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

| | |
|---|---|
| CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,<br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br>Defendant,<br><br>HILLARY FOR AMERICA and CORRECT THE RECORD,<br>Defendant-Intervenors. | Civil Action No: 1:19-cv-02336-JEB |

**PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Campaign Legal Center and Catherine Hinckley Kelley, pursuant to Fed. R. Civ. P. 56, Local Rules 7(h)(2) and 7(n), and the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C), respectfully move this Court for a summary judgment declaring that the Federal Election Commission's dismissal of plaintiffs' administrative complaint against Correct the Record and Hillary for America was contrary to law, and directing the Commission to conform with such declaration within thirty days consistent with the Court's judgment.

Pursuant to Federal Rule of Civil Procedure 10(c), Plaintiffs' Second Motion for Summary Judgment expressly incorporates by reference their prior briefing on intervenors' motion to dismiss, *see* ECF No. 27, and the parties' cross-motions for summary judgment, *see* ECF Nos. 35, 42.

Support for this second motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Second Motion for Summary Judgment and in Opposition to Defendant-Intervenors' Second Motion for Summary Judgment; plaintiffs' previously filed

briefing on the merits, *see* ECF Nos. 27, 35, 42; and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, ECF No. 43. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated: September 12, 2022

Respectfully submitted,

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

*Attorneys for Plaintiffs*

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

| | |
|---|---|
| CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,<br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br>Defendant,<br><br>HILLARY FOR AMERICA and CORRECT THE RECORD,<br>Defendant-Intervenors. | Civil Action No: 1:19-cv-02336-JEB |

**PLAINTIFFS' COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT-INTERVENORS' SECOND MOTION FOR SUMMARY JUDGMENT**

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

*Attorneys for Plaintiffs*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Cases:**

**Statutes:**

**Legislative and Regulatory Authorities:**



**Other Materials:**

## TABLE OF ABBREVIATIONS

| | |
|---|---|
| **APA** | Administrative Procedure Act |
| **CLC** | Campaign Legal Center |
| **CTR** | Correct the Record |
| **FEC** | Federal Election Commission |
| **FECA** | Federal Election Campaign Act |
| **HFA** | Hillary for America |
| **MUR** | Matter Under Review |
| **OGC** | Office of General Counsel (FEC) |

## INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs Campaign Legal Center and Catherine Hinckley Kelley (collectively, "CLC") challenge the Federal Election Commission's dismissal of their administrative complaint against the super PAC Correct the Record ("CTR") and Hillary for America ("HFA"), Hillary Clinton's 2016 presidential campaign committee, as contrary to law under 52 U.S.C. § 30109(a)(8)(C), because the dismissal, as explained in the two "controlling" Commissioners' Statement of Reasons ("SOR"), rested on impermissible interpretations of the Federal Election Campaign Act ("FECA" or "the Act") and Commission regulations, and was arbitrary and capricious, *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986).

Plaintiffs' administrative complaint thoroughly detailed how CTR, despite its obligation to maintain complete independence from candidates, was openly coordinating millions of dollars of expenditures with Hillary Clinton's 2016 presidential campaign—all in clear defiance of FECA's contribution restrictions and disclosure requirements. The Commission nevertheless deadlocked 2-2 on whether to find reason to believe respondents had violated FECA, and subsequently voted 4-0 to close the file, dismissing the complaint.

The two controlling Commissioners excused this massive coordination scheme by finding that all of CTR's disbursements were "inputs" for the type of internet communications that FEC rules exempt from regulation as coordinated expenditures, 11 C.F.R. §§ 109.21, 100.26, or alternatively (and counterfactually), represented expenditures that were not coordinated with HFA at all. This expansive interpretation of the "internet exemption" effectively allowed a presidential candidate to outsource millions of dollars of campaign costs—for key activities such as media relations, polling, and opposition research—to a super PAC on the pretext that coordinated expenditures for these purposes were mere input costs for eventual internet communications.

As this Court recognized in denying intervenors' motion to dismiss, the controlling Commissioners' interpretations of law "create[] a loophole that effectively vitiates the plain language of FECA." ECF No. 33 at 23. Upon subsequently deciding the parties' cross-motions for summary judgment, however, this Court determined that plaintiffs had failed to establish injury-in-fact, and dismissed the case without addressing the merits. On appeal of that ruling, the D.C. Circuit reversed, holding that plaintiffs have indeed established standing—because (1) they have suffered informational injury and (2) "set[ting] aside" the agency decision would "likely redress [their] injury in fact." *CLC v. FEC*, 31 F.4th 781, 793 (D.C. Cir. 2022). The case was accordingly remanded for this Court to consider whether the dismissal of their administrative complaint was contrary to law. *Id*. at 784.

Plaintiffs have advanced two principal arguments on that score. First, the controlling Commissioners' exemption of expenditures only tangentially related to exempt internet communications "unduly compromises" FECA's explicit language directing that all coordinated "expenditures" shall be deemed contributions. *Orloski*, 795 F.2d at 164. Second, even if the dismissal did not rely on impermissible interpretations of FECA, it was still "arbitrary and capricious" under the second *Orloski* prong because the controlling Commissioners ignored clear evidence that HFA and CTR had coordinated expenditures for activities with no nexus to the internet, such as surrogate training, candidate tracking, and press outreach. *See* Pls.' Mot. for Summ. J. 18-36, ECF No. 35 ("Pls.' MSJ"); Pls.' Opp'n to Def.-Intervenors' Cross-Mot. for Summ. J. 11-43, ECF No. 42 ("Pls.' MSJ Opp.").

Although this Court has previously found that plaintiffs had presented "significant and largely uncontroverted evidence" to support both of these arguments, ECF No. 33 at 28, intervenors say strikingly little to counter them in their second motion for summary judgment. *See*

Mem. Supp. Def.-Intervenors' 2d Mot. for Summ. J. 6-10, ECF No. 61-1 ("Int. 2d MSJ"). First, intervenors make virtually no mention of FECA; they certainly do not attempt to argue that the Act's text compelled the controlling Commissioners to exempt all disbursements made by CTR that could have indirectly "conferred" "some advantage" on a subsequent exempt internet communication or "message on Facebook." ECF No. 33 at 23-24. Nor are intervenors able to justify the controlling Commissioners' view that the complaint was factually deficient to find reason to believe that CTR coordinated any *non*-internet activities with HFA—perhaps because this required arbitrarily disregarding uncontroverted record evidence to the contrary.

Instead, intervenors principally work to augment their previous summary judgment briefing with extra-record defenses and policy concerns unrelated to the FEC proceedings underlying this case. Virtually none of these new arguments even appeared in the statement of reasons under review here. They range from due process claims that were not adopted by the controlling Commissioners, *see* Int. 2d MSJ 9, 15-16, to a reiteration of intervenors' frivolous "press exemption" defense, *id*. at 17-18, to the inexplicable assertion that any abuses allowed by the controlling Commissioners' interpretation of the internet exemption may be ameliorated by other, unrelated provisions of FECA, *id*. at 11.

These extraneous "merits" arguments are accompanied by a mootness defense—albeit one masquerading as a renewed challenge to plaintiffs' standing—that is wholly without basis. Not only do intervenors erroneously cast their argument that plaintiffs' informational injury "is no longer redressable," Int. 2d MSJ 2, in terms of standing rather than mootness—leading them to misallocate the burden of proof—but they also base this argument on the existence of a possible partial time-bar that has no application to this administrative review action. Intervenors identify no authoritative FEC policy or judicial precedent demonstrating that 28 U.S.C. § 2462 would bar

further action in the event of a contrary-to-law ruling and remand here, whether by the FEC or by plaintiffs if FECA's citizen-suit provision is triggered. Even assuming *arguendo* that the statute of limitations in 28 U.S.C. § 2462 had run with respect to any of the violations alleged here, it still would not bar injunctive or declaratory relief, including an order to disclose unlawfully withheld information. *FEC v. Christian Coalition*, 965 F. Supp. 66, 71-72 (D.D.C. 1997). Intervenors therefore fail to carry their heavy burden of establishing that effectual relief is impossible. *Honeywell Int'l v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010).

This "redressability" argument is also squarely at odds with D.C. Circuit's decision in this case and the Supreme Court's ruling in *FEC v. Akins*, 524 U.S. 11, 25 (1998). The Court of Appeals explicitly found that plaintiffs "easily satisfy the causation and redressability requirements of Article III standing." *CLC*, 31 F.4th at 793. And *Akins* made clear that a plaintiff challenging the dismissal of an FEC complaint under 52 U.S.C. § 30109(a)(8) does not lack a redressable injury merely because, on remand, the "FEC might reach the same result" for a different reason. 524 U.S. at 25.

