ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5336

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER AND CATHERINE HINKLEY KELLEY

Plaintiff-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant,

HILLARY FOR AMERICA AND CORRECT-THE-RECORD

Intervenor-Defendant Appellees.

On Appeal from the United States District Court
for the District of Columbia
(Hon. James E. Boasberg)

BRIEF *AMICUS CURIAE* OF LEE E. GOODMAN, FORMER FEC CHAIR AND COMMISSIONER, IN SUPPORT OF APPELLANT

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May 31, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICUS

Except for *amicus curiae* of Lee E. Goodman, the Former Chair and Commissioner of the Federal Election Commission, who files this *amicus* brief in support of Appellant, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Defendant-Appellant Federal Election Commission.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Defendant-Appellant Federal Election Commission.

C. RELATED CASES

Counsel for *amicus curiae* is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE

Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus* Lee E. Goodman, former Chair and Commissioner of the Federal Election Commission, certifies that he is not aware of any other non-government *amicus* brief addressing the subject of this brief, *i.e.*, the erroneous interpretation of the Federal Election Campaign Act and the Federal Election Commission's regulation by the District Court. As the former Chair and Commissioner of the Federal Election Commission, *amicus curiae* is particularly well-suited to provide the Court important context on these subjects that will assist it in resolving this case.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Lee E. Goodman, former Chair and Commissioner of the Federal Election Commission ("Commission" or "FEC"), respectfully submits this brief in support of Appellant the Federal Election Commission.[1] Amicus has extensive experience and expertise in implementing the Commission's regulatory approach to internet communications. This includes the key regulation at issue here, 11 C.F.R. § 100.26, which exempts free online communications from regulation as a "public communication"—part of what is known as the "Internet Exemption."

When the District Court ruled against the Commission and remanded the matter to the "expert agency" to distinguish between exempt versus non-exempt "input costs" incurred by citizens to produce and disseminate online political content, *See Campaign Legal Center v. Federal Election Commission*, Civ. A. 19-2336 (D.D.C. Memorandum Opinion dated December 8, 2022) ("Mem. Op."), amicus became concerned that certain language in the opinion could be construed to disrupt nearly two decades of carefully calibrated regulations implementing a complex statute while ensuring free political speech on the internet. The arbitrary and capricious standard of review applicable to the Commission's decision as well

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) & D.C. Circuit R. 29(b), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel contributed money intended to fund the preparation or submission of this brief.

as the deference courts are to afford an agency's interpretation of its own regulations are safeguards against such errors, but they did not restrain the lower court here.

Amicus also was concerned that the District Court might have ruled without a full appreciation for the agency's tortuous experience with trying to regulate political speech on the internet, the history underlying the Internet Exemption, and the reasons for exempting free online posts and the "input costs" incurred to produce them from the restrictions the Federal Election Campaign Act applies to paid "advertising." The District Court was denied the benefit of a complete briefing on the historical rationale of the exemption, including "input costs," because the Commission had defaulted. Because the District Court was not fully informed, imprecise language in its ruling effectively reversed a regulation firmly grounded in the text of the Act as well as years of rulemaking history, practical experience in regulating online political speech, and sound legal and policy foundations.

After being reconstituted, the Commission re-engaged in this litigation, which is constructive. Amicus desires to provide additional explanation about the Internet Exemption and its importance for ordinary citizens to inform this Court's analysis of the Commission's decision and whether the District Court properly applied an arbitrary and capricious standard of review.

SUMMARY OF ARGUMENT

When the District Court held that an undefined class of "input costs" related to free online communications should be regulated as contributions, it ignored decades of FEC experience, substituting the court in the place of the Commission in contravention of an arbitrary and capricious standard of review. And the lower court disregarded, instead of deferring to, the Commission's reasonable and prudent interpretation of its own clear regulation.

