejection of credible allegations that at least some of the millions of dollars of expenditures CTR reported were coordinated such that investigation was warranted. The Commission's blinkered view of the record is thus particularly erroneous given the very low evidentiary bar that CLC needed to clear, rendering its analysis arbitrary and capricious under Orloski's second prong.

C. Standing and Mootness

Merits concluded, the Court now wends its way back to CTR's standing challenge, which boils down to this: Plaintiffs' injury is no longer redressable because (1) the FEC "most likely" would dismiss the matter because of FECA's five-year statute of limitations, see CTR MSJ at 20, and (2) today, half a decade after the 2016 election, CTR would probably be unable to reconstruct much of the reporting information CLC seeks. Id. at 26.

Neither of these arguments bears fruit. To begin, CTR's assertion really concerns mootness, not standing. That is apparent from the silence in its Reply after CLC pointed this out. See ECF No. 64 (CTR Reply) at 15–18. That concession aside, CTR's contention is that the injury is "no longer redressable," not that it never was. See CTR MSJ at 2. Indeed, the D.C.

Circuit has just held in this very case that Plaintiffs have standing. CLC IV, 31 F.4th at 783. And nothing has changed between the Circuit's ruling and today. As Plaintiffs note, both the statute-of-limitations issue and the evidence-decay issue that CTR now discusses could have been raised in primary or supplemental briefing before the Circuit. See ECF No. 65 (CLC Reply) at 11 n.3. CTR's new argument, then, is best viewed as contending that the case has become moot over time.

"[W]here litigation poses a live controversy when filed," it is "mootness doctrine" that "requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." LaRoque v. Holder, 679 F.3d 905, 907 (D.C. Cir. 2012) (alteration and citation omitted). "The initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot." Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n, 628 F.3d 568, 576 (D.C. Cir. 2010).

This CTR has not borne. First, it has not shown that the 28 U.S.C. § 2462 statute of limitations bars relief in this case. That is so for several reasons. To begin, CLC is correct that § 2462 likely does not preclude equitable relief — or at least that CTR has not carried its burden to establish the contrary. See, e.g., FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 20-21 (D.D.C. 1995) ("[I]t is well settled that '[t]raditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief,'" and "the explicit language of § 2462" in particular "only refers to 'enforcement of any civil fine, penalty or forfeiture.'") (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)). The relief sought here — producing reports of undisclosed in-kind contributions — is thus likely a permissible equitable remedy. Second, CTR has shown no reason why equitable tolling would not apply here. Tolling

is a fact-bound inquiry, and the Court does not here decide its applicability; it notes only that CTR's conjecture that "tolling does not make sense" is not enough to establish mootness. See CTR MSJ at 23.

FEC v. Akins itself illustrates these principles in action. As Plaintiffs observe, the administrative complaint in Akins was filed before the FEC in 1989 and concerned conduct that occurred between 1980 and 1990; the Supreme Court nonetheless held Plaintiffs' injury there redressable in 1998. See 524 U.S. at 17, 25. (Indeed, the litigation continued through 2010. See FEC v. Akins, 736 F. Supp. 2d 9, 13–16 (D.D.C. 2010).) This Court thus finds itself in good company in concluding that no jurisdictional bar precludes a court from reaching the merits more than five years after the relevant conduct.

Second, CTR contends that it would be incapable at this point of producing the records CLC seeks. That dog won't hunt either. CTR and HFA do not contest that both are still regarded as active by the FEC; indeed, there is some irony in the organizations intervening to argue that they no longer exist. See CLC MSJ at 38 & n.9. And even if some evidence has been lost to the sands of time, there is no reason to think that an FEC investigation could not recover at least some of the sought information. The case is thus not moot, and (as the Circuit held) Plaintiffs have standing.

* * *

Because the Commission's decision was based on an impermissible interpretation of the Act and was otherwise arbitrary and capricious, its dismissal of Plaintiffs' complaint was contrary to law. The Court leaves it to the expert Commission on remand to sketch the bounds of the internet exemption and to more fully analyze the facts before it. That exception must have

real bounds, however, and the clear evidence of coordination discussed above shall inform the Commission's analysis.