Indeed, intervenors' memorandum does not so much present a jurisdictional argument or justification of agency action as lay out a premature defense of their own allegedly illegal activities in anticipation of a remand to the FEC or a future civil enforcement action. Even if these new arguments had any merit—which they do not—the agency action under review survives or falls based on the reasons the controlling Commissioners provided in their statement, not on the post hoc arguments intervenors now seek to add to the controlling rationale. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[T]he courts may not accept . . . counsel's post hoc rationalizations for agency action.").

For these reasons, and those set forth in plaintiffs' previous summary judgment briefing, which they incorporate by reference here, plaintiffs respectfully urge the Court to grant CLC's motion for summary judgment; declare that the FEC's dismissal of plaintiffs' administrative complaint is contrary to law; and direct the Commission to conform with such declaration.

## STATEMENT OF FACTS

The legal and factual background of this case has been briefed in detail in plaintiffs' prior submissions. *See* Pls.' MSJ 4-25; Pls.' Opp'n to Mot. to Dismiss 6-10, ECF No. 27. Relevant statutory and regulatory background is set forth in plaintiffs' prior briefing. *See* Pls.' MSJ 4-9. Relevant portions of the administrative record appear in the joint appendix, ECF No. 43.

### I. The Administrative Complaint

On October 6, 2016, plaintiffs filed an administrative complaint, alleging that CTR made, and HFA accepted, unreported in-kind contributions in the form of coordinated expenditures and compensation for personal services, in violation of FECA's reporting requirements and contribution restrictions. AR038-49 ¶¶ 87-111.

CLC's administrative complaint documented millions of dollars that CTR spent on opposition research, message development, and press outreach to promote Clinton's candidacy. AR004-31 ¶¶ 7-67. As the complaint noted, from CTR's inception in May 2015, it was openly "work[ing] in coordination with the Clinton campaign" on the theory that all of its spending would qualify for the "internet exemption." *Id.* But numerous news reports documented that, in fact, CTR and HFA were coordinating on a host of activities "not fairly characterized as 'communications'" exempt from the coordination rules. AR085. These included, but were not limited to: commissioning an outside polling firm to conduct a poll, AR015 ¶ 31; arranging media training for Clinton surrogates, AR007-08 ¶ 15; sending "trackers" to follow and record Clinton's Democratic primary opponents, AR008-09 ¶¶ 16-17; staffing a "30-person war room" of paid CTR

employees who conducted rapid response during Clinton's appearance before the House Select Committee on Benghazi, AR012-13 ¶¶ 28-29; releasing related opposition research, including a 167-page book, "Committee No. 10: The True Story of the House Select Committee on Benghazi," AR027-28 ¶ 58; and maintaining, throughout the 2016 cycle, an "around the clock" "war room" to produce "point-by-point fact checks quickly disseminated to the news media." AR029 ¶ 61.

The complaint highlighted that under FECA, any expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, [or] his authorized political committees . . . shall be considered to be a contribution to such candidate," 52 U.S.C. § 30116(a)(7)(B)(i), subject to the Act's contribution limits, *id.* § 30116(a)(l), (a)(2)(A), source restrictions, *id.* § 30118(a), and disclosure requirements, *id.* § 30104. As the complaint noted, the Act includes in the definition of "contribution" "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." *Id.* § 30101(8)(A)(ii).[1]

Complainants acknowledged that the FEC had exempted "communications over the Internet, except for communications placed for a fee on another person's Web site," 11 C.F.R. § 100.26, from its framework for regulating coordinated communications. The complaint noted, however, that the "coordinated communication" rule, *id.* § 109.21, applies only to expenditures for "public communications"—communications "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," *id.* § 100.26—but that any other type of expenditure is addressed in 11 C.F.R. § 109.20, and, consistent with

[1] The disclosure requirements applicable to candidate and non-candidate committees are fully detailed in earlier submissions, *see* Pls.' MSJ 4-6, ECF No. 35.

FECA, treated as an in-kind contribution to a candidate if made "in cooperation, consultation or concert with, or at the request or suggestion of" the candidate.

On the basis of the evidence it presented, the administrative complaint urged the Commission to find reason to believe that CTR and HFA violated FECA by making or accepting illegal, over-the-limit in-kind contributions, 52 U.S.C. § 30116(a), and contributions from impermissible sources, *id.* § 30118(a), and by failing to report these contributions, *id.* § 30104; and requested that the Commission conduct an immediate investigation under 52 U.S.C. § 30109(a)(2). AR050 ¶ 112.

**II. Commission Review and Dismissal of Complaint**

After reviewing CLC's complaint and the responses by CTR and HFA, the FEC's Office of General Counsel ("OGC") recommended that the Commission find reason to believe that respondents violated FECA by making and accepting excessive and prohibited in-kind contributions and failing to report those contributions. AR085, 105.

OGC highlighted that respondents CTR and HFA did not "deny or rebut the description or scope of [CTR's] activities on behalf of [HFA]," AR090 n. 28, and thus few facts were in dispute. But OGC rejected respondents' characterization of these activities as largely subsumed by the internet exemption. Instead, it found that much of CTR's approximately $9 million in spending went to a "wide array of activities" that were not connected to exempt internet communications, "unless that term covers almost every conceivable political activity." AR110, 124. Even as to CTR's activities that did have some connection to the internet, OGC found that respondents had overreached by trying to claim the exemption for expenses, such as polling and research, that were not properly characterized as costs incurred to produce exempt internet communications (or, in the controlling Commissioners' coinage, "input costs"). AR100.

On June 4, 2019, the FEC's then-four Commissioners deadlocked 2-2 on whether to find reason to believe that CTR or HFA had violated FECA, and voted 4-0 to close the file, dismissing the complaint. AR372-75. In the Statement of Reasons explaining their votes, the no-voting Commissioners took an expansive view of the internet exemption, finding that expenses for "computer equipment, office space, software, web hosting, video equipment, placing a poll online, and salaries for individuals to conduct internet activity," AR391, were exempt internet communications or "inputs" for such communications under 11 C.F.R. § 109.21. They also rejected the possibility that overhead expenses like rent or salary should be allocated between the exempt and non-exempt activities they supported, claiming that "exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption . . . and potentially chill political speech online." AR392.

As for categories of spending that the controlling Commissioners conceded were "unrelated to creating and disseminating online political communications," AR390, they argued that plaintiffs had not alleged facts sufficient to establish coordination conclusively, "transaction-by-transaction." AR395. In so holding, the Commissioners chose to disregard public statements by CTR, as provided in CLC's complaint and otherwise obtained by OGC, *see* AR005-7 ¶¶ 9-12; AR011-13 ¶¶ 24, 26-27; AR087-88, 91-92, as well as corroborating documents posted on Wikileaks that were presented in related complaints, but not in CLC's, AR092-94. They also reached this conclusion without any mention that, as noted by OGC, neither respondent had disputed that many of these offline activities had in fact been coordinated.

**III. Procedural History**

Plaintiffs filed this action under 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act on August 2, 2019, challenging the dismissal of their FEC complaint as contrary to law, and subsequently amended the complaint to address the belated issuance of the controlling Statement

of Reasons. Compl., ECF No. 1; Am. Compl., ECF No. 15. The FEC has not appeared to defend this action, but CTR and HFA sought and were granted the right to intervene as defendants, over plaintiffs' objection. *CLC v. FEC*, 334 F.R.D. 1 (D.D.C. 2019).

On February 4, 2020, intervenors moved to dismiss under Rules 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim. On June 4, 2020, this Court denied the motion, holding that CLC had "proven its standing" and "cast serious doubt on whether the controlling Commissioners' interpretation of the internet-communications exception was 'sufficiently reasonable' to be accepted by a reviewing court." ECF No. 33 at 17, 21. In considering the parties' subsequent cross-motions for summary judgment on the merits, this Court "reverse[d] field" on plaintiffs' Article III standing, dismissing their FECA claim without addressing the merits. ECF No. 46 at 5, 8; ECF No. 45.[2]

Plaintiffs timely appealed, focusing on the question of whether plaintiffs have established Article III injury because they were deprived of statutorily required information regarding the in-kind contributions that CTR made, HFA received, and neither disclosed. *CLC*, 31 F.4th at 783-84. The Court of Appeals held that plaintiffs had "demonstrated a quintessential informational injury directly related to their 'interest in knowing how much money a candidate spent in an election.'" *Id.* at 784. It further found that plaintiffs "easily satisfy the causation and redressability requirements of Article III," explaining that if "a reviewing court find[s] that the Commission's determinations are contrary to law, the agency's action would be set aside and the case would likely redress [plaintiffs'] injury in fact." *Id.* at 784, 793 (citing *Akins*, 524 U.S. at 25). It remanded

[2] After further briefing on whether plaintiffs could maintain their APA claim even if they lacked standing with respect to their FECA claim, this Court answered that question in the negative, entering its final order dismissing the case on February 12, 2021. ECF No. 52. Plaintiffs do not seek to renew their APA claim here.

the case for "further proceedings consistent with this opinion." *Id*. at 793.