The Federal Election Campaign Act of 1971, as amended (the "Act"), in U.S.C. § 30101(22), defines "public communications" to include "general public political advertising." Free online communications—communications a person does not pay to place on another person's website—are not "general public political advertising" under 52 U.S.C. § 30101(22). As a result, they are not regulated as "coordinated communications" under 11 C.F.R. § 109.21. The Internet Exemption also exempts free online communications from the definitions of "expenditures" or "contributions" under 11 C.F.R. §§100.94(a)(1) and 100.155(a)(1). As originally adopted and implemented over decades, after the failure of a contrary interpretation like the one the District Court adopted, the Commission determined that "input costs" incurred to produce free online communications are also exempt from regulation.

This Court must properly apply the arbitrary and capricious standard of review to preserve the integrity of the Commission's carefully calibrated regulation of political speech disseminated for free on the internet and to prevent the speech-chilling turmoil the District Court's opinion would cause.

BACKGROUND

Before discussing the errors in the District Court's ruling and its impact on the regulation of internal production and publication costs for the free online communications of individuals and organizations, it is necessary to understand the deep foundations of the existing regulation.

A. Early Attempts at Regulation, the Leo Smith Opinion, and *Shays*.

Throughout the 1990s, the Commission struggled to fit online communications and the use of new technologies into the regulatory scheme devised in the 1970s to address rising expenditures on high-cost television and radio advertising. *See generally,* Lee E. Goodman, "The Internet: The Promise of Democratization of American Politics," *Law and Election Politics – The Rules of the Game* (ed. Matthew J. Streb) (2d ed. 2013) at 56. The Commission's early regulatory treatments were *ad hoc* and unguided by a consistent rules or logic. *Id*.

The confusion culminated in 1998 in an advisory opinion issued to a citizen named Leo Smith. Mr. Smith owned a small business that designed websites, and he used his computer and technology to design and post a website urging voters in

Connecticut to vote against incumbent Congresswoman Nancy Johnson. Mr. Smith then asked the Commission whether his anti-Johnson website constituted a regulated "expenditure." *See* FEC Adv. Op. 1998-22 (Leo Smith).

The Commission responded in the affirmative, concluding that virtually all technological "inputs" to Mr. Smith's website were indeed regulated:

> The web site would be viewed as something of value under the [Federal Election Campaign Act of 1971, as amended ("Act")] because it expressly advocates the election of a Federal candidate, and the defeat of another Federal candidate. Therefore, it meets the requirements of 2 U.S.C. § 431(9) and 11 CFR 100.8(a)(1). The Commission concludes that **the costs associated with the creation and maintaining of the web site, as described in your request, would be considered an expenditure under the Act and Commission regulations**.

Id. at 3 (emphasis added).

The Commission concluded that Mr. Smith was required to calculate all his "overhead costs" incurred in creating, hosting, and maintaining the website, which "would include, for example, the fee to secure the registration of domain name, the amounts you invested in your hardware, and the utility costs to create the site." *Id.* at 4. The Commission even instructed Mr. Smith to "apportion" the cost of his personal computer among all his varied uses and to report that cost to the agency as an "expenditure." *Id*. The Commission further advised Mr. Smith that his website was subject to disclaimer, independent expenditure reporting obligations, and coordination and contribution limits.

The breadth of costs regulated under the Leo Smith advisory opinion cast the use of websites, emails, blogs, links and emerging platforms into a regulatory bewilderment that persisted for several years. In addition to the practical problem it presented for ordinary citizens and organizations seeking to post political messages, the regulation of the "overhead costs" incurred to create and maintain a website appeared divorced from the only constitutionally-permissible purpose of regulating spending on political messages—*i.e*., the prevention of *quid pro quo* corruption of politicians. *See* Goodman at 52-56.