## IV. Conclusion

For the foregoing reasons, the Court will grant CLC's Motion for Summary Judgment, deny CTR's, and direct the Commission to conform with this decision within 30 days. See 52 U.S.C. § 30109(a)(8)(C). A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: December 8, 2022

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,**

**Plaintiffs,**

**v.**

**FEDERAL ELECTION COMMISSION,**

**Defendant,**

**and**

**HILLARY FOR AMERICA and CORRECT THE RECORD,**

**Defendant-Intervenors.**

**Civil Action No. 19-2336 (JEB)**

**MEMORANDUM OPINION**

Back in 2019, Plaintiff Campaign Legal Center brought this suit to challenge the Federal Election Commission's dismissal of its administrative complaint against Correct the Record and Hillary for America for failing to report millions of dollars' worth of alleged in-kind contributions in connection with the 2016 presidential campaign. After myriad twists and turns, on December 8, 2022, this Court held that the FEC's dismissal was contrary to law and remanded the matter to the Commission. Unhappy with that result, the FEC, which had refused to participate and had ceded its defense to Defendant-Intervenors CTR and HFA, now finally comes off the sidelines to seek a stay of that remand pending its noticed appeal to the D.C. Circuit. Although cognizant of the Commission's concerns about its ability to present its legal

arguments on appeal, the Court nonetheless finds that the relevant factors weigh against a stay. It will, accordingly, deny the Motion.

## I. Background

The legal, factual, and procedural background of this case has by now been covered numerous times by this Court and once by the D.C. Circuit. Campaign Legal Ctr. v. FEC, 334 F.R.D. 1, 3–4 (D.D.C. 2019) (CLC I); Campaign Legal Ctr. v. FEC, 466 F. Supp. 3d 141, 146–50 (D.D.C. 2020) (CLC II); Campaign Legal Ctr. v. FEC, 507 F. Supp. 3d 79, 81–83 (D.D.C. 2020) (CLC III); Campaign Legal Ctr. v. FEC, 31 F.4th 781, 784–88 (D.C. Cir. 2022) (CLC IV); Campaign Legal Ctr. v. FEC, No. 19-2336, 2022 WL 17496220 (D.D.C. Dec. 8, 2022) (CLC V). The briefest of summaries will therefore suffice here.

Plaintiff Campaign Legal Center — a non-profit campaign-finance watchdog group — filed an administrative complaint with the FEC in October 2016. CLC V, 2022 WL 17496220, at *2. It alleged that a Super PAC named Correct the Record had improperly coordinated expenditures with the Hillary Clinton campaign (Hillary for America) without disclosing them as in-kind contributions and in gross violation of the Federal Election Campaign Act's contribution limits. Id. CTR rejoined that this spending was appropriate because it fell under the so-called "internet exemption," which excluded certain expenses related to unpaid internet communications from the definition of in-kind contributions. Id.

Although the FEC's Office of General Counsel investigated the allegations and issued a report recommending that the Commission find reason to believe that several violations had occurred, the FEC itself rejected the OGC's recommendation and dismissed the administrative complaint without further action by a 2-2 deadlocked vote. Id. at *3. The controlling Commissioners, in a written Statement of Reasons, agreed with CTR that its expenditures fell

under FECA's internet exemption and therefore did not need to be reported as in-kind contributions. Id. They further concluded that insufficient record evidence existed to indicate that CTR had coordinated with HFA as to non-communications activities. Id.

In August 2019, CLC and one of its directors, Catherine Hinckley Kelley, filed this action challenging the FEC's dismissal order under 52 U.S.C. § 30109(a)(8). See ECF No. 1 (Complaint) at 22–23; see also ECF No. 15 (Amended Compl.). The FEC, however, failed to garner the four affirmative votes required by 52 U.S.C. §§ 30106(c) and 30107(a)(6) to defend this civil suit and thus defaulted. CLC I, 334 F.R.D. at 3–4. Notwithstanding the Commission's default, this Court permitted HFA and CTR to intervene as Defendants in November 2019 over Plaintiffs' objection. Id. at 5–7. After an initial dismissal for lack of standing and subsequent reversal by the D.C. Circuit, see CLC II, 466 F. Supp. 3d at 146–50, rev'd, CLC IV, 31 F.4th 781, this Court in its latest Opinion on cross-motions for summary judgment rejected the controlling Commissioners' justifications for dismissing the administrative complaint. First, it held that their Statement of Reasons rested on a flawed and overly broad interpretation of the internet exemption. CLC V, 2022 WL 17496220, at *4. Second, it held that the controlling Commissioners' "analysis of CTR's offline activities flagrantly disregarded key pieces of evidence" and was therefore arbitrary and capricious. Id. The Court did not, however, delineate the full scope of the internet exemption and, instead, left it "to the expert Commission on remand to sketch the bounds of the . . . exemption and to more fully analyze the facts before it." Id. at *9.