## STANDARD OF REVIEW

Intervenors misstate the summary judgment standard in this action for judicial review of agency action, where "the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record." Comment to LCvR 7(h). An FEC dismissal is "contrary to law" under 52 U.S.C. § 30109(a)(8)(C) "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, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion under *Orloski* is similar to the "arbitrary [or] capricious" standard applied under the APA. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 & n.6 (D.C. Cir. 1980); *see also Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) ("*Shays II*") ("[W]hether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable."). Under that analysis, a court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

## ARGUMENT

### I. The Dismissal Was Contrary to Law.

#### A. A deferential standard of review does not excuse an impermissible construction of the Act or arbitrary and unreasoned decision-making.

The parties are in agreement that *Orloski* provides the relevant substantive standard here.

*See* Int. 2d MSJ 8. Where plaintiffs and intervenors part ways is with respect to the application of *Orloski's* second prong ("arbitrary or capricious" standard). Intervenors now take the extraordinary position that this Court should focus on the "outcome" of agency decisionmaking and excuse defective reasoning under the "harmless error" standard of 28 U.S.C. § 2111, *see* Int. 2d MSJ 19, rather than following the longstanding rule of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), that agency "action[s] must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

But it is a "foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (citation and internal quotation marks omitted). The "harmless error" standard intervenors cite, *see* Int. 2d MSJ 19 (citing *FEC v. Legi–Tech, Inc.*, 75 F.3d 704, 705-06 (D.C. Cir. 1996)), was applied to forgive a procedural voting error, not to excuse *legal* error or deficient reasoning in an FEC decision, as intervenors urge here. Nor did the D.C. Circuit suggest this standard would permit the FEC—or, for instance, intervenors here—to offer up "post hoc justifications" to defend an agency decision because its stated reasons were founded on errors of law or arbitrary and capricious reasoning. *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 536 n.11 (D.C. Cir. 2018). This incorrect understanding of the "harmless error" principle would all but obviate review for reasoned decisionmaking under *State Farm*. Indeed, there would be little point in even requiring the controlling Commissioners to issue a statement of reasons to effectuate judicial review, *see Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988), if its contents could be treated as largely irrelevant to the legality of the Commission's decision.

**B. The dismissal was based on impermissible interpretations of the Act.**

As plaintiffs have argued, the controlling Commissioners committed at least two fundamental errors of law in applying the internet exemption to dismiss the substantial majority of CLC's allegations against CTR and HFA: (1) they defied FECA's unambiguous mandate to regulate all "expenditures" made "in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate as in-kind contributions to that candidate, 52 U.S.C. § 30116(a)(7)(B)(i); and (2) they relied on a radically expanded version of the internet exemption that compromises FECA's purposes and is unsustainable under the Commission's own rules and precedent. *See* Pls.' MSJ 19-26; Pls.' MSJ Opp. 12-34.

**1. FECA's text is unambiguous and makes clear Congress's intent to regulate the coordinated expenditures at issue here as in-kind contributions.**

The Act defines "contributions" and "expenditures" broadly as any "gift" or "payment" made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). It further prescribes that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . *shall be considered to be a contribution to such candidate*." *Id.* § 30116(a)(7)(B)(i) (emphasis added). As the Supreme Court has recognized, Congress has thus "always treated expenditures made 'at the request or suggestion of' a candidate" as contributions rather than expenditures, to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (per curiam).

The controlling Commissioners ignored this unambiguous directive and expanded a regulatory exemption to "permit an entire class of political communications"—and *non-communication* expenditures—"to be completely unregulated irrespective of the level of coordination." *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004) ("*Shays I*"). Under their

reading, the internet exemption not only exempts internet communications not "placed for a fee" from the coordination rules, but also encompasses all "input costs" "incurred by a speaker to produce [exempt] internet communication[s]," AR391, including, *at a minimum*, "staff time, computer usage, and electricity," but also possibly "the services of consultants, graphic designers, videographers, actors, and other specialists." AR392. Further, in open disregard of FECA's dictates, the Commissioners refused even to allocate CTR's general overhead expenditures between its exempt and non-exempt activities, even as they conceded that such overhead would necessarily also support its offline activities such as press outreach, tracking, and surrogate training. AR392.

As this Court has recognized, this unbounded interpretation of the internet exemption, and the "input costs" to which the exemption supposedly extends, "creates a loophole that effectively vitiates the plain language of FECA." ECF No. 33 at 23. "If any cost can be exempted from campaign-finance regulation because it has some tangential effect upon an unpaid internet communication, political committees could avoid reporting (and therefore limiting) almost all coordinated expenditures merely by posting a message on Facebook that purports to use some advantage conferred by the expenditure." *Id*. at 23-24.

This error is all the more acute because the internet exemption represents an area where the Commission is already approaching the outer bounds of its interpretive discretion. There is no textual basis for the internet exemption in the Act. Indeed, the FEC made clear in the 2006 internet rulemaking that the exemption was closer to an act of administrative grace, founded on concerns that FECA might otherwise apply to individuals and bloggers who incidentally communicate about a candidate online, or to communicative activity involving only very de minimis expenditures. *See* Pls.' MSJ Opp. 17-25. To expand the exemption to reach spending that has only a tertiary

connection to internet communications, or that pays for general overhead expenses covering both on- and offline activities, is not simply a strained interpretation of FECA, but a direct refutation of its textual mandate to regulate all coordinated expenditures as contributions.

In their latest submission, intervenors make no attempt to reconcile the controlling Commissioners' position with the Act's text—because they cannot. It is extraordinary that in an action turning on whether an agency has lawfully interpreted its governing statute, they make nary a mention of said statute. Nor does their prior summary judgment briefing fill that void.

Intervenors' only nod to the Act comes in their invocation of *Shays* for the proposition that FECA permits the Commission to "draw[] a meaningful line" between internet-related spending that represents a regulable expenditure and that which does not. Int. 2d MSJ 11-12. But the *Shays* litigation noted only that the FEC has discretion to impose "content" standards in its coordination rules to effectuate "the [statutory] expenditure definition's purposive language." *Shays II*, 414 F.3d at 99; *see also* 52 U.S.C. § 30101(9)(A)(i) (defining expenditure as payments "for the purpose of influencing" federal election). In construing that language, the court noted, the Commission could permissibly employ some content standard to clarify when spending is "undertaken 'for the purpose of influencing' a federal election" (and thus qualifies as an "expenditure") and when it instead relates to "collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign." *Shays II*, 414 F.3d at 99.

But that is not what happened here. The controlling Commissioners were not attempting to interpret the definition of expenditure to shield spending with a "weak nexus" to electoral campaigns from regulation—they were exempting broad categories of spending indisputably comprised of expenditures "for the purpose of influencing" a federal election. CTR was a registered political committee whose activities are "assumed to fall within the core area sought to

be addressed by Congress." *Buckley*, 424 U.S. at 79. *See also* Mem. Supp. Def.-Intervenors' Cross-Mot. for Summ. J. 26, ECF No. 38-1 ("Int. MSJ") (conceding that "whether [CTR's] costs constitute 'expenditures' is not in dispute"). *Shays II* thus provides no justification for the dismissal. Instead, as in the *Shays* litigation, here too "the FEC lacks discretion to exclude [communications intended to influence federal elections] from its coordinated communication rule." *Shays v. FEC*, 528 F.3d 914, 927 (D.C. Cir. 2008) ("*Shays III*") (alteration in original) (citing *Shays II*, 414 F.3d at 99).

**2. The dismissal was based on an impermissible construction of the coordination regulations and internet exemption.**

Instead of arguing that the controlling Commissioners' rationale is consistent with FECA, intervenors' principally attempt to justify the dismissal under *Orloski*'s first prong by claiming that the Commissioners' reasoning is at least consistent with past FEC enforcement decisions and guidance. This claim is wrong. And regardless, "[n]o amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009). If the controlling Commissioners' interpretation is contrary to the text and purposes of FECA, its purported consistency with past agency guidance will not save it.