Recognizing these problems, the Commission tried to walk back some of the Leo Smith opinion in subsequent advisory opinions, but the confusion remained. *See, e.g.,* FEC Adv. Op. 1999-17 (George W. Bush for President Exploratory Committee) (allowing some uses of a home computer for campaign purposes without triggering an in-kind contribution). By 2002, however, the disadvantages of the case-by-case approach were unmistakable. Consequently, the agency promulgated a rule that exempted **all** internet communications from regulation. *See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064 (July 29, 2002).

It was not long until the 2002 rule was challenged in federal court, with the plaintiffs arguing that a blanket exclusion of all internet communications was overly broad. In 2004, the U.S. District Court for the District of Columbia agreed and

remanded the rule back to the Commission to reconsider the breadth of the exclusion. *See Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005).

B. The FEC Regulates Only Ads Disseminated *for a Fee*.

In 2005, the Commission initiated another rulemaking in accord with the federal court's decision. *See Internet Communications*, 70 Fed. Reg. 16,967 (Apr. 4, 2005). The Commission received over 800 comments and held two public hearings. *Id*. The result, in April 2006, was unanimous adoption of the Internet Exemption that has protected free political speech by American citizens for nearly two decades. *See Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006). At the heart of the rulemaking was the definition of "public communication" and the application of that term to political messages disseminated via the internet.

The Commission grounded its analysis in the statute. Congress, the Commission observed, had defined a "public communication" to mean communications disseminated via "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." 52 U.S.C. § 30101(22). Notably, despite the internet existing for more than 40 years, it is still not included on this list. This makes sense given that the internet is a unique medium because of the degree of autonomy, control, and ease in disseminating

electronic messages from a personal computer, as well as the autonomy of the recipients of such messages to ignore or amplify them. Outside of paid online advertising, virtually any citizen can disseminate her political speech on the internet without a filter in ways, and to audiences, that are fundamentally different from the mass media enumerated in the Act. Mass media, by contrast, generally require payment of a fee for the dissemination of messages to reach a third-party's established audience.

Because Congress did not include the internet in the definition of "public communication," and expressly defined the term with reference to fee-based dissemination services rather than free, soapbox-type advocacy, the Commission rightly concluded that free communications via the internet did not fit within the Act's definition of "advertising" regulated as "public communications." Based on those principles, the Commission's post-*Shays* rule distinguished between **paid** internet advertising, which should be regulated like paid newspaper or television advertising, and **unpaid** internet dissemination, which would not be regulated. As the Commission's Explanation and Justification underscored:

> Communications placed for a fee on another person's website . . . are analogous to the forms of 'public communication' enumerated by Congress in [52 U.S.C. § 30101(22)] . . . . [B]ecause Congress did not include the Internet in the list of media enumerated in the statutory definition of 'public communication,' an Internet communication can qualify as a 'public communication' only if it is a form of advertising . . . . By definition, the word 'advertising' connotes a communication for

> which a payment is required, particularly in the context of campaign messages.

71 Fed. Reg. at 18,594.

To implement this approach, the Commission adopted a set of rules in three complementary regulations: 11 C.F.R. §§ 100.26, 100.94(e)(1), and 100.155(e)(1). First, the Commission excluded from the definition of "contribution" and "expenditure" any internet activities by individuals and groups, acting independently or in coordination with candidates, if the individuals or groups are not compensated by another party for their internet activities. 11 C.F.R. §§ 100.94(a)(1); 100.155(a)(1). Second, the Commission excluded communications disseminated online without payment of a fee to a third party from the definition of "public communication" under 11 C.F.R. § 100.26. And because so many other regulations hinge on the existence of an expenditure for a "public communication," those exclusions ripple throughout the regulatory scheme, including the definition of "coordinated communications" under 11 C.F.R. § 109.21.