The Commission filed its Notice of Appeal approximately two weeks after this Court's decision, on December 21, 2022. See ECF No. 72 (Notice of Appeal). Although opinions remanding a matter to an agency are not ordinarily appealable as final orders, the FEC here does

have this opportunity. It is permitted to appeal this Court's remand Order under an exception to the finality requirement where an "agency cannot later challenge its own actions complying with a remand order." Sierra Club v. U.S. Dep't of Agric., 716 F.3d 653, 656–57 (D.C. Cir. 2013); see also, e.g., Common Cause v. FEC, 842 F.2d 436, 449 (D.C. Cir. 1988) (FEC appeal from remand order from district court). With the appeal pending, the FEC has now finally entered an appearance in this case. It here asks the Court to stay its remand Order pending appellate review. See ECF No. 73 (Motion for Stay).

## II. Legal Standard

The party seeking a stay pending appeal bears the burden of justifying it based upon the following factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. U.S. Nuclear Regul. Comm'n, 772 F.2d 972, 974, 978 (D.C. Cir. 1985). This familiar test is "'essentially the same' as the test for a preliminary injunction, 'although courts often recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal where the balance of harms favors a stay.'" Citizens for Responsibility & Ethics in Wash. v. Off. of Admin., 565 F. Supp. 2d 23, 25 n.1 (D.D.C. 2008) (quoting Al-Anazi v. Bush, 370 F. Supp. 2d 188, 193 & n.5 (D.D.C. 2005)). In assessing the propriety of a stay, the Court bears in mind that it is an "extraordinary remedy," Cuomo, 772 F.2d at 978, that is "not a matter of right, even if irreparable injury might otherwise result" to the movant. Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). Instead, a stay is "an exercise of judicial discretion" that turns upon the particular circumstances of each case. Id. at 433 (citation omitted).

## III. Analysis

A. Success on Merits

In considering the four factors, the Court begins with the likelihood of the FEC's success on its noticed appeal. As the Commission acknowledges, the Court has, by now, "written five opinions addressing aspects of this matter." Motion for Stay at 6. The Court remains convinced that its latest Opinion correctly resolved the issues presented therein. It recognizes, however, that so long as the other three factors "strongly favor a stay, such remedy is appropriate if 'a serious legal question is presented.'" Loving v. IRS, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (quoting Citizens for Responsibility & Ethics in Wash. v. Off. of Admin., 593 F. Supp. 2d 156, 160 (D.D.C. 2009)); see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843–44 (D.C. Cir. 1977). The Court does not dispute that the present case involves serious legal questions about the metes and bounds of the FEC's internet exemption. As a result, "[i]f the other factors tip in favor of a stay[,] . . . this factor will not preclude one." Loving, 920 F. Supp. 2d at 110; see also Holiday Tours, 559 F.2d at 843 (noting that court "may grant a stay even though its own approach may be contrary to movant's view of the merits").

B. Irreparable Harm

To establish the existence of the second factor, the movant must demonstrate that the injury is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury must also be "both certain and great; it must be actual and not theoretical." Id. (quoting Wisconsin Gas, 758 F.2d at 674). Finally, the injury must be "beyond remediation." Id.

The FEC devotes the bulk of its Motion to arguing that, absent a stay, it would be faced with irreparable harm no matter what it does. On one approach, it could decline to conform to this Court's remand Order — so as to preserve its appeal intact — but then lose exclusive civil-enforcement jurisdiction because § 30109(a)(8)(C) permits plaintiffs to bring a private lawsuit against the administrative respondents should the Commission not conform in 30 days. On the other approach, the FEC could immediately conform to the Court's Order, but thereby moot its noticed appeal and leave it with "no practical ability to challenge this Court's interpretation and application of FECA and the internet exemption to the administrative dismissal plaintiff challenges." Motion for Stay at 3.

While the Court is sympathetic to this purported dilemma, the facts on the ground have changed. The FEC's loss of exclusive civil-enforcement jurisdiction has already come to pass now that CLC has initiated a private action against HFA and CTR. See ECF No. 77 (Notice of Related Case); see also Campaign Legal Ctr. v. Correct the Record, No. 23-75 (D.D.C.). Regardless of whether the accrual of a private right of action for Plaintiffs constitutes irreparable harm for the FEC, that ship has sailed, and the Commission is no longer faced with the "untenable choice [of] conform[ing] . . . or giv[ing] up its [exclusive] jurisdiction over this case." Motion for Stay at 3. This harm is therefore insufficient "because it relates to past injury rather than imminent future injury that is sought to be" avoided through imposition of a stay. Summers v. Earth Island Inst., 555 U.S. 488, 495 (2009). After CLC initiated its private suit, the FEC filed a Notice urging the Court to stay that action as an alternative solution. See ECF No. 78 (FEC Notice) at 1. As the Commission is not even a party there, it would be unusual for the Court to take such a step, and it is not inclined to do so without the input of the parties to that case.