But intervenors identify no FEC precedent suggesting that the types of expenditures involved here—which range from polling costs to overhead payments for rent, salary, and travel—represent mere "input" costs for the purpose of applying the internet exemption. And even with respect to the narrower category of direct production costs for exempt communications, FEC guidance is largely silent. As OGC has observed, "[n]either the [internet] regulation itself nor the Commission's accompanying explanation and justification expressly address whether the regulation also exempts production costs that are incurred unrelated to the advertisement's

dissemination over the internet." First Gen. Counsel's Rpt. at 5-6, MUR 6729 (Checks and Balances) (Aug. 6, 2014), https://www.fec.gov/files/legal/murs/6729/14044363781.pdf. The rulemaking certainly did not purport to exempt a political committee's overhead, research, or staff expenses that only tangentially or indirectly support internet posts.

As explained more fully in prior briefing, *see* Pls.' MSJ 7-8, Pls.' MSJ Opp. 24-25, insofar as the 2006 rulemaking addressed such "inputs," it was to suggest that overhead and other indirect expenses that support unpaid internet communications are *not* exempt. In particular, plaintiffs have highlighted that when the Commission exempted "*uncompensated* internet activity" by individuals and groups of individuals from the definitions of "contribution," 11 C.F.R. § 100.94, and "expenditure," *id.* § 100.155, *see* Internet Communications, 71 Fed. Reg. 18,589, 18,603-04 (Final Rules with Explanation & Justification) (emphasis added), it made clear that "a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election, remains an 'expenditure' by the political committee," even if the internet activities conducted on that computer may have been exempt, *id.* at 18,606. If the underlying expenditure for equipment were coordinated with a candidate, it would thus constitute an in-kind contribution to the campaign. 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20.

Intervenors attempt to discount this part of the rulemaking, arguing that CTR does not dispute that its spending constitutes "expenditures," only whether its expenditures should be regulated as "coordinated expenditures." Int. 2d MSJ 15. This misses the point. CLC highlights this discussion to demonstrate that the FEC, insofar as it mentioned overhead or other indirect costs in the rulemaking at all, indicated that they should not be exempted simply by virtue of their indirect connection to an internet communication.

Turning from the rulemaking, intervenors claim that they have also provided this Court

with FEC precedents holding that "all associated production costs" of unpaid Internet communications are exempt from regulation. Int. 2d MSJ 13-14. But their only support for this proposition comes by way of statements issued by a minority bloc of FEC Commissioners, which by definition are not precedential. *See Common Cause*, 842 F.2d at 449 n.32 ("[S]uch an [SOR] would not be binding legal precedent or authority for future cases. The statute clearly requires that for any official Commission decision there must be at least a 4-2 majority vote."). That intervenors must rely so heavily on non-binding statements in deadlocked matters only underscores that the interpretation underlying this dismissal was neither "consistent" nor authoritative.

Intervenors also claim that their earlier filings presented "numerous examples of FEC enforcement actions in which a *controlling bloc* of Commissioners declined to subject any input costs to a coordination test." Int. 2d MSJ 14 (emphasis added). But virtually none of the cases cited by intervenors or in the controlling SOR considered which expenditures qualify for exemption as direct input costs for an exempt internet communication. Indeed, most did not address coordination at all.[3] Even the matter that the controlling Commissioners cite that is most on point, MUR 6657 (Akin for Senate), considered direct costs for coordinated internet activities that are not remotely analogous to those here. There, the Commission was examining whether expenditures for "Email List Rental" or "Online Processing" were alone sufficient to cause the group's internet communications to be "placed for a fee," thereby rendering the internet exemption entirely inapplicable. First Gen. Counsel's Rpt. at 2, 6-7, MUR 6657 (Mo. Democratic State Comm.) (May 6, 2013), https://www.fec.gov/files/legal/murs/6657/13044343282.pdf. The question was not whether a broader category of disbursements unconnected to online communications, such as

[3] Plaintiffs' prior summary judgment briefs discuss at length—and distinguish—each of the inapposite FEC matters intervenors cite on this point. *See* Pls.' MSJ Opp. 25-29.

CTR's overhead expenses here, should be exempt as "input costs." As this Court noted, "[t]he difference between those 'input costs' and the 'creation and production costs' at issue in this case is one of kind and not of degree." ECF No. 33 at 23.

**3. Intervenors' constitutional and policy arguments are unavailing.**

Intervenors devote most of their memorandum to arguing that dismissal was justified by constitutional and policy considerations that the controlling Commissioners never adopted or even indicated that they considered. But it is axiomatic that "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. Post hoc rationalizations by *intervenors'* counsel cannot supplement the agency's stated reasons—and departing from this rule would be "doubly inappropriate here, given that the agency is not present to articulate its own views or protect its enforcement prerogatives." Pls.' MSJ Opp. 30.

Regardless, as with intervenors' earlier First Amendment claims, Pls.' MSJ Opp. 30-34, their new constitutional and policy arguments also fail on their own terms.

First, in a half-hearted attempt to counter plaintiffs' charge that the dismissal here frustrates FECA's regulation of coordinated spending, intervenors boldly proclaim that despite plaintiffs' "alarmist rhetoric," the dismissal did not "create massive amounts of coordinated spending" after the 2016 election. Int. 2d MSJ 10. The implication of this claim—that plaintiffs, in describing how the controlling Commissioners' interpretation of the internet exemption opens a patent loophole in FECA's regulation of coordinated expenditures, must also substantiate that concern with evidence of abuse postdating the dismissal of their administrative complaint—is wholly untenable. Not only does it improperly demand evidence far outside the scope of the administrative record, it also ignores the D.C. Circuit's recognition in *Shays II* that "if regulatory safe harbors permit what [FECA] bans . . . savvy campaign operators will exploit them to the hilt." 414 F.3d at 115.

This type of abuse is also inherently difficult to detect. And, unlike CTR, the average group intent on skirting the Act's requirements is unlikely to organize as a super PAC supporting a single candidate and then repeatedly trumpet their coordination with that candidate. As plaintiffs have reiterated, the problem is not only that the controlling group's expansion of the internet exemption would allow, for example, a foreign national to coordinate with a federal candidate, but also that most of this activity would likely escape disclosure. *See* Pls.' MSJ Opp. 44-45. And if anything, online efforts by foreign actors to influence U.S. elections are increasing in volume and sophistication. The proliferation of influence operations from China, Russia, Venezuela, and others since 2016 should be reason to strengthen rather than weaken efforts to prevent illegal coordination.[4]

Intervenors' second and even less tenable policy argument is that the loophole created by controlling Commissioners will be checked by "other regulatory provisions" that will "regulate the illegal activity causing Plaintiffs' apparent concern." Int. 2d MSJ 11. But it is no defense of an agency's impermissible interpretation of one provision of its governing statute to argue that any potential harm caused thereby may be ameliorated by a different, unrelated statutory provision. Indeed, this whole argument is a tacit admission that the interpretation cannot be justified on its own terms and the potential abuse it allows is manifest.

Finally, intervenors again attempt to defend the controlling Commissioners' decision by invoking "First Amendment considerations," Int. 2d MSJ 12, but offer no actual argument for why

[4] *See* Meysam Alizadeh *et al.*, *Content-based features predict social media influence operations*, Science Advances, Vol. 6, Iss. 30 (July 24, 2020), https://www.science.org/doi/10.1126/sciadv.abb5824; *see also* Joint Report of DOJ/DHS on Foreign Interference Targeting Election Infrastructure or Political Organization, Campaign, or Candidate Infrastructure Related to the 2020 US Federal Elections (2021), https://www.dhs.gov/sites/default/files/publications/21_0311_key-findings-and-recommendations-related-to-2020-elections_1.pdf.

regulating coordinated spending as FECA requires would unconstitutionally burden speech.

The controlling Commissioners mentioned the First Amendment only fleetingly—in connection to their wholesale exemption of CTR's overhead costs from regulation, even costs with no nexus to internet activities—and thus intervenors again make the mistake of defending the entirety of the Commission's action on legal grounds that barely appear in the statement of reasons. *State Farm*, 463 U.S. at 50 ("[C]ourts may not accept . . . counsel's post hoc rationalizations.").