During its deliberations, the Commission fully considered whether the costs incurred to create or produce content later disseminated online for free should count as a regulated expenditure. For example, a public comment submitted to the Commission observed that "[t]ypically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials" and proposed that the Commission establish a threshold (e.g., $25,000)

over which the costs of preparing content for distribution via the internet would lose the exemption and be regulated. *See* Comment on Notice 2005-10 (Internet Communications) by Democracy 21 Campaign Legal Center, and Center for Responsive Politics at 12 n.10, 16 (June 3, 2005). The Commission rejected that idea in the final rule.

Instead, the Commission keyed exclusively on the payment for public display and dissemination on a third-party's website, in order to purchase access to that third-party's established audience, as the thing of value being purchased and therefore regulated. *See* 71 Fed. Reg. at 18,594-95 (pointing out the distinction between an "advertiser [that] is paying for access to an established audience using a forum controlled by another person, rather than using a forum that he or she controls to establish his or her own audience.").

The exemption, therefore, extended to uncompensated "internet activities" that included "blogging; creating, maintaining, or hosting a Web site; paying a nominal fee for the use of another person's website; and any other form of communication distributed over the internet," (11 C.F.R. §§ 100.94(b); 100.155(b)), all of which could entail costs in the creation of the exempted content. The Commission also expressly vacated and superseded the Leo Smith advisory opinion that required counting input and overhead costs as regulated expenditures. *See* 71 Fed. Reg. at 18,605 n.49 ("Advisory Opinion 1998-22 is superseded to the extent

that it treated as an 'expenditure' an individual's use of computer systems and services for uncompensated Internet activity."); *see also* FEC Adv. Op. 1998-22 (Advisory Opinion 1998-22 was "Superseded in part by the 2006 Internet Communication Regulations, 71 FR 18,589, 18,605 n. 49 (April 12, 2006)").

Thereafter, it was widely accepted within and outside the Commission that production costs associated with free online communications are unregulated. In Advisory Opinion 2008-10 (VoterVoter.com), for example, the Commission recognized that "[t]he costs incurred by an individual in **creating an ad** [are] covered by the Internet exemption from the definition of 'expenditure' **so long as the creator is not also purchasing TV airtime for the ad he or she created**." FEC Adv. Op. 2008-10 (VoterVoter.com) at 7 (emphasis added). The Commission publicly has reaffirmed this rule many times since the VoterVoter.com advisory opinion. *See, e.g.,* The FEC Record (Dec. 2008) (quoting the exemption of creation costs in Advisory Opinion 2008-10); FEC Corporate & Labor Guide Supplement (Aug. 2011) at 36 (same); FEC Non-Connected Supplement (Aug. 2011) at 22 (same).

So settled was the principle by 2014 that it was unremarkable when the Commission's Office of General Counsel advised that a non-profit organization's costs to produce a political video disseminated for free on YouTube.com were exempt from regulation. *See* Matter Under Review ("MUR") 6729 (Checks and Balances for Economic Growth, Inc.), First General Counsel's Report, Aug. 6, 2014.

If no fee is paid for dissemination, the General Counsel advised, then the production costs are not regulated expenditures. *Id.* at 6 ("any production costs [that an incorporated non-profit advocacy organization] may have incurred would not constitute contributions or expenditures and, accordingly, would not give rise to an obligation to report those costs as independent expenditures.").

Given the ease with which anyone on the internet can effortlessly and independently copy and re-disseminate another person's content without their knowledge or permission, leading to "viral" messages beyond the originator's intent or ability, regulation of the input costs of one person's free internet communication would be meaningless, arbitrary, and not in furtherance of the Act's objectives. Indeed, given the lack of a person's control over the reach of their internet content (if they are not paying to disseminate it), the disconnect between cost and influence would render regulation of input costs both needlessly chilling and irrelevant.

The Internet Exemption thus embodies thoughtful statutory interpretation, consistent with the canons of construction, and fulfills the balance Congress struck to achieve the Act's objectives without unnecessarily infringing First Amendment rights. Under this careful approach that balances the practicalities of online communications, political speech on the internet has flourished. The American people have been able to disseminate and access millions of political messages in a realm of speech free from government-imposed regulatory burdens and

complexities. The democratic and individual benefits made possible by this freedom cannot be seriously questioned. Meanwhile, there is no documented case of corruption of a public official arising from free posts on the internet.