The only potential harm remaining at this juncture is the possible mooting of the Commission's appeal if it now conforms to the remand Order. But because CLC has already initiated its private suit against HFA and CTR, the Commission has not identified any trade-off from waiting and choosing to proceed with its appeal rather than immediately acting on the Court's previous Order. In other words, now that its exclusive jurisdiction is off the table, FEC has not pointed to any remaining harm "of such imminence that there is a 'clear and present' need for equitable relief," Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting Wisconsin Gas Co., 758 F.2d at 674), and the Commission's currently noticed appeal "provide[s] the very avenue for the FEC" to challenge this Court's Order. Shays v. Fed. Election Comm'n, 340 F. Supp. 2d 39, 50 (D.D.C. 2004) (denying FEC motion to stay).

The Court recognizes that the procedural posture of this appeal is unusual and complicated, and it takes seriously considerations of judicial efficiency and the risk of mootness. The FEC, nevertheless, has not demonstrated that the risk to its ability to appeal this Court's remand Order is "both certain and great." Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting Wisconsin Gas Co., 758 F.2d at 674). Finally, to the extent that the Commission now finds itself in a procedural tangle because of its late entry into this litigation, that is a knot of the agency's own tying. This factor, too, does not support a stay.

C. Public Interest and Harm to Others

Finally, the Court considers the "prospect that others will be harmed if the court grants the stay," as well as the "public interest in granting a stay." Cuomo, 772 F. 2d at 974. On the first point, the FEC maintains that staying this Court's remand would not substantially harm Plaintiffs both because the spending reports that CLC seeks concern a long-defunct presidential campaign and associated Super PAC, and because the length of this litigation means that the

"marginal extra time that an appeal will add to final resolution of this case is minimal compared with the time that has already elapsed." Motion for Stay at 5, 6. Neither argument is availing.

It has indeed been over six years since CLC first filed its administrative complaint with the FEC and over three years since the initiation of this suit. Such delay has long precluded Plaintiffs from either obtaining the disclosure of information they seek or bringing a civil action to challenge CTR and HFA's alleged violations. See 52 U.S.C. § 30109(a)(8)(C). After years of diligently pursuing their claims, further pause would push this litigation into the territory of indefinite and "undue delay." Belize Soc. Dev. Ltd. v. Belize, 668 F.3d 724, 732 (D.C. Cir. 2012); cf. Campaign Legal Ctr v. Fed Elec. Comm'n, No. 20-809 (D.D.C.), ECF No. 37 (Order on Mot. to Intervene) at 10–11 (noting that "[p]arties deserve some level of finality and cannot be expected to litigate cases indefinitely"). Although the relevant campaign activities that CLC seeks to challenge occurred long ago, Plaintiffs "ha[ve] endured the failure to act on [their] administrative complaint, filed in [2016], until now." Campaign Legal Ctr., No. 20-809, Order on Mot. to Intervene at 11.

For similar reasons, the FEC's arguments regarding the public interest in a stay fall flat. "The public interest is a uniquely important consideration in evaluating a request for [a stay]." In re Special Proceedings, 840 F. Supp. 2d 370, 376 (D.D.C. 2012) (quoting Nat'l Ass'n of Mfrs. v. Taylor, 549 F. Supp. 2d 68, 77 (D.D.C. 2008)). "It is well settled that '[d]isclosure [requirements are] justified . . . on the ground that they . . . help citizens make informed choices in the political marketplace.'" Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 369 (2010)). Here, the FEC nevertheless contends that allowing this Court's remand Order to go into effect would "result in duplicative proceedings as the private

right of action advanced in this Court while the Court of Appeals considered the Commission's case." Motion for Stay at 4. That is, however, precisely what FECA envisions by giving the Commission 30 days to conform after which a private civil cause of action becomes available under § 30109(a)(8)(C). The Commission nevertheless insists that "apply[ing] this Court's interpretation of the internet exemption while at the same time defending the controlling statement at the Court of Appeals . . . would undoubtedly cause confusion in the regulated community." Id. As noted above, however, there is no rush for the Commission to engage in such application while the appeal is pending. The Commission could thus avoid any regulatory confusion by waiting for a resolution of its appeal. This factor, too, does not support a stay.

**IV. Conclusion**

For the foregoing reasons, the Court will deny Defendant's Motion to Stay. A separate Order so stating will issue this day. While nothing in this decision prevents the FEC from continuing to seek its desired relief in the Court of Appeals, the Court sees no basis for any further delay.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: February 1, 2023