But, as plaintiffs explained in earlier submissions, invocation of the First Amendment is not a get-out-of-jail-free card, nor does it give the Commission carte blanche to disregard or countermand FECA's clear mandates. *See* Pls.' MSJ Opp. 30-34. And neither the controlling Commissioners nor intervenors have ever articulated their substantive constitutional concerns with respect to regulating the coordinated spending alleged in this case. There is no argument here that overzealous enforcement of the coordination rules would threaten to extend the Act beyond "election-related advocacy" to "activity falling outside FECA's expenditure definition." *Shays II*, 414 F.3d at 102. CTR is a registered political committee whose expenditures "are, by definition, campaign related." *Buckley*, 424 U. S. at 79. Nor has any party attempted to argue that the controlling Commissioners' interpretation of the internet exemption was somehow necessary to avoid reaching *independent* speech—which has the been the principal locus of Supreme Court concern in the area of campaign finance. *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (noting that "the rationale for affording special protection to *wholly independent* expenditures" does not extend to *coordinated* expenditures, because "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash'") (emphasis added).

It is thus insupportable to claim that the First Amendment compels exempting the entirety of CTR's coordinated operation simply because some fraction of its activities involved internet

communications. The FEC attempted to defend various impermissible coordination standards in the *Shays* cases on similar First Amendment grounds, but was rejected. As the D.C. Circuit remarked, "We applaud the Commission's sensitivity to First Amendment values, but as we said in *Shays II*, 'regulating nothing at all' would achieve the same purpose, 'and that would hardly comport with the statute.'" *Shays III*, 528 F.3d at 925-26 (citing *Shays II*, 414 F.3d at 101).

### C. The controlling Commissioners' conclusion that there was insufficient evidence of coordination was arbitrary, capricious, and wholly contrary to the record.

The controlling Commissioners did not dispute that a significant measure of CTR's activities did not "relate directly to internet communications," even under their expansive view of that concept. *See, e.g.*, AR393; Int. MSJ 36-37. And in the administrative proceedings, CTR and HFA largely did not deny that this category of non-communication expenditures was "coordinated with the Clinton campaign." AR046 ¶ 100, AR090 n.28. The controlling Commissioners thus could only fail to find reason to believe CTR's offline activity was "coordinated" by ignoring voluminous evidence of systematic coordinated efforts between CTR and the Clinton campaign, as well as CTR's repeated public statements that it existed for the singular purpose of advocating for Clinton's election.

Tellingly, intervenors spend little time attempting to justify the controlling Commissioners' conclusion that the record was insufficient to find reason to believe, instead offering a collection of new arguments for why the "ultimate outcome" was correct "regardless of the reasoning." Int. 2d MSJ 19. But this very attempt underscores that the Commissioners "entirely failed to consider . . . important aspect[s]" of the matter. *State Farm*, 463 U.S. at 43. This is precisely the arbitrary and capricious decisionmaking that judicial review is meant to correct.

#### 1. The record includes copious evidence showing CTR and HFA coordinated on non-exempt activities.

The controlling group's dismissal of CLC's complaint rested primarily on one central

finding: that "[t]he information in the record indicates that [CTR] limited its interactions with [HFA] to the very communications that the Commission has previously decided not to regulate." AR395. But as detailed in CLC's earlier briefs, *see* Pls.' MSJ 29-32; Pls.' MSJ Opp. 34-43, and as this Court found, ECF No. 33 at 23, the record contains significant evidence demonstrating that CTR both engaged in a significant amount of non-communication-related activities, and that CTR and HFA did not "limit" their coordination to internet activities.

First, it is undisputed that many of CTR's expenditures had no connection to the internet. As the controlling SOR acknowledges, "the record suggests" that CTR engaged in activities that "do not relate directly to [its] internet communications," including CTR's "surrogacy program, research and tracking, and contacts with reporters." AR393. *See also* AR088-90. The undisputed record also shows that HFA compensated CTR for almost none of that work. Over the duration of the campaign, HFA made two payments to CTR for its services, but these payments totaled only three percent of CTR's overall operating budget. AR089; AR100 n.67.

Second, there is ample affirmative evidence in the record showing that CTR and HFA did not limit their coordination to internet activities—most obviously, CTR's open acknowledgement of such coordination. As already detailed at length, CTR from its inception announced publicly that its mission was broad, systematic coordination with the Clinton campaign in many areas of its operations. *See* Pls.' MSJ 29-32; Pls.' MSJ Opp. 37-40. CTR's novel effort was explained in its own press release, AR359 (asserting CTR would "be allowed to coordinate with campaigns and Party Committees"), and reasserted in its first response to CLC's complaint, AR062. *See also* Pls.' MSJ 29-31. As this Court noted, "there was ample evidence of extensive coordination between HFA and CTR available in *public* statements." ECF No. 33 at 27.

Beyond CTR's own direct and public admissions, the apparent synchronization in the

timing and content of CTR and HFA messaging was further evidence of coordination, as plaintiffs' earlier submissions documented. *See, e.g.*, Pls.' MSJ 31-32; *see also* AR009-10 ¶ 20 (noting CTR email to supporters highlighting Clinton's campaign finance plan); AR011-12 ¶ 26 (Fox News noting that a senior Clinton campaign staffer and CTR President Brad Woodhouse had tweeted identical messages about Clinton around the same time).

And, of course, this evidence was further corroborated by internal documentation uncovered by Wikileaks, as cited in other complaints against these respondents. AR116-18. Whatever merit there may be to the controlling Commissioners' reluctance to credit this material to discourage "hacking," ECF No. 33 at 27, they cannot credibly claim the *factual* record is insufficient to proceed while simultaneously excluding available evidence that corroborates plaintiffs' allegations. *See* Pls.' MSJ 40, ECF No. 35; *In re FECA Litig.*, 474 F. Supp. 1044, 1046 (D.D.C. 1979) ("[The Commission] must take into consideration all available information concerning the alleged wrongdoing. In other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate.").

And this blinkered analysis of the evidentiary record was doubly in error because it occurred at the preliminary "reason to believe" stage. The Commission has long recognized that "[a] 'reason to believe' finding is not a finding that the respondent violated the Act, but instead simply means that the Commission believes a violation *may* have occurred." FEC Guidebook for Complainants and Respondents on the FEC Enforcement Process 12 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf (emphasis added). In contrast, a finding of no reason to believe is appropriate only where "evidence convincingly demonstrates that no violation has occurred," or when a complaint is "not credible," "so vague that an investigation would be effectively impossible," or "fails to describe a violation of the Act." 72

Fed. Reg. at 12,546 (emphasis added). *See* Pls.' MSJ 38-39.

For example, it was error for the Commissioners to find, with respect to CTR's press outreach, that "the complaints do not present facts to show that particular efforts were even 'coordinated.'" AR395. CLC presented, among other things, a TIME profile of CTR founder and chairman David Brock in which he was quoted as saying he believed he could coordinate with HFA while "deploying the unregulated money he raises to advocating her election online, *through the press*, or through *other means* of non-paid communications." AR401 (emphasis added).

Intervenors make a similarly untenable defense of their payments for polling, arguing again that the polling cannot be considered a contribution unless the candidate receives "cross-tabs, questions asked, and methodology." Int. 2d MSJ 18; Int. MSJ 41-42. But this standard is once again derived from non-binding two- or three-Commissioner statements. And as intervenors acknowledge, these arguments were not even adopted by the controlling Commissioners, who treated CTR's polling expenses as exempt "input costs" because the poll was eventually posted online. AR392; Int. 2d MSJ 19.[5] Intervenors nevertheless argue that because the authority they cite here may have led the Commissioners to reach the same "outcome," the Commissioners' failure to properly assess the coordination of these polling expenses was a "harmless error." Int. 2d MSJ 19. But it is black-letter law that the "soundness of an agency's decision must rest on the reasoning contained therein, and not on any post hoc justifications offered by counsel." *Oglala Sioux*, 896 F.3d at 536 n.11. Invocation of the "harmless error" standard does not nullify an agency's obligation to engage in reasoned decisionmaking, nor, in the event of subsequent litigation, permit

[5] Beyond being extraneous to the rationale for dismissal, intervenors' argument that CLC failed to meet the requirements of 11 C.F.R. § 106.4 is incorrect. CLC not only alleged that CTR posted "data from the poll on the Internet," *id.*, but also provided evidence that CTR engaged a consultant to write up a report including detailed polling data, methodology, questions asked, and margins of error, which was posted on the consultant's website and distributed to press, AR220; AR015 ¶ 31.

an agency to defend only the ultimate "outcome" of its decisionmaking "regardless of the reasoning" it stated for such outcome, Int. 2d MSJ 19.