ARGUMENT

A. The District Court Exceeded an Arbitrary and Capricious Standard of Review by Substituting its Judgment for that of the FEC.

A narrow question before the District Court was whether certain costs incurred by Correct the Record ("CTR") were merely "input costs" for exempt internet communications or whether they were not "input costs" in the first instance. As the District Court noted: "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." Mem. Op. at 10. Therefore, the District Court should have reviewed whether the Commission permissibly determined the particular expenses in this case were, in fact, bona fide "input costs" of the exempt communications.

Instead, the District Court's analysis ventured too far into questioning the Internet Exemption itself, unnecessarily injecting quasi-legislative observations and directions that would create an ill-defined and unworkable rule impossible for the public to understand and the Commission practically to administer. The inevitable consequence of the unclear rule established by the District Court would be to

regulate free internet communications by virtue of the costs incurred to create them, and chill otherwise free dissemination of core protected political speech. This Court should therefore reverse or limit the District Court's reasoning and preserve the Internet Exemption for both communications and their bona fide input costs.

The complexities and challenges of administering the Act without violating the First Amendment warrant the kind of restraint that courts must exercise when reviewing FEC decisions. As the District Court initially acknowledged, its task was "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." Mem. Op. at 9 (citing *Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal quotations omitted) and *Campaign Legal Center v. Federal Election Commission*, 952 F.3d 352, 357 (D.C. Cir. 2020). The District Court stated that its role was to apply the arbitrary-and-capricious standard of review provided by the Administrative Procedure Act. *Id.*; 5 U.S.C. § 706(2)(A). The District Court further noted that the Commission's decision would only be "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.'" Mem. Op. at 9 (citing *Motor Vehicle Mfrs. Ass'n v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasis added). "'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.'" *Id.* (citing and quoting *Airmotive Eng'g Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Furthermore, when a regulation is clear, "the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Even if 11 C.F.R. § 100.26 or § 109.21 were ambiguous (they are not ambiguous), the District Court was bound to defer to the Commission's controlling interpretation of its own regulations so long as its interpretation was well reasoned and based upon the agency's expertise. *Kisor*, 139 S.Ct. at 2415.

The Commission's regulation at 11 C.F.R. § 109.21(c) is clear. It provides in relevant part that there can be no "coordinated communication" unless the communication at issue is either a "public communication," 11 C.F.R. § 109.21(c)(2), (3), (4), or an "electioneering communication," 11 C.F.R. § 109.21(c)(1). A free online post is neither a "public communication" nor an "electioneering communication." A free online post is not an "electioneering communication" because that term encompasses only advertisements disseminated

via broadcast media. 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29. And a free online post is not a "public communication" because "[t]he term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26. That definition is not an accident. It reflects the Commission's conscientious consideration of the Internet Exemption in 2006, based on its prior experience.

B. The District Court's Re-Interpretation of the FEC's Regulation Exceeded The Well-Established Arbitrary and Capricious Standard of Review and is Unworkable.

The District Court's reasoning was errant in some aspects and incomprehensible in others, and in any event would dramatically undermine the Internet Exemption. The District Court's remand order begins with the oversimplification, if not mischaracterization, of the Commission's Internet Exemption as merely "a narrow exemption from the 'coordinated communications' definition for unpaid internet communications." Mem. Op. at 3. The opinion asserts that it restores a "commonsense" interpretation of the Commission's regulation, but acknowledges this new interpretation throws the Commission's other precedents into doubt. Mem. Op. at 13. After venturing into the agency's regulatory role, like a judicial bull in an administrative china shop, the District Court's opinion then proceeds to break delicate regulatory principles and effectively re-write the Internet Exemption. This is more than an arbitrary and capricious standard of review.