**2. The controlling Commissioners arbitrarily disregarded CTR's and HFA's responses to the administrative complaint.**

The most significant evidence the controlling Commissioners disregarded is the fact that respondents in the administrative proceedings did not deny that they engaged in systematic coordination—with respect to either their exempt or non-exempt activities. AR090 n.28, AR003 ¶ 5 (noting CTR did not "deny or rebut" the allegation that it "spen[t] millions on opposition research, message development, surrogate training and booking, professional video production, and press outreach for the Clinton campaign"). Instead of contesting the allegations of coordination with respect to its offline activity, CTR presented purely legal defenses,[6] claiming that some of its coordinated activities, such as calling reporters and training local surrogates, were exempt from the coordination rules because they were "communications" but not "public," AR065-66, 76. As for certain other offline activities, particularly op-eds by CTR officials and contacts with reporters, CTR claimed these were covered by the media exemption, 11 C.F.R. § 100.73. AR065-67, 75-76.

The controlling Commissioners did not address respondents' tacit concession that they had coordinated many non-exempt expenditures, nor the legal arguments they actually did offer. This omission, by definition, is arbitrary and capricious. *See Antosh v. FEC*, 599 F. Supp. 850, 855-56 (D.D.C. 1984) (finding FEC dismissal arbitrary and capricious where it ignored "persuasive, indeed undisputed, evidence in the record").

[6] CTR again claims to have contested the allegations that it coordinated its surrogate trainings with HFA. Int. 2d MSJ 17-18. As plaintiffs have explained, *see* Pls.' MSJ Opp. 41-42, instead of a denial, CTR offered a carefully worded statement that is entirely consistent with a conclusion that CTR initiated these training sessions at HFA's "request or suggestion." *See* 52 U.S.C. § 30116(a)(7)(B)(i); AR066 (stating only that CTR "did not include any official Clinton campaign surrogates (as identified by HFA) or HFA staff in the trainings" or "permit HFA to direct individuals to the sessions").

To be sure, an agency need not "discuss every argument raised before them when they have already reached a decision based on alternative grounds." Int. MSJ 42. But here, legal arguments represented the *only* defense that respondents raised with respect to certain allegations of coordination. The controlling Commissioners' error was not merely the failure to assess these arguments on the merits; it was the failure to recognize and take into account CTR's effective admission that it had coordinated to place op-eds, conduct press outreach, and engage in a broad spectrum of activities that were not related to internet communications. Given that respondents offered no defense to certain coordination allegations save the media exemption—which all concede does not apply to *non*-media communications—the controlling Commissioners' failure to address this "defense" meant that they "entirely failed to consider an important aspect" of the matter. *State Farm*, 463 U.S. at 43. *See also* ECF No. 33 at 26 (noting that "[w]hile the controlling Commissioners acknowledged that HFA asserted that the media exemption applied to it . . . they never addressed this mistake").

The intervenors have no answer for this except to press the same faulty legal defenses again here, *see* Int. 2d MSJ 10-13, although none were adopted by the Commissioners; or to offer up new alternative arguments that they believe might justify the "outcome" of the administrative proceedings, *id*. at 17-20, although of course these arguments were not even before the Commission. But these diversionary tactics do not obscure that the Commissioners' failure to find reason to believe on this voluminous, uncontested record of coordinated activity "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

**II. This Case Is Not Moot.**

The Court of Appeals found that plaintiffs have suffered a "quintessential informational injury" redressable by this Court. *CLC*, 31 F.4th at 784. Intervenors, undaunted by the D.C. Circuit's clear holding, now renew their standing arguments—this time, based on speculation

about how the FEC will exercise its discretion following any contrary-to-law finding and remand. Int. 2d MSJ 20. In that eventuality, they posit, the FEC "would likely" dismiss the matter because the FEC is assertedly "barred from pursuing both monetary and injunctive relief by the applicable five-year statute of limitations set forth in 28 U.S.C. § 2462." *Id.* at 21. That statement is laden with misstatements of law and fact. It is also flatly contrary to the Supreme Court's ruling in *Akins*, which considered and rejected an identical redressability argument. 524 U.S. at 25.

Even taken in the most charitable light, intervenors' "redressability" arguments amount to little more than expedient speculation about how the FEC will exercise its enforcement discretion in the event of a remand and in the face of a possible partial time bar—the applicability and scope of which remains (at best) contested within this circuit. That falls far short of carrying their burden of demonstrating that effectual relief is impossible.

**A. Intervenors improperly cast a mootness defense as a concern about redressability.**

As a threshold matter, intervenors' redressability argument "confuses standing with mootness." *Loughlin v. United States*, 393 F.3d 155, 169 (D.C. Cir. 2004). Intervenors consequently misallocate the burden of proof and misapply the relevant statute of limitations.

Intervenors assert that plaintiffs' informational injury "is *no longer* redressable," Int. 2d MSJ 2 (emphasis added)—because, they claim, the FEC would be time-barred from proceeding against them in the event of a contrary-to-law finding and remand to the agency, or at least intervenors would make that argument. *See id.* at 20-27. But it is mootness doctrine, not standing doctrine, that enforces the Article III requirement that a case or controversy "must continue throughout [the litigation's] existence." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)); *see also, e.g., Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013). Thus, "where

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 proper characterization of the issue makes a difference because standing and mootness "are cousins, not twins." *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1255 (D.C. Cir. 2004) (concurring opinion). As the Supreme Court has emphasized, the two doctrines are significantly different, and the greater flexibility of mootness doctrine reflects that "by the time mootness is an issue, the case has been brought and litigated, often (as here) for years," and "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Laidlaw*, 528 U.S. at 191-92. Thus, while the burden of proving standing rests on the plaintiff, "[t]he initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot." *Honeywell*, 628 F.3d at 576; *see also Kifafi v. Hilton Hotels Retirement Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-70 (1984). A party carries that burden only by demonstrating that it is "impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 669 (2016) (citation omitted); *see also Decker*, 133 S. Ct. at 1335; *AstraZeneca Pharm. LP v. FDA*, 713 F.3d 1134, 1138 (D.C. Cir. 2013); *Honeywell*, 628 F.3d at 576.

Intervenors have utterly failed to make this showing. They point to no authoritative FEC rule or policy that would compel the agency to dismiss purportedly "stale" matters, nor indeed, to any other binding precedent supporting intervenors' sweeping construction of the limitations period they identify. And, of course, the FEC is not here to elucidate its views on those questions because it chose not to defend itself in this lawsuit. That is reason enough for the Court to reject

this eleventh-hour, patently self-serving attempt to circumscribe the FEC's civil enforcement discretion by an intervenor attempting to capitalize on the agency's absence.

**B. Plaintiffs have proven their standing, including a "quintessential informational injury" redressable by this Court.**

This Court should not entertain intervenors' attempt to relitigate plaintiffs' informational standing after it was confirmed on appeal, and certainly should not do so based on a redressability argument that is flatly contrary to the Supreme Court's ruling in *Akins* and the D.C. Circuit's ruling in this case. As the Court of Appeals found, plaintiffs' informational injuries are indistinguishable from those recognized in *Akins*—and as such, "easily satisfy the causation and redressability requirements of Article III standing." *CLC*, 31 F.4th at 784 (citing *Akins*, 524 U.S. at 21).

Moreover, as a general matter, "[a] party need not demonstrate with certainty that its injury will be redressed, and standing is not defeated by the possibility that an agency might ultimately wield its discretion in a way that does not fix a party's alleged injury." *NTCH, Inc. v. FCC*, 841 F.3d 497, 506 (D.C. Cir. 2016) (citing *Akins*, 524 U.S. at 25).

In *Akins*, for example, the FEC's unsuccessful standing argument turned predominantly on similar claims about the "obstacles to redressability" for plaintiffs seeking to remedy informational injuries caused by the FEC's failure to enforce the law against a third party. Pet'r Reply Br., *Akins*, 524 U.S. 11 (No. 96-1590), 1997 WL 675443, at *4. *See also id.* at *7 ("[T]he Commission cannot itself compel [respondent] to disclose whatever relevant information may remain in its possession, but must (absent a negotiated settlement) attempt to persuade another decisionmaker (a court) to order such relief."). The Commission's briefing stressed that there was "no guarantee that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, would result in the disclosures" sought, and also notably argued that "[t]he parties ha[d] little or no idea whether [the respondent] ha[d] retained the information" at issue. Br. for Pet'r, *Akins*, 524

U.S. 11 (No. 96-1590), 1997 WL 523890, at *29-30. The Supreme Court, for its part, agreed that it was "possible that even had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require [the PAC]to produce the information." *Akins*, 524 U.S. at 25. Notwithstanding that possibility, however, the Court had no trouble finding a redressable injury—because "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground . . . even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Id.*

Intervenors' redressability arguments are indistinguishable from those rejected in *Akins*, and they fail for the same reasons. As intervenors concede, the FEC is subject to no mandatory or binding obligation to dismiss this matter; it retains the discretion to take any other enforcement actions authorized under FECA. Accordingly, as in *Akins*, plaintiffs' standing is not extinguished by the possibility that the FEC will decline enforcement for a different reason.