For example, the District Court wrote that "the internet exemption covers only unpaid internet communications themselves, and **not all offline inputs to those communications**." Mem. Op. at 4 (emphasis added). However, as the Commission learned over decades of grappling with internet political speech, one cannot distinguish—practically or legally—between the "communication" (i.e., video, editorial, blogpost, podcast, tweet) versus the "inputs to those communications." The "inputs," assuming the court meant the graphics, hardware and software, research, videos, script, content, and similar components of an internet communication, are part and parcel the communication. No communication can exist without its production "inputs."

Later, the District Court attempted to distinguish between the "kind" of "inputs" that are exempt versus those that are not exempt, but ran into a quagmire. Among the "inputs" the District Court indicated it would exempt are "email list rentals and donation-processing software purchased to enable email blasts." Mem. Op. at 14 (*citing* Matter Under Review 6657 (Akin for Senate)). But the court could not identify which "inputs" are **not** exempt under the definition of "public communication" in 11 C.F.R. § 100.26. The one "input" the court identified as **not** exempt—the **purchase of computers**—would vitiate the entire rule because all free internet communications require the purchase of a computer. Mem. Op. at 3-4. Why

the costs of hardware would not be exempt but the costs of software would be exempt is not clear, rational, or defensible.

No internet communication would ever be exempted from the definition of "public communication," and thus from federal regulation of online political speech, if the cost of the computer on which the communication was created is not exempt. And if a person's computer costs must be counted, then why not their rent or mortgage, or a camera or scanner? That reasoning would return regulation to the Commission's early struggles in the Leo Smith opinion under which free internet communications were regulated and the cost of computers and other inputs and overhead expenses were fully regulated as contributions and expenditures.

Having effectively ventured into the role of agency rulemaking itself, the District Court became confused about which parts of the Internet Exemption applied to the coordination allegations at issue in this case. For example, the court's opinion latched onto a very brief passage from the Commission's 25-page Explanation & Justification qualifying 11 C.F.R. §§ 100.94 and 100.155. *See* Mem. Op. at 3-4. But that passage expressly applies only to those two regulations. It does not qualify the definition of "public communication" under 11 C.F.R. § 100.26, which controls the regulation of "coordinated communications" under 11 C.F.R. § 109.21(c). There is also no indication in the opinion that the District Court understood the distinction between the various prongs of the Internet Exemption or that the definition of "public

communication" in § 100.26 is not dependent upon the provisions in §§ 100.94 and 100.155. The lower court appears to have missed these distinctions entirely (or cherry picked the one statement in the E&J conveniently).

The lower court also seemed preoccupied with the sharing of polling data. That issue could have been resolved by reference to an entirely different regulation, 11 C.F.R. § 106.4(c), which provides that polling data publicized on the internet and made available to the public are not "contributions." *Id*. But the District Court erred by suggesting that polling data might be regulated as a coordinated expenditure because some "input costs" to internet communications are regulated expenditures while some are not.

The District Court recognized the problem it created and disavowed responsibility for the consequences. It reopened the same issues the Commission grappled with for decades, but was at a loss to resolve the critical regulatory question before it, announcing that it "leaves the task of defining the exemption's precise parameters to the expert agency, so long as it is consistent with the principles expressed" by the court, Mem. Op. at 14. Ironically, the Commission already had applied its expertise when it adopted the Internet Exemption two decades ago and arrived at the answer to this case: **"input costs" to free online posts are not regulated as "public communications."**

The Internet Exemption in its current form, and in its multiple parts, already was considered in a direct challenge before the U.S. District Court and the U.S. Court of Appeals in *Shays*, and the Commission long ago conformed the rule to the directives of the federal courts in the 2006 rulemaking. The Internet Exemption has become well-established in the 17 years since its adoption and should not be eroded in light of one court's obvious struggle with the exemption's application in a case where it was not directly challenged and the Commission did not participate. Resolution of this case does not require a reinterpretation of the Internet Exemption or curtailment of broad freedom to speak freely on the internet.

C. This Court Should Correct the District Court's Error Before it Sows Confusion and Chills Political Speech

This Court must properly apply the arbitrary and capricious standard of review to preserve the integrity of the FEC's careful regulation of online political speech and prevent the regulatory and speech-chilling turmoil the District Court's opinion would potentially cause if left undisturbed.

The Internet Exemption of 2006 reflects decades of Commission experience and expertise, as well as hundreds of public comments during a formal rulemaking process. The Commission prudently determined that, as a legal, policy, and practical matter, a person's free online communication is not a "public communication" within the meaning of the Act, and therefore avoids the Act's burdensome regulation of "advertising." The regulation likewise exempts the costs of "inputs" into those

free internet communications—overhead, technology, production, research, staff and content.

Mindful of this history, this Court should be faithful to the following well-established principles: First, when Congress wrote the relevant clause of the definition of a "public communication" in the Act, it used the specific term "advertising," not the general term "communication." Second, the "inputs" to produce communications disseminated via the internet without paying an advertising fee to a third-party website are exempt from the definition of "public communication" under 11 C.F.R. § 100.26, and therefore are exempt from the definition of a "coordinated communication" under 11 C.F.R. § 109.21 (which regulates "public communications" coordinated with a candidate campaign); third, such "inputs" may also be independently exempt from regulation as contributions and expenditures under 11 C.F.R. §§ 100.94 and 155, if they meet the requirements of those provisions; fourth, disbursements for other political activities that are not "inputs" to produce such internet communications are not necessarily exempt under 11 C.F.R. §§ 100.26, or 100.94, or 100.155, and such disbursements may indeed be subject to regulation as "expenditures" or "contributions" if they otherwise meet the definition of those terms; and fifth, if such "expenditures" or "contributions" are provided to or coordinated with a candidate committee, constitute cognizable "things of value," and are not otherwise exempt, they can be regulated as "contributions"

under 11 C.F.R. § 109.20. However, the Court should not confuse bona fide "input costs" to free internet communications as regulated expenditures, contributions, public communications, or coordinated expenditures.

CONCLUSION

This Court should reverse the lower court's failure to properly review of the Commission's decision under an arbitrary and capricious standard of review and defer to the Commission's interpretation of its own clear regulation—a regulation and interpretation based on decades of regulatory experience, an extensive formal rulemaking, and prior litigation. The regulatory consequences of the District Court's opinion—expanding the definition of "public communication" to include "input costs" such as the price of a computer—would be broad and severe. It would return the agency and American citizens to the 1998 Leo Smith paradigm and subject all costs incurred to produce internet content to potential regulation, chilling non-corruptive online speech and likely violating the First Amendment.

Nearly two decades ago the Commission unanimously acknowledged that "[t]he Internet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities." 71 Fed. Reg. at 18,603. The Commission declared it would take a "restrained regulatory approach" with respect to online political activity. *Id*. at 18,589. In this spirit, the Commission promulgated the Internet Exemption to

"remove any potential restrictions" on the ability of citizens to engage in civic and democratic life in unpaid communications over the internet. *Id.* The Internet Exemption has been successful in allowing millions of Americans to speak freely online about politics and their government without the kind of encumbrances once imposed on Leo Smith. Because the District Court's opinion would take regulation of online political speech back decades to an old and unworkable regulatory paradigm, this Court should reverse the judgment of the District Court.

Respectfully submitted,

Dated: May 31, 2023

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because this brief contains 5124 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

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

Dated: May 31, 2023

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on May 31, 2023, I electronically filed the foregoing *Brief Amicus Curiae of Lee E. Goodman, Former FEC Chair and Commissioner, in Support of Appellant* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: May 31, 2023

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