In fact, another court in this district rejected an identical argument by an intervenor-defendant in a suit challenging the FEC's dismissal of an administrative complaint. The intervenor—who, as here, was respondent to the underlying administrative complaint—asserted that CREW, the plaintiff, lacked a redressable injury because "the five-year statute of limitations ha[d] run on CREW's administrative complaints" and "the FEC has a practice of not pursuing stale enforcement actions even to obtain equitable relief." *CREW v. FEC*, 209 F. Supp. 3d 77, 85 n.3 (D.D.C. 2016). In dismissing this standing argument, the court noted in particular that the intervenor cited no binding FEC rule or policy barring its pursuit of equitable relief for "stale" violations, and further stressed that the *FEC* had not "admitted to such a practice or addressed this issue" in the litigation—omissions that proved "fatal" to the intervenor's argument. *Id.*

So too here. For support, intervenors point only to a handful of minority statements from past enforcement matters, but statements that fail to garner four Commissioner votes do not speak for the agency. *See Common Cause*, 842 F.2d at 449. To illustrate the point, plaintiffs can just as readily point to Commissioner statements recognizing that 28 U.S.C. § 2462 "does *not* bar potential injunctive relief, such as requiring the Committee to amend apparently incorrect disclosure reports." SOR of Comm'r Ellen L. Weintraub at 4 & n.26, MUR 7220 (Make America Great Again PAC) (Sept. 24, 2021) (emphasis added); *see also id.* at 4 (stressing that "the imminence of the statute of limitations is only one factor to be considered," as "[t]he Commission must also weigh the seriousness of the violation, in this case involving multimillion-dollar allegations"). Given the absence of FEC authority constraining its discretion with respect to purportedly time-barred actions—much less supportive judicial precedent construing the statute as an absolute barrier to further enforcement under these circumstances—intervenors' redressability claim is little more than hopeful supposition about how the FEC might exercise its discretion. But "the mere fact that the FEC has discretion to dismiss [plaintiffs'] complaint for another reason does not vitiate the redressability of [their] claim." *CREW*, 209 F. Supp. 3d at 85 n.3.

**C. Intervenors have not shown that the statute of limitations in 28 U.S.C. § 2462 makes effectual relief impossible in this case.**

The precise contours of a nonjurisdictional statutory time bar that indisputably does not apply to plaintiffs or this case, but rather *may* be invoked by intervenors as an affirmative defense in a future case, is not a question appropriately presented here. Regardless, intervenors have not carried their heavy burden of demonstrating mootness by showing that 28 U.S.C. § 2462 makes it impossible for a court to grant any effectual relief.

**1. The statute of limitations does not bar claims for equitable relief.**

The statute upon which intervenors rely, 28 U.S.C. § 2462, provides a five-year limitations

period only for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." "[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.'" *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) ("*NRSC*") (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). As the D.C. Circuit has held, therefore, § 2462 bars only actions by the government to impose "punishment," *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996), and not to actions brought for "purely remedial and preventative" relief, such as cease-and-desist orders or other equitable relief to remedy or prevent violations. *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), *abrogated in part by Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *see also SEC v. Brown*, 740 F. Supp. 2d 148, 156-57 (D.D.C. 2010).

Courts in this District have likewise specifically held that the FEC is not barred from seeking equitable relief to remedy FECA violations even where penalties for those violations would be barred. *Christian Coalition*, 965 F. Supp. at 71-72; *NRSC*, 877 F. Supp. at 20-21.[7] *See also, e.g.*, *Sierra Club v. Entergy Arkansas LLC*, 503 F. Supp. 3d 821, 838 (E.D. Ark. 2020) (concluding that § 2462 is nonjurisdictional and noting "that the government has regularly been allowed to bring equitable actions . . . outside of § 2462's five-year window") (citing *Christian Coalition*, 965 F. Supp. at 70).

Even if it were a matter of first impression in this circuit, 28 U.S.C. § 2462 clearly does not apply to enforcement actions seeking disclosure. A desired remedy counts as a "penalty" under

[7] Although *FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10 (D.D.C. 1996), suggested the possibility that equitable relief might be barred, it ultimately denied injunctive relief because the government had not shown any likelihood that the defendant would again engage in the unlawful surveillance of campaign opponents of which it was accused. *Id*. at 15. In contrast, the lack of disclosure here is continuing.

§ 2462 only if: (1) "the wrong sought to be redressed is a wrong to the public," rather than "a wrong to the individual"; and (2) "it is sought 'for the purpose of punishment, and to deter others from offending in like manner.'" *Kokesh*, 137 S. Ct. at 1642. Disclosure and registration are not penalties under this test. Orders requiring disclosure or political committee reporting are not meant to punish or to deter others; they merely ensure the offending party's compliance with the law. *See Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir. 1956) ("One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty."). Moreover, equitable remedies to enforce FECA's disclosure requirements are compensatory. Requiring offenders to disclose statutorily required information that has been unlawfully withheld remedies the informational harm caused by those violations. *See* 52 U.S.C. §§ 30104(a)(11)(B); 30111(a)(4). *Contra Kokesh*, 137 S. Ct. at 1644 ("Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so.").

Relying on *Kokesh*, however, intervenors suggest that any request for declaratory and injunctive relief to remedy FECA disclosure violations constitutes a "penalty" because it redresses a public rather than an individual harm. *See* Int. MSJ 24-25 (citing *Kokesh*, 137 S. Ct. at 1642). But the holding in *Kokesh* was limited to whether "disgorgement in the securities-enforcement context is a penalty within the meaning of § 2462," 137 S. Ct. at 1639, an issue not presented in a FECA case involving no claim for disgorgement. Further, intervenors do not even attempt to explain why declaratory and injunctive relief requiring CTR and HFA to report their undisclosed in-kind contributions would *not* be purely remedial. Unlike the judicially developed disgorgement remedy considered in *Kokesh*, the equitable relief at issue here would do no more than effectuate a statutory disclosure mandate and provide the FECA-required information that intervenors continue to withhold. Such relief would not constitute a penalty. *Cf., e.g.*, *Riordan*, 627 F.3d at

1234-35 (finding that a cease and desist order is not a fine, forfeiture, or penalty covered by § 2462 because such an order "simply requires [a defendant] not to violate the relevant . . . laws in the future" and is thus "purely remedial and preventative").

Intervenors next contend—citing the Ninth Circuit's ruling in *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996) and a supplemental statement of reasons from an enforcement matter signed by a single FEC Commissioner—that the concurrent remedies doctrine bars relief. Int. MSJ 25-26. But that doctrine does not apply here. *Williams* is not the law of this Circuit, and Judge Joyce Hens Green declined to adopt its cursory analysis of the concurrent remedy doctrine in *Christian Coalition*. There, she extensively addressed the inapplicability of that doctrine to cases where equitable relief is not based on "concurrent" equitable jurisdiction to supplement or facilitate legal relief, but where "the nature of the remedy is an injunction that is independent of the legal relief available"—as under FECA, where the FEC "has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy." 965 F. Supp. at 71-72. *See also Riordan*, 627 F.3d at 1234-35 (holding that § 2462 did not bar the SEC's claims for remedial equitable relief even though it would bar claims for civil penalties arising from same violations).

Circuit precedent clearly permits equitable remedies under FECA regardless of whether civil penalties remain available, and the FEC has previously secured disclosure from "defunct" groups to remedy years-old violations. *Cf. FEC v. Craig for U.S. Senate*, 816 F.3d 829, 847 (D.C. Cir. 2016) ("FECA grants district courts broad authority to fashion remedies for violations of the statute."); Conciliation Agreement, MUR 6538R (Americans for Job Security) (Aug. 28, 2019) (requiring group that became defunct in 2013 to disclose unreported activity in 2010 and 2012 election cycles). Intervenors thus fall far short of carrying their burden of demonstrating that it is now *impossible* for this Court to grant effectual relief.

**2. The statute of limitations has not run.**

In addition to the equitable relief that clearly remains available, there is strong reason to believe that the statute of limitations has not even run here.

*First*, the statute of limitations would not bar an action under FECA's citizen-suit provision because no such claim has yet accrued, and accordingly, the statute has not begun to run. Intervenors entirely ignore the possibility that if the Court declares the dismissal contrary to law and orders the agency to conform, the FEC might fail to do so—thereby triggering a private right of action allowing plaintiffs to file suit directly against the administrative respondents.

It is an open question in this Circuit whether § 2462 applies to citizen suits at all. *See CREW v. American Action Network*, 410 F. Supp. 3d 1, 23 (D.D.C. 2019) ("*CREW-AAN*"). But the Court need not resolve that question because no such claim has yet accrued. Under § 2462, the statute of limitations runs from "when the claim first accrued." 28 U.S.C. § 2462. No such claim could accrue, and thus the statute of limitations could not begin to run against plaintiffs, unless and until the FEC failed to conform within 30 days to an order of this Court declaring the dismissal of plaintiffs' administrative complaint contrary to law. *CREW-ANN*, 410 F. Supp. 3d at 24 ("[T]he question is not when the alleged violation occurred, but when the claim first could have been brought: that is, when [plaintiff] had a 'complete and present cause of action.'") (quoting *Gabelli v. SEC*, 568 U.S. 442, 448 (2013)). Indeed, "the D.C. Circuit has found it 'virtually axiomatic' that 'a statute of limitations cannot begin to run against a plaintiff before the plaintiff can maintain a suit in court' and thus 'a cause of action does not "first accrue" . . . until a party has exhausted all administrative remedies whose exhaustion is a prerequisite to suit.'" *Id.* at 25 (citation omitted).

*Second*, the statute has been tolled during the pendency of this suit, and in fact, intervenors concede that no court has endorsed their view that suits under 52 U.S.C. § 30109(a)(8) cannot toll

the statute of limitations. Int. 2d MSJ 23. The various policy arguments they offer to fill this vacuum run headlong into "the rule that statutes of limitations are construed narrowly against the government," and as a corollary, "the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 95-96 (2006) (citing *E.I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)).

Whether and to what extent tolling doctrines would apply to a future case brought by the FEC—or to a citizen suit brought by plaintiffs—is ultimately a fact-bound question that it would be premature to resolve here. But certainly, intervenors cannot establish that effectual relief is impossible merely based on their wishful thinking that "tolling does not make sense." Int. 2d MSJ 23. Reflexively denying the availability of tolling ignores the Supreme Court's admonition that "Congress must do something special . . . to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *United States v. Kwai Fun Wong*, 575 U.S. 402, 403 (2015). *Cf. Jackson v. Modly*, 949 F.3d 763, 777 (D.C. Cir. 2020) (holding 28 U.S.C. § 2401(a) nonjurisdictional and subject to equitable tolling).

The filing of this action in August of 2019 should toll the running of the statute during the suit's pendency. The filing of a legal proceeding that is a necessary prerequisite to the filing of an action subject to a statute of limitations periods may, in appropriate circumstances, suspend the running of a limitations period. *See, e.g.*, *Mt. Hood Stages, Inc. v. Greyhound Corp*., 616 F.2d 394, 396-400 (9th Cir. 1980); *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 596-97 (9th Cir. 1991). That is especially so here, where the statutory scheme makes the filing and successful prosecution of this action a necessary prerequisite to the filing of an action against CTR and HFA based on the alleged violations at issue. *See* 52 U.S.C. § 30109(a)(8); *CREW-ANN*, 410 F. Supp. 3d at 24. Moreover, the filing of this action has fulfilled the purpose of the statute of limitations

by providing intervenors with notice of the potential claims against them well within the limitations period (as evidenced by the fact that they moved to intervene less than two months after the complaint was filed). *See Mt. Hood*, 616 F.2d at 400-01.[8]

*Third*, intervenors cannot assert a limitations defense for delay they caused. If this case ultimately resulted in the initiation of an action against intervenors by either the FEC or plaintiffs, intervenors would be equitably estopped from asserting a limitations defense because the "delay" in resolution of this action was of their own making. As the D.C. Circuit has explained, "equitable estoppel in the statute of limitations context prevents a defendant from asserting untimeliness where the *defendant* has taken active steps to prevent the plaintiff from litigating in time." *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998).

Here, CTR and HFA sought intervention, assuring the Court that their involvement "will not unduly delay or prejudice the adjudication of the rights of the original parties." Mot. to Intervene 10, ECF No. 10. Plaintiffs, for their part, opposed intervention, emphasizing that the FEC had affirmatively chosen not to defend its action here, and thus this action could otherwise have been speedily resolved given the agency's decision to default. The Court itself acknowledged the possibility that "allowing intervention would prejudice CLC from the speedier resolution of this case by default." ECF No. 20 at 9. Plaintiffs do not renew their opposition here, but it would be extraordinary to fault them for delay caused by intervenors' involvement, especially after intervenors' assurances that granting intervention would not cause prejudice or undue delay.

*Fourth*, intervenors' disclosure violations are continuing. *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980) ("[A] nondisclosure violation is a continuing one.").

[8] In *NRSC*, the court held that an FEC investigation did not stop the running of the statute because it lacked "adjudicatory procedures," but did not address whether the commencement of a suit such as this one would have a tolling effect. 877 F. Supp. at 19.

Because a finding that intervenors engaged in illegal and undisclosed coordinated expenditures in 2016 would lead to the conclusion that intervenors have engaged in ongoing disclosure violations within the limitations period, § 2462 would not bar all possible relief, even under the very broadest interpretation of the statute. *See* 52 U.S.C. § 30104; FEC, Filing Amendments, https://www.fec.gov/help-candidates-and-committees/filing-amendments. *See also* FEC Advisory Op. 1999-33 at 3 (MediaOne PAC) (committee "must amend" prior inaccurate reports).

**D. Intervenors cannot establish mootness by claiming to lack the requisite knowledge or records to effectuate required disclosures.**

Intervenors' avowed intention to frustrate future enforcement efforts—whether by asserting a statute of limitations defense, failing to maintain records, or otherwise resisting lawful administrative or judicial process—cannot establish mootness or defeat plaintiffs' standing. Nor can terminating committee status with the FEC or dissolving as corporate entities. Apart from being factually dubious in light of intervenors' presence in this litigation and the fact that both committees still appear to be regarded by the FEC as "active,"[9] the idea that administrative respondents can defeat a complainant's right to judicial review by intervening as defendants in an action against the FEC, only to claim that future enforcement will be futile because they no longer exist, is an affront to this entire judicial proceeding.

CTR and HFA intervened in this lawsuit and have been actively defending their coordination scheme for more than three years. Now, at the eleventh hour, they assert without evidence that "HFA and CTR are defunct" and "memories have faded," Int. 2d MSJ 26, such that "as a practical matter it would be impossible" to provide the disclosure plaintiffs seek, *id.* at 2. It

[9] *See* Letter from Ezra W. Reese, Counsel for Correct the Record, to Debbie Chacona, FEC Reports Analysis Division (Aug. 5, 2022), https://docquery.fec.gov/pdf/319/202208110300416319/202208110300416319.pdf (indicating that CTR's recent termination request was disallowed because CTR remains the subject of an open enforcement matter).

is outrageous on its face to argue that plaintiffs lack a redressable injury because the administrative respondents—and defendants here—may seek to resist enforcement to secure the missing disclosures. Nor could the supposed practical "difficulty" of providing FECA-required disclosure information obviate intervenors' statutory obligations. *Cf. Akins v. FEC*, 101 F.3d 731, 738-39 (D.C. Cir. 1996) (en banc) (noting that FECA's citizen suit provision "completely undermine[d]" the argument that plaintiffs lacked a redressable injury because AIPAC "might not comply" with a disclosure order), *vacated on other grounds*, 524 U.S. 11 (1998).

Even assuming intervenors do hope to stymie future enforcement efforts by nominally ceasing operations or destroying records, the FEC or plaintiffs in a citizen suit would have a range of tools at their disposal to otherwise seek compliance. And supposing intervenors' termination or dissolution would prevent proceeding against them directly, it would not prevent pursuing the committees' agents—including their treasurers, who may be liable in their own right. *Combat Veterans for Congress PAC v. FEC*, 983 F. Supp. 2d 1, 12 (D.D.C. 2013) (holding treasurer liable for failure to file reports required by the FECA); 52 U.S.C. §§ 30102(c), (d), 30104(a)(1). Any information thus obtained would ameliorate plaintiffs' informational harm and defeat this claim of non-redressability. *See Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007).

## CONCLUSION

For these reasons, this Court should grant CLC's second motion for summary judgment; declare the FEC's dismissal of plaintiffs' administrative complaint contrary to law; and direct the FEC to conform with such declaration within 30 days consistent with the Court's judgment.

**Dated: September 12, 2022**

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*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2022, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

*/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